MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

DANA ROLAN, on her own behalf and on behalf of the class she represents,

Plaintiff,

v.

NEW WEST HEALTH SERVICES, DARWIN SELECT INSURANCE COMPANY and ALLIED WORLD ASSURANCE COMPANY AND DARWIN NATIONAL ASSURANCE COMPANY,

Defendants.

ALLIED WORLD ASSURANCE COMPANY,

Counterclaimant,

v.

DANA ROLAN, on her own behalf and on behalf of the class she represents,

Counter-Defendants.

Cause No. CDV-2010-91

ORDER ON VARIOUS MOTIONS

This matter involves a class action lawsuit by Dana Rolan and a certified class against New West Health Services (New West). Allied World Assurance Company (Allied) insures New West. Defendant/Counterclaimant Allied filed a motion for partial summary judgment seeking a declaratory ruling that its limit of liability under the Managed Care Errors and Omissions Liability Policy (MCEO) is $1 million, and that the Health Care Organization Directors and Officers Liability Insurance Policy Including Employment Practices Liability Coverage (HCDO) does not provide coverage. Plaintiffs/Counter-Defendants Dana Rolan and the class filed a cross-motion for summary judgment against Allied on coverage. Defendant New West also filed a cross-motion for summary judgment that Allied provides coverage for all claims asserted by Rolan and the class in the full amount of the aggregate limit ($3 million) and is subject to an excess verdict because of its failure to settle within limits.

Plaintiffs also ask for sanctions against Allied for discovery violations. Allied requests that the motion for sanctions be stricken.

Finally, on September 21, 2018, Allied filed a motion to strike an affidavit filed by Erik Thueson. That motion has been fully briefed.

UNDISPUTED FACTS

Plaintiffs filed a complaint against New West in January 2010. New West contacted its insurer, Allied. Joseph Sappington, Esq., Allied World Assurance Company Senior Claims Analyst, wrote a Reservation of Rights (RoR) letter dated February 18, 2010 to Angela Huschka at New West.[1] The letter states in part:

/////

[1] The complete RoR letter is included in the court file as Ex. A to the July 26, 2018 Affidavit of Gary Zadick.

SUMMARY OF FACTS

We have reviewed the Complaint (the "Complaint") captioned, *Dana Rolan v. New West Health Services*. . . .

Plaintiff, a resident of Montana, brings the Action on behalf of herself and on behalf of those similarly situated. The Plaintiff claims that she suffered injuries caused by the legal fault of others and has not been made whole. It is further alleged that the Defendant has avoided payment of medical bills that they are allegedly contractually obligated to pay by claiming the medical costs are the responsibility of those at fault. . . .

The Complaint further sets forth actions for class certification, declaratory relief and payment, and other class claims for payment and breach of contract and similar Montana statutes as those referred to above. Plaintiffs seek both monetary damages, punitive damages, attorneys' fees and costs.

RoR, at 2, 3.

In the summary of coverage, a definition of "claim" is discussed:

"**Claim**" is defined in Definitions § IV(C) as 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**.

RoR, at 3.

The RoR letter makes no reference whatsoever to the definition of "Related Claims."

/////

After the summary of coverage under the Managed Care Errors and Omissions (MCEO) Policy, Sappington accepts coverage of New West under the policy with Allied, stating:

> As the Complaint includes allegations sounding in a **Managed Care Activity**, and the allegations were apparently first made against an **Insured** in writing during the Policy Period, the conditions precedent to the Insuring Agreement appear to be satisfied. Accordingly, the MCEO Policy provides for a **Per Claim** Limit of Liability of $1,000,000 and a Maximum Aggregate Limit of Liability of $3,000,000 subject to a $50,000 retention applicable to **Loss**, including **Defense Expenses**, for each **Claim**.
>
> Under the MCEO Policy the **Underwriter** has the right and duty to defend any **Claim** made against any **Insured** which is covered by the MCEO Policy even if the allegations of such **Claim** are groundless, false or fraudulent. (Insuring Agreement § I). In addition and pursuant to the MCEO Policy, the amount stated in ITEM 3(a) of the Declarations shall be the maximum aggregate Limit of Liability of the **Underwriter** for all **Loss**, including **Defense Expenses**, resulting from all **Claims** for which this MCEO Policy provides coverage, regardless of the number of **Claims**, the number of persons or entities included within the definition of **Insured**, or the number of Claimants. . . .

RoR, at 4.

The letter notes that:

> [U]nder the MCEO Policy, no **Insured** may incur any **Defense Expenses** or admit liability for or settle any **Claim** without the **Underwriter's** written consent. (Conditions § III(A)(3)). The **Underwriter** will have the right to make investigations and conduct negotiations and, with the consent of the **Insureds**, enter into such settlement of any **Claim** as the **Underwriter** deems appropriate.

RoR, at 4-5.

The RoR also states, "[a]s we are assuming New West's defense in this matter I will be in contact with you shortly to discuss retention of" attorneys. RoR, at 5. Since the February 2018 RoR letter was sent to New West, Allied has provided a defense to New West for this litigation.

The RoR letter states that there is no coverage available under the HCDO policy. RoR, at 9.

LEGAL STANDARDS

A court shall grant summary judgment when the moving party shows "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Mont. R. Civ. P. 56 (c).

An interpretation of an insurance policy is a question of law. *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 8, 403 P.3d 664.

"The doctrine of equitable estoppel is predicated on equity and good conscience, and will grant relief to prevent a party from suffering a gross injustice at the hands of the other party who brought about the situation or condition." *Avanta Fed. Credit Union v. Shupak,* 2009 MT 458, ¶ 41, 354 Mont 372, 223 P.2d 863 (citations omitted).

DISCUSSION

Estoppel

Plaintiffs and New West argue Allied is estopped from relying on a limited coverage defense six years after taking control of the defense of the claim, without specifying any reservation of right to limit coverage to a single claim or related claims. They rely on *Safeco Ins. Co. v. Ellinghouse*, 223 Mont. 239, 775 P.2d 217 (1986), for the principal that an insurer is estopped from

denying coverage to its insured when the insurer had initially accepted coverage of the claim and assumed defense of the claim without reservation.

In considering an argument for estoppel of insurance coverage, the Montana Supreme Court looks to the Montana Unfair Trade Practices Act. "[The Act] requires that the insurer 'promptly provide a reasonable explanation of the basis the insurance policy in relation to the facts or applicable law for denial of the claim.'" *Ellinghouse,* 223 Mont. at 245, 725 P.2d at 221 (citing Mont. Code Ann. § 33-18-201(14); 38 A.L.R.2d 1148). "It is well established in Montana that an insurer has an obligation to inform the insured of all policy defenses it intends to rely upon." *Portal Pipe Line Co. v. Stonewall Ins. Co.*, 256 Mont. 211, 217, 845 P.2d 746, 750 (1993).

Allied argues that *Ellinghouse* has no application to this matter and that New West and Plaintiffs do not identify or prove the required elements for estoppel. Allied raises the six elements of estoppel, arguing that crossclaimants fail to prove the requisite elements by clear and convincing evidence. See, e.g. *Avanta Fed. Credit Union*, ¶ 42[2]; *King v. State Farm Fire Casualty Co.*, 2010 U.S. Dist. LEXIS 49029 (D. Mont. 2010).

Allied also claims the RoR letter does not limit its defense, but rather, alerted New West to the limit of $1 million for each "Claim" as defined by the policy. Allied asserts its position on coverage limits has been consistent and that New West never relied on the $3 million aggregate limit.

[2] (1) the existence of conduct, acts, language, or silence amounting to a representation or a concealment of a material fact; (2) these facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him; (3) the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon by him; (4) the conduct must be done with the intention, or at least the expectation, that it will be acted upon by the other party, or under circumstances both natural and probable that it will be so acted upon; (5) the conduct must be relied upon by the other party and, thus relying, he must be led to act upon it; and (6) he must in fact act upon it in such a manner as to change his position for the worse.

When addressing the issue of estoppel regarding insurance coverage in *Ellinghouse*, the Montana Supreme Court adopted the general rule set forth in 14 Couch, INSURANCE 2D, § 51.58 (2d ed. 1982):

> Where an insurer, without reservation and with actual or presumed knowledge, assumes the exclusive control of the defense of claims against the insured, it cannot thereafter withdraw and deny liability under the policy on the ground of noncoverage, prejudice to the insured by virtue of the insurer's assumption of the defense being, in this situation, conclusively presumed . . . the loss of the right of the insured to control and manage the case is itself prejudicial.

Ellinghouse, 223 Mont. at 245, 725 P.2d at 221.

In *Portal Pipe Line Co.*, at 217, 845 P.2d at 750, the Montana Supreme Court distinguished *Ellinghouse* and rejected the principle that an insurance company is strictly limited to those defenses detailed in a reservation of rights letter. However, the facts in *Portal Pipe Line Co.* are very different from those presented here, in that the insurer had no duty to defend Portal Pipe Line Co., did not assume the insured's defense, and Portal Pipe Line Co. obtained independent counsel throughout the litigation. As such, the Supreme Court held that the insured was not prejudiced by the insurer's reliance on various exclusions to coverage.

In *Barnard Pipeline, Inc. v. Travelers Prop. Cas. Co. of Am.*, 3 F. Supp. 3d 865, 875, a United States district court judge, citing *Portal Pipeline Co.*, clarified that "an insurer does not waive all policy defenses that are not included in a reservation of rights letter." The decision also iterated the legal requirement in Montana for an insurer to "promptly provide a reasonable explanation of the basis in the insurance policy . . . for denial of a claim." (Citing Mont. Code Ann.

§ 33-18-201(14)). It was noted in *Barnard* that the insured was always on notice that the insurer intended to assert all policy defenses, as distinguished from the current case, where the RoR relayed a different message related to coverage and possible defenses.

The facts of this case are that New West was sued by Rolan and other yet to be identified plaintiffs certified in the class action. The insurer, Allied, knew the alleged facts and the nature of the class claims. While reciting the policy in effect at the relevant time, the RoR sent by Allied to New West did not mention application of any single claim limitation, including "related claims," to coverage in this matter. In fact, the RoR implied that there would be $3 million aggregate coverage. Allied assumed the defense of the case and hired attorneys to represent New West.

Allied argues it has never controlled the defense of the case, has never waived any defenses, and the *Ellinghouse* presumption of prejudice does not apply. Citing *In re the Rules of Professional Conduct*, 2000 MT 110, 299 Mont. 321, 2 P.3d 806, Allied claims that modern defense practices do not require pre-approval of the actions of New West's counsel provided by Allied because under the Montana Rules of Professional Conduct, New West is considered the sole client of its defense counsel. Notwithstanding the relationship between New West and counsel provided by Allied, Allied assumed defense of the case in 2010. "The loss of the right of the insured to control or manage the case is itself prejudicial." *Ellinghouse,* at 245, 775 P.2d at 221. Allied did not make clear its current coverage position until 2016 – six years after the RoR was issued and Allied assumed defense of the case. "The course cannot be rerun, no amount of evidence will prove what might have occurred if a different route had been

taken." *Id.*, citing *Transamerica Inc. Group v. Chubb and Son, Inc.*, 554 P.2d 1080, 1083 (1976).

An effective reservation of rights letter must communicate any reservation to the insurer specifically and unambiguously.

> The reservation of rights letter must inform the insured in detail of every reason of which the carrier is aware, or should be aware, supporting a denial or limitation of coverage. . . . The carrier must advise the insured specifically why . . . there is a potential denial of coverage. It is not sufficient just to cite to the pertinent policy provisions without explanation. A reservation of rights letter should, to the extent feasible, be written in lay terms and should not only set forth the potential coverage defenses but also explain why they apply. . . . The insurer must avoid ambiguity, since any ambiguity in the reservation of rights will be resolved against the insurer.

Leitner, LAW AND THE PRACTICE OF INSURANCE § 8.9.

It is presumed the RoR letter was written thoughtfully and intentionally. There is no evidence the RoR was supplemented or amended in any way after February 2010. Allied knew the nature of the complaint and all claims made therein. If the limitation of coverage based on a single claim or related claims was available to it and intended to be relied upon, it was incumbent upon the insurer to notify the insured of such limitation or defense. Simply reciting the definition of "Claim" without explanation, clarification, or assertion of limitation to coverage is vague and ambiguous. As such, interpretation the letter must be construed against Allied and in favor of New West and Plaintiffs.

This failure for years to inform of a limitation of coverage differs from *Portal Pipe Line* or *Barnard* where defenses were timely raised and

/////

reserved. Allied's delayed communication of its interpretation of coverage limitations presumptively prejudiced New West and Plaintiffs.

This Court finds that in consideration of the uncontested facts, Allied is estopped from asserting a limitation of coverage to $1 million based on a single claim or related claims. Allied's argument for partial summary judgment for limited coverage for "each Claim" therefore need not be addressed.

HCDO Policy Coverage

Allied asserts, and no party has refuted, that the HCDO Policy does not apply to the Rolan/class complaint.

Assumption of Risk of an Excess Verdict

New West asks for a declaratory ruling that when Allied rejected a demand of $3 million, it assumed the risk of an excess verdict by refusing to settle within policy limits, citing *Jessen v. O'Daniel,* 210 F. Supp. 317 (D. Mont. 1960). Allied counters that it had a reasonable basis in law for contesting coverage, and therefore there was no duty to settle. *State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, 372 Mont. 191, 312 P.3d 403. "Without coverage, a duty to settle does not arise, even if the facts of the [underlying case] indicate that an insured's liability is reasonably clear." *Id.* ¶ 47.

When Allied refused to settle "within policy limits" of $3 million, the question of aggregate coverage had not been resolved. It is premature to declare that Allied has assumed the risk of an excess verdict.

Sanctions

In February 2018, Plaintiffs were granted leave to amend the complaint to bring Allied into the lawsuit regarding the issue of coverage. Allied was served with an amended complaint and plaintiff's first discovery requests on

March 23, 2018. Allied answered the amended complaint on April 25, 2018. If properly served with the discovery,[3] Allied had forty-five days to respond. On June 21, 2018, the legal assistant to Plaintiffs' counsel, Erik Thueson, sent an email wondering if discovery requested in March had been provided and noting she did not see it in her file. On June 22, 2018, the parties attended court-ordered mediation, which proved unsuccessful. On July 5, 2018, Allied moved for partial summary judgment on the issue of coverage, admitting coverage under the $1 million single-claim limit of the MCEO policy. Plaintiffs claim that if the discovery requested had been available at mediation the result may have been different, and that Allied's failure to respond constitutes unfair prejudice to Plaintiffs.

The parties agree that on May 7, 2018, Randy Nelson, attorney for Allied, emailed Thueson, indicating he was aware Thueson was involved in an out-of-state trial and that Nelson assumed discovery would be postponed until after mediation. Unbeknownst to either Thueson or Nelson, the email address for Thueson used by Nelson was not working, so Thueson did not receive the email. Nelson sent a follow-up email on May 21, 2018, asking about his previous request regarding discovery being postponed until after mediation. Although he received no response, Nelson did not follow up with Thueson, nor reply to the discovery.

The unsuccessful mediation was held on June 22, 2018. On July 24, 2018, Thueson filed a motion for sanctions pursuant to Montana Rule of Civil Procedure 37 due to Allied's failure to respond to discovery. On

[3] Allied argues that service by the Montana Commissioner of Securities and Insurance, as relied upon in this matter, is inadequate for service of discovery because the Commissioner is not authorized to serve discovery upon parties in a civil action pursuant to Montana Code Annotated § 33-1-601(1).

August 7, 2018, Allied responded to the discovery requests. Allied asks this Court to strike Plaintiff's request for sanctions as an "insufficient defense [or] immaterial matter. . . ." pursuant to Montana Rule of Civil Procedure 12. Allied asserts that Plaintiffs failed to comply with the Rule 37 certification requirement that a party asking the court for sanctions first confer in good faith with opposing counsel before seeking court intervention. Montana Rule of Civil Procedure 37(d)(1)(A) states that the court may order sanctions when a party fails to answer interrogatories or respond to a request for inspection. However, "[a] motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action." Mont. R. Civ. P. 37(d)(1)(B).

Plaintiffs assert they met the "confer and certify" requirement by attempting to confer with Allied's counsel via the June 21, 2018 email from Thueson's legal assistant reminding them of the discovery. Allied counters that its attorneys accommodated Thueson's schedule for an out-of-state trial and then Nelson attempted to contact Thueson to ask for a continuance in response to discovery until after mediation.

When considering sanctions, the Montana Supreme Court has laid out factors to consider:

> [W]hether the sanction relates to the extent and nature of the actual discovery abuse; whether the sanction relates to the extent of the prejudice to the opposing party; whether the sanction is consistent with the consequences expressly wared of by the district court, is a

/////

/////

warning was issued; and whether the party disregarded the court's orders and authority.

Cox v. Magers, 2018 MT 21, ¶ 27, 390 Mont. 224, 411 P.3d 1271 (citation omitted).

There was no evidence presented that Allied's counsel attempted to thwart or unnecessarily delay response to discovery propounded by Plaintiffs. Further, Plaintiffs failed to certify that there was communication or any attempt to confer about discovery issues and presented no evidence of a meaningful attempt to confer in good faith with defense counsel prior to filing the motion for sanctions.

Montana Rule of Civil Procedure 12(f) provides: "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

Neither party is to blame for the email not going through to Thueson, and both parties share responsibility for the failure to "confer" with the other party before making assumptions about that party's position with respect to discovery.

Sanctions are not warranted at this juncture, but the motion asking for court intervention was not so extreme as to merit being stricken from the pleadings.

Motion to Strike Affidavit of Thueson

The Court has not relied upon the affidavit of Thueson, and therefore finds this motion should be denied as moot.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. Allied's motion for partial summary judgment for $1 million limit of coverage is DENIED.

2. Allied's motion for partial summary judgment on inapplicability of the HCDO Policy is GRANTED.

3. New West's cross-motion for summary judgment for assumption of excess verdict is DENIED.

4. Plaintiffs motion for sanctions is DENIED.

5. Plaintiffs' and New West's cross-motions for partial summary judgment for estoppel are GRANTED.

6. Allied's motion to strike the affidavit of Thueson is DENIED as moot.

DATED this 23 day of October 2018.

KATHY SEELEY
District Court Judge

pc: Erik B. Thueson, PO Box 280, Helena MT 59624-0280
Robert C. Lukes/L. Mike Wilson, PO Box 7909, Missoula MT 59807-7909
Gary M. Zadick, PO Box 1746, Great Falls MT 59403
Randall G. Nelson/Thomas C. Bancroft, 2619 St. Johns Avneue, Suite E, Billings MT 59102
Martha Sheehy, PO Box 584, Billings MT 59103-0584

KS/t/rolan v new west ord var mots.doc