COPY

FILED

APR 19 2019

ANGIE SPARKS, Clerk of District Court
By AMBER M MULLEN Deputy Clerk

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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

Plaintiffs,

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 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (INDEMNITY) AND PLAINTIFFS' MOTION TO RESCHEDULE SUBMISSION OF PROPOSED ORDER

On November 6, 2018, after almost nine years of litigation, Plaintiffs and Defendant New West Health Services (New West) filed a joint motion for approval of proposed compromise settlement and notice to the class. On December 20, 2018, a hearing was held to discuss the proposed settlement, at which the Court approved the settlement in principle, with the understanding the proposed settlement would be modified and resubmitted with a proposed order. Defendant/Counterclaimant Allied World Assurance Company (Allied World) advised the Court that it did not participate in the proposed settlement or wish to approve it prior to submittal to the Court.

On December 18, 2018, Plaintiffs moved for entry of final judgment. On January 9, 2019, Allied World filed a response opposing the motion for final judgment. Allied World contends that the settlement amounts set out in the proposed settlement are not covered by Allied World under the Managed Care Organizations Errors and Omissions (MCEO) Liability Policy. Further, Allied World objects to some assertions and terms of the proposed settlement as unreasonable. Although taking issue with the terms and reasonableness of the settlement, Allied World nonetheless objects to "any change in the terms of the settlement itself."[1]

On January 17, 2019, Allied World filed a motion for summary judgment (indemnity) alleging there is no "loss" as defined in the MCEO policy. Defendant New West joins Plaintiffs in opposing the motion.

On January 28, 2019, Plaintiffs filed a motion to reschedule submission of proposed order. Plaintiffs anticipate that resolution of the motion for summary judgment will require modification to the preliminary settlement,

[1] Allied World Assurance Co.'s Resp. Mot. Reschedule Submission Proposed Order (Feb. 6, 2019).

and they wish to ensure that the original notice to the class accurately reflects the status of the proceedings.

Oral argument was held on March 13, 2019, and the matters are deemed submitted for ruling.

LEGAL STANDARD

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, 389 Mont. 48, 403 P.3d 664.

FACTS

Facts regarding this class action lawsuit are laid out in this Court's Order on Various Motions dated October 24, 2018.[2]

The class of Plaintiffs provided in the Certification Order includes persons:

1. who incurred medical bills due to the negligence or wrongdoing of a third-party tortfeasor(s):

2. whose medical bills were not paid by New West but were paid by the tortfeasors or tortfeasors' insurers; and

3. who were not provided a valid "made-whole" determination by New West before avoiding payment of benefits.

/////

/////

[2] The Court's Memorandum and Order on Motions Following Remand dated December 7, 2016 details earlier procedural history.

The proposed settlement includes a plan to modify the certification order, but the proposed order also includes language regarding medical bills not being paid and avoiding payment of benefits.

In addition to the provisions of the MCEO policy referenced in previous court orders, the policy provides the following provisions:

I. INSURING AGREEMENT

> The Underwriter will pay on behalf of any Insured any Loss which the Insured is legally obligated to pay as a result of any Claim that is first made against the Insured during the policy Period during any applicable Extended Reporting Period. As part of and subject to the Limit of Liability stated in ITEM 3(a) of the Declarations, the Underwriter will have the right and duty to defend any Claim made against any Insured which is covered by this Policy, even if the allegations of such Claim are groundless, false or fraudulent.

(Emphasis omitted.)

Under Definitions, at Section IV(J), the MCEO policy states:

> "Loss" means Defense Expenses and any monetary amount which an Insured is legally obligated to pay as a result of a Claim. Loss shall not include:
>
> . . .
>
> (2) Fees, amount, benefits or coverage owed under any contract with any party including providers of health care services, health care plan or trust, insurance or workers' compensation policy or plan or program or self-insurance[.] . . .

The proposed settlement settles Plaintiffs' claims against New West and assigns to Plaintiffs all New West's coverage and all its claims against Allied World. New West and Plaintiffs agree to settle the following types of damages for the estimated settlement amounts:

1. Administrative costs: $200,000

2. Gross value of monetary remedy if all eligible class members could be identified and paid, including prejudgment interest: $3,000,000.

3. Incentive award to class representative Rolan: $50,000.

4. Attorney fees and costs (1/3 of common fund): $1,100,000.

DISCUSSION

Plaintiffs argue against summary judgment on indemnity as a matter of law and again raise estoppel. The legal issue is dispositive. There are issues of fact regarding estoppel, and the Court need not address it.

Allied World has acknowledged its duty to defend New West and has done so throughout this lawsuit. The issue of coverage limits was litigated, with a decision from this Court that Allied World was estopped from asserting a limitation of coverage to $1,000,000 based on a single claim or related claims. Practically, this finding means there is up to $3,000,000 aggregate limit in coverage for the class.[3]

Regardless of an insurer's acknowledgment of a duty to defend, the issue of whether an insurer has a duty to indemnify may remain unresolved. The Court is now tasked with an analysis of indemnification under the MCEO policy held by New West Health Services as underwritten by Allied World Assurance Company.

a. Does a "Benefit or Coverage Owed" Exclusion to "Loss" Preclude Indemnification?

Allied World asserts the proposed settlement agreement between New West and Plaintiffs contains only contract damages, and Allied World is not

[3] Allied World intends to appeal this issue.

obliged to indemnify New West for "benefits or coverage owed" because they are excluded from "loss" under the policy. Allied World contends the settlement amounts are derived from the amount of benefits which New West should have paid to the class of insured plaintiffs if New West had conducted a made whole analysis regarding class members injured by a third-party tortfeasor. Allied World contends that because the negotiated damages were determined by potential amounts owed class members if a made whole analysis had been conducted by New West, the negotiated damages are therefore "benefits" owed under the MEOC policy, or contract, between New West and Allied World.

Allied World refers to language in the preliminary proposed settlement agreement which states that class "contract damages are easily calculated." The proposed settlement also provides that class members may opt out of any non-contractual claims against New West. Allied World argues this language supports a finding that the damages agreed to in the proposed settlement are not "wrongful acts" committed by New West, but arise entirely from New West's failure to pay benefits owed under its plan. Allied World claims that it is therefore not obligated to indemnify New West for payments which New West was contractually obligated to pay to claimants. Even if New West's actions are considered wrongful, Allied World cites *Health Net, Inc. v. RLI Insurance Co.*, 206 Cal.App.4th 232, 253 (Cal. 2012) as instructive. In *Health Net*, the California court held that "an insured's alleged or actual refusal to make a payment under a contract does not give rise to a loss caused by a wrongful act." The *Health Net* decision does not, however, exclude from coverage "extracontractual damages." *Id.* at 257.

/////

It is clear Plaintiffs and New West are utilizing benefit amounts to simplify determination of the amount of damages. Nonetheless, Plaintiffs argue the damages at issue are consequential – flowing from New West's wrongful failure to conduct a made whole analysis. They contend the MCEO policy does not preclude a duty to indemnify New West for the damages outlined in the preliminary proposed settlement agreement because the MCEO policy definition of "loss" does not exclude extracontractual damages or statutory damages.[4]

In interpreting insurance policies, a court considers the policy, and attempts to reconcile its various parts to give each meaning and effect. *Mont. Petroleum Tank Release Corp. Bd. v. Crumleys, Inc.*, 2008 MT 2, ¶ 34, 174 P.3d 948. Ambiguous terms are viewed from "the viewpoint of a consumer with average intelligence but not trained in the law or insurance business." *Id.* See also, *Alpha Real Estate Dev., Inc. v. Aetna Life & Cas. Co.*, 174 Mont. 301, 304, 570 P.2d 585, 587 (1977) ("[A] contract of insurance will be construed strictly against the insurer and liberally in favor of the insured."); *Pablo v. Moore*, 2000 MT 48, ¶ 17, 298 Mont. 393, 995 P.2d 460 ("If the terms of an insurance policy are ambiguous, obscure, or open to different constructions, the construction most favorable to the insured or other beneficiary must prevail, particularly if an ambiguous provision attempts to exclude the liability of the insurer.")

"An ambiguity exists 'when a contract taken as a whole in its wording or phraseology is reasonably subject to two different interpretations.'" *Mont. Petroleum*, ¶ 34 (citing *Jacobsen v. Farmers Union Mut. Ins. Co.*, 2004 MT 72, ¶

[4] Plaintiffs cite Montana Code Annotated § 33-18-201, which delineates unfair trade practices for insurance companies under the Unfair Trade Practices Act (UTPA). Plaintiffs also cite *Williams v. Sif Constituents of La., Inc.*, 133 So.3d 707 (La. App. 2014), for the legal conclusion that statutory damages are not excluded from the policy definition of "loss." The statutory damages alleged by Plaintiffs in this matter appear to be alleged violations of the UTPA. Violation of the UTPA has not yet been established, however, and the *Williams* case is not applicable to the issues presently under consideration.

19, 320 Mont. 375, 87 P.3d 995). The court may not rewrite an insurance policy if the terms are clear and explicit, but must enforce the policy as written.

The question before the Court is whether Montana's long-standing, common law made-whole requirement with respect to insurance claims involving or paid by third-party tortfeasors is a "benefit owed" under class members' New West insurance policy.[5] Alternatively, does the MCEO contract language clearly and unambiguously exclude damages stemming from New West's failure to conduct a made-whole analysis for claims caused by third-party tortfeasors?

The requirement that an insurer in Montana conduct a made-whole analysis before asserting its subrogation rights stems from a long line of cases.

> In 1977, this Court established the "made whole" doctrine to be applied in insurance subrogation cases. The doctrine required that an insured be "made whole" before an insurer could assert its subrogation rights, which meant that, not only must the insured recover all of her losses but also all costs of recovery as well, such as attorney fees and costs of litigation.

Swanson v. Hartford Ins. Co., 2002 MT 81, ¶ 15, 309 Mont. 269, 46 P.3d 584 (citing *Skauge v. Mountain States Tel. and Tel. Co.*, 172 Mont. 521, 565 P.2d 628 (1977)). See also *Van Orden v. United Serv. Auto. Ass'n*, 2014 MT 45, ¶ 14, 374 Mont. 62, 318 P.3d 1042.

Allied World relies on the exclusion to the definition of "loss" in the MCEO policy, citing *American Medical Security, Inc. v. Executive Risk Specialty Ins. Co.,* 393 F. Supp. 2d 693 (D. Wis. 2005). This class action lawsuit from Wisconsin addressed the same exclusion for "loss" as found in the MCEO policy

[5] It is noted that neither party cites or addresses terms of the insurance policy between New West and class members.

here, with the court concluding the contract language precludes indemnity coverage for claims for "fees, amounts, benefits or coverage owed" under the plan. The Wisconsin court found the definition of "loss" precluded indemnification for two plaintiffs who alleged the insurer failed to pay benefits owed under the policy. Other claims brought by class members in the case alleged the insurer had improperly increased individual premiums for what it sold as a group insurance policy. The court did not exclude damages flowing from the insurer's "breach or other wrong" as precluded by the contract's definition of loss. *Id.* at 708.

More persuasive to the facts of this matter is the Court's conclusion related to an insurer's duty to indemnify for damages flowing from the insurer's "breach or other wrong." When damages arise under a failure to conduct a made-whole analysis, the damages are outside of the contractual policy benefits. Such damages, which include attorney fees and costs of suit, flow from, and are coincidental to the insurer's failure to follow Montana's adherence to the made whole doctrine.

The claims of class members here are for damages related to New West's wrong-doing, i.e. failure to conduct a made-whole analysis of each claim for injury by third-party tortfeasors, and New West's refusal to make payment for medical expenses already paid by the tortfeasor's insurer. Allied World argues these amounts equate to "benefits owed" under the policy, but the claims by these class members regard subrogation under Montana's made-whole doctrine and are "extracontractual." "Subrogation is an equitable doctrine which is not dependent on any contractual relationship between the parties." *Youngblood v. Am. States Ins. Co.*, 262 Mont. 391, 395, 866 P.2d 203, 205 (1993).

The MCEO policy language does not clearly exclude claims for subrogation or loss due to the insurer's failure to conduct a made-whole analysis. Allied World relies on the language of the preliminary proposed settlement agreement as conclusive evidence that the damages are "benefits" owed under the contract and excluded from "loss." The language of the preliminary proposed settlement agreement, however, is not directly at issue.[6] At issue is the legal interpretation of the definition of "loss" under the MCEO policy, which is ambiguous when applied to the failure to conduct a made-whole analysis.

> "[P]olicy exclusions are strictly construed [citations], while exceptions to exclusions are broadly construed in favor of the insured. '"[A]n insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again 'any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.' Thus, 'the burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language.' The exclusionary clause 'must be *conspicuous, plain and clear*.'" This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded.'"

Health Net, supra, at 251 (citations omitted).

There is no instructive case law cited holding that damages flowing from violation of Montana's long-standing and broadly interpreted made-whole requirement are benefits or amounts owed under a contract. The Court concludes that the monetary recovery for class members, regardless of how calculated, reflects New West's failure to conduct a made-whole analysis. The contract does

[6] A final settlement has not been approved by the Court. If the language of the preliminary proposed settlement agreement does not reflect the understanding or status of the parties to the settlement, the agreement may be amended or modified to more accurately reflect the legal status and intent of the parties.

not exclude such damages from "loss." As such, the damages stemming from New West's failure to conduct a made-whole analysis for the class members are not precluded from indemnification by Allied World.

Administrative Costs

Based on Allied World's argument that the class members' damages detailed in the settlement agreement do not constitute "loss," Allied argues it is not responsible for administrative costs incurred in obtaining a non-covered monetary award. The MCEO policy between New West and Allied World excludes from the definition of "loss" "non-monetary relief or redress in any form, including without limitation the cost of complying with any injunctive, declaratory or administrative relief."

Plaintiffs filed a motion for declaration and certification of class, which was granted by the Court. The administrative costs incurred by compliance with the declaration flow from the claims of violation of Montana's made-whole requirement. The costs are necessary to secure the relief granted for New West's failure. Only one class member has been identified to date. Other potential class members must be notified of their rights and potential recovery. The administrative costs required to find class members are necessarily included in making each insured claimant whole. Summary judgment shall be denied on this issue.

Incentive Award to Rolan

The settlement contains an extra $50,000 to the only identified class member, Dana Rolan. Rolan has endured nine years of litigation while waiting to be made whole. If her counsel and New West agree to compensate her for her patience, they may do so, but it is too far a stretch to conclude that such an

"incentive" award calculated as part of making this class member "whole." Allied World has no obligation to indemnify for the incentive award.

Attorney Fees

Allied World contends that, because the damages in this case are not covered by the MCEO policy, the attorney fees expended to recover them do not constitute a "loss" under its MCEO policy. The Court has found that the damages in this case are a covered loss. The definition of "loss" includes "any monetary amount which an **Insured** is legally obligated to pay as a result of a **Claim.**"[7] Allied World insures New West for loss covered by the MCEO policy and is responsible for indemnification of attorney fees owed by New West to its insureds for damages caused by its failure to conduct a made-whole analysis. The amount of attorney fees remains an issue. Allied World has repeatedly stated it has no interest in negotiating or approving the settlement agreement between New West and Plaintiffs. Now that the terms have been proposed, Allied World takes issue with those terms.

In the terms of the proposed settlement, there is an assumption that there is $3,000,000 available for a "trust" for the potential class members who have yet to notified or found. Based on the MCEO policy limits for aggregate coverage, the proposed settlement concludes that $3,000,000 will be placed in a "common fund" for the benefit of the class. Citing *Stimac v. State*, 248 Mont. 412, 812 P.2d 1246 (1991), Plaintiffs argue the appropriate award is 33 1/3 percent of the gross value of the common fund, for an estimated contingency fee of $1,100,000. In their brief in support of preliminary approval of attorney fees

[7] MCEO policy, p. 26, Ex. 1 to Defendant/Counterclaimant Allied World Assurance Company's Brief in Support of Motion for Summary Judgment (Indemnity).

and costs,[8] Plaintiffs present the argument that fees must be based on the percentage of the entire fund, not the amount paid out, citing e.g., *Williams v. MGM-Plathe Comm. Co.*, 129 F.3d 1026 (9th Cir 1997) (citing *Boeing Co. v. Van Gemet*, 444 U.S. 472, 480-81 (1980)).[9]

The class action settlement in *Williams*, *supra*, involved an "arms-length" negotiation by the parties, with the knowledge that attorney fees based on the entire settlement fund were being requested. The court stated that "Defendants had some responsibility to negotiate at the outset for a smaller settlement fund if they wished to limit the fees." *Williams*, 129 P.3d at 1027. The case is instructive to both parties – attorney fees for a formulaic amount is not automatic in a class action lawsuit, and the defendant has a responsibility to negotiate the fees relative to the settlement or run the risk of paying significantly more than anticipated.

New West has agreed to include a percentage of the entire $3,000,000 coverage limit in the settlement for attorney fees. New West has limited remaining assets, providing a total of $250,000 for the entire settlement. Allied World takes quite a gamble in removing itself from approving a settlement under which it might ultimately be found responsible for indemnification of all negotiated damages, costs and fees.

/////

[8] Doc. 234.

[9] Courts are split on how to deal with the size of the actual distribution in a class action and the amount of attorney fees. Some circuits prohibit the allowance of fees in an amount greater than the sum claimed by the class, considered a windfall to the attorneys. In referencing the *Boeing* decision, the U.S. Supreme Court has since held the court "had no occasion in *Boeing*, however, to address whether there must at least be *some* rational connection between the fee award and the amount of the actual distribution to the class." *Int'l Precious Metal Corp. v. Waters*, 530 U.S. 1223, 1224 (2000).

At this point Dana Rolan is the only identified class member. While there are presumably more, the chance of individuals being found, and their eligibility verified, becomes more remote as the years pass. The Court finds that, although there is precedent for attorney fees based on the total fund available to the class, there must be a rational connection between the fee award and the amount of the actual distribution or value to the class.

The Court further concludes that the preliminary proposed settlement contains material misunderstandings of fact.[10] Before this Court signs a settlement order, the document must be modified to reflect the findings and conclusions of this decision.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that Allied World's motion for summary judgment regarding indemnification is DENIED with the exception of summary judgment on indemnification of Plaintiff Rolan's "incentive award'" which is GRANTED.

Plaintiffs' motion for entry of final judgment is DENIED.

/////

/////

/////

/////

/////

/////

/////

[10] For example, the proposed settlement states that Allied agreed to deposit $1,000,000 (minus defense costs) into a common fund, relying upon that sum for the fund. Allied filed an affidavit explaining the amount was offered only for a complete settlement of all claims, not an agreement to deposit that amount into a common fund.

Plaintiffs' motion to reschedule submission of proposed order is GRANTED consistent with the findings and conclusions of this decision.

DATED this 19 day of April 2019.

KATHY SEELEY
District Court Judge

pc: Erik B. Thueson, PO Box 280, Helena MT 59624-0280
Robert C. Lukes, 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 Avenue, Suite E, Billings MT 59102
Martha Sheehy, PO Box 584, Billings MT 59103-0584

KS/t/rolan v new west ord d mot sj and p mot reschedule.doc