IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 20-0279

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

Plaintiffs, Counter-Defendants and Appellees

v.

NEW WEST HEALTH SERVICES,
Defendant and Appellee

DARWIN SELECT INSURANCE COMPANY and ALLIED WORLD ASSURANCE COMPANY and DARWIN NATIONAL ASSURANCE COMPANY
Defendant, Counterclaimant, and Appellant

On Appeal from the Montana First Judicial District
Lewis & Clark County Cause No. CDV-2010-91
Honorable Kathy Seeley

APPELLANT ALLIED WORLD ASSURANCE COMPANY'S OPENING BRIEF

APPEARANCES:

Martha Sheehy
SHEEHY LAW FIRM
P.O. Box 584
Billings MT 59103
406 252-2004
msheehy@sheehylawfirm.com

Randall G. Nelson
Nelson Law Firm
2619 St. John's Avenue
Billings MT 59102
406 867-7000
Rgnelson@nelsonlawmontana.com

Attorneys for Allied: Defendant / Counterclaimant / Appellant

APPEARANCES (continued)

Erik B. Thueson
THUESON LAW OFFICE
P.O. Box 280
Helena, MT 59624-0280
ethueson@gmail.com

Attorney for Rolan Plaintiffs/Appellees

Robert Lukes
GARLINGTON, LOHN & ROBINSON
P.O. Box 7909
Missoula, MT 59807-7909
Rclukes@garlington.com

Attorneys for New West Health Services

Gary M. Zadick
UGRIN ALEXANDER ZADICK P.C.
P.O. Box 1746
Great Falls, MT 59403
Gmz@uazh.com

Attorneys for New West Health Services

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other

I. STATEMENT OF THE ISSUES

1. Did the District Court err when it declined to apply the Managed Care Errors and Omissions Liability Policy ("MCEO Policy" or "Policy") language defining the "each claim" limit of $1 million, and instead found coverage by estoppel in the amount of the aggregate limit of $3 million?

2. Did the District Court err when it determined that the Policy covered breach of contract claims asserted by Dana Rolan and the class ("Rolan") against New West Health Services ("New West"), seeking damages in the amount New West should have paid to claimants under its policies?

II. STATEMENT OF THE CASE

This Court has twice addressed the issues between Rolan and the class and New West . *See Rolan v. New West Health Serv.*, 2013 MT 220, 371 Mont. 228, 307 P.3d 219 ("*Rolan I"*); and *Rolan v. New West Health Serv.*, 2017 MT 270, 389 Mont. 228, 405 P.3d 65 ("*Rolan II"*). Allied World Assurance Company ("Allied") adopts this Court's case summary with respect to the original claims against New West, and incorporates the insurance information relevant to the coverage issues raised by Rolan in the Second Amended Complaint filed in February 2018:

Rolan v. New West, 2007 to 2020

Rolan was injured in a vehicular collision on November 16, 2007, and sustained injuries which resulted in medical expenses totaling approximately $120,000. Rolan carried health insurance through New West. The tortfeasor who caused the accident carried liability insurance through Unitrin Services Group (Unitrin). Unitrin accepted legal responsibility and paid approximately $100,000 of Rolan's medical bills. *Rolan II,* ¶ 5.

On January 26, 2010, Rolan filed a complaint against New West alleging individual and class claims for breach of contract, violation of made-whole rights, and unfair claims settlement practices under §§ 33-18-201, MCA, *et seq*. (Dkt.1). *Rolan II,* ¶ 3. New West tendered the claim to Allied for review under the MCEO Policy and the Health Care Organization Directors and Officers Liability Insurance Policy ("HCDO Policy") with policy periods from April 1, 2009 to April 1, 2010. (See Policies, Exs. 1 and 2, Dkt. 187). Allied acknowledged a duty to defend New West under the MCEO Policy. Since 2010, without interruption, Allied has provided a defense subject to the reservation of rights. (Second Nelson Aff., App. Tab 4, ¶¶ 7, 8).

In the original complaint, Rolan sought compensatory and punitive damages against New West. *Rolan II,*¶ 4. Rolan sought to certify a class under M. R. Civ.

P. 23(b)(2) for declaratory and injunctive relief arising from the claims for breach of contract and violation of made-whole rights. Rolan's class certification was based on the systematic practices by New West to avoid paying medical bills for an insured when a liability carrier was available to pay medical bills as part of tort damages. On April 25, 2012, the District Court granted class certification. *Rolan II,*¶ 5. This Court upheld the class certification in *Rolan I.*

On October 24, 2013, New West moved to amend its answer to allege that the New West policy was governed by the Employee Retirement Income Security Act (ERISA), and that all Rolan's and the class's state law claims were preempted by federal law. Rolan opposed New West's motion to amend. The District Court allowed New West to amend its answer to include the affirmative defense of ERISA preemption. Following the District Court's order allowing New West to amend, New West moved for summary judgment. *Rolan II,* ¶ 6.

On May 6, 2015, the District Court granted New West's motion for summary judgment holding that Rolan's policy was subject to ERISA and thus her original state law claims were preempted. On June 1, 2015, with leave of court, Rolan amended her complaint to include both state law and ERISA claims. New West then removed the case to federal court. *Rolan II,* ¶ 7

On February 29, 2016, the federal court remanded the case back to state

court. The federal court determined that New West's removal was untimely and remanded to state court. *Rolan II,* ¶ 8. Once remanded, New West moved for summary judgment in the District Court, asserting ERISA preemption. On December 7, 2016, the District Court granted New West's motion for summary judgment, determining that complete preemption under § 502 of ERISA was proper and thus barred any state law claims asserted by Rolan. *Rolan II,* ¶ 9. On November 7, 2017, this Court reversed the District Court's grant of summary judgment to New West, holding that Rolan and the class were unduly prejudiced by the District Court's grant of leave to New West to amend its Answer to include the ERISA defense. *Rolan II,* ¶ 24. The case was again remanded to District Court. *Rolan II,* ¶ 25.

Rolan and New West have settled their claims, and the District Court approved the settlement on January 27, 2020. (Dkt. 284).

Rolan v. Allied, 2018 to present.

Since tender of the claim in 2010, Allied has provided a defense to New West subject to the 2010 reservation of rights.[1] (Second Nelson Aff, App. Tab 4, ¶¶ 7-8). In March 2018, after remand in *Rolan II,* Rolan joined Allied as a party to

[1] Allied is the claims manager for named Defendants Darwin National Assurance and Darwin Select Insurance. (App. Tab 5, p. 1). The term "Allied" encompasses the three defendant insurers.

this action, alleging a single cause of action: declaratory relief. (Dkt. 169, Second Amended Complaint, Count V). Specifically, Rolan sought a "declaratory judgment holding that Rolan and her class are covered (1) under one or both of the E and O policies in question; and (b) this coverage includes both the individual and aggregate limits." (Dkt. 169, p. 14).

Allied moved for partial summary judgment to establish that only the MCEO Policy, and not the HCDO Policy, applied to Rolan's claim; and that the $1 million "each claim" limit, rather than the $3 million aggregate limit, applied. The District Court correctly held that only the MCEO Policy applies to this claim, and neither New West nor Rolan appeals from that ruling. (First Order, App. Tab 1). The District Court did not rule on the MCEO's Policy's limitation of coverage to the "each claim" $1 million limit. (App. Tab 1, p. 10). Instead, the District Court declined to address the terms of the Policy, and found coverage by estoppel in the amount of the aggregate limit, $3 million. (App. Tab 1, pp. 5-10).

Subsequently, Allied moved for summary judgment on the issue of indemnity, seeking a ruling that the Policy excludes coverage for "benefits and coverage owed," and thus does not provide coverage for the counts alleging breach of contract, but does provide indemnity coverage for the counts alleging violation of the Unfair Trade Practices Act ("UTPA"). (Dkt. 252). The District

Court held that "damages stemming from New West's failure to conduct a made-whole analysis for the class members are not precluded from indemnification by Allied." (Second Order, App. Tab 2, p. 11).

Allied appeals from these two orders addressing coverage. (App. Tabs 1 and 2). By stipulation of the parties and order of the District Court, these two orders were certified as final pursuant to Rule 54(b), M.R.Civ.P. (App. Tab 3). The two orders contain other rulings that have not been appealed by any party:

1. No party has sought review of the district court's determination that the Allied HCDO Policy does not apply to the Rolan claim. (First Order, App. Tab 1, p. 10). The applicability of the HCDO Policy is not at issue.
2. The denial of New West's motion asserting that Allied assumed the risk of an excess verdict has not been appealed by any party. (First Order, App. Tab 1, p. 10). Assumption of the risk of an excess verdict is not at issue.
3. The denial of Rolan's motion for sanctions has not been appealed, and is not at issue. (First Order, App. Tab 1, p. 10).

III. STATEMENT OF THE FACTS PERTINENT TO THIS APPEAL.

While the underlying case between Rolan and New West has over a decade of history, the coverage issues pled by Rolan are relatively new, having been raised for the first time in this lawsuit in the Second Amended Complaint in 2018.

Rolan filed a complaint in 2010 seeking certification of a class based on New West's practice of not conducting a "made whole" analysis before denying claims covered by a liability carrier. Ten years later, Rolan remains the only identified class member in the class certified on April 25, 2012. (Second Order, App. Tab 2, p. 14).

On January 26, 2010, Rolan filed a complaint against New West alleging individual and class claims for breach of contract, violation of made-whole rights, and unfair claims settlement practices under §§ 33-18-201, MCA, *et seq*. (Dkt.1). *Rolan II,* 2017 MT 270, ¶ 3. New West tendered the claim to Allied. (App. Tab 5). Allied determined that a potential for coverage existed under the MCEO Policy (but not the HCDO Policy) and immediately acknowledged a duty to defend New West in the Rolan claim pursuant to a reservation of rights letter dated February 18, 2010. (App. Tab 5). Allied reserved its rights under the Policy, informing New West that the Policy contained limits of $1 million "each Claim" and $3 million "aggregate." Allied also informed New West of the definition of "Claim" upon which the "each claim" limit is based. *Id.*

It is undisputed that Allied has provided a continuous defense to New West since 2010, subject to the reservation of rights. (Second Nelson Aff., App. Tab 4, ¶¶ 7-8). As to the duty to indemnify, neither New West nor Rolan have identified

any demands, settlement offers, or judgments which would trigger consideration of Allied's duty to indemnify until 2017. Moreover, neither New West nor Rolan have identified any representations of any kind from Allied World indicating that the aggregate limit of $3 million applied to the loss.

Allied World consistently and repeatedly communicated its position that the "each Claim" limit applied to Rolan's lawsuit. On October 5, 2016, Allied's Michelle Querijero informed New West: "This is an eroding policy, as you mentioned, so defense costs are within limits. The Limit of Liability is $1 million, and we have paid out a total of $74,710.23 in defense costs as of today." (App. Tab 4, ¶9). Before, during, and after the first mediation in April, 2017, Allied informed the parties that Allied relied upon the $1,000,000 "each claim" limit. (App. Tab 4, ¶12). In response to the Second Amended Complaint, Allied asserted that the "each Claim" limit applied. (Answer, Dkt. 175, ¶ 9). Prior to the second mediation on June 22, 2018, Allied informed the parties that the $1 million "each claim" limit applied, and provided advance copies of Allied's briefing on the issue. (Nelson First Aff., Dkt. 206, ¶15).

Allied's insured, New West, confirmed that it understood that Allied asserted application of the "each Claim" limit. New West's Chief Executive Officer, Angela Huschka, testified by affidavit on October 17, 2016: "New West

possesses insurance with an aggregate limit of $3,000,000 and a per claim limit of $1,000,000. It is my understanding that of the $1,000,000 limit, approximately $920,000 remains available to cover Plaintiffs' claims in the present case, should there be an adverse judgment against the company." (Dkt. 133, ¶6). On October 28, 2016, New West informed Plaintiffs that "approximately $920,000 of the coverage under the policy remains in the present case," a clear reference to the $1,000,000 limit, reduced by defense expenses. (Dkt. 192, App. 3, p. 2).

Like New West, Rolan also confirmed that she understood that Allied relied upon the "each Claim" limit. Rolan's attorney, Erik Thueson, discussed the issue of applicable limits in March, 2017 with Allied's attorney, Randy Nelson. (App. Tab 4, ¶ 10). In an email dated March 22, 2017, Mr. Thueson summarized the conversation and confirmed his understanding of Allied's position applying the "each claim" limit, stating in part:

> (1) At the current time, there is a little less than $900,000 available on the single claim coverage, which is subject to reduction for the future litigation costs;
>
> (2) Allied denies that the aggregate limits apply to the class claims and there is some debate, at least, as to whether they would be covered by the single claim coverage.

(App. Tab 4, ¶ 11). In her Second Amended Complaint in February, 2018, Rolan specifically asserted that a dispute exists with respect to whether the "each claim"

limit or the "aggregate" limit applied. (Dkt. 163, ¶¶ 36-37).

Rolan has never offered to settle the within the "each Claim" limit of $1,000,000. (App. Tab 4, ¶ 15). Allied World has repeatedly indicated its willingness to pay the $1 million "each Claim" limit, less defense expenses, as part of a negotiated settlement of the claims against its insured. (App. Tab 4, ¶ 15). Indeed, upon Rolan's and New West's settlement, Allied World 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).

IV. STANDARD OF REVIEW

This Court reviews findings of fact for clear error and conclusions of law for correctness. *Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 33, 394 Mont. 135, 433 P.3d 1230 (*Abbey/Land II*). Summary judgment rulings are reviewed *de novo*, applying the same criteria as the district courts. *Kaufman Bros. v. Home Value Stores, Inc.*, 2012 MT 121, ¶ 6, 365 Mont. 196, 279 P.3d 157. The interpretation of an insurance contract is a question of law, and the unambiguous terms of an insurance policy must be enforced as written. *Grimsrud v. Hagel*, 2005 MT 194, ¶ 14, ¶ 35, 328 Mont. 152, 119 P.3d 47. Estoppel, in contrast, requires proof by clear and convincing evidence. *Turner v. Wells Fargo Bank,* 2012 MT 213, ¶30, 366 Mont. 285, 291 P.3d 1082.

V. SUMMARY OF ARGUMENT

The District Court committed reversible error when it determined that Allied's Policy provided $3 million in available coverage, rather than $1 million. First, the District Court erred in declining to interpret the "limits of liability" language in the Policy. Montana law requires a district court to enforce the unambiguous terms of an insurance policy as written. *Grimsrud*, 2005 MT 194 at ¶ 18. Interpreting the Policy's clear provisions, Rolan's class action lawsuit constitutes a single claim, and the "each claim" limit of $1 million applies.

Second, the District Court erred in finding coverage by estoppel. The equitable remedy of estoppel is predicated upon a breach of the duty to defend, and the parties do not dispute that Allied has defended New West since the outset of the litigation without interruption. *Draggin' Y Cattle Company v. Junkermier, Clark, Campanella, Stevens, P.C.*, 2019 MT 97, ¶ 22, 395 Mont. 316, 439 P.3d 935. The District Court mistakenly relied entirely on *Safeco Ins. Co. v. Ellinghouse,* 223 Mont. 239, 775 P.2d 217 (1986), a legal precedent with no application to these facts. Additionally, the District Court applied an incorrect legal standard when it found estoppel based on assumptions and implications. Montana law requires that estoppel be based on clear and convincing evidence. *Turner,* 2012 MT 213, ¶30.

Allied has voluntarily paid the "each claim" limit, interpleading that amount (less defense costs) into the district court. Thus, a finding that the "each claim" limit applies ends the inquiry. In the event the $3 million limit is applied, the stipulated damages do not give rise to a covered "Loss" under the Policy. Allied's Policy specifically excludes coverage for "benefits or coverage owed under any" New West policies or health care plans. (Policy, Dkt. 187, Ex. 1, Definitions, § IV(J)(2). The Policy thus excludes the damages identified by the class and New West in the settlement, which will be calculated based on amounts New West should have paid to class members as plan benefits, but were not paid because of payments made by third parties. (Dkt. 278, p. 3).

VI. ARGUMENT

A. THE POLICY'S "EACH CLAIM" LIMIT OF $1,000,000 IS THE MOST MONEY AVAILABLE UNDER ALLIED'S POLICY.

1. In Determining the Amount Available Under Allied's Policy, the Duty to Indemnify Hinges not on Rolan's Assertions, but on Facts Established by Stipulation or Judgment.

Rolan and New West have taken a long and circuitous route to the settlement of Rolan's claims in 2020. Meanwhile, Allied's involvement has been limited to that of New West's insurer. As the insurer, Allied owes two separate duties to New West: the duty to defend and the duty to indemnify. *State Farm*

Mut. Auto. Ins. Co. v. Freyer, 2013 MT 301, ¶ 26, 372 Mont. 191, 312 P.3d 403. This Court has often stressed the importance of distinguishing the two distinct duties in coverage analysis. *Id.; Draggin' Y Cattle Company*, 2019 MT 97, ¶ 22.

The duty to defend arises "when a complaint against an insured alleges facts, which if proven, would result in coverage." *Id. (citations omitted).* Thus, in 2010, Allied acknowledged its duty to defend based on the allegations in Rolan's complaint, and has provided a defense to New West pursuant to a reservation of rights for the intervening ten years. (App. Tab 4, ¶¶ 7-8; App. Tab 5). That Allied's fulfilled its duty to defend New West is not at issue in this case; however, Allied's fulfillment of its duty to defend is fatal to the District Court's incorrect analysis of estoppel.

Separate and distinct from the duty to defend, an insurer's duty to indemnify arises only if coverage under the policy is actually established. *Id., citing State Farm Fire & Cas. Co. v. Schwan*, 2013 MT 216, ¶ 15, 371 Mont. 192, 308 P.3d 48. Allied's "duty to indemnify hinges not on the facts [Rolan] alleges and hopes to prove but instead on the facts, proven, stipulated or otherwise established that actually create [New West's]liability." *Freyer,* 2013 MT 301, ¶ 26. Thus, whether Allied owes indemnity coverage for Rolan's loss, and in what amount, is dependent upon facts proven, stipulated or established by Rolan and New West.

Three important undisputed facts have bearing on the determination of the scope and extent of Allied's duty to indemnify. First, only one claimant, Dana Rolan, has been identified as a member of the class, even to this day. (Second Order, App. Tab 2, p. 14). Second, Allied has fulfilled the duty to defend. (App. Tab 4, ¶¶ 7-8). Third, until November 2017, the District Court had established as a matter of law that New West was *not liable* to Rolan based on ERISA preemption. *Rolan II,* 2017 MT 270, ¶ 9. Therefore, Allied had no duty to indemnify New West because no facts created liability on the part of New West. *Freyer,* 2013 MT 301, ¶ 26. After reversal of that determination, Allied's duty to indemnify now hinges on the facts stipulated by the parties – only recently – in their settlement (Dkt. 277), as approved by the District Court (Dkt. 285). *Id.*

2. The Class Action Constitutes a "Claim" Subject to the "Each Claim" Limit.

This Court "has consistently held that where the 'language employed in an insurance contract is clear, the language controls,' and the court must enforce it as written." *Grimsrud v. Hagel*, 2005 MT 194, ¶ 18, 328 Mont. 152, 119 P.3d 47, *quoting Fire Insurance Exchange v. Tibi*, 51 F.Supp.2d. 1065, 1069 (D.Mont. 1995); *Counterpoint, Inc. v. Essex Ins. Co.*, 1998 MT 251, ¶ 13, 291 Mont. 189, ¶ 13, 967 P.2d 393, ¶ 13; *Schell v. Peters* (1966), 147 Mont. 21, 27, 410 P.2d 152,

155. When there is no ambiguity in the policy, as here, the District Court should grant summary judgment, upholding the unambiguous policy language. *Id.; Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200.

In this case, the language of the Policy regarding the limits of liability is unambiguous. The Policy defines "Claim" as any "written notice" asserting a "wrongful act" and "such notice may be in the form of . . . judicial . . . proceeding." (Dkt. 187, Ex. 1, p. 26). This lawsuit constitutes a single written notice and a single claim under the Policy's definition of "Claim." Therefore, the "each claim" limit applies. Moreover, only one class member – Rolan – has been identified to date. (Second Order, App. Tab 2, p. 14).

New West and Rolan never responded to – much less refuted – Allied's assertion that Rolan's single class action lawsuit constitutes a single "Claim" as defined by the Policy. Failure to respond to the argument constituted acquiescence, and Allied was entitled to a declaration that this lawsuit constitutes a single Claim, and the "each claim" limit of $1,000,000 applies. *See Rule* 8(b)(6), M.R.Civ.P.; *Uniform District Court Rule 3; Chapman v. Maxwell*, 2014 MT 35, ¶11, 374 Mont. 12, 322 P.3d 1029.

Instead, the District Court completely ignored Allied's primary basis for application of the single claim limit. The District Court determined that Allied's

"each Claim" limit "need not be addressed." (App. Tab 1, p. 10). To the contrary, Montana law holds that where the language employed in an insurance contract is clear, the court must enforce it as written." *Grimsrud*, 2005 MT 194, ¶ 18. When there is no ambiguity in the policy, summary judgment should be granted, upholding the unambiguous policy language. *Id.* The District Court erred in failing to grant summary judgment based on the Policy's unambiguous language, which establishes that the "each claim" limit of $1,000,000 applies.

3. Any Future Class Members' Allegations in this Lawsuit are Related to the Rolan Claim, Constituting a Single Claim.

In addition to the unambiguous definition of "claim" as a judicial proceeding, the Policy provides, as a condition, that "all **Related Claims**, whenever made, shall be deemed to be a single **Claim**." (Dkt. 187, Ex. 1, p. 20). Thus, under the 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. Allied raised this issue in the lower court as an "alternative" argument, (Dkt. 187, p. 5), given that no "related claims" have ever been identified; Rolan remains the only member of the class. (Second Order, App. Tab 2, p. 14).

Allied established that even if there were more than one Claim brought by as-yet-unidentified members of the Class, all such Claims would constitute "Related Claims" by definition. Based on the certified definition of the "class," each and 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." (Dkt. 285, p. 2). As stated by the Seventh Circuit, "it is easy to decide that all the class claims" should be treated as a single claim. *Gregory v. Home Ins. Co.*, 876 F.2d 602, 605 (7th Cir. 1989). The definition of the class guarantees a significant relationship between the claims. In this case, the claims would be related for several reasons, but primarily because any eventual class members would allege that New West failed to perform a "made whole" analysis.

Courts uniformly interpret the "related claims" provision as including all claims within a class action. *WFS Financial, Inc. v. Progressive Cas. Ins. Co., Inc.,* 232 F.App'x 624, 2007 WL 1113347 (9th Cir. 2007) (all claims arising from WFS's business practice of permitting independent dealers to mark up WFS loans were interrelated and constituted a single claim, including two class action lawsuits); *Gregory*, 876 F.2d at 606 (class claims and cross-claim were "related" and single claim limit applied); *Amer. Medical Sec. v. Executive Risk Ins. Co.,* 393 F.Supp.2d 693 (E.D.Wis. 2005) (38 lawsuits constituted a single claim).

New West never disputed, or responded to, the "Related Claims" definition or numerous authorities cited by Allied in the District Court. The District Court refused to address the issue because the "related claims" definition was not included in the 2010 reservations of rights letter. Of course, at the time of the reservation – and even today – no "related claims" have been identified. (App. Tab 4, p. 14). The "related claims" provision would apply only in the event Rolan ever identifies a second class member, or if a putative member of the class brought a separate claim arising under the 2010 policy.

Where, as here, "the language of the insurance contract is clear, the language controls, and the court **must** enforce it as written." *Grimsrud,* 2005 MT 194, ¶ 18 (emphasis added). The District Court erred in failing to enforce – or even address – the Policy language. The "each claim" limit of $1,000,000 applies to the class action as a matter of law.

B. THE DISTRICT COURT ERRED IN FINDING ESTOPPEL.

The District Court ruled that the $3 million aggregate limit applied – rather than the $1 million "each Claim" limit – based on the equitable doctrine of estoppel. (First Order, App. Tab. 1, pp. 5-10). Neither the facts nor the law support a finding of coverage by estoppel in this case.

1. No Legal Basis Exists to Support Coverage By Estoppel.

a. As a Matter of Law, Estoppel Does Not Apply when the Insurer Provides a Defense.

Montana law does not recognize a cause of action for estoppel when the insurer has defended its insured. *Draggin' Y ,* 2019 MT 97, ¶ 22; *Tidyman's Mgmt. Servs. Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2016 MT 201, ¶ 14, 384 Mont. 335, 378 P.3d 1182 (*Tidyman's II*); *Abbey/Land II,* 2019 MT 19, ¶ 34. As this Court has explained, "a breach of the duty to defend is a material breach of the contract that relieves the insured of the reciprocal contract duty to cooperate with the insurer, (citations omitted), and equity thus estops the insurer from denying coverage and raising other contract defenses in subsequent litigation." *Draggin' Y* at ¶ 22. In *Draggin' Y*, this Court held that a stipulated judgment is not presumptively enforceable against an insurer when the insurer has provided a defense. *Id.* In reaching that conclusion, the Court specified that it is the breach of the duty to defend that gives rise to estoppel. *Id.* Yet in this case, the District Court found estoppel despite Allied's unwavering ten-year defense of New West. (App. Tab 1, p. 8).

Just as this Court held in *Draggin' Y* that an insurer cannot be bound to a stipulated judgment when the insurer provided a defense, an insurer cannot be held

to an inapplicable limit of liability when the insurer provided a defense. No breach of the duty to defend exists to justify the use of the equitable doctrine of estoppel, and the court must enforce the contract as written. This is especially true here, where Allied not only defended, but also alerted the insured to the "each claim" limit provision in the reservation ten years ago, and consistently asserted applicability of the "each claim" limit.

b. Ellinghouse is Inapplicable as Precedent to this Claim.

In finding coverage by estoppel, the District Court relied completely on one precedent, incorrectly applied: *Safeco Ins. Co. v. Ellinghouse,* 223 Mont. 239, 775 P.2d 217 (1986). (App. Tab 1). Simply put, the case is not valid authority for applying estoppel to a policy, much less one provision of a policy, the limits of liability. *Ellinghouse*, decided almost 35 years ago, has been distinguished by courts because the unique factual situation has not been repeated. *See, e.g., King v. State Farm Fire & Casualty Co.*, 2010 WL 4920906, *3-*4 (D. Mont. 2010) (slip op.)*; T.H.E. Insurance Co. v. Flying Phoenix Fireworks Corp.,* 2008 WL 11347999, *8 (D. Mont. 2008)(slip op.); *Haskins Const., Inc. v. Mid-Continent Cas. Co.*, 2011 WL 5325734, *4 (D. Mont. 2011)(slip op.); *Barnard Pipeline, Inc. v. Travelers Property Cas. Co. of America*, 3 F.Supp.3d 865, 875 (D. Mont. 2014).

In *Ellinghouse,* the insurer (Safeco) originally defended its insured, and controlled the defense in many ways. First, Safeco "extracted" a non-waiver agreement from the insured "by deceit," and then used the agreement against the insured in the declaratory action. *Ellinghouse*, 725 P.2d at 223. Second, Safeco directed defense counsel to cut back discovery. *Id.* Third, Safeco's claims division supervisor early recognized the prejudice to Ellinghouse, but still did not inform him that the existence of coverage was in question. *Id.* Fourth, defense counsel promised to file a motion for summary judgment, but instead waited four months and then Safeco withdrew coverage without defense counsel ever filing a motion. *Id.*

In *Ellinghouse,* Safeco's actions prejudiced the insured. Ellinghouse had to mortgage his house due to Safeco's withdrawal. *Id.* at 224. Moreover, "by never sending a reservation of rights notice, Safeco was permitted to arrange and announce its surprise denial of coverage to an unsuspecting insured whose advance opportunity to demand and protect his rights was forever lost." *Id.*

None of these actions have occurred in this case. Unlike Safeco in *Ellinghouse*, the undisputed sworn testimony establishes that Allied has always defended New West, and the record is devoid of any evidence that Allied controlled that defense. (App. Tab 4, ¶7). Allied reserved its rights. (App. Tab 5,

Ex. A). Allied has not disclaimed coverage. (App. Tab 4, ¶8). To the contrary, since the first settlement discussions after reversal of the judgment in favor of New West, Allied has been ready and willing to contribute to a settlement of the claims against New West in the amount of $1,000,000, less defense costs, as part of a negotiated settlement. (App. Tab 4, ¶15). Upon approval of New West's settlement with Rolan, Allied paid that amount voluntarily. (Dkt. 297). *Ellinghouse* clearly does not apply here.

c. The District Court Erred as a Matter of Law by Incorporating the UTPA into Its Estoppel Analysis.

Rolan asserts only one claim against Allied: declaratory relief based on the written contract of insurance. Rolan has not asserted a violation of the UTPA. Yet the District Court incorrectly held that "in considering an argument for estoppel of insurance coverage, the Montana Supreme Court looks to the [UTPA]." (App. Tab 1, p. 6). This Court explicitly rejected this notion in *Draggin' Y*, recognizing that "the distinctions between when and how these [UTPA] duties and the duty to defend arise are important." *Draggin' Y Cattle Company*, 2019 MT 97, ¶ 30. In fact, this Court emphasized the need to maintain a separate framework for resolution of UTPA allegations from the breach of contract allegations. *Id.* at ¶ 31.

Neither Rolan nor New West alleges that Allied ever affirmatively represented that the $3 million aggregate limit applied. Instead, Rolan claims that Allied did not effectively refute application of the aggregate limit in the 2010 reservation of rights letter. Allied maintains that it accurately recited the policy limits in the reservation of rights, and that throughout this litigation, Allied has consistently informed both its insured and Rolan that the "each Claim" limit applies. This case resembles *Draggin' Y*, where the parties made various arguments as to whether the insurer met the duty to affirm coverage – a duty imposed by the UTPA, § 33-18-201(5), MCA. This Court held that the dispute "underscore[s] the reason for a separate framework for presenting such claims in a UTPA action." *Id.*

In summary, estoppel arises only when an insurer has breached the duty to defend, which is required for application of the equitable doctrine of estoppel. *Id.* at ¶ 22. Because Allied provided a defense, estoppel does not apply. *Id.* Moreover, the District Court erred as a matter of law by incorporating the requirements of the UTPA (which Rolan never pled) to find estoppel, rather than interpreting the terms of the insurance contract.

2. No Factual Basis Exists to Support Estoppel, which Must Be Proven by Clear and Convincing Evidence.

Estoppel – even coverage by estoppel – must be established "by clear and convincing evidence." *King*, 2010 WL 4920906, *3-*4; *see also Turner,* 2012 MT 213 at ¶30. The District Court declared coverage by estoppel although New West and Rolan neither identified nor proved the required elements of the claim. A party seeking to invoke estoppel "must establish six elements by clear and convincing evidence," which include a representation and detrimental reliance. *Turner,* 2012 MT 213, ¶ 30. The District Court failed to establish any of the six elements, but in particular the District Court failed to establish a representation of coverage made by Allied, and any detrimental reliance by New West.

a. The District Court clearly erred by "implying" the element of a representation.

Neither Rolan nor New West alleges that Allied ever represented that the $3 million aggregate limit applied to Rolan's single lawsuit. More importantly, the District Court did not find that Allied, through conduct, acts, or silence, represented that the $3 million aggregate limit applied. Rather, the District Court erroneously found that "the RoR **implied** that there would be $ 3 million in aggregate coverage." (First Order, App. Tab 1, p. 8, *emphasis added*). This is clear error because estoppel must be proven not by implication, but by "clear and

convincing" evidence. Moreover, nowhere does the Reservation of Rights letter "imply" imposition of an aggregate limit. The Reservation of Rights letter accurately states the Policy's limits of liability as set forth in the declarations: $1 million "each Claim," and $3 million "aggregate." (App. Tab 5, p. 1).

The "implied" aggregate limit is further defeated by the uncontested record, because no implication exists applying the $3 million limit. Both New West and Rolan *confirmed that they knew* that Allied relied on the "each claim" limit for years, even during the period when Rolan's claims had been dismissed based on ERISA preemption:

1. October 5, 2016: Allied informed New West: "This is an eroding policy, as you mentioned, so defense costs are within limits. The Limit of Liability is $1 million, and we have paid out a total of $74,710.23 in defense costs as of today." (App. Tab 4, ¶ 9).
2. October 17, 2016, New West confirmed by sworn testimony of its Chief Executive Officer, Angela Huschka: "New West possesses insurance with an aggregate limit of $3,000,000 and a per claim limit of $1,000,000. It is my understanding that of the $1,000,000 limit, approximately $920,000 remains available to cover Plaintiffs' claims in the present case, should there be an adverse judgment against the company." (Dkt. 133, ¶ 6).

3. October 28, 2016, New West informed Rolan that "approximately $920,000 of the coverage under the policy remains in the present case," a clear reference to the $1,000,000 limit, reduced by defense expenses. (Dkt. 192, Ex. 3, p. 2).

4. March 22, 2017, Rolan's attorney confirmed that Allied "denies that the aggregate limits apply to the class claims." (App. Tab 4, ¶ 11).

5. April 2017, Allied (which was not yet a party to the suit) informed the parties of the $1,000,000 "each claim" limit when preparing for first mediation. (App. Tab 4, ¶12).

6. Rolan filed the Second Amended Complaint in February, 2018, specifically asserting that a dispute exists with respect to whether the "each claim" limit or the "aggregate" limit applied. (Dkt. 163, ¶¶ 36-37).

Neither Rolan nor New West identified a single declaration or course of conduct demonstrating that Allied implied or suggested that the aggregate limit applied to Rolan's class action. To the contrary, the unrefuted evidence establishes that at every juncture when the duty to indemnify was at issue, Allied has relied upon the $ 1 million "each claim" limit. The District Court erred, because Montana law does not recognize or endorse estoppel by implication.

b. The District Court Completely Failed to Establish the Necessary Element of Detrimental Reliance.

The District Court did not even address the required element of detrimental reliance. Interpreting Montana law in *St. Paul Fire & Marine Ins. Co. v. American Bank*, 33 F.3d 1159, 1162 (9th Cir. 1994), the Ninth Circuit Court held that "to succeed in invoking the doctrine of estoppel" against an insurer, the insured "must establish, among other things, that its position changed for the worse as a result of its reliance" on representations that the policy covered the actions. *Id.* The loss of an opportunity to act, standing alone, is insufficient to establish reliance. *Id.* New West and Rolan did not established that they relied on the aggregate limit. To the contrary, from the first mediation in 2017 to today, New West and Rolan confirmed that they knew Allied relied upon the "each Claim" limit. (*See supra, points 1-6).*

In addition to reliance, prejudice is a required element of estoppel, and must be proven by clear and convincing evidence, not by assumptions. *Turner* at ¶ 30. No party has identified any communications from Allied World indicating the aggregate limit applied. No party has asserted that indemnity – and therefore the amount of coverage available in indemnity – was placed at issue prior to 2017 by a settlement offer, demand, or judgment. Nevertheless, based on the absence of any

evidence, the District Court found that "Allied did not make clear its current coverage position until 2016," and held that "Allied's delayed communication. . . presumptively prejudiced New West and Plaintiffs." (App. Tab 1, p.8, 10). No delay occurred, since Allied accurately reported the policy's "each claim" and aggregate limits to the insured in 2010, and consistently relied on the "each claim" limit once the duty to indemnify was at issue on this one claim. (App. Tab 5, p. 1).

In finding prejudice, the District Court relied not on clear and convincing evidence, but on "the *Ellinghouse* presumption of prejudice." (App. Tab. 1, p. 8). Detrimental reliance cannot be presumed (as it was in *Ellinghouse*) when the insurer accepts the defense under a reservation of rights, and the insured is represented by independent counsel. *T.H.E. Insurance Co.*, 2008 WL 1134799, *8 ("In *Ellinghouse,* the Montana Supreme Court . . . found detrimental reliance existed where an insurer accepted exclusive control of the defense of claims against the insured without reservation, only to later deny coverage."). The record contains no evidence that Allied exerted any control over the defense of New West. New West defended under a reservation of rights without interruption.

Here, the District Court found estoppel based on mistaken assumptions, presumptions, and implications. The District Court erred in finding estoppel without identifying clear and convincing evidence to support estoppel.

C. ALLIED'S POLICY DOES NOT PROVIDE COVERAGE FOR THE PORTION OF THE SETTLEMENT ATTRIBUTABLE TO BENEFITS OR COVERAGE OWED BY NEW WEST TO CLASS MEMBERS UNDER NEW WEST'S POLICIES.

As shown above, the $1 million "each claim" limit applies to Rolan's class action lawsuit. Rejection of the District Court's finding of estoppel, and enforcement of the Policy's $1 million "each claim" limit resolves this entire matter. Allied has already paid its $1 million limit by interpleader.[2] In the unlikely event this Court determines that the aggregate limit applies, Allied disputes the District Court's finding that Allied's policy provides indemnity coverage for the portion of the settlement funds attributable to the amounts New West should have paid to its insureds under the "made whole" analysis.

The Policy provides that Allied will pay New West for any **Loss** which New West is obligated to pay as a result of a **Claim** that is first made against the New West during the **Policy Period.** (Dkt. 187, Ex. 1, Section I). The Policy defines **"Loss"** as "**Defense Expenses** and any monetary amount which an **Insured** is legally obligated to pay as a result of a **Claim**." Dkt. 187, Ex. 1, Definitions, IV(J) and Endorsement 5). Further, by definition, **Loss** *shall not include*:

---

[2]Allied reserves the right to seek return of "unused funds" in the event the class recovery does not exceed the amounts interpled by Allied and New West. (Dkt. 297, p. 3). Whether the interpled funds will be depleted is an open question, as only one class member (Rolan) has been identified to date. (App. Tab 2, p. 14).

(2) fees, amounts, 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 of self-insurance.

(Dkt. 187, Ex. 1, Definitions, § IV(J)(2)).

The District Court erroneously held that "when damages arise under a failure to conduct a made-whole analysis, the damages are outside of the contractual policy benefits." (App. Tab 2, p. 9). The District Court incorrectly characterized such damages as "subrogation," as opposed to the claimants' first-party benefits due from New West, and then found the damages to be extra-contractual. (App. Tab 2, p. 9-10).

The District Court erred in attempting to reclassify the contract damages as tort damages. Allied's duty to indemnify New West hinges on the parties' stipulated settlement "that actually creates [New West's] liability. *Freyer*, 2013 MT 301, ¶ 26. Here, New West and Rolan agreed that "the recovery through this class action equals the amount each class member lost from his or her third-party tort recovery." (Dkt. 278, p. 3). In other words, the recovery is equal to the contract benefits New West refused to pay because a third-party paid the damages. Pure and simple, the class recovery, as defined and calculated by the settling parties, is excluded from Allied's Policy.

In short, in insuring New West for certain "wrongful acts," Allied did not agree to make payments which New West was contractually obligated to make to claimants under its plans. To the contrary, Allied's Policy explicitly *does not include* coverage for benefits and coverage owed by New West under its plans. (Dkt. 187, Ex. 1, Policy, IV(J)(2)).

The California Court of Appeals explained this limitation in *Health Net, Inc. v. RLI Insurance Co.*, 206 Cal.App.4th 232 (Cal. 2012):

> "[A]n 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." (*August Entertainment, Inc. v. Philadelphia Indemnity Ins. Co.* (2007) 146 Cal.App.4th 565, 578[]). "As noted in a leading treatise: 'Professional liability policies often contain an exclusion for "[a]ny 'claim' arising out of a breach of contract, or out of liability assumed under any contract or agreement." Even in the absence of an express exclusion, courts have held that a claim alleging breach of contract is not covered under a professional liability policy because there is no "wrongful act" and no "loss" since the insured is simply being required to pay an amount it agreed to pay.' [Citation.]" (*Id*. at p. 579, 52 Cal.Rptr.3d 908.)

Id. at 252-253.

Health Net did not involve the specific definition of **Loss** which excludes "benefits or coverage owed" at issue in this case. Nonetheless, the court in *Health Net* held that even absent such an exclusion, the E&O coverage distinguishes between tort claims, which are covered, and breach-of-contract claims, which are

not covered. *Id.* The court in *Health Net* concluded that a breach-of-contract claim is not a **Loss** because "the insured is simply being required to pay an amount it agreed to pay." *Id.*

The *Health Net* breach-of-contract analysis is valid here, but Allied's Policy is even more specific. The Policy unambiguously does not include "benefits and coverage owed" by New West to claimants in the definition of covered **Loss.** The Policy explicitly states that **Loss** shall not include:

> (2) fees, amounts, 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 of self-insurance. (Ex. 1, Policy, Definitions, IV(J)).

In *American Medical Security, Inc.,* 393 F.Supp.2d 693, the Wisconsin federal district court addressed this exact issue with respect to nearly identical policy language. In that case, American Medical Security ("AMS") underwrote and administered health insurance policies. AMS purchased a Managed Care Errors and Omissions Liability Policy from Executive Risk. *Id.* at 707. A class action was brought against AMS for various actions and inactions, based mostly upon AMS's refusal to re-write policies. AMS sought coverage under the Executive Risk MCEO policy. Like the Allied policy at issue in this case, Executive Risk's policy contained a definition of **Loss** which excluded coverages

owed by AMS to claimants. The Executive Risk policy defined **Loss,** and stated that the term "shall not include:"

> (2) fees, amounts, benefits or coverage owed under any contract, health care plan or trust, insurance or workers' compensation policy or plan or program of self-insurance;

Id. at 707-708.

In the *American Medical Security* class action, the claim that all of the various lawsuits had in common was that AMS improperly increased their individual premiums for what it sold as a group insurance policy. *Id.* Those "re-writing" claims were covered by the Executive Risk policy. But in two of the cases, plaintiffs alleged that AMS failed to pay benefits to its insureds. *Id.* Executive Risk argued that the definition of **Loss** excluded coverage for "fees, amounts, benefits or coverage owed" by AMS to claimants under the AMS plan. The Court agreed, holding, "To the extent the lawsuits against AMS seek recovery of benefits owed under policies that were in effect at the time the claim was submitted, there is no coverage under the policy." *Id. See also Illinois Union Ins. Co. v. Louisiana Health Service and Indemnity Co.*, 257 F.Supp.3d 763, 788-789 (D.La 2012) (Blue Cross admits that damages arising from breach of its contractual obligation to pay benefits are not covered under definition of **Loss** which excludes "benefits and coverage owed.").

In this case, New West has stipulated by settlement to pay amounts to claimants that New West owed under its policy – the "made whole' amounts. As in *Health Net*, these breach-of-contract damages are not covered "Losses" because New West is merely required to pay benefits owed under its plans. More importantly, Allied's Policy, unlike RLI's policy in *Health Net*, contains a specific exclusion to the definition of **Loss.** The exclusion at issue here is nearly identical to the exclusion to **Loss** in *American Medical Security.* The clear policy definition establishes that benefits and coverages owed by New West are not included in **Loss,** and are not covered. *Id.* Any such amounts should be deducted from the covered claims, should any class members ever be identified.

VII. CONCLUSION

Allied respectfully requests the following relief:

1. Reversal of the District Court's finding that Allied is estopped from asserting the "each claim" policy limit of $1 million;
2. Reversal of the District Court's refusal to enforce the $1 million "each claim" limit based on the unambiguous policy provisions and the undisputed facts.

Resolution of these issues in favor of Allied ends the inquiry, because Allied has already paid its "each claim" limit. In the event of an adverse ruling

with respect to the applicable policy limit, Allied requests that this Court reverse the District Court's finding that damages arising from New West's failure to conduct a "made whole" analysis are covered by Allied's policy.

DATED this 24th day of August, 2020.

NELSON LAW FIRM
SHEEHY LAW FIRM

BY /s/Martha Sheehy
Martha Sheehy

P.O. Box 584
Billings, MT 59103-0584

Attorneys for Appellant Allied World

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27, M.R.App.P., I hereby certify that this brief is printed with proportionally spaced New York Times typeface of 14 points; is double-spaced except footnotes and block quotes; and the word count of 7,729 words is less than the 10,000 word limit, exclusive of tables and certificates.

/s/Martha Sheehy
Martha Sheehy

CERTIFICATE OF SERVICE

I, Martha Sheehy, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-24-2020:

Randall George Nelson (Attorney)
2619 St. Johns Ave., Suite E
Billings MT 59102
Representing: Allied World Assurance Company
Service Method: eService

Gary M. Zadick (Attorney)
P.O. Box 1746
#2 Railroad Square, Suite B
Great Falls MT 59403
Representing: New West Health Services
Service Method: eService

Robert C. Lukes (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: New West Health Services
Service Method: eService

Erik B. Thueson (Attorney)
P.O. Box 280
213 Fifth Avenue
Helena MT 59624
Representing: Dana Rolan
Service Method: eService

Electronically Signed By: Martha Sheehy
Dated: 08-24-2020