**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/Appellees,

vs.

NEW WEST HEALTH SERVICES,

Defendant/Appellee

DARWIN SELECT INSURANCE COMPANY and ALLIED WORLD ASSURANCE COMPANY and DARWIN NATIONAL ASSURANCE COMPANY,

Defendant/Counterclaimant, and Appellant.

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

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# APPELLEES' BRIEF

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Dana Rolan ("Rolan") responds for the class she represents and as an assignee of all rights New West Health Service ("NW") has against its insurer Allied World Assurance Company ("Allied").

## I. STATEMENT OF THE ISSUES

Only two of the three issues raised by Allied are properly before the Court:

(1) Did the District Judge properly estop Allied from raising new coverage defenses over six years into the lawsuit?

(2) Did the District Judge properly hold Allied's "loss" provision does not exclude the class' damages?

If the Judge's holdings are correct, then the purpose of this interlocutory appeal is fulfilled. All coverage issues will be resolved. On remand, the Judge can consider final approval of the settlement and distribution of the class remedy.

In its brief, however, Allied attempts to raise a third issue: Is its "related-claims" coverage defense correct on the merits? This issue should not be considered because the District Judge did not address it below. Rather, she denied Allied's summary judgment based on estoppel. Therefore, there was no reason to address the merits.

Fundamentally, a party should not be allowed to raise an issue which was not decided below--especially given the limited scope of interlocutory appeal.

## II. STANDARD OF REVIEW

Allied's statement is partially correct.

This Court reviews the evidence *de novo.* Once this Court decides the undisputed facts are adequate to allow estoppel, however, the District Judge's discretion to apply it should be respected. *See e.g., Hoefler v. Babbitt*, 139 F.3d 726, 727 (9th Cir. 1998).

This is not only legally correct, but logical. Judge Seeley had a ring-side seat to what went on in her courtroom over the past decade. She should, at least, have discretion to determine if estoppel should be applied in the interest of justice. *See e.g., Sadlowski v. Michaels Stores, Inc.* (9th Cir. 2016); *Bates v. Union Oil Co. of California*, 944 F.2d 647 (9th Cir. 1991).

Allied also states there is a "clear and convincing" evidence standard on appeal. If, however, the material evidence is undisputed, it is certainly "clear and convincing."

## III. FACTS

Allied's "Statement of the Facts" lacks the detail and accuracy to perform a *de novo* review. Considerable detail appears in *Rolan v. New West,* 2013 MT 220 ("*Rolan I*") and *Rolan v. New West,* 2017 MT 270 ("*Rolan II*"). The following incorporates and supplements these facts.

## A. BEFORE ALLIED DISPUTED COVERAGE (2010-2016)

1. Thirteen years ago, Dana Rolan, a teenager, sustained serious injuries in a T-bone collision. Her immediate medical bills exceeded $100,000. The vast majority were paid by the liability carrier of the person who caused the collision. Her health insurer, New West, avoided paying by denying coverage existed when a liability carrier could pay them as part of the tort damages. *See Rolan II, supra*.

2. Eleven years ago, Rolan filed a complaint against NW alleging individual and class claims sounding in tort and contract for violations of Montana's made-whole laws. *See Rolan II, supra* at ¶4. New West timely "tendered" the defense to Allied, sending a copy of the complaint. DN 175, ¶8.

3. A month later, attorney Joseph Sappington, Allied's Senior Claims Analyst, notified NW full coverage existed:

> "As the Complaint includes allegations sounding in a Managed Care Activity, and the allegations were apparently first made against an insured in writing during the policy period, the conditions precedent to the insuring agreement appears to be satisfied. Accordingly, the MCEO policy provides for a per claim limit of liability of $1,000,000 and a maximum aggregate limit of liability of $3,000,000 subject to a $50,000 retention applicable to loss including defense expenses for each claim."

App. 1, *supra* at 5.

Relevant to this appeal, Sappington's RoR letter ***does not*** reserve any rights on the $3,000,000 aggregate coverage which is relevant, here. It does not mention, let alone address, the "related-claim" provision Allied now contends

excludes coverage. Nor does it address class action claims and their purported exclusion from aggregate coverage limits on that ground.

To the contrary, Sappington's RoR letter makes repeated reference to the $3,000,000 aggregate limit, indicating it is in play given the claims in the complaint:

> In addition and pursuant to the MCEO Policy, the amount stated in ITEM 3(a) of the Declarations shall be *the maximum aggregate limit of liability … resulting from all claims* for which this MCEO Policy provides coverage, *regardless of the number of claims, the number of persons or entities included within the definition of insured, or the number of claimants*.

*Id.* at 4 (emphasis added). Another portion repeats:

> If the insureds refuse to consent to a settlement acceptable to the claimant in accordance with the underwriter's recommendation, then subject to the underwriter's *maximum aggregate limit of liability.*

*Id.* at 5. The only reservations placed on the aggregate limit is that punitive damages are not covered and the covered damages, plus litigation costs, cannot exceed the "maximum aggregate limit." *Id.* at 7.

The RoR letter does contain other reservations not related to this appeal. A generic statement near the bottom states Allied "reserves all of their rights and defenses under the policies and available law with respect to this matter." (As explained below, a generic reservation statement lacks legal significance.)

4. The parties engaged in considerable discovery and motion practice over the next three years. On April 26, 2012, the District Judge certified the class and held NW liable for monetary losses. On August 6, 2013, the Montana Supreme Court affirmed. *Rolan I, supra.* Seemingly, liability had been established and Allied's obligation to indemnify was at hand.

5. In this context, NW retained attorney Ian McIntosh of Crowley Fleck to confirm the RoR letter accurately set forth the coverages available for indemnification. On September 30, 2013, McIntosh wrote Sappington:

> 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.

App. 2. There is no evidence Sappington or anyone else at Allied responded. Thus, at a time when liability had been affirmed by the highest court in Montana, Allied chose not to inform NW there were any pertinent reservations on its $1,000,000 single/$3,000,000 aggregate coverages.

6. On October 28, 2013, Allied dismissed the law firm representing its insured and retained new counsel. New counsel immediately moved to amend NW's answer with a new defense which, if granted, would nullify the class

certification and judgment. He contended ERISA barred all claims—even though NW had previously admitted ERISA was inapplicable. DN 68 and 69. Rolan objected, but the District Judge granted NW's motion, even as she recognized this would unfairly prejudice Rolan. DN 73.

7. On May 6, 2015, the District Judge granted a summary judgment in favor of NW, holding ERISA preempted all claims. New West then removed to federal court. *See Rolan II, supra* at ¶7. The granting of the motion to amend and the subsequent granting of summary judgment on the new defense, essentially derailed the litigation for approximately four years. *See* discussion, *infra.*

8. On February 29, 2016, Federal District Judge Lovell remanded to state court because removal had been untimely and because the state had concurrent jurisdiction. The reasons included the "inexplicable confusion [NW had caused] over whether its own plan was or was not an ERISA plan." *See Rolan II, supra* at ¶8.

9. On June 13, 2016, shortly after remand, NW filed another summary judgment motion, this time requesting dismissal on the ground ERISA preempted all claims. DN 117.

10. While this was going on, NW announced it was going out of business. On September 30, 2016, Rolan applied for a preliminary injunction and show cause hearing, explaining:

> For the last six and one-half years, plaintiff Rolan and the class she represents have been engaged in this protracted litigation with defendant New West. The Court has already recognized NW has caused several years of delay and therefore, awarded attorney fees and costs for some of the delay.
>
> Last week, defendant New West issued a press release announcing it is going out of business as of January 1, 2017. …Given this situation, Dana Rolan requests a restraining order prohibiting New West from disposing of any evidence or assets necessary to justly resolve this case. At the show cause hearing, NW should be compelled to provide all evidence and documents necessary to protect the interests of the plaintiffs.

DN 124, 125, p. 1.

On October 19, 2017, NW opposed, representing it had adequate insurance coverage to pay all claims:

> Although the company is going out of business, New West has insurance with an aggregate limit of $3,000,000 and with a per claim limit of $1,000,000. Although defense expenses reduce the policy limits, approximately $920,000 remains of the original policy limits. *The insurer has issued a Reservation of Rights letter, but New West believes it only disclaims liability for intentional acts.* Aff. Huschka. Thus, this insurance policy appears to cover Plaintiffs' claims in this case and the insurance coverage should continue to apply even after New West ceases business operations.

DN 132, p. 6 (emphasis added).

## B. THE FACTS AFTER ALLIED FIRST DENIED COVERAGE

11. Nine days after NW informed the Court it had full $1,000,000/$3,000,000 coverage, it stated the insurance picture had suddenly changed:

> Since the signing of Ms. Huschka's Affidavit [on October 16, 2016], there has been a development in this regard. *Allied World now claims that there is no indemnity under the policy, but they are paying the costs of defense. This information is new to New Wes*t, *since it had previously understood that there was coverage for claims other than intentional acts.* New West has now retained coverage counsel to press this issue with Allied World.

DN 192, Attachment 3, NW's Response to Ninth Discovery, pp. 3-4 (emphasis added). Thus, over six years after Sappington's RoR letter informed NW full coverage applied, Allied had reversed its position, taking the position no coverages applied.

12. New West hired coverage counsel Gary Zadick. On November 2, 2016, Zadick reviewed the circumstances that brought NW to this point:

> A reservation-of-rights letter was issued on February 18, 2010 by Joseph Sappington ... [It] advised Allied was assuming the defense of New West. ... [;] acknowledged that the conditions precedent "appear to be satisfied." ... [and] raised Exclusion A- willful misconduct ....
>
> There has been no supplemental reservation of rights issued. However, Ian McIntosh .... wrote [Allied] on September 30, 2013 confirming his understanding that New West was covered except to the extent of any willful misconduct or willful violation of state law. Mr. McIntosh and Kevin Heaney of New West also spoke with Mr. Sappington and he confirmed to them that those were the only grounds upon which Allied World was contesting coverage.
>
> Of course, it is far too late to assert any additional ground for challenging coverage. Allied World has been defending the case for six years under the February 18, 2010 reservation of rights. Allied World would be estopped to raise any additional defenses at this late date.
>
> [New West] is concerned, however, because of a comment … in an email to defense counsel … of October 5, 2016 in which you stated: "We issued a

> reservation-of-rights letter with respect to this matter, and our position is that there is no indemnity obligation under the policy." This comment is directly contrary to Allied World's reservation of rights letter of February 18, 2010 in which Mr. Sappington acknowledged that there would be coverage except only to the extent of any conduct that would fall within Exclusion A [for willful acts].
>
> Therefore, New West expect that Allied World will continue to provide a defense and indemnify New West with respect to any recovery that is not within the scope of the very stringent limitations o [the willful-acts exclusion].

App. 3 (emphasis added). The statement that Mr. Sappington "confirmed" coverage in 2013 has not been refuted. This should be considered a tacit admission under Mont. R. Evid. 801(d)(2).

13. On December 7, 2016, the Judge held "ERISA … barred any state law claims asserted by Rolan." *Rolan II, supra* at ¶9. It denied Rolan's request for an injunction and show cause hearing. DN 139. The case was then appealed to this Court a second time.

14. On March 27, 2017, with the case still on appeal, coverage attorney, Zadick, wrote Allied:

> On behalf of New West, Allied World Assurance is requested to settle the claims if there is a demand within the remaining limits. New West gives it consent to settlement.
>
> In the event that Allied World Assurance decides to continue litigating the matter, then on behalf of New West, I request that Allied World Assurance give written confirmation that it will pay any judgment even if in excess of the limits.

> As the insurer in the control of the defense, if Allied World Assurance elects not to settle the case then it must accept the risk of an excess verdict. New West is entitled to have its interests consider on at least the same level as Allied World's interests since Allied World has a fiduciary obligation to New West.

DN 197, Zadick Affidavit.

15. On April 4, 2017, the parties attended a court-ordered mediation. It was unsuccessful. Allied was only willing to settle for $50,000 and refused Rolan's request to reveal why Allied was now denying coverage.

On April 6, 2017, Rolan's attorney wrote Allied's counsel. He explained that he, too, had been misled by Sappington's RoR letter. He, therefore, wanted to know why Allied was now denying coverage existed. App. 4 hereto; *see* DN 220, Attachment 3.

Allied's attorney refused to provide any information: "Our position remains the same as that expressed at the time of the mediation." Concerning the duty to disclose under the UTPA, he stated: "I think the rule requiring an insurer to provide an explanation exists at the prelitigation stage." *Id.*

16. On November 7, 2017, this Court reversed the District Judge's Order which had dismissed all claims. *Rolan II, supra*. The Court held the motion to amend should have been denied in the first instance four years earlier. Granting it had caused "extraordinary circumstances" of prejudice:

> (1) the length of the delay, (2) the parties have conducted extensive discovery, and (3) the case has already been appealed to the Montana Supreme Court [which affirmed] class certification based on state law claims. Conversely, New West has not offered any reasonable justification for the delay. New West has not sufficiently explained why it failed to assert ERISA preemption in its original answer, why its own representative in a deposition substantiated that ERISA did not apply, or why it proceeded based upon state law claims for nearly three and a half years. The facts of this case are akin to *Peuse* and *Bitterroot*, in which we affirmed the District Courts' denial of leave to amend. Nevertheless, the District Court determined that New West should be able to amend its pleading.

*Rolan II*, ¶21. As Mr. Zadick stated in his 2016 letter, *supra,* Allied had "control" of the defense.

Thus, after approximately seven years of litigation, both Rolan and NW found themselves starting all over again—this time, however, with Allied denying any coverage existed. New West clearly had been prejudiced by the delay. Besides the ongoing public exposure to a lawsuit, NW had already paid out its $50,000 contribution to litigation costs and the single limit coverage was now being eroded away by ongoing costs. *See* Huschka Affidavit, DN 133. All the while, Allied had failed to raise coverage defenses which, if revealed, would have given NW a right to take a different, less expensive course.

17. On February 28, 2018, the District Judge granted Rolan's motions to re-certify the class and amend the pleadings to include a declaratory judgment action against Allied over its new coverage defenses. DN 170.

18. On July 3, 2018, Allied moved for summary judgment, contending the "related-claims" provision excluded the $3,000,000 aggregate coverage. DN 186, 187. Rolan filed a cross-motion for summary judgment that Allied should be estopped from denying any coverage defenses not set forth in the 2010 RoR letter. DN 190, 192.

19. On October 23, 2018, the District Judge held Allied was estopped:

> "This Court finds that in consideration of the uncontested facts, Allied is estopped from asserting a limitation of coverage to $1 million based on a single claim or related claims."

DN 230, p. 10; *see* Allied's Appellate Brief, App. 1.

20. On November 7, 2018, NW and Rolan jointly moved for preliminary approval of a settlement and to re-certify the class. The Judge denied the motion on a variety of grounds. DN 238.

21. On January 17, 2019, Allied again moved for summary judgment, this time contending the $1,000,000 single-claim limit did not apply either. DN 250, 251. It contended the class' damages were excluded under the "loss" provision of the policy. The District Judge ultimately denied the motion both on estoppel grounds and on the merits. DN 273. (As Allied indicates in its brief, it has since tendered the remains of the $1,000,000 coverage to the class recovery fund.)

22. On September 18, 2018, NW and Rolan again worked out a settlement. DN 274. On January 27, 2020, the Judge approved the settlement and issued a revised Certification Order. The Order provided:

1. New West will pay $250,000 into court for the benefit of the Class.

2. New West assigns all its rights against Allied World to the Class.

3. The Class grants NW a covenant not to execute on any claims covered by this class action and its settlement. The class will retain individual claims not covered by the judgment and orders in this class action, subject to a covenant not to execute against NW.

4. New West shall cooperate with Class counsel to identify potential class members and provide Class counsel a copy of all relevant records for the processing of claims and identifying class members.

5. The settling parties consent to class certification under Rule 23(b)(3) with appointment of Erik B. Thueson as Class counsel.

6. The Court shall issue a judgment that NW has violated Montana's made-whole laws, entitling class members to tort damages. and/or consequential contract damages equal to the amount of money they consequently lost from third-party tort recoveries.

7. The Court shall convert the current Rule 23(b)(2) class to a Rule 23(b)(3) class to provide additional due process protection to the class members.

8. The settling parties agree to send notices to Class members to resolve the class action consistent with the due process rights of the Class members. The costs of the notices shall be deducted from the $250,000 paid by NW under the settlement.

9. In all likelihood, the overall monetary recovery and litigation costs would exceed the aggregate limits. With 13 years of prejudgment interest, Rolan’s recovery alone would exceed $200,00. New West had already provided a list indicating hundreds of people would

qualify for monetary recovery. Over 100,000 NW insureds would receive notices and therefore, still additional class members will receive recoveries. Finally, class counsel has litigated for over a decade without payment of attorney fees and costs.

10. Until the Supreme Court rules on the aggregate limits, it would not be possible to hold a final fairness hearing. If the aggregate limits were deemed excluded, the class action would have to be decertified, although individual claims could be pursued to try to gain a recovery, including potential bad faith insurance claims again Allied.

DN 284, pp. 2-6, 9.

23. On April 27, 2020, the Judge certified the coverage issues for interlocutory review. She recognized the fairness hearing needed for final approval or disapproval of the class settlement cannot take place until this Court resolves the coverage issues. DN 312. This interlocutory appeal followed.

## IV. ARGUMENT SUMMARY

The District Judge should be affirmed. First, her estoppel decision is based on the controlling case, *Safeco v. Ellinghouse,* 223 Mont. 239, 775 P.2d 217 (1986). It has been on the books for over three decades. The equitable principles adopted in the case are recognized by most American jurisdictions.

Second, the District Judge properly held the "loss" definition in its policy does not exclude coverage of the types of damages Rolan and the class will receive. It only excludes contractual damages for "benefits." Rolan and the class, however,

have a right to recover consequential damages based on both their contractual and extra-contractual claims which are not excluded by the "loss" provision.

The District Judge properly chose not to address Allied's "related-claims" defense on the merits. She had already ruled Allied was estopped from raising that defense and therefore, there was no need to address the merits. Since there is no ruling below on the merits, there is no basis for this Court to hear Allied's arguments. Allied should be limited to challenging the Judge's estoppel ruling, since it is the only ruling on the summary judgment motion.

## V. ARGUMENT

Since Allied's "related-claims" coverage defense is not properly before this Court, Rolan begins by discussing the major issue, estoppel.

### A. THE JUDGE PROPERLY FOLLOWED *ELLINGHOUSE.*

The Judge properly determined *Ellinghouse, supra,* controls.

### B. THE MAJORITY OF JURISDICTIONS FOLLOW A SIMILAR APPROACH.

In *Safeco v. Ellinghouse, supra,* this Court recognized it was "adopt[ing] the general rule in an insurance estoppel case as set forth in 14 *Couch, Insurance 2d*, Sec. 51.85 (2d ed. 1982) as follows:

> Where an insurer, without reservation and with actual or presumed knowledge assumes the exclusive control of the defense of claims against the insured, it cannot thereafter withdraw and deny liability under the policy on the ground of noncoverage, prejudice to the insured by virtue of the insurer's

> assumption of the defense being, in this situation, conclusively presumed… The loss of the right of the insured to control and manage the case is in itself prejudicial."

*Id.* at 220-221. This Court also observed that *Couch*, *supra,* is consistent with Montana public policy that insurers have a legal 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 (14), MCA. *Id*. This duty also existed under common law, which recognizes insurers are fiduciaries of their insured in this type of situation. *See e.g., Gibson v. Western Fire Ins. Co*., 210 Mont. 267, 682 P.2d 725, 730 (1984).

The American Bar Association, Tort and Insurance Section, recognizes the equitable principles employed in *Ellinghouse* are the majority view. Its research and conclusions are set forth in Leitner, *Insurance Coverage Litigation*, Chapter 8. *See* App. 5 hereto. As it states:

> An insurer may lose the right to rely on any defense to coverage which is not asserted in the reservation-of-rights letter, either by "waiving" that defense or by being "estopped" to deny coverage.

Leitner, *supra* at §8.21, p. 8-38. The insurer *will* be estopped if its RoR letter is inadequate and causes prejudice:

> Under the doctrine of estoppel, the insurer will not be permitted to disclaim coverage if the insured has been prejudiced by the insurer's actions.

*Id.* at §8.22, p. 8-40. Furthermore, estoppel applies even if it increases the coverage provided in the policy:

> The insurer will be estopped from disclaiming coverage or withdrawing its defense, *even if no coverage existed*, if it had undertaken the defense of a case without asserting defenses or reserving its rights to do so, because the, insured had been prejudiced by losing its right to control its own defense.

*Id.* (emphasis added).

Case law from other jurisdictions supports *Ellinghouse*:

> A widely recognized exception to the general estoppel rule is that when an insurance company assumes the defense of an action against its insured, without reservation of rights, and with knowledge, actual or presumed, of facts which would have permitted it to deny coverage, it may be estopped from subsequently raising the defense of non-coverage. *See e.g., Pennsylvania Nat. v. Kitty Hawk Airways, supra; City of Carter Lake v. Aetna Cas. And Sur., supra; Sauer v. Home Indem. Co.,* 841 P.2d 176 (Alaska 1992); *American General v. Progressive Cas.,* 110 N.M. 741, 799 P.2d 1113 (1990); *American Home Assur. V. Ozburn-Hessey*, 817 S.W.2d 672 (Tenn. 1991); *Stonewall Ins. v. Palos Verdes Estates*, 7 Cal.App.4th 309, 9 Cal.Rptr.2d 663 (1992); *Doe v. Illinois St. Med. Inter-Insurance*, 234 Ill.App.3d 129, 174 Ill. Dec. 899, 599 N.E.2d 983 (1992); *Admiral Ins. v. Columbia Ins.,* 194 Mich. App. 300, 486 N.W.2d 351 (1992); *Farmers Texas County Ins. Co. v. Wilkinson*, 601 S.W.2d 520 (Tex. Civ. App. 1980).

*First United Bank of Bellevue v. First American Title Ins. Co*., 242 Neb. 640, 496 N.W.2d 474, 480 (1993). *See also Federal Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563 (7 Cir.1997); *Hoover v. Maxum Indem. Co*., 730 S.E.2d 413 (Ga.2012); *Admiral Ins. Co. v. Little Big Inch Pipeline Co*., 523 F.Supp.2d 524, 543 (W. D. Tex. 2007). *Ins. Co. of NA v. Travelers Ins. Co*., 692 N.E.2d 1028 (Ohio, 1997);

*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.

## D. ESTOPPEL WAS MERITED UNDER THE UNDISPUTED FACTS.

Boiled down, estoppel applies when: (1) the insurer has failed to provide an RoR letter that adequately alerts the insured that coverage is being denied; and (2) the insurer's assumption of the defense and late denial of coverage prejudices the insured. *See* authorities, *supra.* The undisputable material evidence shows both circumstances exist here.

**1. Allied's 2010 RoR was inadequate**. The RoR letter is a "critical" document. Leitner, *supra* at §8.9. As 12 *New Appleman on Insurance* § 149.02[2][a] explains:

> "Although a reservation of rights may protect an insurer's interests, it also is intended to benefit the policyholder by alerting the policyholder to the potential that coverage may be inapplicable for a loss; that conflicts may exist as between the policyholder and the insurer; and that the policyholder should take steps necessary to protect its potentially uninsured interests."

"It is not sufficient just to cite to the pertinent policy provisions without explanation. To the extent feasible, the letter should not only set forth the potential coverage defenses but also explain why they apply. "The insurer must avoid ambiguity, since any ambiguity in the reservation of rights will be resolved against the insurer." Leitner, *supra* at §8.9, p. 8-15.

Judged against these standards, Allied's 2010 RoR letter was clearly inadequate. The letter does not even mention the "related-claims" provision—let

alone inform NW it excludes the $3,000,000 aggregate coverage. It does not mention "class claims" at all—let alone explain they are excluded.

Rather, Sappington's letter expressly states that given the "allegations" in the complaint, the "MCEO policy provides … a maximum aggregate limit of liability of $3,000,000 …." It later indicates the aggregate limit applies subject to reservations not applicable to this appeal. SOF No. 3, *supra*. Small wonder that NW's two experienced coverage attorneys and Rolan's attorney understood all coverages applied to the claims, including the $3,000,000 aggregate limit.

Allied compounded its mistake three years later in 2013. This Court had affirmed certification and liability in *Rolan II, supra.* New West retained a coverage attorney, Ian McIntosh. Mr. McIntosh wrote Mr. Sappington, requesting he verify "there is coverage under the MCEO policy, unless NW committed willful misconduct …. Please contact me to confirm [under your duty to promptly and fully disclose] …UTPA at §33-18-201(2)." The evidence indicates Sappington and Allied either confirmed NW's understanding or failed to answer at all. *See* SOF 5, 12. This evidence either re-enforces the District Judge's decision to apply estoppel or is a separate ground for estopping Allied.

Allied has chosen not to contest this evidence. It has not submitted any affidavits from Sappington or anyone else at Allied contending the ROR letter excluded the $3,000,000 coverage. It provides no admissible evidence explaining

why it waited until 2016 to announce it was denying both the single and aggregate coverages. By that time, NW had gone out of business. SOF 14-15.

**2. Both actual and presumed prejudice resulted**. "If the insured does not know the grounds on which the insurer may contest coverage, the insured is placed at a disadvantage because it loses the opportunity to investigate and prepare a defense on its own." *Desert Ridge, supra* at 967. Indeed, without knowledge of the bases upon which the insurer might dispute coverage, "the insured has no reason to act to protect its rights because it is unaware that a conflict of interest exists between itself and the insurer." *Magnum Foods, Inc. v. Cont'l. Cas. Co*., 36 F.3d 1491, 1498 (10th Cir. 1994). Thus, "[t]he general rule precluding an insurer from raising new grounds contesting coverage in a subsequent action is justified in th[is] … context." *Id.* … "The insurer is in a unique position to know the scope of coverage and exclusions in its policies and the duty to notify [the insured] is not onerous." *Harleysville, supra* at 297-298.

As recognized in *Ellinghouse,* "of necessity prejudice must be 'conclusively presumed'" when the litigation has proceeded for an appreciable length of time before the insurer denies coverage. "The course cannot be rerun, no amount of evidence will prove what might have occurred if a different route had been taken." *Id.* at 221. This conclusive presumption has been applied for delays far shorter

than the six years, here. *E.g., Ellinghouse, supra* and *Transamerica Ins. Group v. Chubb & Son, Inc.,* 554 P.2d 1080 (Wash. App. 1976) (relied on in *Ellinghouse*).

Even if prejudice were not conclusively presumed, the only logical conclusion is that NW was clearly prejudiced by six years of delay. Throughout this period, Allied had a conflict of interest by misleading NW into believing full coverage existed. New West had "no reason to act to protect its rights because it [was] unaware that a conflict of interest exist[ed] between itself and the insurer." *Magnum Foods, supra.*

Had NW known Allied was going to deny coverages, it had other options besides long and expensive litigation. Ultimately, this litigation cost NW in the neighborhood of a third of a million dollars ($50,000 in litigation costs; reductions for additional defense costs from coverage; another $250,000 to settle and NW's own attorney fees and costs). It could have settled with Rolan individually for far less at the time.

"Where there are issues raised by the insurer's reservation of rights, the parties start from the common understanding that there is some coverage; and thus, are usually inclined to work on their differences." Leitner, *supra* at §8.9, p. 8-14. Both NW and Rolan were deprived of this option. Had Allied timely notified the litigants at the commencement of suit that it was challenging coverages, the parties

would have "work[ed] on their differences," rather than engaging in expensive, complex litigation for a decade and still counting.

From the outset, NW faced a significant probability of a multi-million-dollar class action judgment. If Allied had informed NW it was challenging coverages, a declaratory judgment action would have been filed. If NW did not file one, Rolan certainly would have as there is no use in engaging in years of class action litigation if there is not enough money to pay the class' losses. If the declaratory judgment action went against them, both NW and Rolan would have been forced to settle, since the flame would not be worth the candle (Rolan had no duty to sacrifice her personal interests until the class was certified which, at the earliest, occurred in 2012.). One thing is sure, this litigation would be long over by now.

In summary, both parties were prejudiced. Both lost their constitutional right to the speedy administration of justice guaranteed under Art. II, §16 of our Constitution. That guarantee, obviously, exists to prevent unfair prejudice. "[T]he maxim, 'justice delayed is justice denied' is particularly applicable here." *State ex. rel. Fitzgerald v. Dist. Court*, 217 Mont. 106, 703 P.2d 148, 153, (1985). The administration of justice was also hampered since Judge Seeley's Court expended considerable resources and time which otherwise would not have been necessary.

## E. ALLIED'S ADDITIONAL CONTENTIONS LACK MERIT.

In addition to the contentions discussed above, Allied makes the following arguments.

**1. Allied's RoR letter was not adequate.** As shown above, Allied's contention its RoR letter was adequate lacks merit.

**2. Allied's assumption of the defense does not let it off the hook as it is the reason prejudice occurred.** For the most part, the cases Allied cites do not support its contention. They do not hold that *in this situation* assumption of the defense lets the insurer off the hook on estoppel. If they were read to indicate this, they would be contradicting the extensive body of law developed in American jurisdictions, including Montana. As this law shows, it is the assumption of the defense without revealing coverage defenses which causes the prejudice and requires application of estoppel. A conflict of interest is created which potentially is as destructive as underfunding the defense which occurred in *In Re: Rules of Professional Conduct*, *supra.*

Only *Draggin' Y Cattle Co. v. Junkermier, et. al.,* 2019 MT 97, discusses the RoR letter in any detail, but not in the context of Rolan's case. To the contrary, in *Draggin' Y,* the insured never "challenged the reservation-of-rights letter or asked for confirmation of $2 million in coverage under the policy." *Id.* at ¶14. Moreover, the insurer never pulled coverage. It admitted that if a declaratory

judgment action were filed, it would be limited to the defenses set forth in its RoR letter. *Id*. at ¶31.

**3. Allied's contention the UTPA is not relevant.** Whether or not the UTPA has a separate enforcement scheme, it still is the public policy of this state which is relevant to the policies for applying estoppel. This Court has used the public policies and duties in the UTPA to shape equitable rules in other contexts where insurers were engaging in conduct prejudicial to their insureds. In *Home Ins. Co. v. Pinsky Brother, Inc*., 160 Mont. 219, 500 P.2d 945, 949 (1972), this Court held the UTPA is relevant when applying the equitable concept of subrogation. To allow an insurer to subrogate against its insured would "violate basic equity principles [and] . . . sound public policy," as recognized in the UTPA. The same public policy consideration is applicable here as recognized in *Ellinghouse*.

**4. Allied's contention it had no duty to disclose its coverage denial until indemnity had been established.** This contention defies common sense and coverage estoppel law. Virtually, if not literally, every decision applying estoppel in this situation involves insurers who have prejudiced their insureds by untimely revealing coverage defenses before a judgment on liability. It is the time when prejudice occurs that forms the basis for estoppel—not when the final judgment and duty to indemnify occurs. Moreover, Allied did not even reveal its defenses in

2013 when its duty to indemnify first arose and it was asked to confirm coverage by attorney McIntosh.

**5. Allied's contention Rolan failed to prove the elements of estoppel.**

As previously discussed, this Court rejected the exact same contention in *Ellinghouse.* Moreover, the case law elsewhere indicates the six-element approach is not particularly relevant in these precise circumstances. Regardless of the approach taken, however, the results are the same: Allied is still estopped.

*Turner v. Wells Fargo Bank*, 2012 MT 213 sets forth the six elements of estoppel. First, there must be representations or silence by the insurer which "amount[s] to a representation or a concealment of a material fact." *Id*. at ¶30. Here, Allied engaged in both representations and silence "which amounts to a representation or a concealment of [the] material fact." If Allied is to be believed, its position was no coverage existed from the beginning, which is contrary to what it stated in its RoR letter. Thus, the facts satisfy the first element.

The second element requires the facts must be known to the insurer during the period of its misrepresentation or silence or "at least the circumstances must be such that knowledge of them is necessarily imputed to" the insurer. Here, Allied is contending there was no coverage, but by its misrepresentations and silence in the RoR letter, it misled NW for over six years. This alone, satisfies this element. Moreover, Allied wrote the policy; its senior claims analyst, attorney Sappington,

interpreted it and wrote the ten-page RoR letter. The letter must be clear and comprehensive under the UTPA and/or widely recognized insurance law. It was not. Nor was Allied's response to Mr. McIntosh, three years later. If the true facts were not known by Allied at the time, they are certainly imputed to it. Thus, the facts satisfy the second element.

The third element is that the truth concerning the facts must be "unknown to the other party claiming the benefit of estoppel at the time it was acted upon by him." Clearly, NW did not know coverage was being denied. If it had, it certainly would not have asked Allied to affirm full coverage in 2013. Nor would it have represented to the Judge in 2016 that it had "insurance with an aggregate limit of $3,000,000." As NW stated by affidavit in 2016: "Allied now claims … there is no indemnity under the policy …. This information is new to New West, since it had previously understood that there was coverage for claims other than intentional acts." Coverage counsel Zadick, as well, had concluded full coverage existed, as he explained in his letter to Allied's lawyer in 2017. *See* SOFs 5, 10, 12, 15. Thus, the third element is satisfied.

The fourth element requires the insurer's conduct be done with at least the expectation it will be acted upon by the insured or "under the circumstances both natural and probable that it will so be acted upon." Here, NW had to know at the beginning of the lawsuit that class damages would run into the millions if Rolan

were successful. Rolan's claim alone was over $100,000. New West had been using improper claims practices for years and insured approximately 100,000 people. It is "both natural and probable" that a business in these circumstances "will act upon" its insurer's representations in the RoR letter that $3,000,000 of coverage protected its personal assets. If it had known Allied was going to challenge the coverages, it had other options to protect itself. *See* discussion, *supra* at 24-25. Thus, the fourth element is satisfied.

The fifth element is the insured "must be led to act upon it." As previously discussed, both NW and Rolan, as rational parties, would have done things quite differently if Allied had not misled them. *See* discussion, *supra* at 24-26. The fifth element is satisfied.

The final element is there must be prejudice. Under *Ellinghouse* and related authorities, prejudice is conclusively presumed where, as here, Allied had misled both NW and Rolan for over six years. Nevertheless, it defies reason to conclude NW and Rolan would have taken the present course for over a decade, had they known Allied was going to yank the coverages. Therefore, the sixth and final element is established and the District Judge had a right to estop Allied.

Incorporating the same insurance rules into the four-element promissory estoppel approach also would lead to the same conclusion, if it were applicable.

In summary, all roads lead to the same place: Allied is estopped.

## F. THE "LOSS" PROVISION DOES NOT EXCLUDE CLASS DAMAGES.

In a separate Order, the District Judge recognized that estoppel prevented Allied from raising the "loss" defense because it was not raised in its RoR letter. *See* Order, Allied's Brief, App. 2. Nevertheless, she went on to rule that Allied's "loss" provision did not exclude coverage. Rolan, therefore, addresses that decision below.

Before discussing the Judge's Order, it appears Allied is taking inconsistent positions. On the one hand, it asserts on appeal that the "loss" exclusion precludes all coverages for class damages. On the other hand, it has tendered the $1,000,000 single-claim limit into the fund created for the class' recovery. Both single and aggregate limits would be excluded if the "loss" exclusion applied. Parties are estopped from taking inconsistent positions in a lawsuit. *See e.g*., *Plouffe v. Burlington Northern, Inc.*, 224 Mont. 467, 730 P.2d 1148,1152-1153 (1987).

Turning to the Judge's Order, Allied's position lacks merit at any rate. The District Judge recognized that Allied's "loss" provision only excluded "fees, amounts, benefits or coverage owed under any contract." She held the class' monetary recovery was either extracontractual or did not fall within the excluded types of contract damages. As stated in the Judge's Certification Order: "The Class is eligible for consequential and compensatory damages caused by New West's

violation of made-whole laws, either under a tort theory or a contract theory for breach of contract." SOF 22.

Allied's argument incorrectly equates the class recovery to the contractual "benefits" excluded by the "loss" provision. They are, however, two separate things. The class recovery is the face value of the bills that were paid by the tortfeasors' liability carriers, plus interest thereon. This amount is due because NW's tort violation of the made-whole laws resulted in less liability insurance available to the insured for other types of damages—including general damages such as pain and suffering and special damages such as lost wages. This is different from and much higher than contractual "benefits" due under the NW Health insurance policy, which equal only the value of medical bills after deductions for preferred provider rates, co-pays and deductibles.

"A contract of insurance will be construed strictly against the insurer and liberally in favor of the insured." *Alpha Real Estate Development, Inc. v. Aetna Life & Cas. Co.*, 174 Mont. 301, 570 P.2d 585, 587 (1977). "If the terms … are ambiguous, obscure, or open to different constructions, the construction most favorable to the insured or other beneficiary must prevail, particularly if an ambiguous provision attempts to exclude the liability of the insurer." *Pablo v. Moore*, 2000 MT 48, ¶ 17. "The test is not what the insurer intended the words of the policy to mean but what a reasonable person in the position of an insured

would understand them to mean.… If an insurer desires to limit its coverage in certain areas, it should employ language clearly and precisely outlining such restrictions." *Alpha*, *supra* at 587-588.

All of these rules point to the same conclusion. The class settlement pays out what class members lost from their third-party tort recoveries which would have been paid out for general and special damages. These are not "amounts due under [a] contract," as excluded in the policy. Allied's attempt to fit the class losses into this benefit exclusion is at least "open to different constructions." Therefore, "the construction most favorable to the insured or other beneficiary must prevail." *Pablo, supra.*

The cases Allied relies upon are different. Some support Rolan. *Health Net, Inc. v. RLI Ins. Co*., 141 Cal.Rptr.3d 649 (Cal. App. 2012) is distinguishable. It is an ERISA case where the primary monetary recovery consists of payment of contract "benefits." ERISA only allows contract recoveries. Tort recoveries and damages are not allowed under ERISA. *Health Net, Inc*. is favorable since it recognizes contract damages--different from benefits--would not be excluded from coverage. *Id.* at 667.

In *American Medical Sec. v. Executive Risk Specialty*, 393 F.Supp.2d 693 (E. D. Wis. 2005), the Court agreed part of the claimed losses were excluded because they constituted "benefits … owed under any contract." However, it also

recognized other types of losses would be covered such as the cost of medical care class members incurred because of the "breach or other wrong." *Id.* at 708 (i.e., consequential damages). The same applies to the *Rolan* class losses which are not benefits due under a contract, but are defined as the amount class members lost from their tort recoveries because NW violated their statutory made-whole rights—as well as committing violations of §33-18-201, *supra.*

There are cases which refute Allied's position. In *Young Men's Christian Ass'n. of Plattsburgh v. Phila. Indem. Ins. Co.* (N.D. N.Y. 2018), the Court recognized that non-contract damages are not excluded. *Id.* at 4-5, 8-9. A copy of this case is provided as Appendix 6. Moreover, "consequential damages" flowing from a breach of contract are not excluded if defendant should have anticipated them. *Id.* at 12. Coverage also exists if the damages were caused by negligent benefits administration—rather than violation of contract. The Court did not allow damages for bad faith insurance practices, but only because New York "does not recognize … an independent cause of action for bad faith denial of insurance coverage." *Id*. at 11. Virtually all of these circumstances exist here.

In summary, there are few cases interpreting this type of "loss" exclusion. There are none in Montana. Those that do exist are factually and legally different in some respects, but in other respects, support coverage of the Rolan class losses.

## G. "RELATED CLAIMS"

The interpretation of "related-claims" provisions is one of first impression in Montana. As discussed above, there is no need to address it because it was not addressed below and because a favorable resolution on estoppel renders it moot. If, however, this Court decides to address the merits, this case is distinguishable from all other cases we have located on the issue.

The circumstances are important because whether or not a "related-claims" exclusion applies depends on the facts of the particular case. *Lexington Ins. Co. v. Lexington Healthcare Grp., Inc*., 84 A.3d 1167, 1176 (Conn. 2014). "Context is often central to the way in which policy language is applied; the same language may be found both ambiguous and unambiguous as applied to different facts." *Highwoods Properties, Inc. v. Executive Risk Indem., Inc.,* 407 F.3d 917, 923 (8th Cir. 2005).

Interpreting the Allied policy in the context of this case is important because the circumstances are unique. They include the considering of the facts justifying estoppel. This is because, "It is a familiar principle of contract law that the parties' contemporaneous construction of an agreement, before it has become the subject of a dispute, is entitled to great weight in its interpretation'." *Saul Subsidiary II Limited v. Barram,* 189 F.3d 1324,1326 (Fed. Cir. 1999).

Here, we know Allied's "contemporaneous construction of [the] agreement, before it ha[d] become the subject of [this] dispute." That construction was made by Mr. Sappington is 2010. He compared the policy with claims in the complaint and told NW, in writing, how he constructed the policy in relationship to the claims—including the class claims. He, obviously, did not think the "related-claims" exclusion was relevant or applied because he said nothing about it in his RoR letter. At the same time, he stated more than once that the aggregate policy limit applied.

Allied presented no evidence from Mr. Sappington, including what his contemporaneous thoughts were. The letter he wrote speaks for itself. By his silence about the "related-claims" exclusion; class claims; and affirmance of aggregate coverage, he tells NW there is full coverage when the claims are compared to the policy. Whether he believed that way or he just wrote an ambiguous letter is not relevant, since either way, an ambiguous letter must be construed in favor of coverage under well-known rules of construction. Further, if Mr. Sappington believed the "related-claims" exclusion did exclude aggregate coverage, then he violated the insurer's 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*. It is Allied's error and not NW's,

which had a right to rely on the representations of its insurer and plan its course accordingly.

Contrary to Allied's contention, the relevance and meaning of the related-claims exclusion is not so clear. "The contract as a whole must be considered [and] doubts must be resolved in favor of the insured." *Aleksich v. Mut. Benefit Health & Accident Ass'n.,* 118 Mont. 223, 232 (1945).

Here, the format and words used in Allied's 29-page contract at least obscures the meaning and importance of the "related-claims" exclusion. For one thing, it does not list the "related-claims" exclusion in the "EXCLUSION" portion of the policy, although that is where the reasonable insurance consumer would look. Nor is it mentioned in the two-page "ENDORSEMENT" at the beginning of the policy, although that is where NW is told it is paying for aggregate claims coverage protection which, to the reasonable consumer, at least, would expect the basic scope of its coverage to be outlined. The term shows up only once in the body of the policy in a "condition" limiting the policy period for coverage of claims at page 20.

Rather, the "related-claims" exclusion basically shows up as one of 24 "definitions" listed near the end of the policy at page 27. It reads:

> (Q) "Related Claims" means all Claims for Wrongful Acts based on, arising out of, resulting from, or in any way involving the same or related facts, circumstances, situations, transactions or events or the same or related series of facts, circumstances situations, transactions or events, whether related logically, causally or in any other way.

Other than the fact that the boilerplate language is mind boggling, the definition, if read literally, nullifies the aggregate claims coverage. It makes all claims related because it states there is a relationship, "whether related logically, causally or in any other way." There is a relationship between every claim made against NW by virtue that it is the defendant. There is a relationship because all claims allege NW did something wrong causing damages. There is a relationship among all types of errors NW might make when adjusting claims, because "adjusting claims" is common to all such claims. All claims are related even if they involve different mistakes at different times, under different circumstances, with different people and with different amounts and types of damages. A contract provision which gives a party this much unfettered discretion to nullify coverages is unenforceable. *See e.g., Moua v. Optum Servs., Inc*., 320 F.Supp.3d 1109, 1113 (C.D. Cal. 2018).

Finally, it would not have been difficult for Allied to remove any ambiguities in either its policy or its RoR letter. All it would have to expressly state in either of them was that "class claims are considered 'related claims,' which are not part of aggregate coverage," or words to that effect. The insured would then be on clear notice on what course it needed to take to protect its assets.

In summary, Allied's policy "related-claims" provision is obscure, ambiguous, confusing and unenforceable under the circumstances of this case for a variety of reasons. If Sappington truly believed otherwise in 2010, he could and should have so informed NW and this case would have gone differently. In fact, under the UTPA, he had a duty to clearly state this. Truth be known, he probably did not interpret the policy to exclude class claims as related claims. A logical inference is that many years later, someone at Allied reviewed the case and interpreted "related claims" in a different way to deny coverage. (A similar scenario played out in *Ellinghouse, supra*, where long after suit was filed, someone reviewed the file and discovered a coverage defense.)

## CONCLUSION

The undisputed facts are adequate to apply estoppel either under the approach in *Ellinghouse* or the six-element approach in *Turner, supra*. The District Judge had discretion to apply estoppel because of this.

If estoppel applies, the issues addressing the merits are dicta. If, however, this Court decides to reach the merits, the defenses lack merit.

DATED this 6th day of November, 2020.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27, M. R. App. P., I hereby certify that this brief 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 10,000 words.

DATED this 6th day of November, 2020.

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## CERTIFICATE OF SERVICE

I, Erik B. Thueson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-06-2020:

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