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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

DANA ROLAN, on her own behalf and on behalf of the class she represents, Plaintiffs, vs. NEW WEST HEALTH SERVICES, DARWIN SELECT INSURANCE COMPANY and ALLIED WORLD ASSURANCE COMPANY and DARWIN NATIONAL ASSURANCE COMPANY, Defendants.	Cause No. CDV-2010-91 Judge Christopher Abbott **DEFENDANT ALLIED WORLD ASSURANCE COMPANY'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS**
ALLIED WORLD ASSURANCE COMPANY, Counterclaimant, vs. DANA ROLAN, on her own behalf and on behalf of the class she represents, Counterdefendants.	

INTRODUCTION

Plaintiff Dana Rolan ("Rolan") seeks to recover attorney fees from Allied World Assurance Company ("Allied") incurred in Rolan's litigation against New West Health Services ("New West"). Rolan admits that the attorney fees should be paid by New West, not Allied. (Rolan Brief, Dkt. 368, p. 2). Allied agrees, and advises the Court that Allied's policy indemnifies New West for an award of attorney fees *within the policy limit.* The Court deferred ruling on the availability and amount of fees incurred by Rolan in the class action at the time of the settlement with New West, waiting for additional information about the identity of class members and the size of the claims. (Dkt. 284, p. 11).

But Rolan seeks fees from "additional sources," seeking to shift responsibility for the class's attorneys fees to Allied. "Montana follows the American Rule for attorney fees, which prohibits fee-shifting in most cases, absent statutory or contractual authority to the contrary." *Abbey/Land LLC v. Glacier Construction Partners LLC*, 2019 MT 19, ¶ 63, 394 Mont. 135, 433 P.3d 1230. In seeking additional fees from Allied directly, Rolan twists the exceptions to the American Rule beyond recognition. The contortion is based primarily upon an unsupported assertion that "Allied's conduct over the past decade brings it within the purview of" legal grounds for relief. Allied has not been a party to this litigation for over a decade, except as an insurer which provided a defense and

indemnity to New West. Allied did not control the defense. Indeed, Rolan asserted that theory to the Montana Supreme Court in *Rolan v. New West Health Services*, 2022 MT 1, ¶ 35, 407 Mont. 34, 407 Mont. 34 ("*Rolan III*"), and the Supreme Court rejected it.

The American Rule applies. Rolan may recover fees from New West, but not Allied. Allied's policy provides indemnification of fee awards assessed against New West *within the policy limits.* None of the limited exceptions to the American Rule apply to allow an award of fees in favor of Rolan and against Allied. All five of Rolan's theories fail as a matter of law.

I. ALLIED DID NOT MULTIPLY THE PROCEEDINGS.

A. Rolan's Factual Assertions Are Unsupported and Have Been Rejected by the Montana Supreme Court.

Rolan asserts that Allied misrepresented coverage and multiplied proceedings, justifying an award against Allied based on § 37-61-421, MCA. That statute provides:

> An attorney or party to any court proceedings who, in the determination of the court, multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct.

Allied was not a party to these proceedings until 2018. Allied's participation in this litigation is limited to a single claim – Rolan's declaratory action against

Allied. Rolan does not cite to a single action taken by Allied or Allied's attorneys which multiplied the proceedings. To the contrary, the record establishes that Allied moved quickly to obtain a judicial declaration regarding the coverage issue raised by Rolan: whether the $1,000,000 limit or the $3,000,000 aggregate limit applies.

Based on discovery between Rolan and New West *prior* to Allied's involvement in this suit, Rolan asserts that New West misrepresented the coverage and provided the incorrect policy. Rolan has already argued this exact chain of events to the Montana Supreme Court as a basis for coverage by estoppel. *Rolan III*, ¶¶ 4-16, 23-24. The Supreme Court rejected this theory, holding "New West has failed to identify any affirmative communication in which Allied represented that the $3,000,000 aggregate limit applied to this litigation." *Rolan III*, ¶ 25.

Rolan asserts that ASIC belatedly asserted a "no coverage" position and hid that position from Rolan. Again, the Supreme Court rejected this assertion in *Rolan III.* The record establishes through sworn testimony that Allied did not withdraw defense or coverage. (Nelson 2d Aff., Dkt. 212, ¶ 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 less defense costs to any negotiated settlement of the claims against New West. (Nelson Aff., Dkt. 267, ¶ 6, Nelson 2d Aff., Dkt. 212, ¶ 15). That offer was never withdrawn.

(Dkt. 67, ¶ 23). Allied interpled the "each claim" limit upon approval of the settlement between New West and Rolan. (Dkt. 310).

Rolan next argues that Allied controlled the defense of New West – a theory raised and rejected before the Montana Supreme Court. On appeal, Rolan asserted "control of the defense" as a basis for application of the *Ellinghouse* case. (See Excerpt of Appellee's Brief, pp. 19-22, Ex. 1). There is no evidence – none– that Allied controlled the defense of New West. Rolan urged the Supreme Court to hold that Allied "gained control [of the defense of New West] through the 'cooperation clause' in its policy." (Ex. 1, 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, "[f]rom 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). The sworn testimony in the record establishes that Allied correctly provided a defense to New West since 2010 pursuant to a reservation of rights. (Dkt. 212, Nelson 2d Aff., ¶ 8). On this record, the Supreme Court discussed but did not apply *Ellinghouse*. *Rolan III*, fn 1 and 2.

Finally, Rolan suggests that this case would have settled in 2012 had Rolan

understood that the $1,000,000 limit applied. (Dkt. 368, p. 9). The facts do not support Rolan's premise. After joining Allied as a party in 2018 to litigate coverage, with full briefing regarding Allied's coverage position, it took years for Rolan to settle with New West. And since June of 2018, Allied stood ready and willing to contribute the "each claim" limit of $1,000,000 less defense costs to any negotiated settlement of the claims against New West. (Nelson Aff., Dkt. 267, ¶ 6, Nelson 2d Aff., Dkt. 212, ¶ 15).

The only bases cited by Rolan to justify relief under § 37-61-421, MCA, are unsupported by the record and have been rejected by the Montana Supreme Court. Allied did not control the defense of New West, Allied did not misrepresent its coverage position, and Allied did not withdraw defense or coverage. Just the opposite, Allied stood ready to contribute the single limit to any settlement which occurred prior to the resolution of the coverage question. Allied did not multiply the proceedings.

B. Rolan May Not Rewrite the Insurance Contract.

In addition to seeking a blanket order requiring Allied to pay fees incurred by the Class in litigation against New West, Rolan seeks "restoration of the $250,000 which Allied has subtracted from the $1,000,000 single claim limit over the past decade" and "restoration of all attorney fees and costs Allied required New West to pay over the past decade." (Dkt. 368, p. 9). Allied has "subtracted"

defense costs from the policy limit pursuant to the express terms of the contract.

The Policy explicitly notifies the policyholder of the "defense within limits" nature of the policy. On the first page, in bold capital letters, the policy states:

> **THE LIMIT OF LIABILITY AVAILABLE TO PAY DAMAGES, SETTLEMENTS OR JUDGMENTS WILL BE REDUCED AND MAY BE EXHAUSTED BY THE PAYMENT OF DEFENSE EXPENSES. PLEASE READ THE ENTIRE POLICY CAREFULLY.**

(Dkt. 368, Ex. 2, p. 43). Inclusion of the defense costs within the policy limit is a condition of the policy:

> **III. CONDITIONS**
>
> A. **Limit of Liability, Retention**:
>
> ****
>
> (2) **Defense Expenses** are part of and not in addition to the Underwriter's Limit of Liability, and payment of **Defense Expenses** by the Underwriter will reduce its Limit of Liability.

(Dkt. 368, Ex. 2, p. 63).[1] Defense-within-limits provisions are widely used in D&O and professional liability policies, and are generally held to be valid. *See, e.g.*, Munro, *Defense Within Limits: The Conflicts of "Wasting" or "Cannibalizing" Insurance Policies*, 62 Mont. L. Rev. 131, 159 (2001).

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[1]Note that Plaintiff Rolan attaches a 73-page document identified as the "Policy" as Exhibit 2 to Rolan's Brief. (Dkt. 368). In actuality the document contains two policies, the first being the Healthcare Organization Directors & Officers ("HCDO") policy, and the second being the Managed Care Organization Errors & Omissions ("MCEO") policy (Dkt. 368, Ex. 2, p. 43). This Court has already determined that the HCDO policy does not apply to this loss. (Dkt. 230, p. 10). Plaintiff's inclusion of the inapplicable policy, and highlighting of terms within that policy, confuse the issue. The only policy at issue is the MCEO policy.

"It is well established that in construing and analyzing the terms of an insurance policy [a court] look[s] first to the policy's plain language." *Monroe v. Cosgrove Agency*, 2010 MT 134, ¶ 15, 356 Mont. 417, 234 P.3d 79. The court "may not rewrite the contract at issue, but must enforce it as written if its language is clear and explicit." *Id.* Such is the case here. New West and Allied entered into a "defense within limits" policy, and the policy's terms must be enforced as written.

II. THE FOY EXCEPTION DOES NOT APPLY.

"In isolated instances," a district court may award attorney fees under its equity powers to make an injured party whole. *Goodover v. Lindy's Inc.* (1992), 255 Mont. 430, 446, 843 P.2d 765, 774-75. Known as the "*Foy* exception," the principle is strictly limited:

> "The equitable exception to the [American] rule is available in those unique factual situations in which a party is forced into a frivolous lawsuit and must incur attorney's fees to dismiss the claim." *Goodover v. Lindey's, Inc*., 255 Mont. 430, 447, 843 P.2d 765, 775 (1992). This exception has been narrowly construed, and its application is confined to situations in which the individual claiming fees has been forced into litigation through no fault of his own. *See Foy v. Anderson*, 176 Mont. 507, 580 P.2d 114 (1978).

Jacobsen v. Allstate Ins. Co., 2009 MT 248, ¶ 67, 51 Mont. 464, 215 P.3d 649.

Courts in Montana have invoked this "equitable" exception to the American Rule infrequently and "only in cases with particularly limited facts." *Id.* The

Montana Supreme Court recently explained that "[t]his equitable exception to the general rule is available in those unique factual situations in which a party is forced into a frivolous lawsuit and must incur attorney[ ] fees to dismiss the claim." *Abbey/Land LLC*, 2019 MT 19, ¶ 63, *citing Goodover*, 255 Mont. at 447, 843 P.2d at 775.

The exception simply does not apply here. Far from being forced into litigation, Rolan chose to bring both a class claim against New West and a declaratory action against Allied. Moreover, neither claim was frivolous and neither claim resulted in dismissal.

III. RULE 37 (DISCOVERY SANCTIONS) DOES NOT APPLY.

Rolan claims that New West violated discovery rules in responding to two interrogatories in 2011 and supplementation in 2013 (Dkt. 368, p. 11). If any violation occurred, New West, not Allied, committed the violation decades ago. Rule 37 cannot be invoked against a separate party (Allied) now.

Moreover, Rule 37(b) provides for sanctions for failure to comply with a court order compelling discovery, and no court order was issued in this case. *Jerome v. Pardis*, 240 Mont. 187, 783 P.2d 91, (1989). Rule 37(c) allows sanctions for failing to disclose, supplement, or admit, but only allows an award of fees after motion and an opportunity to be heard. New West has never been given such an opportunity. Rule 37(d) authorizes the imposition of sanctions for specific

failures: 1) failure to attend at one's own deposition, 2) failure to serve answer's to interrogatories, or 3) failure to serve a written response to a request for production. *Id.* None of those 37(d) failures are alleged by Rolan.

Rolan relies upon Rule 37(c), which allows sanctions for failing to disclose, supplement, or admit. (Dkt. 368, p. 15). This theory is based entirely on New West's allegedly flawed supplementation of discovery in 2013. (Dkt. 368, p. 16). Rule 37(c) only allows an award of fees after motion and an opportunity to be heard. This motion, made nine years after the alleged violation, is untimely. Moreover, New West has never been given an opportunity to be heard, and thus attorney fees may not be awarded.

Finally, even if a discovery violation had been committed by New West (or Allied), the sanctions available are limited to the costs of the making the motion to compel or sanction, including fees "caused by the failure." Rule 37 (c)(1)(A), M.R.Civ.P. Rule 37 does not provide any basis for an award of fees to the class for the litigation as a whole.

IV. ROLAN MAY NOT RECOVER ADDITIONAL FEES FOR NEW WEST'S ASSERTION OF ERISA.

In 2015, New West asserted ERISA preemption, resulting in "two years of delay," according to Rolan. (Dkt. 368, p. 18). In 2017, the Montana Supreme Court held that the District Court erred when allowing the amendment. At that

time, Rolan sought fees incurred by Rolan as a result of New West's delay in asserting ERISA. The District Court awarded $44,111 with three years' interest at 10%. (Dkt. 157). The award was made after briefing, hearing, and expert testimony.

The District Court's order awarding fees for the delayed assertion of ERISA by New West constitutes law of the case. Rolan may not now seek additional fees based on the fully-adjudicated claim for fees arising from ERISA allegations. (Dkt. 157). The amount of fees awarded to Rolan has been fully and finally resolved, was never appealed, and cannot be re-litigated five years later.

V. THE INSURANCE EXCEPTION DOES NOT APPLY.

As acknowledged by Rolan, the insurance exception provides that "an **insured** is entitled to recover attorney fees, pursuant to the exception to the American Rule, when the insurer forces the insured to assume the burden of legal action to obtain the full benefit of the insurance contract." *Mountain West Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 36, 315 Mont. 231, 69 P.3d 652 (emphasis added). The strictly limited "insurance exception" allows the recovery of attorney fees when an **insurer** forces its first-party insured into litigation. *Abbey/Land.* at ¶ 64. The exception does not apply here because Rolan is not a first-party insured. *Id.* at ¶ 64. In *Jacobsen,* ¶ 22, the Supreme Court refused to allow the extension of the insurance exclusion to third-party claimants against an

insurance company. In 2019, the Court again rejected expanding the exception, and instead "carefully limited the application of this exception to prevent the exception from swallowing the rule." *Abbey/Land*, ¶ 64.

Though she has not done so yet, Rolan may claim that the insurance exception applies to Rolan not as a third-party, but as an assignee. This theory has been soundly rejected by Montana's federal district court. *Woods v. Preferred Contractors' Insurance Company Risk Retention Group*, 144 F.Supp.3d 1166, 1172 (D. Mont. 2015). The federal district court also refused to grant a third-party claimant's request for fees under the Declaratory Judgment Act's "supplemental relief" provision. *Id.* The federal court correctly determined that an assignment does not apply to strangers to the insurance contract:

> This is because "[t]he rationale underlying the insurance exception to the American Rule is the existence of a fiduciary duty, and no such duty exists" between the insurer and a third-party claimant. *Jacobsen v. Allstate Ins. Co.*, 351 Mont. 464, 215 P.3d 649, 656 (2009). Again, though the assignment in this case places Wood more in the position of a first-party claimant, the Court does not extend this notion so far as to transfer [the insurer's] fiduciary duty under the Policy to Wood.

Id.

The insurance exception is specifically limited to first-party insureds. The exception cannot be applied to Rolan as either a third-party or an assignee.

CONCLUSION

"Montana follows the American Rule for attorney fees, which prohibits fee-shifting in most cases, absent statutory or contractual authority to the contrary." *Abbey/Land LLC*, 2019 MT 19, ¶ 63. Rolan has failed to establish any basis for an award of fees incurred in the class action against New West or the declaratory action against Allied. However, Rolan has never been without a remedy, because Allied's policy indemnifies New West for the fees awarded in the settlement between Allied and New West *within the policy limits*.

DATED this 20th day of July, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of July, 2022, a copy of the foregoing was duly served by first class mail, postage prepaid, upon the following, as well as by email:

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Harleysville Grp. Ins. Co. v. Heritage Cmtys, Inc., 803 S.E. 2d 288, 297 (S.C. 2017).

World Harvest Church. v. Gideon Mut. Ins, 695 S. E 2d 6 (Ga. 2010) reviews the case law and concludes *Ellinghouse* represents the majority approach:

> Where, as here, there was no effective reservation of rights, whether the insurance is estopped from asserting noncoverage depends upon whether, with actual or constructive knowledge of noncoverage, it assumed or continued the defense of a suit against its insured.

Id. at 10. *Ellinghouse's* "conclusively presumed" prejudice rule has "been identified and adopted as the general or majority rule." *Id*. at 10–11.

C. *ELLINGHOUSE* REMAINS AUTHORITATIVE.

The Judge found no merit in Allied's attempt to discredit *Ellinghouse*. *See* Order, App. 1, Allied's Appellant Brief, pp. 7-8. She correctly observed that *Portal Pipeline Co. v. Stonewall Ins. Co*., 845 P2d 746, 256 Mont. 211 (1993) re-enforces *Ellinghouse*. Among other things, it states, "it is well-established in Montana an insurer has an obligation to inform the insured of *all* policy defenses it intends to rely upon." *Id*. at 749. It also recognizes *Ellinghouse's* reliance on the UTPA, §33-18-201, MCA. It did not discredit *Ellinghouse*, but merely recognizes an excess insurer's RoR letter cannot be prejudicial because excess carriers do not have a duty to defend.

The Judge properly determined *Bernard Pipeline, Inc. v. Travelers Prop. Cas. Co.*, 3 F. Supp. 3d 865 (D. Mont. 2014) does not undermine *Ellinghouse*. There, the insured was on notice that the insurer intended to assert all policy defenses "as distinguished from the current case, where the RoR relayed a different message related to coverage and possible defenses." Order, *supra* at 8.

In addition, *Bernard Pipeline* cannot be read to mean an insurer is off the hook simply by making a generic statement in the RoR letter that defenses are reserved. *Bernard* provides no authority for that proposition. Such a reading would contradict *Ellinghouse* and *Portal Pipeline Co., supra*, which recognize the insurer has an "obligation to inform the insured of *all* policy defenses it intends to rely upon." (Emphasis added). Further, "A general statement that rights are reserved is inadequate." The insurer "must specify in detail any and all bases upon which it might contest coverage in the future since grounds not identified … may not be asserted later by the insurer." *Desert Ridge Resort LLC v. Occidental Fire & Cas.*, 141 F.Supp.3d 962, 967 (D. Az. 2015). *See also, Harleysville, supra* at 297; *Wilkinson, supra* at 522. It would also violate the UTPA duty to "promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim…" §33-18-201, *supra*.

The Judge properly determined *In re: Rules of Professional Conduct*, 2000 MT 110 does not hold insurers have lost their right to control the case. The case

merely makes clear that once insurers assume the defense, they cannot require the attorneys they hire to make decisions which create conflicts of interest with their insureds. It supports the application of estoppel, here, since Allied created a conflict of interest by not informing NW for over six years that it was denying coverages. Had NW known, it would and could have taken a different course than 10 years of expensive litigation.

Allied's contention it did not have control over the case is incorrect. It gained control through the "cooperation clause" in its policy. As set forth in 44 AM. JUR. 2d Insurance § 1390:

> Clauses are usually found in policies of liability insurance giving the insurer the right to make such investigation, negotiation and settlement of any claim or suit as it deems expedient. Such policies usually also contain a clause which prohibits the insured from voluntarily assuming any liability, settling any claims, incurring any expenses or interfering in any legal proceedings or negotiation for settlement unless with the consent of the insurer. *The purpose of these provisions… [Is] to invest the insurer with the complete control and direction of the defense or a compromise of such suit or claims, and there is no doubt as to the validity of such provisions*.

(Emphasis added). Allied's cooperation clause gives Allied the right to investigate, defend and negotiate and settle claims and to otherwise conduct the litigation and requires NW to cooperate. *See* DN 186, Exh. 1, p. 21.