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FILED

JAN 27 2020

ANGIE SPARKS, Clerk of District Court
By JREIJGERS Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

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

Plaintiffs,

v.

NEW WEST HEALTH SERVICES,
DARWIN SELECT INSURANCE
COMPANY and ALLIED WORLD
ASSURANCE COMPANY and
DARWIN NATIONAL ASSURANCE
COMPANY,

Defendants.

Cause No. CDV-2010-91

**ORDER ON PRELIMINARY
SETTLEMENT, RULE 23(b)(3)
CERTIFICATION, AND
REVISED CERTIFICATION**

On January 22, 2020, a hearing was held to consider the preliminary approval of a settlement between Dana Rolan, the Class Members (the Class), and New West Health Services (New West). Class counsel Erik Thueson appeared and represented Rolan and the Class. Robert C. Lukes and Gary Zadick appeared and represented New West Health Services. Martha

1 Sheehy appeared and represented Allied World Assurance Company. Based
2 upon documents and argument presented, and the documents contained in the
3 court file, the Court issues the following orders:

4 **PRELIMINARY SETTLEMENT**

5 **The Settlement**

6 The settling parties, Rolan, the Class and New West, have filed a
7 motion and two briefs in support of preliminary approval of a settlement.
8 Included within the briefs are the settlement agreements signed by the settling
9 parties and proposed orders.

10 The proposed settlement has the following basic terms:

- 11 1. New West will pay \$250,000 into court for the benefit of
12 the Class.
- 13 2. New West assigns all its rights against Allied World to
14 the Class.
- 15 3. The Class grants New West a covenant not to execute on
16 any claims covered by this class action and its settlement. The class will retain
17 individual claims not covered by the judgment and orders in this class action,
18 subject to a covenant not to execute against New West.
- 19 4. New West shall cooperate with Class counsel to identify
20 potential class members and provide Class counsel a copy of all relevant records
21 for the processing of claims and identifying class members.
- 22 5. The settling parties consent to class certification under
23 Rule 23(b)(3) with appointment of Erik B. Thueson as Class counsel.
- 24 6. The Court shall issue a judgment that New West has
25 violated Montana's made-whole laws, entitling class members to tort damages

1 and/or consequential contract damages equal to the amount of money they
2 consequently lost from third-party tort recoveries.

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

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

10 9. Dana Rolan volunteered to be class representative a
11 decade ago and has received no compensation for her claims. She shall be paid
12 an incentive award of \$50,000 deducted from the \$250,000 New West is paying
13 into court.

14 10. The settlement incorporates by reference the details set
15 forth in the settling parties' motion and briefs for preliminary settlement
16 approval, including the supplemental brief filed on October 21, 2019.

17 **Preliminary Approval Requirements are Met**

18 Under Montana Rule of Civil Procedure 23(e), a class action may not
19 be compromised without approval of the Court and notice of the proposed
20 compromise shall be given to all members of the class in such manner as the
21 Court directs. The rule requires that a court approve a proposed class action

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1 settlement before it can be finalized. *In re: Mego Fin. Corp. Sec. Litig.*, 213 F.3d
2 454, 458 (9th Cir. 2000).¹

3 At this preliminary stage in the approval process, the Court
4 determines whether the proposed settlement is in the range of judicial approval.
5 The Ninth Circuit has ruled that courts should evaluate a proposed settlement
6 with reference to eight factors to determine whether a settlement is acceptable.

7 The pertinent factors are:

- 8 1. strength of Plaintiffs' case;
- 9 2. risk, expense, complexity, and likely duration of further
10 litigation;
- 11 3. amount offered in settlement;
- 12 4. the stage of the proceedings including status of
13 discovery;
- 14 5. experience and views of counsel;
- 15 6. the reaction of the class members to the proposed
16 settlement; and²
- 17 7. the absence of collusion.

18 *See Torrasi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (quoting
19 *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625
20 (9th Cir. 1982)). Each of these factors are evaluated below.

21 ////

22 ¹ Federal law interpreting and applying Fed. R. Civ. P. 23 assist in interpreting and applying
23 similar Mont. R. Civ. P. 23. *See e.g., MacDonald v. Washington*, 261 Mont. 392, 400, 862 P.2d 1150,
24 1155 (1993). The Montana Supreme Court has held that federal authority regarding Rule 23 is
instructive. *Sieglock v. Burlington N. Santa Fe Ry. Co.*, 2003 MT 355, ¶ 10, 319 Mont. 8, 81 P.3d 495.

25 ² This factor (opposition to the settlement) is appropriate for review at the final fairness hearing
only. It cannot be measured yet because notice has not yet been issued.

1 **1. Strength of Plaintiffs' Case**

2 Over the past decade, the class has prevailed on virtually all
3 substantive issues. The settlement provides full relief allowed through a class
4 action. New West, which is essentially judgment-proof, is required to contribute
5 \$250,000.

6 In addition, the class has prevailed on insurance issues related to
7 coverage through Defendant Allied. Class counsel informs the Court he will
8 move for certification of the insurance rulings for interlocutory review by the
9 Montana Supreme Court.

10 **2. Risks**

11 As set forth above, all substantive issues have been resolved in favor
12 of the class. Insurance issues remain to be fully resolved. If the Montana
13 Supreme Court reverses this Court's decisions that insurance coverage exists, the
14 Class members will retain their individual claims, even though the class action
15 would need to be decertified due to the lack of a common fund. The aim is to
16 swiftly resolve the case.

17 **3. Amount Offered in Settlement**

18 The settlement includes virtually all funds available through New
19 West which went out of business during this lawsuit.

20 **4. Stage of Proceedings**

21 Final determination on insurance coverage issues must be made and
22 procedures have been established depending on the outcome. Class
23 administration and other procedures are set forth in the revised Certification
24 Order issued by the Court.

25 /////

1 **5. Views of Counsel**

2 Counsel have been negotiating at arms-length for some time to reach a
3 settlement which gives eligible class members a reasonable chance to obtain
4 recovery through this class action.

5 **6. The Absence of Collusion**

6 The Court is aware of the independent efforts of Class counsel to
7 obtain a recovery over the past decade. The settlement provides full
8 compensation to the Class if funds are available. If less than adequate funds are
9 available, the Class members can opt out or share pro rata in the funds available.
10 The settlement provides the judgment on liability shall remain should it be
11 necessary to disband the Class for lack of funds.

12 **7. Reaction of Class Members to the Settlement**

13 The Court makes a decision on preliminary approval without
14 notification to the Class. After preliminary approval, the settlement contemplates
15 two notices which will be approved subject to the requirements of Montana Rule
16 of Civil Procedure 23.

17 The first notice will identify persons who potentially qualify for a
18 recovery. It shall be sent soon after the Court provides preliminary approval of
19 the settlement.

20 The second notice will be submitted for court approval and sent to
21 identified class members after the insurance issues are finally resolved. This
22 notice will notify identified class members of their options, depending on the
23 final judgment pertaining to the insurance issues.

24 In summary, the requirements for preliminary approval have been
25 met. The settlement currently will provide \$250,000 to pay an incentive to

1 Plaintiff Rolan and for notices to the class. As a practical matter, ongoing
2 litigation carries the risk New West will not have the financial ability to pay
3 \$250,000 and insurance proceeds will decrease because defense costs are being
4 subtracted from the coverages. Therefore, the settlement is designed to provide
5 the Class with the best opportunity to obtain recoveries under the circumstances.

6 Therefore, **IT IS ORDERED** that this settlement is preliminarily
7 approved.

8 **Future Events Contemplated by the Settlement**

9 The settlement addresses future proceedings and contingencies:

10 1. It provides the Court will issue a revised Certification
11 Order to govern future proceedings.

12 2. Notices will be sent to first identify class members and
13 second, to advise them of their options after final determination of insurance
14 issues.

15 3. Initial administration costs shall be covered by the
16 \$250,000 deposited into Court by New West. Subsequent expenses will depend
17 upon the resolution of the insurance issues.

18 The settling parties agree that Class counsel may retain a professional
19 administrator to send out the notices and collect/organize the responses, subject
20 to Court approval.

21 **REVISED RULE 23(b)(3) CERTIFICATION**

22 In order to carry out the settlement, Class counsel seeks class
23 certification under Montana Rule of Civil Procedure 23(b)(3). This revises the
24 current certification to allow for notice to class members of the status of the class
25 action, provides for the maximum recovery allowed under class action law and

1 better protects due process rights. The requirements for converting the Class are
2 set forth below.

3 **Stipulated Class Definition**

4 The parties have stipulated that the Class in the above-captioned
5 matter should be redefined to be a Rule 23(b)(3) Class and shall include the
6 following individuals:

7 1. All persons insured by New West at any time from
8 January 26, 2002 (eight years preceding the filing of this lawsuit) through the
9 date that this Court will ultimately enter judgment on the merits, excluding those
10 who participated in a Medicare Advantage program or in an employer self-
11 funded plan that was merely administered by New West (i.e., premiums were not
12 paid by employer to New West to pay for medical bills);

13 2. Who incurred medical bills for covered services due to
14 the negligence or wrongdoing of a third-party tortfeasor or tortfeasors;

15 3. Whose medical bills for covered services were not paid
16 by New West, but were paid by the tortfeasors or insurance covering damages
17 caused by the tortfeasors; and

18 4. Who were not provided a valid “made-whole”
19 determination by New West.

20 **Rule 23(b)(3) Requirements**

21 The Court previously approved a Rule 23(b)(2) class action.
22 Subsequent events and discovery have strengthened the evidence in favor of
23 numerosity. Rule 23(b)(3) adds two additional requirements.

24 1. **New Evidence Concerning Numerosity.** Under Rule
25 23(a)(1), the Class must demonstrate that the number of putative class members

1 justifies a class action. As explained in *Rolan v. New West*, 371 MT 228, 307
2 P.3d 291 (2013), the identities of most class member eligible for a remedy will
3 not appear in New West’s records. However, New West had provided a list of
4 approximately 700 people, many who will qualify for recovery. Therefore,
5 several hundred people will be eligible for a recovery.

6 **2. Additional Rule 23(b)(3) Requirement of**
7 **Predominance is Satisfied.** The predominance requirement in Rule 23(b)(3) is
8 satisfied if “there is a common nucleus of operative facts” and these facts
9 represent a significant aspect of a case that can be resolved for all class members
10 in a single adjudication. *Heartland Commc’ns v. Sprint Corp.*, 161 F.R.D. 111,
11 117 (D. Kan. 1995). The common issues do not have to be “dispositive of the
12 entire litigation.” *Chandler v. S.W. Jeep-Eagle*, 162 F.R.D. 302, 310 (N.D. Ill.
13 1995).

14 Predominance only requires that the Court ascertain existence of a
15 group more bound by a mutual interest in the settlement of common questions
16 than it is divided by individual members’ interests in matters peculiar to them.
17 *Elliot v. ITT Corp.*, 150 F.R.D. 569, 577 (N.D. Ill. 1990).

18 If there are common issues of law or fact with respect to liability,
19 predominance exists even if there are individual questions relevant to damages.
20 *See Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 796 (10th Cir. 1970);
21 *Albertson’s Inc. v. Amalgamated Sugar Co.*, 62 F.R.D. 43, 52 (D. Utah 1973) (“It
22 is well settled that as long as liability can be established by common proof, a
23 class action will not be defeated by the individual nature of the damages.”),
24 *vacated and remanded on other grounds*, 503 F.2d 459 (10th Cir. 1974).

25 //

1 In *McDonald v. Washington*, 261 Mont. 392, 403, 862 P.2d 1150,
2 1157 (1993), the defendants argued that differences in individual damages made
3 certification impractical. The Montana Supreme Court found that “damages may
4 always differ for the members but the issue of damages is not dispositive.” It has
5 been commonly recognized that the necessity for calculation of damages on an
6 individual basis should not preclude Class determination when the common
7 issues, which determine liability predominate. *Id.*, at 403-04, 862 P.2d at 1157.

8 Here, New West joins this motion for approval of the Class definition
9 and the predominance factor is satisfied under *McDonald*. The predominant and
10 common issue is that New West’s systematic insurance practices violated
11 Montana’s made-whole law, entitling class members to a monetary recovery.

12 **3. Additional Rule 23(b)(3) Requirement of Superiority is**
13 **Satisfied.** The Court must also find the class action device is superior to
14 individual lawsuits for resolving the dispute. Rule 23(b)(3) lists four factors
15 relevant to deciding whether a class action is superior:

- 16 (A) The class members’ interests in individually controlling
17 the prosecution or defense of separate actions;
18 (B) The extent and nature of any litigation concerning the
19 controversy already begun by or against class members;
20 (C) The desirability or undesirability of concentrating the
21 litigation of the claims in the particular forum; and
22 (D) The likely difficulties in managing a class action.

23 Mont. R. Civ. P. 23(b)(3)(A)-(D).

24 This litigation spans a decade. The class members have not evinced
25 interest in controlling separate litigation. There is no other litigation currently
pending. There is no inherent undesirability in concentrating the litigation in this
forum.

1 Therefore, **IT IS ORDERED** that the motion for Rule 23(b)(3)
2 certification is granted.


3 **REVISED RULE 23 CERTIFICATION ORDER**

4 The course of the proceedings is governed by the Certification Order
5 which “may be altered or amended” depending on the circumstances. Mont. R.
6 Civ. P. 23(c)(1)(B). The last certification order was issued several years ago and,
7 obviously, things have changed. Therefore, to reflect the impact of the
8 settlement, a revised order will be issued.

9 **CONSIDERATION OF ATTORNEY FEES AND COSTS IS DEFERRED**

10 As previously ruled by this Court, attorney fees and costs owed class
11 counsel shall be deferred until additional evidence is available concerning the
12 identity of class members and the potential size of their claims.

13 DATED this 27 day of January 2020.

14
15 
16 KATHY SEELEY
17 District Court Judge

18 pc: Erik B. Thueson, PO Box 280, Helena MT 59624-0280
19 Robert Lukes, PO Box 7909, Missoula MT 59807-7909
20 Martha Sheehy, PO Box 584, Billings MT 59103-0584
21 Gary Zadick, PO Box 1746, Great Falls MT 59403
22 Randall Nelson/Thomas Bancroft, 2619 St. Johns Avenue, Suite E, Billings MT
23 59102

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