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 REPLY 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

INTRODUCTION

Dana Rolan brought this claim against New West Health Services in 2010, alleging breach of contract and bad faith based on New West's failure to apply the "made-whole" doctrine in adjusting Rolan's claim. Allied World Assurance Company ("Allied") has defended its insured, New West, without interruption since 2010. In the intervening ten years, no other lawsuits have been brought against New West. Although Rolan had a class certified in 2013, *See Rolan v. New West Health Serv.*, 2013 MT 220, 371 Mont. 228, 307 P.3d 219 ("*Rolan I"*), to this day not a single person has been identified, other than Rolan, as a class member. (Order, App. Tab 2, p. 14).

Allied offered to pay the "each claim" limit in settlement of the covered claims against New West years ago. (App. Tab 4, ¶ 15). After the district court approved the settlement between Rolan and New West (Dkt. 284), Allied interpled the "each claim" limit (Dkt. 310), which should exhaust the Policy proceeds. However, the district court erroneously held that Allied's aggregate policy limit must be applied to this single lawsuit. (App. Tab 1). The district court did not consider the unambiguous language of the Policy. Instead, the district court incorrectly found coverage by estoppel. (App. Tab 1). This Court has never applied estoppel when the insurer has reserved its rights and provided a defense,

as here. Moreover, there is no justification for providing aggregate coverage to a single claim. The district court's finding of estoppel should be reversed, and the Policy's stated "each claim" limit should be enforced as written.

RESPONSE TO ROLAN'S STATEMENT OF THE ISSUES

Rolan agrees with Allied's stated issues, except Rolan argues that "in the brief . . . ASIC attempts to raise a third issue: Is its 'related-claims' coverage defense correct on the merits?" (Appellee's Brief, p. 1). Rolan mistakenly asserts that "this issue should not be considered because the district court did not address it below." (Appellee's Brief, p. 4).

The district court decided this very issue as part of Allied's motion for summary judgment on the application of the "each claim" limit. (Dkt. 186). Rolan cross-moved for summary judgment based on estoppel. (Dkt. 190). The district court granted Rolan's cross motion and denied Allied's motion in a single order on October 23, 2018. (Dkt. 230). In addition, the district court specifically certified both summary judgment determinations for appeal. (Certification Order, Dkt. 311, p. 5). Yet Rolan urges this Court to ignore the district court's erroneous denial of summary judgment to Allied. (Appellee's Brief, p. 35).

In evaluating cross motions for summary judgment, "the district court, **and consequently this Court**, must evaluate each party's motion, on its own merits." *Putman v. Central Montana Medical Center*, 2020 MT 65, ¶ 12, 399 Mont. 241, 460 P.3d 419 (emphasis added). The district court denied Allied's motion for summary judgment regarding the policy limits, and erred by failing to evaluate the merits of Allied's motion. Consequently, this Court must now evaluate Allied's motion "on its own merits." *Id.*

Rolan suggests remand on the issue. This is the third appeal arising out of Rolan's claim. *See Rolan I* and *Rolan v. New West Health Serv.*, 2017 MT 270, 389 Mont. 228, 405 P.3d 65 ("*Rolan II"*). Judicial economy is not served by remanding to the district court for a re-examination of a pure question of law, followed by a subsequent appeal. The issue of whether the "each claim" limit applies to the single claim asserted against New West is ripe for review.

RESPONSE TO ROLAN'S STATEMENT OF FACTS

Rolan asserts that Allied's Statement of Facts "lacks the detail and accuracy to perform a *de novo* review." (Appellee's Brief, p. 2). *De novo* review allows this Court "to review the record and make [its] own determination regarding the existence of disputed issues of fact and entitlement to judgment as a matter of law." *Norbeck v. Flathead County*, 2019 MT 184, ¶ 12, 395 Mont. 294, 438 P.3d

811. Appellate review, however, is limited to the record of admissible evidence.

With respect to evidence submitted in support or opposition to a motion for summary judgment, this Court "reviews *de novo* whether the evidentiary requirements of Rule 56(e) have been satisfied." *Smith v. Burlington Northern and Santa Fe Ry. Co.*, 2008 MT 225, ¶ 41, 344 Mont. 278, 187 P.3d 639. If testimony is not sworn, and based on the affiant's personal knowledge, the evidence does not comply with the requirements of Rule 56(e). *Id.*

Rolan repeatedly asserts that Allied "controlled" the defense of its insured, New West. There is no evidence – none– that Allied controlled the defense of New West. On appeal, Rolan argues that Allied "gained control [of the defense of New West] through the 'cooperation clause' in its policy." (Appellee's Brief, p. 20). But Allied World *explicitly waived* reliance on the cooperation clause which requires the insurer's consent to settle, and confirmed that waiver at three separate hearings in the district court. (Trans., Aug. 29, 2018 hearing, p. 7-8; Trans., March 13, 2019 hearing, p. 15) As Allied informed the district court in 2020, "From the outset Allied World has waived any reliance on the consent to settle clause, [and] continues to waive that reliance. . . ." (Trans., Jan. 20, 2020, p. 16).

Rolan also claims that Allied controlled the defense based on various letters from attorneys, without providing the responsive correspondence. Statements by

attorneys in letters do not constitute evidence.[1] As this Court noted in *City of Helena v. Whittinghill*, 2009 MT 343, ¶ 21 n. 2, 353 Mont. 131, 219 P.3d 1244, "[a] party cannot establish facts in a case by asserting them in a brief. Those are nothing more than an attorney's statements, which are not evidence." *See also City of Missoula v. Armitage*, 2014 MT 274, ¶ 37, 376 Mont. 448, 335 P.3d 736. Neither New West's defense attorney Robert Lukes nor New West's coverage attorney Gary Zadick ever provided sworn testimony to indicate that Allied controlled the defense they provided to New West.

In the trial court and now on appeal, Rolan has not provided any evidence which satisfies the requirements of Rule 56(e) to support a finding that Allied controlled the defense of New West. The sworn testimony in the record establishes that Allied provided a defense to New West since 2010 pursuant to a reservation of rights. (App. Tab 4, Nelson Aff., ¶ 8). Throughout her brief, Rolan also states that Allied "denied coverage," but the record establishes through sworn testimony that Allied did not withdraw defense or coverage. (App. Tab 4, ¶ 8). Moreover, the sworn testimony in the record establishes that since the mediation in June 2018, Allied has offered to contribute the "each claim" limit of $1,000,000

[1]Mr. Zadick provided a foundational affidavit to establish the authenticity of seven letters he sent or received. Other than establishing the letters are correct copies, Mr. Zadick did not provide sworn testimony. (Dkt. 197).

less defense costs to any negotiated settlement of the claims against New West. (Nelson Aff., Dkt. 267, ¶ 6, App. Tab 4, ¶ 15). That offer was never withdrawn. (Dkt. 67, ¶ 23), and Allied interpled the "each claim" limit upon approval of the settlement between New West and Rolan. (Dkt. 310).

De novo review of the district court's finding of coverage by estoppel requires examination of the admissible record for clear and convincing evidence to support estoppel. The record contains no such supporting evidence.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING COVERAGE OF $3 MILLION BY ESTOPPEL.

Allied's Policy contains an "each claim" limit of $1,000,000, and an aggregate limit of $3 million. (App. Tab 5, p. 1). Allied informed New West of both limits in reserving its rights. (*Id.*). Allied also informed New West that a "claim" is defined as "any written notice received by any Insured that a person or entity intends to hold an Insured responsible for a Wrongful Act. . . ." (App. Tab 5, p. 3). Since Rolan initiated this claim, Rolan's claim is the only written notice received by New West alleging a claim. Allied informed New West that a "judicial proceeding" meets the definition of a "claim." (*Id.*). To date, this lawsuit is the only judicial proceeding against New West. Thus, there are no additional

claims to "aggregate." The "each claim" limit applies to the only asserted claim – Rolan's lawsuit. Despite these undisputed facts, the district court incorrectly estopped Allied from asserting the "each claim" limit.

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

In its opening brief, Allied established by overwhelming authority that Montana law does not recognize a cause of action for coverage estoppel when the insurer has defended its insured. *Draggin' Y Cattle Company v. Junkermier, Clark, Campanella, Stevens, PC ,* 2019 MT 97, ¶ 22; 395 Mont. 316, 439 P.3d 935; *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*). In *Draggin' Y*, this Court held that it is the breach of the duty to defend that gives rise to estoppel. *Id.* It is undisputed in this case that Allied has defended New West without interruption for ten years, since the inception of Rolan's claim. (App. Tab 1, p. 8).

In response, Rolan asserts only that this case differs factually from *Draggin' Y*. (Appellee's Brief, p. 26). Roland fails to support those alleged differences with citation to the record in this case. Rolan completely fails to address, much less distinguish, this Court's longstanding precedents that estoppel does not apply when an insurer provides a defense pursuant to a reservation of rights.

Instead, Rolan (like the district court) relies exclusively on *Safeco Ins. Co. v. Ellinghouse,* 223 Mont. 239, 775 P.2d 217 (1986). (App. Tab 1). Since the decision 35 years ago, *Ellinghouse* has not been relied upon by any court to justify estoppel, given that *Ellinghouse's* unique factual situation has not been repeated. Courts have distinguished the case repeatedly. *See, e.g., King v. State Farm Fire & Casualty Co.*, 2010 WL 4920906, *3-*4 (D. Mont. 2010) (slip op.)*; Barnard Pipeline, Inc. v. Trav. Prop. Cas. Co.*, 3 F.Supp.3d 865, 875 (D. Mont. 2014); *T.H.E. Insurance Co. v. Flying Phoenix Fireworks Corp.,* 2008 WL 11347999, *8 (D. Mont. 2008)(slip op.). As in these cases, a core element of *Ellinghouse* is absent here because there is absolutely no evidence that Allied controlled the defense of New West. To the contrary, Allied merely provided the defense.

Rolan seeks to extend *Ellinghouse* far beyond the legal basis set forth in that 35-year-old ruling. In doing so, Rolan asks this Court to ignore or overturn its longstanding precedent that it is the breach of the duty to defend which gives rise to estoppel. *Draggin' Y ,* 2019 MT 97, ¶ 22. Rolan provides no legal justification for such a sweeping change in the law. The district court erred as a matter of law in finding coverage by estoppel when Allied always defended its insured.

B. No Factual Basis Exists to Support Coverage By Estoppel.

In addition to failing to provide a legal basis to support an application of *Ellinghouse,* Rolan has not established a factual basis to support its application. As recognized by Rolan, *Ellinghouse* only applies where an insurer "assumes the exclusive control over the defense" without a reservation of rights. (Appellee's Brief, p. 15). Rolan argues that this is the majority position, and cites to a number of cases, all of which limit application of estoppel to cases where an insurer failed to reserve its rights. (Appellee's Brief, p 16-18). It is undisputed that Allied reserved its rights, including to the amount of coverage available, informing the insured that the Policy contained limits of $1,000,000 per claim and $3 million aggregate. (App. Tab 5, p. 1). Allied also reserved rights as to the definition of "claim" upon which the "each claim" limit is based. (App. Tab 5, p. 3). Rolan has not cited to a single authority – not even *Ellinghouse* – that allows coverage by estoppel when an insurer defends under a reservation of rights.

Ellinghouse sets forth the level of control necessary to justify estoppel. In *Ellinghouse*, the insurer (Safeco) extracted a non-waiver agreement from the insured "by deceit," and then used the agreement against the insured in the declaratory action. *Id.*, 725 P.2d at 223. Here, Allied waived the policy provision requiring Allied's consent to settle. (Trans., March 13, 2019, p. 15; Trans., Jan.

20, 2020, p. 16). In *Ellinghouse,* Safeco insisted that its retained defense counsel cut back on discovery. *Id.* Here, there is no evidence that Allied interfered with defense counsels' representation of Allied. In *Ellinghouse*, Safeco did not inform the insured that coverage was in question and did not reserve its rights. *Id.* Here, Allied explicitly reserved its rights and provided a defense. (App. Tab 5; App. Tab 4, ¶ 8). Just the opposite of *Ellinghouse*, there is no evidence in the record to establish that Allied ever directed, determined, or controlled the defense of New West provided by Montana attorneys such as Robert Lukes and Gary Zadick.

Moreover, Rolan fails to refute that Montana law requires that estoppel must be proven "by clear and convincing evidence" of six elements. *King*, 2010 WL 4920906, *3-*4; *see also Turner v. Wells Fargo Bank* 2012 MT 21, ¶ 30, 366 Mont. 285, 291 P.3d 1082. The district court did not apply the "clear and convincing evidence" standard. First and foremost, the district court did not find that Allied, through conduct, acts, or silence, ever represented that the $3 million aggregate limit applied. To the contrary, the district court found that "the RoR **implied** that there would be $ 3 million in aggregate coverage." (Order, App. Tab 1, p. 8, *emphasis added*). This is clear error because estoppel may not be proven by implication. *Id.*

Furthermore, the record establishes that no "implication" exists that the aggregate limit of $3 million applied. Both New West and Rolan repeatedly confirmed that they understood that Allied relied on the "each claim" limit:

1. October 5, 2016: Allied informed New West: "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. February 2018: 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).

The record establishes that at every juncture when the duty to indemnify was at issue, Allied has relied upon the $ 1 million "each claim" limit. And at every juncture, both New West and Rolan were aware of Allied's assertion of the "each claim" limit. Thus, the district court erred in finding coverage based on an "implication," because Montana law does not allow estoppel by implication and Allied never implied that the aggregate limit applied to this single claim.

Prejudice is also a required element of estoppel, and must be proven by clear and convincing evidence, not by assumptions. *Turner* at ¶ 30. Yet in finding prejudice, the district court relied exclusively on "the *Ellinghouse* **presumption** of prejudice." (App. Tab. 1, p. 8, emphasis added). 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. v. Flying Phoenix Fireworks Corp.*, 2008 WL 1134799, *8 (D. Mont. 2008). 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. The district court erred in finding estoppel without identifying clear and convincing evidence to support estoppel.

C. Even if Estoppel Applied, it Would Not Preclude Operation of the Policy's Unambiguous Definition of "Claim."

Rolan's entire theory of estoppel is based on the mistaken notion that Allied forfeited its right to rely on the definition of "related claims" because the definition was not set forth in the reservation of rights letter. This argument ignores that Allied has relied primarily on the Policy's definition of "claim" to establish the applicability of the "each claim" limit. Allied reserved its rights with respect to that provision. Rolan's argument also ignores the undisputed fact that even now the "related claims" provision is hypothetical. No other lawsuits and no other class members have asserted a claim. (App. Tab 2, p. 14).

Even if applied – which it should not be – estoppel does not preclude Allied from its continued reliance on the Policy's definition of "claim." From the outset, Allied informed New West the Policy's limits of liability were $1,000,000 per claim and $3 million aggregate. (App. Tab 5). Moreover, Allied reserved its right to limit coverage based on the definition of "claim," setting forth the entire definition in its reservation of rights letter. (App. Tab 5). Only one claim has ever been asserted against New West – Rolan's lawsuit. (Order, App. Tab 2, p. 14). Thus, the single claim limit applies, without reference to the "related claims" provision.

D. The District Court Erred in Applying the UTPA to Estoppel.

Rolan fails to rebut Allied's showing that the district court erred in holding 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 theory 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. This Court requires that a district court maintain a separate framework for resolution of UTPA allegations from breach of contract allegations. *Id.* at ¶ 31. Here, Rolan has not alleged violation of the UTPA, and the district court erred in analyzing the breach of contract claim as a UTPA claim.

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

A. Only One "Claim" – Rolan's Lawsuit – Has Been Asserted against New West.

Just as in the district court, Rolan does not even address Allied's primary argument, which relies upon the Policy definition of "Claim," and does not rely upon interpretation of the "related claims" provision. 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). Rolan's lawsuit

constitutes the only written notice of a claim against New West. Indeed, Rolan's lawsuit is **the only claim** asserted against New West. Further, though designated as a class action, it is undisputed that the class contains only one member: Rolan. (Order, App. Tab 2, p. 14).

Rolan asks this Court to apply the aggregate limit to a single claim based not on the language of the contract, but on the equitable doctrine of estoppel. But this Court holds 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. The rules of contract construction require a finding that the filing of a single claim results in application of the each claim limit.

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

As shown above, only a single claim has been asserted against New West, and only one claimant has been identified. In the event additional members of the class are ever identified, the single claim limit still applies. 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.

Supposing that Rolan ever identifies additional class members, all such assertions would constitute "Related Claims" by Policy 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). Allied has provided copious authority establishing that class claims constitute a single claim. 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). *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); *Amer. Medical Sec. v. Executive Risk Ins. Co.,* 393 F.Supp.2d 693 (E.D.Wis. 2005) (38 lawsuits constituted a single claim).

Rolan has not provided any facts or legal authorities to refute Allied's showing. The definition of the class guarantees a significant relationship between the class claims. In this case, the as-yet-unidentified 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.

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.

III. ALLIED'S POLICY DOES NOT PROVIDE COVERAGE FOR THE PORTION OF THE SETTLEMENT ATTRIBUTABLE TO BREACH OF CONTRACT.

Allied has already paid its "each claim" policy limit of $1 million. (Dkt. 310). Rejection of the district court's finding of estoppel, and enforcement of the Policy's $1 million "each claim" limit resolves this entire matter. However, in the event the Court determines that the $3 million aggregate limit can be applied to this single claim, Allied disputes the district court's finding that Allied's policy provides indemnity coverage for the amounts New West should have paid to its insureds.

Rolan claims that Allied is taking inconsistent positions by questioning coverage above the $1 million limit. In actuality, Allied's position is completely

consistent. Allied's duty to indemnify "hinges not on the facts [Rolan] alleges and hopes to prove but instead upon facts, proven, stipulated or otherwise established that actually create [New West's] liability. *State Farm Mut. Auto. Ins. Co. v. Freyer,* 2013 MT 301, ¶ 26, 372 Mont. 191, 312 P.3d 403. Until this Court decided *Rolan II* in 2017, Allied had no duty to indemnify because the law of the case established no liability on behalf of its insured, New West.

In *Rolan II*, this Court reversed the finding that ERISA preemption applied. On remand, New West sought to settle the claim, and Allied did not stand in the way. (Trans., March 13, 2019 hearing, p. 15). Allied waived the Policy's requirement that New West obtain Allied's consent to settle. (Transcript, Aug. 29, 2018 hearing, p. 7-8). Allied offered to pay its "each Claim" policy limit of $1 million (less defense costs) as part of a settlement between New West and Rolan. (App. Tab 4, ¶ 15). Allied relied upon defense counsel's assessment that "the value of the covered (tort) claims meets or exceeds the limit" of $1,000,000 less defense costs. (Sheehy Declaration, Dkt. 308, ¶ 4). Defense counsel Lukes confirmed that "it is our opinion that the bad faith damages, including fees, will meet or exceed the remaining single limit." (Dkt. 308, ¶ 12).

While acknowledging coverage for the bad faith count, Allied has always disputed coverage for New West's liability for the non-covered claim of breach of

its insurance contract. Indeed, when Rolan presented the first stipulated settlement to the district court for approval, Allied moved for a ruling that the settlement did not fall within the scope of coverage because Rolan and New West settled only the breach of contract claim, and specifically reserved the covered bad faith claim to be brought at a later time. (See Allied's Brief, Dkt. 266, p. 2). Subsequently, Rolan withdrew that settlement proposal from consideration by the district court, and a different settlement agreement was approved. (Dkt. 274; Dkt. 277).

To the extent the approved settlement results in damages based on amounts New West should have paid to policyholders, the damages are not covered by Allied's policy. 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) 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)).

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)). Numerous courts have reached this conclusion, and Rolan has not refuted these authorities. *Health Net, Inc. v. RLI Insurance Co.*, 206 Cal.App.4th 232 (Cal. 2012); *American Medical Security, Inc.,* 393 F.Supp.2d at 707-8. In the *American Medical Security* class action, the court interpreted a similar policy and held, "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, Allied has agreed to pay its "each claim" limit for the damages resulting from the bad faith claims against New West. (Dkt. 308, ¶¶ 4, 12). Defense counsel opines that those "bad faith" damages meet or exceed the "each claim" limit, so Allied interpled that limit. (*Id.;* Dkt. 310). However, New West

has also stipulated by settlement to pay amounts to claimants that New West owed under its policy – the "made whole' amounts. (Dkt. 278, p. 3). As in *American Medical Security*, these breach-of-contract damages are not covered "Losses." The unambiguous definition of "Loss" establishes that benefits and coverages owed by New West are not included in **Loss,** and are not covered. *Id.*

CONCLUSION

No factual or legal basis exists to apply the Policy's aggregate limit to a single lawsuit asserting the claim of a single class. This is especially evident here, because the class contains one member (Rolan), and any as-yet-unidentified members will assert "related claims" as defined to qualify for the class.

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. 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 21st day of December, 2020.

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 reply 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 4,887 words is less than the 5,000 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 Reply to the following on 12-21-2020:

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: 12-21-2020