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/Appellees, vs. NEW WEST HEALTH SERVICES, DARWIN SELECT INSURANCE COMPANY and ALLIED WORLD ASSURANCE COMPANY and DARWIN NATIONAL ASSURANCE COMPANY, Defendants/Appellants.	

APPELLEES' PETITION FOR REHEARING

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Appellees request rehearing because the Opinion conflicts with Montana law. *See*, Mont. R. App. Civ. P. 20(1).

A. THE WRONG DEFINITION OF MISREPRESENTATION

Your opinion that Allied cannot be estopped unless it made an "affirmative communication" the $3,000,000 aggregate limits applied is contrary to prior law. Allied, like all insurers, owes a fiduciary duty to insureds. It does not have to make an "affirmative communication." All that is necessary is "any breach of duty which, without an actual fraudulent intent, gains an advantage … by misleading [the insured] to his prejudice …." It is "bound to act in the highest good faith" and cannot gain ***"any advantage*** …over the [insured] by the ***slightest*** misrepresentation [or] ***concealment*** … ***of any kind."*** *Tynes v. Bankers Life Co*., 224 Mont. 350, 730 P.2d 1115, 1124, 1126 (1987) (emphasis added).

Safeco. v. Ellinghouse, 223 Mont. 239, 725 P.2d 217(1986) remains the law on insurance estoppel. *See, Rolan* (2022), ¶21, n.1; ¶24, n. 2. *Ellinghouse* is based on the heightened duties insurers owe insureds. It adopts a case and treatise which recognize a strict duty to timely disclose. *Id.* at 220-21.

Ellinghouse also holds the duties of the UTPA, §33-18-201, MCA *et. seq* must be considered. *Rolan* (2022), ¶24,n.2, *supra*. The UTPA must be read in light of an insurer's fiduciary duties. *Lorang v. Fortis Ins. Co*., 2008 MT 252, ¶178. A

narrow definition of misrepresentation "conflicts with the UTPA plain language." The UTPA "prohibits misrepresentations categorically--whether intentional or unintentional." *Id.* at ¶¶124-125.

The UTPA is remedial which requires broad interpretation in favor of those protected. *Dannels v. BNSF Ry*. Co., 2021 MT 71, ¶34. "Montana has an ***overriding interest*** in protecting its citizens from fraudulent, malicious, and bad faith claims practices." *Id*. (citing UTPA purpose statement).

Given this, limiting misrepresentations to "affirmative communications" conflicts with both Montana law and public policy.

B. *ELLINGHOUSE*

Ellinghouse demonstrates an affirmative misrepresentation does not have to be made. The insurer, there, made no representation about coverage at all. It simply took over the defense not revealing its coverage defenses until 18 months later. The facts show the late disclosure was negligent—not intentional. Nevertheless, the insurer was estopped. Allied's misconduct, here, is far worse. It took over the defense without disclosing coverage defenses for seven years.

Ellinghouse's analysis incorporates the duty to disclose promptly. This duty is violated if the insurer "assumes …exclusive control of the defense" without

revealing coverage defenses it "presumably" knows. It is "conclusively presumed the loss of the right of the insured to control and manage the case is itself prejudicial." *Id.* at 221.

Ellinghouse adopts *Transamerica v. Chubb*, 554 P.2d 1080 (Wash. 1976). *Chubb* explains why the fiduciary duty is violated under these circumstances. When an insurer takes control of the case without revealing coverage defenses, it creates a conflict of interest, which it must reveal immediately. If it fails, it "deprive[s] the insured of knowledge of the conflict and hence, the insured loses its "valuable right to retain private counsel" to protect its own interests. *Id.* at 1083. The insured is also deprived of its right to immediately file a declaratory judgment action on coverage before it incurs years of prejudice through litigation. Moreover, if the insured does not know its interests are unprotected," it loses the right "to arrange for the initial investigation, settlement negotiations and the conduct of the lawsuit." *Id.*

The undisputed facts, here, show Allied violated its fiduciary duty by taking control of the defense without informing NW of its intention to deny coverages. NW was unaware its interests were in jeopardy and therefore, could not hire independent counsel, file a declaratory judgment, negotiate a settlement with Rolan or do whatever it deemed necessary to protect its interests. This loss was critical:

Without the aggregate coverage, neither NW nor Rolan could have afforded to litigate for years since there would have been inadequate coverage to compensate the class. With a high probability, they would have settled promptly--before expending hundreds of thousands of dollars on litigation. Likely, Rolan would have been forced to settle her individual claims, since NW would not have had adequate insurance to compensate the class.

The prejudice caused is unknowable. As stated in *Chubb, supra* at 1083 and *Ellinghouse,* "The course cannot be rerun; no amount of evidence will prove what might have occurred if a different route had been taken. By its own actions, [the insurers] irrevocably fixed the course of events concerning the lawsuit." In *Chubb*, "10 months of necessity … established prejudice." Certainly, seven years, here, does.

In summary, undisputed evidence shows Allied failed in its heightened duties to disclose coverage defenses before taking over the defense. Essentially, it screwed up the litigation at great expense to both NW and Rolan for years. It should suffer the consequences.

C. NEW WEST'S INSURER STATUS

At ¶27, the Opinion states NW is not entitled to the same estoppel considerations afforded the "average consumer" because it is an insurance

company. NW's status, however, is not relevant.

First, NW is an insurer skilled in health insurance—not liability insurance.

Second, insurers are just as deserving of protection through estoppel as everyone else. In *Chubb, supra*, liability insurers sued to estop another liability insurer. The Court ruled: "The reasons for the application of estoppel … apply with equal respect to [insurers]…." *Id*. at 1084.

Most importantly, NW's status is not relevant as a matter of law under the UTPA. In *Lorang, supra* at ¶130, you held:

> The UTPA is perfectly clear; it categorically prohibits insurers from misrepresenting coverage provisions in an insurance policy. … It contains no exception for misrepresentations made to claimants who accurately comprehend the meaning of the policy; rather, it is a *protection for all claimants*, *regardless of their level of knowledge regarding the policy*. Nor does the UTPA suggest that a "misrepresentation" is to be defined with reference to the claimant's state of mind.

(Emphasis added.)

D. SINGLE CLAIMANT

The Opinion, ¶25, attaches significance to the fact that at the time Allied drafted its RoR, Rolan was the only identifiable claimant. This holding is impractical and contrary to an insurer's heightened duties.

It is impracticable because companies faced with class action suits are not worried about coverage for the single identifiable plaintiff which is always

relatively small. Rather, their concern is whether or not they have adequate protection to cover the multi-million dollar class action alleged in the complaint. Class members usually cannot be identified until after certification which, here, ended up taking nine years. Obviously, then, a reasonable insurer acting in good faith needs to provide an accurate coverage opinion on the aggregate limits early on.

Thus, Allied has a duty to immediately inform NW of any and all coverage defenses raised by the allegations in the complaint. Without this information, NW was prevented from making an informed decision on whether to allow Allied to assume the defense, hire separate counsel and/or take other steps to protect its interests. *See,* discussion, *supra.*

At any rate, Allied continued to conceal its intentions—even after liability to identifiable class members was knowable. In August 2013, this Court affirmed class certification including NW's liability for class damages. *Rolan v. New West*, 2013 MT 220. Some members were identifiable at that time because a collection company had been subrogating against liability carriers so NW could "avoid payment." *Id.* at ¶9. Early in discovery, NW produced a list showing the identities of insureds who were subjected to this process. *See*, DN 59. Under the UTPA, Allied has a duty to "conduct a reasonable investigation based upon all available information." It is charged with knowledge of these identifiable claimants. *See*,

§33-18-201(4), MCA.

Within a month, NW retained coverage attorney McIntosh to make sure it had coverage to pay Rolan and the class. As this Court found in ¶7 of the Opinion, McIntosh wrote Allied:

> "Pursuant to your letter dated February 18, 2010, it appears that you agree there is coverage under the MCEO policy, unless New West committed willful misconduct or willfully violated a state law. Please contact me to confirm this.
> . . .
>
> As I am sure you are aware, in Montana, an insurer is required to acknowledge and act reasonably promptly upon communications. Mont. Code. Ann. § 33-18-201(2). Please contact me at your earliest convenience to discuss New West's insurance coverage under the MCEO policy.

New West's coverage counsel and a New West representative followed up the letter in a phone conversation with Allied's Senior Claims Analyst that Allied would only contest coverage for 'willful misconduct or willful violation of state law.'" *Id.*

Therefore, when indemnity was at hand for class members, who could be identified, Allied still chose not to disclose any of its coverage defenses for either the single or aggregate limits. It waited another three years. **These events, *independently*, create estoppel without reference to the RoR.**

In summary, that Rolan was the only identifiable claimant initially has

nothing to do with Allied's fiduciary duty to timely disclose its coverage defenses. At any rate, by 2013, there were identifiable class claimants, but Allied still did not reveal its defenses when asked to do so.

E. THE DISTRICT JUDGE SHOULD BE AFFIRMED.

As shown above, uncontradicted evidence establishes Allied violated its UTPA and fiduciary duties, causing enormous delays and prejudice for approximately seven years (2010-2016). Under *Ellinghouse*, that is all that is needed to apply estoppel.

The district judge followed *Ellinghouse* to a tee. Her factual findings match those in your Opinion. *See*, DN 230, pp. 3-4. She set forth legal principles from *Ellinghouse* which this Court acknowledged are correct:

> In considering an argument for estoppel of insurance coverage, the Montana Supreme Court looks to the Montana Unfair Trade Practices Act. "[The Act] requires that the insurer 'promptly provide a reasonable explanation of the basis the insurance policy in relation to the facts or applicable law for denial of the claim.' *Ellinghouse*, 223 Mont. at 245, 725 P.2d at 221 . . . . "It is well established in Montana that an insurer has an obligation to inform the insured of all policy defenses it intends to rely upon."

DN 230*, Id.* at 6; Opinion, ¶24.

She recites the rule of law established in *Ellinghouse* that estoppel applies against an insurer who takes over the defense but fails to disclose all relevant coverage defenses until months or years later. DN 230, p. 8. She shows the facts

establish Allied did not disclose the relevant exclusions in its 2010 RoR:

> The insurer, Allied, knew the alleged facts and the nature of the class claims. While reciting the policy in effect at the relevant time, the RoR sent by Allied to New West did not mention application of any single claim limitation, including "related claims," to coverage in this matter. In fact, the RoR implied that there would be $3 million aggregate coverage.

Id. at 8. She properly recognizes that under insurance law, the RoR must be clear and unambiguous or it will be construed against its drafter: "An effective reservation-of-rights letter must communicate any reservation to the insurer specifically and unambiguously." *Id.* at 9:

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

Id. at 9.

Quoting and applying *Ellinghouse,* estoppel is necessary under the undisputed facts because: Allied "without reservation and with actual or presumed knowledge, assume[d] the exclusive control of the defense of claims against [NW but] thereafter withdrew and denied liability under the policy on the ground of noncoverage." This created "prejudice to [NW] by virtue of [Allied's] assumption

of the defense [causing] the loss of [NW's] right to control and manage the case …"

F. THE CONSTITUTION

There is an elephant in the room: In its brief, NW pointed out Allied's conduct enormously prejudiced both NW and Rolan's fundamental Constitutional right to a "speedy remedy" without "denial, or delay." MONT.CONST. Art II, §16.

This should be a weighty consideration: Two Montana citizens were embroiled in expensive litigation for nine years, which would not have happened had Allied simply revealed its coverage defenses early on as required by its fiduciary duty. The district court and this Court expended hundreds---if not thousands---of hours over the years, including three appeals. This obviously affects the resources available to provide speedy remedies to other Montanans. It would be inappropriate to allow Allied to wreak such havoc without consequences.

G. CONCLUSION/REMEDY

We know it was not this Court's intention, but this Opinion—as currently written—establishes regrettable precedence.

It literally establishes a rule that insurers bear no consequences for misleading their insureds about coverage for years—regardless of how great the prejudice. Only if the insurer makes an unequivocal "affirmative" representation that coverage exists will they be held responsible for late disclosure.

It does not matter if the insurers delayed disclosure negligently, intentionally, through concealment or ambiguity—like the RoR, here. So long as they did not make an unequivocal "affirmative" misrepresentation of coverage, they are off the hook. They are rewarded for making obscure, confusing, and ambiguous coverage letters which allow them to delay disclosing coverage denials literally for years.

Nor does it matter if the insured faces a bankrupting multi-million-dollar class action exposure. Because it is almost impossible to learn class members' identities until after certification, the insurer does not have to render any opinion on aggregate coverage at all.

An interpretation of "misrepresentation," which allows this to happen, runs afoul of Montana statutory and case law which has always recognized Montanans are entitled to special and broad protection in their dealings with the insurance industry. As stated in the UTPA purpose statement, "Montana has an ***overriding*** interest in protecting its citizens from fraudulent, malicious, and bad faith claims practices." *See*, *Dannels, supra*.

Two additional things need recognition. First, the preponderance of evidence standard applies to issues pertaining to UTPA and fiduciary duties--not the clear and convincing evidence standard.

Second, regardless of how the RoR is interpreted, Allied independently

violated its fiduciary duty in 2013 when it failed to reveal its coverage defenses to Attorney McIntosh, causing three additional years of prejudice. Neither this Court nor the lower court considered this aspect of the case.

Therefore, a rehearing is necessary. If questions remain, we request oral argument so this complex case and the important interests it implicates can be thoroughly considered and a just decision made.

DATED this 18th day of January, 2022.

/s/ Erik B. Thueson
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 20(3), M. R. App. P., I hereby certify that this petition is printed with proportionally spaced Times New Roman typeface of 14 points; is double-spaced, except footnotes, quoted and indented material; and the word count calculated by Word is not more than 2,500 words.

DATED this 18th day of January, 2022.

/s/ Erik B. Thueson
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CERTIFICATE OF SERVICE

I, Erik B. Thueson, hereby certify that I have served true and accurate copies of the foregoing Petition - Rehearing to the following on 01-18-2022:

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