Randall G. Nelson
Thomas C. Bancroft
NELSON LAW FIRM, P.C.
2619 St. Johns Avenue, Suite E
Billings, MT 59102
(406) 867-7000
rgnelson@nelsonlawmontana.com

Martha Sheehy
SHEEHY LAW FIRM
P.O. Box 584
Billings, MT 59103-0584
(406) 252-2004
msheehy@sheehylawfirm.com
Attorneys for Allied World Assurance Co.

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

DANA ROLAN, on her own behalf and on behalf of the class she represents, Plaintiffs, vs. NEW WEST HEALTH SERVICES, DARWIN SELECT INSURANCE COMPANY and ALLIED WORLD ASSURANCE COMPANY and DARWIN NATIONAL ASSURANCE COMPANY, Defendants.	Cause No. CDV-2010-91 Hon. Christopher Abbott **ALLIED WORLD ASSURANCE COMPANY'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT UPON REMAND**
ALLIED WORLD ASSURANCE COMPANY, Counterclaimant, vs. DANA ROLAN, on her own behalf and on behalf of the class she represents, Counterdefendants.	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Defendant Allied World Assurance Company ("Allied") moves for summary judgment on the single question presented on remand from the Montana Supreme Court:

> Because the District Court did not reach the merits of the limit of liability issue and, on appeal, Rolan has not briefed the merits, we reverse and remand for consideration by the District Court as to whether this litigation presents a single claim governed by the $1,000,000 "each Claim" limit or multiple claims governed by the $3,000,000 aggregate limit.

Rolan v. New West Health Services, 2022 MT 1, ¶ 28, 407 Mont. 34, 407 Mont. 34 ("*Rolan III*").

In response to the motion, Plaintiff Rolan ("Rolan") drifts far afield from this purely legal question. Whether the "each claim" limit or the aggregate limit applies is a question of insurance contract interpretation for this Court to determine. *Parker v. Safeco Ins. Co. of. Amer.*, 2016 MT 173, ¶ 14, 384 Mont. 125, 376 P.3d 114. The policy terms should be interpreted "according to their usual, common-sense meaning." *Park Place Apts. v. Farmers Union*, 2010 MT 270, ¶ 12, 358 Mont. 394, 247 P.3d 236. In most circumstances, the court views the terms from the "perspective of a reasonable consumer of insurance policies." *Id.* In this case, however, the Montana Supreme Court has already determined that

"being an insurance company itself, New West can hardly be considered an 'average consumer' of insurance. *Rolan III*, ¶ 27.

ARGUMENT

"Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law." *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.,* 2017 MT 246, ¶ 7, 398 Mont. 48, 403 P.3d. Plaintiff Rolan has raised no factual issues which preclude summary judgment. Instead, Rolan proposes a legal interpretation of the contract which is unsupported by Montana law and the law of other states.

I. CLAIMS-MADE-AND-REPORTED POLICIES ONLY PROVIDE COVERAGE FOR CLAIMS MADE AND REPORTED DURING THE POLICY PERIOD.

Rolan completely ignores Allied's primary argument. The claims-made-and-reported policy only covers claims which are made and reported during the policy period, and only one claim was made and reported during the policy period – Rolan's complaint. Plaintiff does not dispute – and has not refuted – that the only claim made against New West and reported to Allied during the policy period is contained in the Rolan Complaint.

Rolan's reluctance to address the primary argument reveals a basic

misunderstanding of the policy at issue. The MCEO Policy is a common type of policy known as a "claims made and reported" policy with an "each claim" limit of $1,000,000 and an aggregate limit of $3,000,000. (Dkt. 187, Ex. 1, p. 1). The MCEO Policy provides in bold, capital letters on the front page:

> **THIS IS A CLAIMS MADE AND REPORTED POLICY WHICH APPLIES ONLY TO CLAIMS FIRST MADE DURING THE POLICY PERIOD.**

The MCEO Policy was in effect from April 1, 2009 to April 1, 2010. (Dkt. 187, Ex. 1, p. 1). Rolan's class action complaint was filed during the policy period, on January 26, 2010. (Dkt. 1).

Unlike "occurrence-based" policies, Allied's MCEO Policy only provides coverage for claims made and reported during the policy period. As held by the Montana Supreme Court in *ALPS Property & Cas. Ins. Co. v. Keller, Reynolds, Drake, Johnson & Gillespie*, "claims-made-and-reported polices are generally a more restrictive form of coverage as 'notice is the event that actually triggers coverage' and is generally required within the policy period or extended reporting period." 2021 MT 46, ¶ 15, 403 Mont. 638, 482 P.3d 638, *quoting Schleusner v. Cont'l Cas. Co.*, 102 F.Supp.3d 1148, 1152 (D. Mont. 2015). "The Insured's giving notice to the insurer triggers coverage." *Nat'l Union Fire Ins. Co. v. Willis*, 296 F.3d 336, 339 (5th Cir. 2002); *see also Pension Trust Fund for Operating*

Engrs. v. Federal Ins. Co., 307 F.3d 944, 956-57 (9th Cir. 2002). This type of policy was "specifically developed to limit the insurer's risk by placing a temporal limitation on coverage." *ALPS*, ¶ 15.

This basic interpretation of the policy is not dependent on application of the "related claims" provision, but rather depends upon the plain meaning of the definition of "Claim," which **requires** written notice of the claim:

> "**Claim**" means any written notice received by any **Insured** that a person or entity intends to hold an **Insured** responsible for a **Wrongful Act** which took place on or after the retroactive date listed in ITEM 7 of the Declarations**.** In clarification and not in limitation of the foregoing, such notice may be in the form of an arbitration, mediation, judicial, declaratory or injunctive proceeding. A **Claim** will be deemed to be made when such written notice is first received by any **Insured**. (Dkt. 187, Ex. 1, Policy Definitions, p. 26)

The lawsuit filed by Rolan and the class against New West on January 26, 2010 is the "written notice" received by New West indicating that Rolan intended to hold New West responsible for a "wrongful act." The class-action complaint, by policy definition, is the "claim."

A single notice – the Rolan complaint – constitutes a single claim by definition. While only one class member (Rolan) has been named, the class was identified in the only notice – and thus only claim – provided to Allied during the policy period.

II. ANY ADDITIONAL CLASS MEMBERS' CLAIMS ARE RELATED.

A. Overwhelming Authority Establishes that Claims within a Class are "Related Claims" Subject to the "Each Claim" Limit.

In addition to the definition of "Claim," the "related claims" condition is an additional contractual basis establishing that the $1,000,000 "each claim" limit applies. As a condition of the MCEO Policy, "all **Related Claims**, whenever made, shall be deemed to be a single **Claim**." (Dkt. 187, Ex. 1, p. 20). The MCEO Policy defines "Related Claims":

> (Q) **"Related Claims**" means all **Claims** for **Wrongful Acts** based on, arising out of, resulting from, or in any way involving the same or related facts, circumstances, situations, transactions or events or the same or related series of facts, circumstances, situations, transactions or events, whether related logically, causally or in any other way.

(Dkt. 187, Ex. 1, p. 27-28). Thus, under the MCEO Policy, all claims which are related by the same or a related series of facts, circumstances, situations, logic, or causation constitute a single claim, and are subject to the single claim limit. Rolan mistakenly characterizes the "Related Claims" a rare policy exclusion (Dkt. 362, p. 2); it is neither rare nor exclusionary. The provision is a **condition** for coverage.

By definition of the class, any class member's claim must arise from New West's acts or omission in the denial of payments based on failure to perform a "made whole" analysis. Thus, Rolan's claims and any class members' claims must

involve the same circumstance, situations, transactions or events. The claims must be related to the same circumstance – the alleged misapplication of the made-whole doctrine – or the class members do not qualify to be in the class.

Plaintiff Rolan fails to distinguish or discredit Justice McKinnon's reasoning in *Rolan III*. Justice McKinnon correctly explained that additional class members' claims must be related, triggering the "each claim" limit rather than the aggregate limit:

> [I]n the event Rolan identifies any other member of her class besides herself, those claims would have a "common nexus" and be related to New West's business practice of failing to perform a "made whole" analysis. Based on the certified definition of the class, every future class member must assert that "all or part of their medical bills were paid by the person or company that injured them - rather than being paid by New West." Although any new members' claims may be based on a different legal theory, the common basis for the claims must be related to the definition of the class. Rolan's assertion that there are different types of claims does not make it an unrelated claim. The definition of the class guarantees and legally requires a significant relationship between members of the class. Thus, even if Rolan were to identify additional class members, all these additional claims would fall under the "Related Claims" definition of the Policy.

Rolan III, ¶ 44 (J. McKinnon, dissenting).[1]

Rolan has also failed to distinguish *WFS Financial, Inc. v. Progressive Cas.*

---

[1]Justice McKinnon dissented not to the reasoning or the result of the majority opinion, but only disagreed with the Court's decision to remand for additional consideration of this issue.

Ins. Co., Inc., 2007 WL 1113347 (9th Cir. 2007). Instead, Rolan incorrectly states that the opinion cannot be cited because it is a memorandum disposition. The rule to which Rolan alludes (but does not cite) was amended over a decade ago. Federal Rule of Appellate Procedure 32.1(a) provides that "a court may not prohibit or restrict the citation of federal opinions, orders, or judgments, or other written dispositions that have been (I) designated as "unpublished". .. . and (ii) issued on or after January 1, 2007. *WFS* is properly available for citation, and a copy of the decision is attached as Exhibit 1.

WFS addresses a class action claim under a claims-made-and-reported policy with a "interrelated claim" condition. The Ninth Circuit held that a single limit (and single policy) applied. "Although the suits were filed by two different sets of plaintiffs in two different fora under two different legal theories, the common basis for those suits was the WFS business practice of permitting independent dealers to mark up WFS loans." *Id.* at *1. The Court held that the "harms alleged in the two class action suits are causally related" and thus treated the two class action suits as a single claim. *Id.*

The Seventh Circuit reached the same conclusion in *Gregory v. Home Ins. Co.*, 876 F.2d 602, 606 (7th Cir.1989), which also involved a claims-made policy and a class action. The Seventh Circuit determined that the class action claims

were related and constituted a single claim. With respect to the claims in the class, the Court noted: "It is easy to decide that all the class claims arising from Mr. Gilbert's mistaken advice on the investment program's tax advantages are treated as a single claim under Paragraph IV of the policy, and therefore are subject to the [single claim] limit." *Id.* at 605. Similarly, in *American Medical Security v. Executive Risk Ins. Co.,* 393 F.Supp.2d 693(E.D.Wis. 2005), a Wisconsin federal court also applied the "related" claims provision to a class action, finding a single claim. The Court reasoned that the "relationship is obvious and direct. . . ." *Id.* at 707. The Court held that 38 lawsuits, including some brought as class actions, constituted a single claim. *Id.*

The plain language of the policy, Justice McKinnon's dissent, and overwhelming authority support the finding that claims within a class must be related.

B. The Authorities cited by Plaintiff are Inapposite.

Plaintiff relies on a number of cases, none of which involve whether claims contained in a single class are related. In *Scott v. American Nat. Fire Ins. Co., Inc.* 216 F.Supp.2d 689 (N.D. Ohio 2002), three clients filed separate malpractice suits against their attorney, and the Ohio court held that the claims were separate because Scott owed separate duties to the clients. Here, one duty is at issue: the

duty to properly assess Montana's made-whole doctrine. More importantly, *Scott*'s reasoning regarding multiple plaintiffs cannot be extended to class claims which claims must, by definition, be related to the class.

Plaintiff also relies on *Lexington Ins. Co. v. Lexington Healthcare Grp., Inc.* 311 Conn. 29, 84 A.3d 1167 (Conn. 2014), in which a nursing home fire killed or injured thirteen individual claimants. Although the Connecticut Supreme Court held that multiple individual claims against a medical provider are unrelated, the Court expressly recognized that the class claims are, indeed, related:

> In three other cases, courts aggregated claims underlying class actions with cross claims by the class action defendant against its counsel for providing negligent advice or services in connection with the activities giving rise to the class members' claims. *See generally Continental Casualty Co. v. Wendt*, 205 F.3d 1258 (11th Cir.2000); *Gregory v. Home Ins. Co., supra*, 876 F.2d at 602; *Westport Ins. Corp. v. Coffman*, Docket No. C2–05–1152, 2009 WL 243096 (S.D.Ohio January 29, 2009). **We conclude that these decisions are readily distinguishable from the typical multiple loss cases cited herein because the class members' claims against the clients and the clients' malpractice claims against their attorneys clearly are inextricably intertwined, with the losses caused to the attorneys by their clients' malpractice claims being, in essence, derivative of the losses caused to the clients from the class members' claims. Accordingly, in those cases, the acts at issue fit comfortably and unambiguously within the commonly accepted definition of the term related.**

Id., fn 12.

Rolan next argues that the "related claim" provision is ambiguous. New

West – the party to the contract – never alleged ambiguity as a defense to the contract. (Dkt. 179). Moreover, the defense is defeated by the very authority relied upon by Rolan. In *Lexington*, the Connecticut Supreme Court acknowledged that with respect to class claims (as opposed to multiple individual claims), "the acts at issue fit comfortably and unambiguously within the commonly accepted definition of the term related." *Id.*

Ambiguity is particularly inapplicable here, since the Montana Supreme Court has already determined that "[b]oth Allied and New West are insurance companies, well-versed in the nuances of policy coverage, limits of liability, and indemnity obligations, as well as the distinctions of that terminology." *Rolan III*, ¶ 27. Further, "being an insurance company itself, New West can hardly be considered an 'average consumer' of insurance. *Id.* New West never pled, and Rolan has not established, ambiguity.

Plaintiff cannot cite to a single case which holds that the claims within a class action are unrelated.[2] Just the opposite, the authority establishes that "[i]t is easy to decide that all the class claims . . . are treated as a single claim under

---

[2]The other cases cited by Rolan also involve multiple individual claims, not class claims. *Financial Mgmt. Advisors LLC v. American Intern. Spec. Lines Ins. Co.*, 506 F.3d 922 (9th Cir. 2007); *Beale v. American Nat'l Lawyers Ins. Reciprocal*, 843 A.2d 76 (Md. 2004).

Paragraph IV of the policy, and therefore are subject to the [single claim] limit." *Gregory,* 876 F.2d. at 605.

III. NEW DEFENSES DO NOT APPLY.

Separate from Rolan's Motion to Amend, Rolan requests that she be allowed "to add affirmative defenses for illusory coverage and reasonable expectations." (Dkt. 362, p. 19). Rolan argues that these defenses "are related to contract interpretation, rather than affirmative defenses." Rolan is not a party to the insurance contract, but apparently asserts these defenses as an assignee of New West. The two defenses fail as a matter of law, and it is futile to amend the pleadings to allow these two defenses.

A. These Defenses Fail As Assigned.

Rolan as assignee holds no more rights than New West held as assignor, and receives the rights subject to any defense which would apply to New West. *Credit Services Company Inc. v. Crasco,* 2011 MT 211, ¶¶ 17 and 19, 361 Mont. 487, 264 P.3d 1061, *citing Massey–Ferguson Credit Corp. v. Brown*, 173 Mont. 253, 256, 567 P.2d 440, 441–42 (1977). New West never asserted any contract defenses in this case. (Dkt. 179). New West only asserted coverage by estoppel based on a perceived delay in asserting the $3,000,000 limit. (Dkt. 179, 196). The Montana Supreme Court has resolved that issue, finding that estoppel does not

apply. *Rolan III*, ¶ 28. Because New West never asserted any contract defenses, there is no "conduct, transaction, or occurrence" to which these assigned claims can relate back. Rule 15(c), M.R.Civ.P.

B. The Reasonable Expectations Doctrine Does Not Apply Based on Law of the Case.

The law-of-the-case doctrine binds the parties on those issues that the appellate court previously has decided. *State v. Winter*, 2014 MT 235, ¶ 14, 376 Mont. 284, 333 P.3d 222, *quoting Zavarelli v. Might* (1988), 230 Mont. 288, 749 P.2d 524, 493; *Haines Pipeline Const. v. Montana Power Company*, (1994), 265 Mont. 282, 291, 876 P.2d 632, 638. "The law-of-the-case doctrine is based on policies of judicial economy and finality of judgments. Under this doctrine, a prior decision of [the Montana Supreme] Court resolving an issue between the same parties is binding and may not be re-litigated. *Id*. at ¶ 15, *citing In re Estate of Snyder*, 2007 MT 146, ¶ 27, 337 Mont. 449, 162 P.3d 87. On remand this Court may only address claims "left open" by the Montana Supreme Court. *Id.*

The Montana Supreme Court specifically addressed the reasonable expectations doctrine on appeal, and rejected its application to New West because, as an insurance company, "New West can hardly be considered an 'average consumer' of insurance." *Rolan III*, ¶ 27. The defense does not apply based on the law-of-the-case doctrine.

In addition, the defense fails as a matter of law. The Montana Supreme Court has determined that New West is not an average consumer, but a sophisticated insurer. As a matter of law, New West's reasonable expectations did not include application of the $3,000,000 limit because Allied never acquiesced to application of the aggregate limit and consistently reported availability of the "each claim" limit. *Rolan III*, 2022 MT 1, ¶¶ 25-26.

C. The Defense of Illusory Coverage Does Not Apply.

A policy is illusory if it "defeat[s] coverage for which the insurer has received valuable consideration." *Cross v. Warren*, 2019 Mt 51, ¶ 20, 395 Mont. 62, 435 P.3d 1202, *citing Fisher ex rel. McCartney v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 208, ¶ 33, 371 Mont. 147, 305 P.3d 861 (*other citations omitted*). In the underlying claim, New West paid a premium for an "each claim" limit and an "aggregate" limit. The limits do not constitute policy exclusions. "[A] policy's liability limits are not 'policy defenses' to coverage as contemplated by the policy's language. (Citations omitted). They are the monetary amounts potentially available to be paid for qualifying liability coverage upon a determination of the scope of an insurer's duty to indemnify." *Rolan III*, ¶ 24.

The coverage is not illusory; Allied made a voluntary payment of the single claim limit ($1,000,000 less defense costs), interpleading $738,600 with the

District Court. (Dkt. 296, 297, 300, 310). The only issue is whether the "each claim" or "aggregate" limit applies. In *Kilby Butte Colony Inc.*2017 MT 246, ¶ 16, the insured asserted that coverage was illusory when it did not include the claimants as "insureds" under the policy. The insured claimed that because the Colony collectively owned its assets, all members of the Colony were "insureds" in the auto policy. The Supreme Court disagreed, and held that the coverage was not illusory because the claimants did not meet the definition of "insured."

Rolan's reliance on *Hardy v. Progressive Specialty Ins. Co.*, 2003 MT 85, 315 Mont. 107, 67 P.3d 892 is misplaced. (Dkt. 362, p. 16-18). In *Hardy*, an insurance policy's anti-stacking provision allowed an insurer to receive consideration for underinsured motorist coverage it did not actually provide. *Id.* The Montana Supreme Court distinguished *Hardy* in *Cross*, 2019 MT 51, ¶21, because the "policy provides the liability coverage for which the premium was paid." The same conclusion must be reached here. New West paid a premium for a policy with $1,000,000 "each claim" limit. Allied provided coverage of $1,000,000 for each claim, which limit has already been paid. New West paid a premium for coverage, and received that coverage.

Finally, Ronan attempts to rehash factual arguments regarding not just the reservation of rights in this case, but in completely separate case, *Diaz*. (Dkt. 362,

pp. 15-16). Whether Allied accurately represented its policy has already been determined by the Montana Supreme Court based on these same allegations. The Court found that "New West has failed to identify *any* affirmative communication in which Allied represented that the $3,000,000 limit applied to this litigation." *Rolan III*, ¶ 26. Allied did not misrepresent application of the limit, *Rolan III*, ¶ 25, and Rolan has no basis to claim that the coverage is illusory or that New West had reasonable expectations of application of the aggregate limit.

CONCLUSION

The Allied Policy provisions are clear. Based both on the definition of "Claim" and the "related claims" provision, the "each claim" limit of $1,000,000 applies to Rolan's Class Action Complaint against New West.

DATED this 24th day of June, 2022.

NELSON LAW FIRM, P.C.
SHEEHY LAW FIRM

Attorneys for Defendant / Counterclaimant
Allied World Assurance Company

By _/s/ *Martha Sheehy*_____
Martha Sheehy
P.O. Box 584
Billings, MT 59103

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of June, 2022, a copy of the foregoing was duly served by email, as agreed by the parties:

Erik B. Thueson — Erik@thuesonlawoffice.com
THUESON LAW OFFICE — Elayne@thuesonlawoffice.com
c/o Elayne Simmons
58 South View Road
Clancy MT 59634

_____*/s/ Martha Sheehy*_____

232 Fed.Appx. 624
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed.
Rule of Appellate Procedure 32.1 generally governing
citation of judicial decisions issued on or after Jan. 1, 2007.
See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

WFS FINANCIAL, INC., Plaintiff—Appellant,
v.
PROGRESSIVE CASUALTY INSURANCE
COMPANY, INC., Defendant—Appellee.

No. 05–55854.
|
Argued and Submitted April 9, 2007.
|
Filed April 16, 2007.

Synopsis

Background: Insured automobile financing company sued insurer for breach of contract, breach of duty of good faith, and declaratory judgment seeking indemnity for claims made under two successive claims-made policies in connection with class actions brought against insured. The United States District Court for the Central District of California, Virginia A. Phillips, J., dismissed complaint. Insured appealed.

Holdings: The Court of Appeals held that:

[1] insured's second indemnity claim, made under second policy, was subject to policy limits of first policy, and

[2] under policies' limitations of liability provisions, insured's second indemnity claim was deemed to have been made during first policy period.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (2)

[1] Insurance Several Injuries

Indemnity claim that was filed by insured automobile financing company under successive claims-made insurance policy, based upon second class action lawsuit against it arising from its practice of permitting independent automobile dealers to mark up interest rates based upon subjective criteria, involved "interrelated wrongful act" to act set forth in insured's previous indemnity claim, which was made under prior policy issued by same insurer and arose out of earlier class action lawsuit stemming from challenged business practice, and thus, pursuant to policies' identical limitations of liability provisions, was subject to policy limits of prior policy, even though two lawsuits were filed by different sets of plaintiffs in two different fora under different legal theories.

8 Cases that cite this headnote

[2] Insurance Claims Made Policies

Insurance Several Injuries

Under limitations of liability provisions in successive claims-made insurance policies, which indicated that claims based upon or arising out of insured's interrelated wrongful acts would be considered single claim and that each such single claim would be "deemed to be first made on the date the earliest of such Claims was first made, regardless of whether such date is before or during the Policy Period," insured's second indemnity claim, which involved "interrelated wrongful act" to act underlying first indemnity claim, was deemed to have been made during first policy period, in which first indemnity claim was made, even though second claim was made during second policy period.

6 Cases that cite this headnote

Attorneys and Law Firms

***624** Erwin E. Adler, Esq., Adler Law Group, Los Angeles, CA, for Plaintiff–Appellant.

Jennifer Mathis, Ross, Dixon & Bell, Irvine, CA, Samuel L. Hendrix, Esq., Lewis K. Loss, Esq., Thompson, Loss & Judge LLP, Washington, DC, for Defendant–Appellee.

Appeal from the United States District Court for the Central District of ***625** California, Virginia A. Phillips, District Judge, Presiding. D.C. No. CV–04–00976–VAP.

Before: B. FLETCHER and McKEOWN, Circuit Judges, and WHYTE [*], District Judge.

MEMORANDUM [**]

****1** Appellant WFS Financial ("WFS"), an automobile financing company, appeals the district court's dismissal of its complaint for breach of contract, breach of duty of good faith, and declaratory judgment seeking indemnity for two claims made under two successive claims-made policies, both issued by appellant Progressive Casualty Insurance Co., Inc. ("Progressive"). We affirm.

WFS's claims sought indemnity for two separate class action lawsuits alleging that WFS's practice of permitting independent automobile dealers to mark up interest rates based on subjective criteria was discriminatory to minority applicants. The first claim, involving the *Lee* class action in federal court, was made during the first claims-made policy period; the second claim, involving the *Thompson* class action in California state court, was made during the second claims-made policy period.

[1] Both policies include the following limitation of liability:

> Claims based upon or arising out of the same Wrongful Act or Interrelated Wrongful Acts committed by one or more of the Insured Persons shall be considered a single Claim, and only one Retention and Limit of Liability shall be applicable. However, each such single Claim shall be deemed to be first made on the date the earliest of such Claims was first made, regardless of whether such date is before or during the Policy Period.

The district court correctly held that WFS's second claim involved an "Interrelated Wrongful Act" to the act set forth in the first claim. Therefore, the second claim was subject to the policy limits of the first policy. "Interrelated Wrongful Acts" are defined as "Wrongful Acts which have as a common nexus any fact, circumstance, situation, event, transaction or series of related facts, circumstances, situations, events or transactions." Although the suits were filed by two different sets of plaintiffs in two different fora under two different legal theories, the common basis for those suits was the WFS business practice of permitting independent dealers to mark up WFS loans. The harms alleged in the two class action suits are causally related and do not present such an "attenuated or unusual" relationship that a reasonable insured would not have expected the claims to be treated as a single claim under the policy. *See* *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal.4th 854, 873, 21 Cal.Rptr.2d 691, 855 P.2d 1263 (1993).

Further, *Homestead Ins. Co. v. Am. Empire Surplus Lines Ins. Co.*, 44 Cal.App.4th 1297, 1304, 52 Cal.Rptr.2d 268 (1996), does not prevent the two claims from being "Interrelated Wrongful Acts" under the policy. *Homestead,* unlike the present case, involved a dispute between two separate insurers on successive years of risk. *See, e.g.*, *Friedman Prof'l Mgmt. Co. v. Norcal Mut. Ins. Co.*, 120 Cal.App.4th 17, 33, 15 Cal.Rptr.3d 359 (2004) (determining that a claim made during a second claims-made policy period could be related to a claim made in the first claims- ***626** made policy period where the policies were issued by the same insurer).

****2** **[2]** Finally, WFS contends that the first policy cannot "receive" a claim from a subsequent policy period because the "Interrelated Wrongful Act" language specifies that "each such single Claim shall be deemed to be first made on the date the earliest of such Claims was first made, regardless of whether such date is *before or during* the Policy Period" (emphasis added). Pursuant to the identical language in the provision limiting liability in the second policy, however, the second claim is deemed to have been

made *during* the first policy period, which the policy language expressly contemplates.

AFFIRMED.

All Citations

232 Fed.Appx. 624, 2007 WL 1113347

Footnotes

* The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.