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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY

DANA ROLAN, on her own behalf and on behalf of the class she represents, Plaintiffs, vs. NEW WEST HEALTH SERVICES, DARWIN SELECT INSURANCE COMPANY and ALLIED WORLD ASSURANCE COMPANY and DARWIN NATIONAL ASSURANCE COMPANY, Defendants.	Cause No. DDV 2010-91 Honorable Christopher D. Abbott **PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR ATTORNEY FEES AND COSTS**

COME NOW plaintiffs and hereby provide their brief in support of Motion for Attorney Fees and Costs.

I. SUMMARY OF ROLAN'S POSITION

"[A]n insured is entitled to recover attorney fees, pursuant to the insurance exception to the American Rule, when the insurer forces the insured to assume the

burden of legal action to obtain the full benefit of the insurance contract..." *Mountain West Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, 315 Mont. 231, 69 P.3d 652. Applied here, Rolan and the Class are entitled to attorney fees and costs from New West, since they were forced to sue to obtain full medical benefits.

This, however, is of little solace to Rolan and the Class. To obtain full restitution and pay all attorney fees, litigation costs and administration costs, they conservatively need approximately $3.3 million. *See*, Exhibit 1. Unfortunately, less than $1,000,000 exists in the Class trust fund to pay restitution and costs (Most, if not all of this, will be exhausted to pay administrative costs, litigation costs and attorney fees.). Therefore, unless additional sources are obtained, everyone, including Rolan, will effectively receive pennies on the dollar.

Besides bad faith insurance claims and continued litigation over the $3,000,000 aggregate limits, there is a source that can provide additional funds for class restitution. Specifically, Allied can legally be required to pay attorney fees and costs and conceivably, additional funds to provide a better chance Rolan and the Class will be made whole. Allied's conduct over the past decade brings it within the purview of the following legal grounds for this relief:

(1) Section 37-61-421, MCA, which awards attorney fees and costs for unreasonably multiplying proceedings.

(2) The *Foy* exception, which shifts fees when the unique circumstances of the case make this equitable (This Court has already employed it to require a small portion of the fees to be shifted. DN 152.).

(3) Montana Rule of Civil Procedure 37(c)(1), which provides mandatory sanctions of attorney fees, costs and "other appropriate sanctions" for a failure to timely supplement discovery which causes unfair prejudice to the other side.

(4) The *Foy* exception for belatedly asserting an ERISA defense. (Under a previous ruling, some fees have already been shifted on this basis, but additional fees need to be paid.) *See*, DN 152, *supra*.

(5) The insurance exception to the American Rule, which requires Allied to pay attorney fees and costs associated with Rolan's partial success in *Rolan III*.

Each ground is discussed separately below.

II. GROUND ONE: MULTIPLYING PROCEEDINGS

The facts and law regarding this ground follow.

A. FACTS

Eleven years ago in 2011, Rolan filed an interrogatory asking the defense to identify available sources of insurance. The defense responded by providing an MCEO policy. The policy expressly stated class actions were covered by the $3,000,000 aggregate coverage. *See,* Exhibit 2.

At the same time, Rolan filed another interrogatory, requesting the defense to "give" additional information, including the "coverages afforded" and any limits

on the coverages. New West responded by directing Rolan back to the MCEO policy. Exhibit 2, *supra*.

Approximately four years into the litigation, the Montana Supreme Court affirmed the District Court's certification of the Class; declaratory judgment in the Class's favor and restitution to class members. *Rolan I,* 2013 MT 220. It was time to pay and based on the defense's discovery responses, $3,000,000 in aggregate limits applied to pay class restitution.

Over the past 11+ years, the defense has never supplemented either discovery response. In late 2013, however, it supplemented another discovery request unrelated to insurance. It provided the coverage letter Joseph Sappington issued to New West on February 18, 2010. As discussed in this and other filings, this 10-page single-space letter only re-enforced the conclusion that class action claims were covered under the $3,000,000 aggregate coverage. The supplement said nothing about a related-claims limitation that purportedly eliminated that coverage. Exhibit 3.

In this supplement, the defense also provided an MCEO policy which presumably was the same as the one provided in 2011. It was not, however, the same policy. Unlike the one provided in 2011, the policy provided in 2013 did not include an endorsement for coverage of class action claims.

The defense did not inform Rolan it was providing an MCEO policy different than the one provided two years earlier. There conceivably was no reason to re-read the new one. Who would have suspected the new one would have the class action endorsement taken out? Rolan and the Class continued to believe they had full aggregate coverage for their class action claims.

In 2016, seven years into the suit, however, Allied announced, for the first time, that no coverage existed for either Rolan's or the Class's claims. Exhibit 4. Neither New West nor Rolan were previously aware of this. Up until then, New West had been relying on Sappington's 2010 letter which indicated both the single and aggregate coverages applied and communications with Sappington in 2013, which re-enforced this belief. *Id*. Rolan was relying on the same letter, plus the MCEO policy she had received in 2011 stating expressly that Class claims were covered by $3,000,000 in aggregate coverage.

In its 2016 change of position, Allied relied on the MCEO policy produced in 2013—not the one produced in 2011. It contended Sappington's 2010 letter made it clear there was no coverage. *See*, email, Exhibit 4. This after-the-fact contention is disingenuous. Sappington's detailed letter doesn't state anywhere that there were no coverages. It does not even mention the limitations and exclusions Allied started using in 2016 as an excuse for denying coverage. To the contrary, it states both the $1,000,000 and $3,000,000 coverages applied.

With nearly 100% certainty, it can be concluded this case would have gone quite differently; would have resolved years ago; and would have been enormously less expensive had Allied announced its "no-coverage" position in 2010 and 2011--rather than in 2016. At a minimum, both Rolan and New West would rationally have immediately filed a declaratory judgment action—rather than be put through years of litigation wondering if any coverage existed. Most probably, both sides would have made a concerted effort to settle: New West would be facing a multi-million-dollar judgment which it could not afford without insurance and Rolan would be facing problems collecting on a judgment if New West did not have insurance (In fact, a decade later, that is how it seems everything is playing out, unless things change.). Thus, much of the expense and the years of wasted time in this case can be directly attributed to Allied's strategy to hide its "no-coverage" defense.

If it had known about Allied's "no-coverage" position in 2010, New West would have immediately offered to settle Rolan's individual claims, which in 2010, were a little over $100,000. This would have been an effective strategy, since a fully compensated class representative does not have standing to represent a class. Rolan would have little choice but to accept since without coverage, she risked a significant chance there would be inadequate recovery to compensate both her and

the Class. But none of this happened because Allied hid its "no-coverage" position until 2016 and by then, it was too late.

The Class has also suffered another loss. The $1,000,000 single claim limit, which this Court has held is available, has been reduced by a quarter of a million dollars. This is because Allied has been subtracting its defense costs from the limit over the past decade plus. Thus, a sad irony is that Allied's secret "no-coverage" position has meant the Class has been paying Allied's defense costs out of coverage designed to pay their restitution. Hardly equitable under the circumstances, it would seem.

B. THE LAW

Section 37-61-421, MCA states:

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

The moving party does not have to prove the dilatory actions were both "unreasonable" and "vexatious." It is sufficient to prove they were "unreasonable." Thus, ordinary negligence is adequate. *In Re Estate of Bayer*, 2001 MT 49, ¶12 (2001).

Moreover, even though the statute states fees can be assessed against "an attorney or party," our Court has interpreted this to include the party's insurance company: "[I]t is axiomatic that the insurer may be responsible for costs, expenses and attorney fees when the insurer multiplies the proceedings in any case unreasonably and vexatiously." *Tigart v. Thompson*, 244 Mont. 156, 796 P.2d 582, 585 (1990).

Concealing information during discovery is a frequent basis for imposing fees—including against the insurer. *See, e.g., In re Bayer, supra* at ¶13 (discussing cases). For instance, in *Thompson, supra*, the defense failed to disclose during discovery that it had a tape-recorded statement of the defendant insured in an automobile negligence case. This failure undermined the trial which ended in a defense verdict. The lower court ordered a new trial and assessed attorney fees and costs against the defendant's insurer, SafeCo, for unreasonably multiplying the proceedings. The Montana Supreme Court affirmed.

This continues to be the law. Even though the defense attorney is considered the attorney for the party, rather than the insurance company, the insurance company can still be held liable for errors of the defense counsel during litigation. *See*, *In re Rules of Professional Conduct*, 2000 MT 110, ¶29 (2000) (recognizing *Thompson* and similar cases for this proposition).

Applied here, in 2011, the defense answered discovery by providing a MCEO policy which, on its face, stated $3,000,000 existed for class actions. At a minimum, to mislead Rolan with the wrong policy was "unreasonable." It was also the proximate cause of so many years of delay and the enormous expenditures in fees and costs (It was also a substantial factor.). As such, the multiplying proceedings law at §421 fully applies.

Therefore, Rolan and the Class request an order that: (1) Allied shall pay all fees and costs the Class has incurred since 2012[1], a probable date this case would have been over had Allied presented accurate information about its "no-coverage" position; (2) restoration of the $250,000 which Allied has subtracted from the $1,000,000 single claim limit over the past decade; and (3) restoration of all attorney fees and costs Allied required New West to pay over the past decade, since that money would have otherwise been available for settlement. This will have the effect of adding several hundreds of thousands of dollars to the Class's trust fund since it will eliminate their responsibility for attorney fees and costs and will add another $250,000 that Allied has taken out of the single claim limit to pay its own defense costs.

[1] Actually, Rolan's individual attorney fees should be paid back to the date suit was filed in January 2010 since both liability and the amount of recovery were reasonable—if not absolutely—clear. *See* UTPA, §33-18-201 (6), MCA.

III. GROUND TWO:
FOY v. ANDERSON

In the alternative, this Court could award the same fees and costs under the *Foy* exception, which shifts these costs in cases like this one, which contain unique circumstances, making it equitable that the losing party should pay.

In fact, this Court has already employed the *Foy* exception to pay some of the attorney fees and costs. DN 152. It required the defense to pay Rolan's fees and costs related to the defense's belated ERISA defense. *See*, discussion, *infra.*

The circumstances set forth in the Class's Proposed Third Amended Complaint and discussed in this brief make it equitable to apply the *Foy* exception. The evidence shows the defense and Allied were often calling the shots with little or no input from New West. For instance, the defense attorney and Allied came up with the unmerited ERISA defense—even though New West testified it did not apply. Moreover, the decision to deny coverage in 2016---seven years into the lawsuit---was solely Allied's and not New West's. If Allied believes defense counsel were responsible for mistakes, it can seek indemnification from them, but Rolan and the Class should not suffer.

The results essentially will be the same as under the multiplying proceedings ground, *supra:* Allied will pay all of Rolan's and the Class's fees and costs over the past decade and through the end of this suit. It should restore all funds to the trust which were subtracted from coverage or paid by New West for defense costs.

IV. GROUND THREE: RULES OF CIVIL PROCEDURE

A more complete remedy is available under the Montana Rules of Civil Procedure. They not only authorize payment of attorney fees and costs, but impose remedial sanctions. *See, e.g.,* M. R. Civ. P. 37. The courts "regard with favor such sanctions for failure to comply with the rules of discovery [because their] …purpose … is to deter parties from being unresponsive to the judicial process ***regardless of the intent, or lack thereof, behind such unresponsiveness***." *See, e.g., Seal v. Woodrows Pharmacy*, 1999 MT 247, ¶21 (citing authorities) (emphasis added).

A. BACKGROUND FACTS

The background facts are similar to those related in the portion of the brief pertaining to ground one, *supra.*

Upon request, a party is specifically entitled to "obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment..." M. R. Civ. P. 26(b)(5). Here, Rolan served two interrogatories in 2011, asking for this insurance information, including any limitations on coverage. The defense responded with an Allied MCEO policy expressly stating that class actions were covered by the $3,000,000 aggregate limits. It provided no information about any limitations on coverages. *See,* discussion, *supra*. To this

day, it has filed no supplements to these discovery requests, pointing out the MCEO policy it provided was in error.

Litigation then continued for over two and a half years. By then, the District Court and the Montana Supreme Court had held New West was liable for the Class's restitution. Payment was at hand. Under the MCEO policy provided in 2011, there was $3,000,000 of aggregate coverage to provide Rolan's and the Class's restitution.

In late 2013, however, New West supplemented a request for production which did not ask for insurance information. It provided Sappington's coverage letter and a MCEO policy different from the one provided in 2011. It did not alert Rolan, however, the MCEO policy it was providing was different from the one provided two years earlier.

Then, in 2016, Allied announced its "no-coverage" position, asserting provisions which are nowhere mentioned in the 2010 Sappington letter. *See*, discussion, *supra*. For reasons previously discussed, this conduct, obviously, severely prejudiced both Rolan and New West. Things would have gone much differently for all parties if Allied had not deceived everyone into believing full $3,000,000 coverage applied.

B. APPLICABLE LAW

"In [g]eneral, [a] party who has responded to an interrogatory, request for production, or request for admission must supplement or correct its response in a timely manner if the party learns that in some material respect the response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known." Rule 26(e). "The party facing sanctions bears the burden of proving that its failure to disclose the required information was substantially justified or is harmless..." *McCulley v. U.S. Bank of Mont*., 2015 MT 100, ¶25.

Here, the two 2011 interrogatories specifically requested insurance information, including any limitations on coverage. They have never been supplemented to this day. The only additional information came through a late 2013 supplementation of a separate request for production, which did not ask about insurance. Even then, the supplement contained no alert the MCEO policy with class action coverage provided in 2011 was incorrect. It contained Sappington's 2010 coverage letter, which only re-enforced the conclusion that class action claims were covered under the aggregate limits.

Waiting over two years to supplement the 2011 insurance interrogatories---even indirectly---was not "timely." Supplementing through "evasive or incomplete … responses must be treated as a failure to … respond" as a matter of law. Rule

37(a)(4), *supra*. These failures to timely supplement or provide a complete supplement were certainly not "harmless." This case would have resolved much quicker and less expensively with better results had Allied revealed its "no-coverage" defense six to seven years earlier when things could have been changed.

Nor can Allied carry its burden that the delay and confusion was "justified." Ignorance is hardly reasonable for at least two reasons. First, as a matter of law, a party responding to discovery has a duty to make reasonably certain the responses are correct and accurate. It cannot simply produce a document during discovery without reviewing it for correctness first. It must certify under oath the response is accurate and correct to its "knowledge, information, and belief *formed after a reasonable inquiry.* Rule 26(g), *supra* (emphasis added). If it fails to make this inquiry, sanctions are mandatory: "[T]he court, upon motion or upon its own initiative, ***shall*** impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee." *Id.*

Second, as a factual matter, this monumental mix-up could not have occurred without Allied's help. It had drafted and imposed its "Billing and Reporting Guideline" on "defense counsel." Exhibit 5. The agreement provided the defense counsel must provide quarterly reports setting forth, among other things,

"discovery garnered during the reporting period." For all we know, Allied was aware of the content of the 2011 insurance interrogatories well before 2013. If not, it should have been if it was enforcing its own agreement. If it denies it was on notice, then it should produce its insurance files. As stated above, it has the burden of proof of showing its delays were justifiable.

Applied here, the 2011 insurance interrogatory responses are signed and certified as being correct. This, obviously, is far from the truth. Therefore, under the mandate of Rule 26(g), the Court "shall" impose appropriate sanctions, including attorney fees and costs resulting from the inaccuracies. At a minimum, a remedial sanction requiring payment of all the unnecessary fees and costs incurred by Rolan and the Class should be imposed "***regardless of the intent, or lack thereof, behind such unresponsiveness***." *Seal, supra* (emphasis added). Further, as stated in *Thompson, supra,* Allied can be held liable for the defense's mistakes during discovery—regardless of the fact the defense lawyer works for the insured. This would seem to be especially true given the "Billing and Reporting Guideline," *supra*, mandating that the defense counsel and Allied share and discuss pertinent information.

The remedial sanctions for a failure to timely supplement are further addressed in Rule 37(c). They are quite important, here, because they are capable of undoing the unfairness associated with Allied's acts and strategies. Specifically:

(1) Failure to Disclose or Supplement. If a party fails to provide information requested in accordance with these rules …, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order the payment of the reasonable expenses, including attorney fees, caused by the failure; and …

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

This Court can remedy most of the unfair prejudice being experienced by Rolan and the Class simply by holding Allied is not entitled to use the information it belatedly produced in 2013 to defeat coverages. The policy produced in 2011 that expressly makes class claims payable under the aggregate limit should apply in any ongoing court proceeding.

At a minimum, the Court should require Allied to at least pay Rolan's individual claim in full, since she would never have been in this endless predicament had Allied disclosed its "no-coverage" defense in 2011 rather than almost six years later. With prejudgment interest, this claim now has reached or exceeds $250,000. The Court can also require Allied to pay her $50,000 incentive award for fighting on for the Class for almost 13 years without compensation. This sanction will free up approximately $300,000 to pay class claims. The Court can also order Allied to pay administrative costs. This will at least provide the full

$1,000,000 single claim limit for paying restitution to the Class. It may not be enough, but it will come a lot closer.

In summary, estoppel and first and third UTPA claims aside, this Court has the power to remedy much of the unfair prejudice attributed to Allied's acts and omissions over the years simply by invoking the remedies already available in Rule 37, *supra*.

V. GROUND FOUR: PARTIAL FEES FOR ASSERTING ERISA

If the Court finds attorney fees and costs should be assessed against Allied under one or more of the first three grounds, it need not consider this or the remaining ground five. This is because grounds one through three subsume the partial remedies in grounds four and five.

A. FACTS

The background facts are set forth by the Supreme Court in *Rolan II*, 2017 MT 270. In 2013, the Montana Supreme Court had affirmed the declaratory judgment and restitution in favor of Rolan and the Class. The case was seemingly over except for administration of claims. *Rolan I*, 2013 MT 220. The only information Rolan and the Class had at the time was that class claims were expressly covered under the $3,000,000 aggregate limit, which would have at least come close to providing full restitution to everyone. *See,* 2011 Insurance interrogatories, *supra*.

However, after this, Allied retained new counsel who moved to amend the answer to include a defense that federal ERISA law preempted state law and thus, all of Rolan's and the Class's claims. Two years of delay ensued. At that point, the District Court "granted New West's motion for summary judgment holding that Rolan's policy was subject to ERISA and thus, her original state law claims were preempted." *Rolan II, supra* at ¶7.

The case was then removed to federal court over Rolan's objection that this Court had concurrent jurisdiction, which eventually was vindicated.

On February 29, 2016, the federal court remanded to state court. Judge Lovell determined New West's removal was untimely. He cited several causes for the delay in removal, one being "New West's inexplicable confusion over whether its own plan was or was not an ERISA plan." He concluded the state court had concurrent jurisdiction over Rolan's ERISA 502(a)(1)." *Id.* at 8. He also provided direction to this Court on why Montana insurance law applied to New West—even assuming, *arguendo*, the plans were covered under ERISA. *See*, Exhibit 6, p. 22.

Then, "[f]ollowing remand, Rolan moved to resolve all matters regarding ERISA preemption" [providing a brief similar to Judge Lovell's reasoning that Montana law applied,] New West moved for summary judgment asserting ERISA preemption requires dismissal of Rolan's state law and ERISA claims. On December 7, 2016, the District Court granted New West's motion for summary

judgment and denied Rolan's motion. The Court again dismissed Rolan's argument that New West waived the affirmative defense of ERISA preemption. Further, it dismissed the lawsuit on the ground "complete preemption under §502 of ERISA was proper and thus, barred any state law claims asserted by Rolan." *Id*. at ¶8. Back to appeal we went.

It was not until 2017 that the Montana Supreme Court held the District Court decision to grant the ERISA amendment initially "exceeded the bounds of reason." "We have previously held that ERISA preemption is an affirmative defense and thus is waivable if not timely raised pursuant to M. R. Civ. P. 8(c)." *Id.* at ¶14. Only "extraordinary circumstances," justified an amendment and they did not exist in *Rolan's* case: "In determining whether an amendment would cause undue prejudice, a court should balance the prejudice suffered by the opposing party 'against the sufficiency of the moving party's justification of the delay.'..." *Id.* at ¶16. Here, "New West has not offered any reasonable justification for delaying the amendment three years, only making it *after* the Supreme Court had affirmed New West's liability and responsibility to the class." *Id.* at ¶20. "Allowing New West to amend to include ERISA preemption would effectively destroy the class . . . . New West's amendment could decertify the class, forcing Rolan and the Class to either seek recertification based on ERISA claims or proceed alone, ten years after Rolan's injury and more than seven years after she

filed suit." *Id*. at ¶22. "[T]he District Court exceeded the bounds of reason resulting in substantial injustice to Rolan." *Id.* at ¶24.

Despite her clear error on the merits, the District Judge did make the defense accountable for attorney fees and costs associated with the belated ERISA defense. She awarded them under *Foy v. Anderson*, 176 Mont. 507, 580 P.2d 114 (1976), which recognizes fees can be awarded "where equity and the unique facts of the case warrant[] them." *See*, DN 152, *supra* at 2. They were, however, quite limited. They only covered a discrete period of time and those tasks directly related to the ERISA controversy. They did not include the attorney fees incurred on appeal in *Rolan II*, *supra*, which held it was clear error for the Court to allow New West to press the ERISA claim in the first place. Given this subject matter, Rolan and the Class are entitled to their fees and costs associated with *Rolan II.* Counsel will submit his estimated time by separate brief and affidavit.

VI. GROUND FIVE: PARTIAL FEES UNDER INSURANCE EXCEPTION

As stated previously, it is well settled that "[A]n insured is entitled to recover attorney fees, pursuant to the insurance exception to the American Rule, when the insurer forces the insured to assume the burden of legal action to obtain the full benefit of the insurance contract..." *Brewer, supra.*

Applied here, Rolan is entitled to partial attorney fees and costs expended in *Rolan III*, *supra*, since she prevailed on the issue the $1,000,000 single claim limit

applied. She will provide an accounting apportioning fees and costs to that issue as opposed to the estoppel issue.

VII. CONCLUSION

The five grounds discussed above, obviously, are not mutually exclusive. Rolan and the Class believe a remedy under ground three, the Rules of Civil Procedure, provides the most complete and just remedy. The *Foy* exception under ground two, likewise, should allow this Court to provide complete remedial relief as a matter of equity. Rolan and the Class have prevailed on all substantive issues. Indeed, they prevailed as early as 2012 when this Court held New West liable for restitution. At that time, the defense's discovery responses expressly stated class action claims were covered to $3,000,000. The delays after that are directly related to Allied's mistakes and strategies.

DATED this 15th day of June, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served true and accurate copies of the foregoing document upon counsel of record by the following means:

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