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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

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| DANA ROLAN, on her own behalf and on behalf of the class she represents,<br><br>Plaintiffs,<br><br>vs.<br><br>NEW WEST HEALTH SERVICES, DARWIN SELECT INSURANCE COMPANY and ALLIED WORLD ASSURANCE COMPANY and DARWIN NATIONAL ASSURANCE COMPANY,<br>Defendants. | Cause No. CDV-2010-91<br><br>Hon. Christopher Abbott<br><br>**ALLIED WORLD ASSURANCE COMPANY'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT UPON REMAND** |
| ALLIED WORLD ASSURANCE COMPANY,<br>Counterclaimant,<br><br>vs.<br><br>DANA ROLAN, on her own behalf and on behalf of the class she represents,<br>Counterdefendants. | |

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## INTRODUCTION

On appeal the Montana Supreme Court reversed this Court's holding that Allied World Assurance Company ("Allied") is estopped from asserting the $1 million "each Claim" limit of liability under the Managed Care Errors and Omissions Liability Policy ("MCEO"). *Rolan v. New West Health Services*, 2022 MT 1, ¶ 35, 407 Mont. 34, 407 Mont. 34 ("*Rolan III*"). The Supreme Court remanded to this Court, stating:

> Because the District Court did not reach the merits of the limit of liability issue and, on appeal, Rolan has not briefed the merits, we reverse and remand for consideration by the District Court as to whether this litigation presents a single claim governed by the $1,000,000 "each Claim" limit or multiple claims governed by the $3,000,000 aggregate limit.

*Id.* ¶ 28. The Supreme Court ordered remand for "further proceedings consistent" with the opinion, leaving one issue remaining. ¶ 37.

Allied now moves for summary judgment on the remaining issue of application of the "each claim" limit. The matter has been briefed by Allied and Rolan previously (See Rolan's Brief, Dkt. 192, pp. 12-16). Whether the "each claim" limit or the aggregate limit applies is a question of insurance contract interpretation for this Court to determine. *Parker v. Safeco Ins. Co. of. Amer.*, 2016 MT 173, ¶ 14, 384 Mont. 125, 376 P.3d 114.

## PROCEDURAL BACKGROUND

The procedural history of this case, filed in 2007, is much more complicated than the sole remaining legal issue. Most of the history does not involve Allied, which provided a defense to New West from the outset and was not named as a party to this litigation until 2018.

On November 16, 2007, Dana Rolan sustained serious injuries from an automobile accident resulting in $120,000 of immediate medical expenses. Rolan had health insurance through New West. *Rolan III*, ¶ 3. The tortfeasor's liability insurer (Unitrin), paid $100,000 of Rolan's medical expenses directly to her medical providers under its liability policy. New West denied coverage to Rolan because Unitrin had paid medical costs in advance. *Id.*

On January 26, 2010, Rolan filed a complaint against New West alleging individual and class claims for breach of contract, violation of made-whole rights, and unfair claims settlement practices under § 33-18-201, MCA. Rolan argued New West reduced her coverage by $100,000 in violation of its made-whole obligations. Rolan sought class certification based on New West's practice of failing to conduct a made-whole analysis and denying claims that were also covered by a liability insurer. New West tendered the defense to Allied. *Id.* at ¶ 4.

Allied acknowledged a duty to defend New West under the MCEO Policy.

On May 7, 2012, the District Court certified the class and held New West liable for monetary losses. On August 6, 2013, the Montana Supreme Court upheld the class certification in *Rolan v. New West Health Servs.*, 2013 MT 220, 371 Mont. 228, 307 P.3d 291 *(Rolan I*). *Rolan III,* ¶ 5.

In February 2018, Rolan amended the complaint to join Allied to the lawsuit regarding the limit of liability issue. Allied moved for partial summary judgment, alleging coverage was limited to the $1 million "each Claim" limit instead of the $3 million aggregate-claim limit because the class action constituted a single claim stemming from a single written notice, and all class claims would constitute "Related Claims" under the policy. New West and the Rolan filed a cross-motion for partial summary judgment for estoppel regarding enforcement of the "each Claim" limit of liability. On October 25, 2018, this Court declined to address Allied's argument for partial summary judgment regarding limited coverage for "each Claim," holding instead that "Allied is estopped from asserting a limitation of coverage to $1 million based on a single claim or related claims." *Rolan III*, ¶ 12.

On November 7, 2018, after almost nine years of litigation, Rolan and New West filed a joint motion for approval of proposed compromise settlement and notice to the class. The proposed agreement settled claims against New West and

assigned to Plaintiff New West's claims against Allied. The proposed settlement concluded that $3 million will be placed in a common fund for the benefit of the class and that the Court would issue a judgment that "New West has acted illegally and/or in breach of contract by reducing benefits without making a 'made-whole' analysis." Plaintiff then moved for entry of final judgment. *Rolan III,* ¶ 13.

This Court approved the proposed settlement agreement and issued a revised Certification Order. It further provided that the fairness hearing for the settlement must await final determination of the amount of the available insurance coverage and that if it was determined that no insurance exists to compensate the class, the class would be decertified, and class members would need to seek individual recoveries. *Rolan III*, ¶ 14. Upon Rolan's and New West's settlement, Allied made a voluntary payment of the single claim limit ($1,000,000 less defense costs), interpleading $738,600 with the District Court. (Dkt. 296, 297, 300, 310).

Allied moved for partial summary judgment alleging Allied had no indemnity obligation because the settlement was excluded by the "Loss" provision as defined in the MCEO Policy. Rolan and New West again argued Allied was estopped from raising a new policy defense. This Court found issues of fact and did not address the merits of equitable estoppel. However, it found that as a

matter of law, the "Loss" provision did not preclude Allied's indemnity obligation. *Rolan III,* ¶ 15.

On April 28, 2020, this Court certified the limit of liability and indemnification issues for interlocutory appeal and approved the settlement between New West and Rolan. *Rolan III,* ¶ 16. The Montana Supreme Court affirmed the holding that Allied's "Loss" provision does not preclude Allied's indemnity obligation. *Id.,* ¶ 36. As to the amount of indemnity coverage available, the Court reversed the holding that Allied is estopped from asserting the $1 million "each Claim" limit of liability under the MCEO Policy. *Id.*, ¶ 36.

The Supreme Court reversed and remanded for determination of a single issue: whether this litigation presents a single claim governed by the $1,000,000 "each Claim" limit or multiple claims governed by the $3,000,000 aggregate limit. *Id.,* ¶ 28. Resolution of this issue in favor of Allied ends the inquiry because Allied has already paid its "each claim" limit via interpleader.

## ARGUMENT

"Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law." *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.,* 2017 MT 246, ¶ 7, 398 Mont. 48, 403 P.3d 664, *quoting Stonehocker v.*

*Gulf Ins. Co.*, 2016 MT 78, ¶9, 383 Mont. 140, 368 P.3d 1187. The interpretation of an insurance contract is a question of law, and the question of the amount of the policy limit must be discerned from the language of the contract. *Id.* at ¶8

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

The MCEO Policy clearly states the Limits of Liability:

> **Item 3. Limit of Liability**:
>
> (a) $1,000,000 Underwriter's maximum Limit of Liability for each Claim and $3,000,000 in the Aggregate for all Claims.

Rolan asserts that the aggregate limit of $3,000,000 applies to this single lawsuit based on the class members' allegations. (Second Amended Complaint, ¶37). However, the unambiguous language of the MCEO Policy establishes that the "each claim" limit of $1,000,000 applies to this Claim.

### A. One Written Notice Gave Rise to a Single Claim.

The MCEO Policy is a "claims made and reported" policy with an "each claim" limit of $1,000,000 and an aggregate limit of $3,000,000. (Dkt. 187, Ex. 1, p. 1). The MCEO Policy provides in bold, capital letters on the front page:

> **THIS IS A CLAIMS MADE AND REPORTED POLICY WHICH APPLIES ONLY TO CLAIMS FIRST MADE DURING THE POLICY PERIOD.**

The MCEO was in effect from April 1, 2009 to April 1, 2010. (Dkt. 187, Ex. 1, p.

1). The only claim made against New West and reported to Allied during that policy period is contained in the Rolan Complaint.

Unlike "occurrence-based" policies, Allied's MCEO Policy only provides coverage for claims made and reported during the policy period. As held by the Montana Supreme Court in *ALPS Property & Cas. Ins. Co. v. Keller, Reynolds, Drake, Johnson & Gillespie*, "claims-made-and-reported polices are generally a more restrictive form of coverage as 'notice is the event that actually triggers coverage' and is generally required within the policy period or extended reporting period." 2021 MT 46, ¶ 15, 403 Mont. 638, 482 P.3d 638, *quoting Schleusner v. Cont'l Cas. Co.*, 102 F.Supp.3d 1148, 1152 (D. Mont. 2015). "The Insured's giving notice to the insurer triggers coverage." *Nat'l Union Fire Ins. Co. v. Willis*, 296 F.3d 336, 339 (5th Cir. 2002); *see also Pension Trust Fund for Operating Engrs. v. Federal Ins. Co.*, 307 F.3d 944, 956-57 (9th Cir. 2002). This type of policy was "specifically developed to limit the insurer's risk by placing a temporal limitation on coverage." *ALPS*, ¶ 15.

The MCEO Policy provides a simple and straightforward definition of "Claim," and the definition requires written notice of the claim:

> "**Claim**" means any written notice received by any **Insured** that a person or entity intends to hold an **Insured** responsible for a **Wrongful Act** which took place on or after the retroactive date listed in ITEM 7 of the Declarations**.** In clarification and not in limitation of the foregoing, such notice may be in the form of an arbitration, mediation, judicial, declaratory or injunctive proceeding. A **Claim** will be deemed to be made when such written notice is first received by any **Insured**. (Dkt. 187, Ex. 1, Policy Definitions, p. 26)

The lawsuit filed by Rolan against New West on January 26, 2010 is the "written notice" received by New West indicating that Rolan intend to hold New West responsible for a "wrongful act."

The Policy provides that a "written notice" constitutes a claim. New West's notice to Allied of Plaintiff's Complaint constitutes a single written notice and therefore constitutes a single claim.

### B. Even If Additional Class Members are Identified and Assert Claims, All Such Claims are "Related Claims" and Therefore Constitute a Single Claim.

#### *1. Any claims asserted by class members are "related claims."*

As noted above, under Allied's policy a "claim" requires a written notice. Rolan filed the Complaint against New West on or about January 26, 2010, during the policy period. (Dkt. 187, Ex. 1, p. 1). New West reported Plaintiff's Complaint to Allied during the policy period, which constitutes the written notice in compliance with the "claims made and reported" policy condition.

As shown above, the Complaint constitutes a single claim because it is a single written notice. In the alternative, even if additional class members are identified and make claims, any additional claims asserted in this lawsuit by Rolan and class members constitute a single claim by definition. As a condition of the MCEO Policy, "all **Related Claims**, whenever made, shall be deemed to be a single **Claim**." (Dkt. 187, Ex. 1, p. 20). The MCEO Policy defines "Related Claims":

> (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.

(Dkt. 187, Ex. 1, p. 27-28). Thus, under the MCEO Policy, all claims which are related by the same or a related series of facts, circumstances, situations, logic, or causation constitute a single claim, and are subject to the single claim limit.

Rolan contends that "the coverage for the class triggers the aggregate limit of $3,000,000." (Second Amended Complaint, ¶37). The assertion directly conflicts with the plain language of the MCEO Policy. Plaintiff's argument ignores not only the definition of "Claim" but also the definition of "Related Claims." Rolan's and the class members' allegations are related as a matter of

law. In this case, the class includes persons insured by New West and to whom New West denied payments based on failure to perform a "made whole" analysis. Dkt. 286; *Rolan I,* 2013 MT 220, ¶8. By definition of the class, any class member's claim must arise from New West's acts or omission in the denial of payments based on failure to perform a "made whole" analysis. Thus, Rolan's claims and any class members' claims must involve the same circumstance, situations, transactions or events. The claims must be related to the same circumstance – the alleged misapplication of the made-whole doctrine -- or the class members do not qualify to be in the class.

In a similar class action situation, the Ninth Circuit Court of Appeals held that an "interrelated wrongful act" provision limited coverage to a single limit. In *WFS Financial, Inc. v. Progressive Cas. Ins. Co., Inc.,* 2007 WL 1113347 (9th Cir. 2007), WFS Financial sought indemnity for two class actions suits made under two successive claims-made policies, both issued by Progressive. Each Progressive policy included the following limitation of liability:

> Claims based upon or arising out of the same Wrongful Act or Interrelated Wrongful Acts committed by one or more of the Insured Persons shall be considered a single Claim, and only one Retention and Limit of Liability shall be applicable. However, each such single Claim shall be deemed to be first made on the date the earliest of such Claims was first made, regardless of whether such date is before or during the Policy Period.

The Policies defined "interrelated wrongful acts" as wrongful acts "which have as a common nexus any fact, circumstance, situation, event, transaction or series of related facts, circumstances, situations, events or transactions." The Ninth Circuit held that a single limit (and single policy) applied. "Although the suits were filed by two different sets of plaintiffs in two different fora under two different legal theories, the common basis for those suits was the WFS business practice of permitting independent dealers to mark up WFS loans." *Id.* at *1. The Court held that the "harms alleged in the two class action suits are causally related" and thus treated the two class action suits as a single claim. *Id.*

In *WFS Financial*, all claims arising from WFS's business practice of permitting independent dealers to mark up WFS loans were interrelated and constituted a single claim. In this case, all claims arising from New West's alleged failure to perform a "made whole" analysis are related and constitute a single claim. *See also Bay Cities Paving & Grading Inc. v. Lawyers' Mut. Ins. Co.*, 855 P.2d 1263 (Cal. 1993).

The Seventh Circuit reached the same conclusion in *Gregory v. Home Ins. Co.*, 876 F.2d 602, 606 (7th Cir.1989). The Court addressed the issue of whether the various claims of the class members and the cross-claim of the brokerage company against an attorney were related such that the policy's single claim limit

applied. The issue arose in the context of a class action against a brokerage company that had marketed an investment package designed to provide tax benefits. When the IRS disallowed the deductions claimed by the buyers and assessed interest and penalties against them, the buyers sued the brokerage company and its attorney who had drafted several of the key documents for the investment program, as well as the tax and security opinion letter upon which the investors relied. The policy provided: "Two or more claims arising out of a single act, error, omission or personal injury or a series of related acts, errors, omissions or personal injuries shall be treated as a single claim." *Id*. at 604. The Seventh Circuit determined that the claims were related, and constituted a single claim. With respect to the claims in the class, the Court noted: "It is easy to decide that all the class claims arising from Mr. Gilbert's mistaken advice on the investment program's tax advantages are treated as a single claim under Paragraph IV of the policy, and therefore are subject to the [single claim] limit." *Id.* at 605.

Similarly, in *American Medical Security v. Executive Risk Ins. Co.,* 393 F.Supp.2d 693(E.D.Wis. 2005), a Wisconsin federal court also applied the "related" claims provision to a class action, finding a single claim. The Court reasoned:

> What all of the lawsuits, several of which have been brought as class actions, have in common is that they are all based on AMS's practice of underwriting renewals of purported "group" health insurance policies based on its assessment of the individual group participant's or beneficiary's health risk. They all flow from AMS' business decision to market and sell, as group health insurance, policies the premiums for which it increased on an individual basis according to its assessment of the health and claim history of the individual participant or beneficiary. In this sense, each case is related, both causally and logically, to one another. The relationship is obvious and direct. . . .

*Id.* at 707. The Court held that the 38 lawsuits, including some brought as class actions, constituted a single claim. *Id.*

*2. Class claims must relate back to Rolan's notice or the claims are not covered.*

For over a decade, the only identified member of the Class is Dana Rolan. As a "prerequisite" for class certification, Plaintiff asserted – and the Court accepted – that the claims of all class members share common questions of fact or law, and that Rolan's claims are typical of the class members' claims. Rule 23(a), M.R.Civ.P. The class was created based on Plaintiff's assertion that any future claims share "commonality" with the Rolan's claim. Thus, by virtue of creating the class, Rolan admits that the claims are related.

While only one class member (Rolan) has been named, additional class members may be identified as notices are provided to policyholders. By definition of the class, those claims must be related to the Rolan claim. If deemed unrelated,

additional claims are not covered by Allied's policy because such claims were not made and reported during the policy period – a requirement of the claims-made-and-reported policy. Succinctly put, any additional class members' claims must be related or they are not covered.

In *Rolan III*, Justice McKinnon correctly reasoned that additional class members' claims must be related, triggering the "each claim" limit rather than the aggregate limit:

> [I]n the event Rolan identifies any other member of her class besides herself, those claims would have a "common nexus" and be related to New West's business practice of failing to perform a "made whole" analysis. Based on the certified definition of the class, every future class member must assert that "all or part of their medical bills were paid by the person or company that injured them - rather than being paid by New West." Although any new members' claims may be based on a different legal theory, the common basis for the claims must be related to the definition of the class. Rolan's assertion that there are different types of claims does not make it an unrelated claim. The definition of the class guarantees and legally requires a significant relationship between members of the class. Thus, even if Rolan were to identify additional class members, all these additional claims would fall under the "Related Claims" definition of the Policy.

*Rolan III,* ¶ 44 (J. McKinnon, dissenting).[1]

A single written notice – the Complaint in this lawsuit– has been submitted

[1]Justice McKinnon dissented not to the reasoning or the result of the majority opinion, but only disagreed with the Court's decision to remand for additional consideration of this issue.

by New West to Allied for coverage under the MCEO Policy during the 2009 - 2010 policy period. Even if new claimants are identified to populate the class, all claims are "related claims" by definition of the class. Each and every class member asserts that New West failed to perform a "made whole" analysis. To paraphrase the Seventh Circuit, "It is easy to decide that all the class claims arising from [the made-whole analysis] are treated as a single claim under . . . the policy, and therefore are subject to the [single claim] limit." *Gregory*, 876 F.2d at 605.

### C. This Court Should Adopt Justice McKinnon's Reasoning.

In *Rolan III*, Justice McKinnon objected to remand for resolution of the applicable limit because the matter could have been decided by the Supreme Court. Justice McKinnon proposed a complete analysis for the determination of coverage. *Rolan III,* ¶¶ 41- 45. The full court did not disagree with this analysis, but simply did not reach the issue. Justice McKinnon's analysis is entirely correct and could be adopted by this Court.

## CONCLUSION

The Allied Policy provisions are clear. The "each claim" limit of $1,000,000 under the MCEO Policy is the maximum limit available for Rolan's Class Action Complaint against New West.

DATED this 9th day of May, 2022.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 9th day of May, 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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