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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' REPLY IN SUPPORT OF MOTION TO AMEND**

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Rolan's and the Class's position is summarized followed by the details.

I. ROLAN'S POSITION SUMMARIZED

Given the arguments, Rolan's position can be summarized as follows.

A. ESTOPPEL REMAINS AN ISSUE OF FACT.

All the Supreme Court did and could do, given the limited nature of interlocutory appeals, was to reverse the summary judgment on estoppel this Court granted to Rolan. Allied has never moved for summary judgment on the estoppel issue and under well-settled law, it cannot be considered on appeal. Moreover, because the appeal was interlocutory, this Court, by rule, retains jurisdiction of the litigants and all of the issues and potential issues. Finally, discovery of the facts could well change the outcome and is a jury question.

Allied can move for summary judgment once adequate discovery is done. The problem is Rolan has been foreclosed up to this point from conducting any, which is why summary judgment for Allied would be premature.

B. BAD FAITH CLAIMS ARE ALLOWED.

Because, by definition, an interlocutory appeal does not divest the lower court of jurisdiction over the parties and claims, Rolan is entitled to amend for a third-party bad faith suit. She has no problem in filing separately, however, so long as it would not jeopardize the statute of limitations. Allied, however, argues the

statute of limitations will have run if the bad faith suits are filed separately. Thus, rather than take the risk, Rolan files the bad faith claims in this suit under the relating-back provision of Rule 15(c) and the doctrine of equitable tolling.

Basically, all this Court need do is rule on the statute of limitations issue. Rolan, in good faith, is relying on the class action rule at M. R. Civ. P. 23, which states neither a settlement nor judgment currently exist and therefore, the statute has not expired if she files the claim as a separate action. Allied, however, contends the preliminary settlement worked out in 2020 constitutes the point at which the statute begins to run and therefore, if Rolan were to file separately, it will already have run. If Allied were to prevail, the doctrines of relating back and equitable estoppel would still allow these claims to be filed in the current lawsuit.

C. THE ILLUSORY COVERAGE/REASONABLE EXPECTATION CONTENTIONS ARE ALLOWED.

If necessary, these contentions can be made under Rule 15's liberal pleading rules in order to respond to Allied's position that the related-claims provision precludes the $3,000,000 aggregate limit.

D. ROLAN ACTED IN GOOD FAITH WITHOUT MEASURABLE UNFAIR PREJUDICE TO ALLIED.

Allied's final contention is to attack Rolan claiming that she somehow is acting in bad faith and is unfairly prejudicing Allied. There is no evidence of this and therefore, the contention should be denied.

E. SUMMARY

Rolan will file the bad faith claims separately so long as it does not jeopardize the statute of limitations. She is entitled to conduct discovery before Allied can make a motion for summary judgment on the estoppel claim. These matters are covered in greater detail below.

II. ROLAN'S POSITION DETAILED

A. ESTOPPEL REMAINS AN ISSUE OF FACT.

The Court retains jurisdiction after an interlocutory appeal to resolve this issue for the following reasons.

1. Further Proceedings Are Allowed On Remand. Allied contends the interlocutory appeal forecloses all claims below. This is incorrect for several reasons.

(a) By definition, an interlocutory appeal does not divest the lower court of jurisdiction over any issues. An interlocutory appeal "*does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."* M. R. Civ. P. 54(b)(1) (Emphasis added). Here, there is no judgment "adjudicating all the claims and all the parties' rights and liability." Therefore, the appeal "does not end the action as to any of the claims or parties and may be revised at any time."

At least before the interlocutory appeal started, Allied took the same position, representing to the Court "*even after the amount of the policy limits is adjudicated, other issues regarding coverage will remain*. ***Some coverage issues do not "ripen" until liability has been established and class members have … been identified."*** DN 260, p. 4. Allied cannot change its position now.

(b) Allied never moved for summary judgment on estoppel in the lower court and therefore, cannot gain that relief on appeal. "A party may not request relief or remedy on appeal that was not presented to the trial court." *Schuff v. AT Klemens & Son*, 16 P.3d 1002, 2000 MT 357, ¶53. Allied did not move below for a summary judgment on the estoppel issue. Only Rolan did. Allied, therefore, "may not request [that] relief or remedy on appeal." This, however, is essentially what it is trying to do.

(c) The Supreme Court's reversal of Rolan's estoppel summary judgment does not imply a summary judgment for Allied. In *State ex rel. First Bank System v. District Court of Eighth Judicial Dist.,* 240 Mont. 77, 782 P.2d 1260 (1989), the trial court granted a summary judgment for plaintiff on the ground it had previously denied one for the defendant. The Supreme Court reversed: "[T]he denial of summary judgment does not preclude either party from raising at trial any of the issues dealt with on the motion. This is because the denial of summary judgment is not a decision on the merits; it simply is a decision that there is a

material factual issue to be tried." *Id.* at 1262 (citing 10 Wright, Miller & Kane, *Federal Practice and Procedure*, §2712 at p. 587).

(d) Rolan has never been allowed to discover the material facts. "When a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error." *E.g., Brown v. Mississippi Valley State University*, 311 F.3d 328, 332 (5th Cir. 2002)**.** Here, granting a summary judgment to Allied on estoppel (when it has never made such a motion) would violate this rule.

The issue specifically remanded is whether or not "related-claims" provision precluded the $3,000,000 aggregate limits. Allied raised this issue in the summer of 2018. Rolan responded that the motion was premature because she had not been given the opportunity to conduct discovery. DN 192. Having raised the issue then, she certainly can do so now. "It is fundamental that parties should not be allowed to raise summary judgment motions" when there has not been any discovery and Allied was resisting discovery." DN 192, pp. 2, 11.

2. Rolan is entitled to perform necessary discovery before a summary judgment can be issued to Allied on estoppel and it has not yet moved for one. Estoppel-related issues are "inherently factual." *Gamble Robinson Co. v. Carousel Properties,* 212 Mont. 305, 688 P.2d 283 (1984); *See, e.g., State ex*

rel. Farm Credit Bank of Spokane v. District Court of Third Judicial Dist. of State in and for County of Powell, 267 Mont. 1, 881 P.2d 594 (1994). Whether or not an insurance company should be estopped on the ground it misled the insured on insurance coverage is a question of fact for a jury—not for a court on summary judgment. *E.g., Jackson v. Hoover*, 321 N.E.2d 348, 352 (Ill. 1974); *Frisbie v. Carolina Cas. Ins. Co*., 103 So.3d 1011 (Fla. App. 2012); *Shea North, Inc. v. Ohio Cas. Ins. Co*., 564 P.2d 1263, 115 Ariz. 296 (Ariz. App. 1977); and *Allstate Ins. Co. v. Reliance Ins. Co*., 786 A.2d 27 (Md. App. 2001). It is reversible error to grant a summary judgment on estoppel when disputed facts exist for the trier of fact. *Id.* Therefore, Rolan is entitled to conduct necessary discovery, which should include the following as a minimum:

(a) Production of the Claims Activity Manual. A document of great relevance would be the standard claim's activity log. It is a contemporary recording by key insurance personnel of significant thoughts and events occurring during the course of the claim—including those involving coverage issues. For example, in the bad faith case of *Shobe v. Kelly*, 279 S.W.3d 203 (Mo. App. 2009), the entries in the claim's adjuster's activity log were critical to liability for compensatory and punitive damages resulting from the insurer's bad faith denial of coverage. In *Integon Nat'l. Ins. Co. v. Gomez* (D. S.C. 2020), the insurer denied

coverage on the ground the insured failed to notify it of the accident. It refused to produce its claim's activity log in discovery. The Court ruled:

> As to relevancy, Integon claims that evidence of its lack of notice of the accident is that no evidence exists. In other words, Integon claims there is no evidence because there was no notice. At the hearing, Price's counsel noted that Integon had not yet produced a claims activity log, which would show that when Integon received notice and opened the claim. The Court agrees that the claims activity log would provide evidence of notice. With regard to Gomez's and Mejia's cooperation, the Court fails to see how Integon can prove that they did not cooperate without producing some evidence of the claim file related to the underlying action. Presumably that claim file would contain Integon's investigation notes, and those notes would reflect whether Gomez and Mejia cooperated. As such, this information is relevant to Integon's allegation that Gomez and Mejia failed to cooperate...

Id. at 16. Likewise, the contemporary documentation in the claim's activity log should go a long way in telling us why Allied waited six years to deny coverage on exclusions never mentioned in its 2010 coverage letter.

The claims activity log would also explain why in 2013 Sappington and Allied refused to respond to the following request from New West's coverage counsel:

> "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."

Exhibit 2, Proposed Third Amended Complaint. Did Sappington and Allied realize they had mis-informed New West initially and were now covering up through silence? What motivated Allied to wait several more years to disclose coverage defenses when being asked point blank by this letter to disclose its position in writing or be subject to Montana's bad faith laws? Again, we do not know because we have been prohibited from conducting discovery.

(b) Production of Training and Instructional Manuals. All insurance companies, of course, train their claims analysts. Allied should be required to produce its training and instructional manuals pertaining to the necessary content to a coverage letter, such as the one provided to New West in early 2010; and (2) the training claims adjusters/analysts receive on how to determine coverage and document the claim.

(c) Depositions of Allied's claims analyst and personnel involved with the claim—particularly with regard to the coverage issue. The primary one would be claims specialist Joe Sappington who drafted the extensive coverage letter on February 18, 2010, which clearly indicated full $1,000,000/$3,000,0000 coverage existed and failed to mention either of the exclusions Allied announced six years later as a basis for denying all coverage. His intent is a question of fact. *See, e.g., Lane v. Farmers Union Ins*., 1999 MT 252, ¶30, 296 Mont. 267, 989 P.2d 309. Rolan is entitled to question and cross-examine him to determine if he, himself,

believed full coverage existed and intended to convey this to New West by his letter. She is also entitled to learn who else Sappington talked with about the coverage issue and what was said. The validity of his testimony is a question of fact. She is entitled to cross-examine him concerning the entries in his claim's activity log and aspects of his training regarding Allied's position on coverage.

3. Summary. Rolan had a right to bring a summary judgment motion at any time. It does not foreclose discovery or a trial. Allied has not moved for summary judgment on estoppel and should not be allowed to do so until discovery of all relevant facts is known. Rolan will be propounding appropriate discovery requests so the truth is known. Her counsel has filed an affidavit pursuant to M. R. Civ. P. 56. After the facts are known, Allied can file a summary judgment motion. *See* Thueson Affidavit, Attachment 1.

B. BAD FAITH CLAIMS ARE ALLOWED.

Concerning amending to add bad faith claims, Rule 54(b), by definition, does not deprive this Court of jurisdiction over the parties and claims, which can be amended at any time prior to final judgment on the merits which has not yet occurred. *See* discussion, *infra*. As indicated by the law above, Allied cannot be granted a summary judgment on appeal where it did not request one to begin with. Rule 15, *supra*, regarding amending pleadings is "rooted in the equitable notion

that dispositive decisions should be based on the merits rather than technicalities." *Citizens Awareness Network v. Montana Bd. of Envtl. Review*, 2010 MT 10, ¶2, 227 P.3d 583. All Allied offers here is technicalities to try to escape a decision based on the merits.

1. Rolan Will File Separately if it Does Not Jeopardize the Statute of Limitations. Rolan has no objection to filing the bad faith suits separately so long as it does not jeopardize the statute of limitations. As shown below, it should not, but since Allied contends otherwise, Rolan cannot take the risk.

(a) The statute of limitations has not run as to the third-party claims because there is no settlement or judgment which would trigger the statute of limitations. On page four of its brief, Allied argues the "parties are not entitled to amend their pleadings when the motion to amend is made after judgment has been entered against them." The problem is no judgment has been issued against either New West nor Rolan. All that has happened is the Supreme Court reversed this Court's summary judgment which was in favor of Rolan and remanded for further proceedings. Indeed, the Court remanded with the express order that Rolan be permitted to challenge the "related-claims" provision. (It was this issue that Rolan stated was premature back in 2018 because she had not been allowed to conduct discovery. *See* discussion, *supra*.) As discussed above, by law, this Court is

entitled to consider and/or amend any of the issues between the parties after an interlocutory ruling on appeal. Rule 54(b), *supra.*

Second, there is no final settlement or judgment in favor of the Class and therefore, the statute of limitations for third-party bad faith has not commenced. Under the class action statute at Rule 23, neither the class representative nor the Court are authorized to settle or enter judgment unless and until (1) the Class has been given a comprehensive notice of what is being settled or resolved by judgment; (2) they are given the opportunity to object to the settlement and judgment at a fairness hearing; and (3) the judge has approved the settlement and judgment. *See,* Rule 23(c)(2)(B) and 23(c)(3)(B). These three requirements have not taken place. Until they do, all we have is an unapproved preliminary settlement, which has not yet been accepted by the absent class plaintiffs. Like all settlements, no agreement exists unless the plaintiff class approves, which has not yet occurred.

Allied's contention that the preliminary settlement, which has not been accepted by the Class, should start the running of the statute of limitations. This obviously contradicts the class action rules of Rule 23, *supra,* which states no class settlement or judgment exists as of the current time. If a substantial question exists over the statute of limitations, "a district court should, in accordance with public policy, resolve the doubt in favor of a statute containing the longer

limitation." *Mangas v. Great Falls Clinic, LLP,* 2009 MT 426, p. 32, 354 Mont. 50, 221 P.3d 130. That public policy being that Montana "favors access to our courts and resolution of claims on their merits rather than the arbitrary bar of the statute of limitations." Thus, Allied's position lacks merit.

In sum, Rule 23 states no class action settlement or judgment now exists. Therefore, unless this express language is ignored, the time for filing the third-party class action has not yet arrived. Since, however, Allied disagrees, Rolan is in no position to dismiss her Motion to Amend until this disagreement is resolved.

2. The First-Party Bad Faith Claims Relate Back. Rolan is also willing to file the first-party claims in a separate lawsuit if Allied agrees it would not raise the statute of limitations defense. Otherwise, Rolan is forced to file the first-party claims in this case under the relating-back and equitable-tolling doctrines.

First, Allied makes the argument that Rolan cannot amend for first-party bad faith as an assignee of New West's claims because New West allegedly made no claims in this lawsuit. The contention lacks merit because there is nothing in Rule 15, *supra,* requiring that a party must have a claim in order to make an amended claim against another party. It simply grants the right to amend the pleadings to any party which must be granted when "justice so requires." Rule 15(a)(2*), supra.*

Likewise, it freely relates amendments back to the date of the original pleadings--regardless of whether or not the statute of limitations has run on the amended claim. Rule 15(c), *supra*.

Second, Allied contends the bad faith claim does not arise out of the same transaction already pled in the lawsuit. This is untrue. Rule 15(c) does require that "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out -- or attempted to be set out -- in the original pleading." The record clearly shows, however, that both the original estoppel claim and the bad faith claim arise out of the same conduct, transaction, or occurrence set out in the amended claim for bad faith. The basis of the original estoppel claim is set forth in detail by the Supreme Court in *Rolan III, supra.* As shown there, the estoppel claim involves: (1) Allied's undermining of the court-approved certification and order to pay the Class in 2013 by raising a non-meritorious ERISA defense; and (2) Allied's failure to reveal its coverage defense until 2016. *Id*. at ¶¶ 3-16. As the proposed Amended Complaint shows, the bad faith claims "ar[ise] out of the [same] conduct, transaction, or occurrence." Therefore, the requirement of Rule 15(c) has been met and Allied's contention to the contrary lacks merit.

In addition, assuming *arguendo*, that Allied were correct on the statute of limitations, it can still be sued in this lawsuit under equitable tolling. This complies

with the "policy behind the doctrine of equitable tolling ... to 'avoid forfeitures and allow good faith litigants their day in court'." The Montana Supreme Court has adopted a three-part test:

> "(1) Timely notice to the defendant within the applicable statute of limitations in filing the first claim;
>
> (2) Lack of prejudice to the defendant in gathering evidence to defend against the second claim; and
>
> (3) Good faith and reasonable conduct by the plaintiff in filing the second claim."

Schoof v. Nesbit, 2014 MT 6, ¶¶33-35, 316 P.3d 831 (2014). *See also, Stevens v. Novartis Pharmaceutical Corp.,* 210 MT 282, 247 P.3d 244 (equitable tolling is particularly applicable in class action suits because absent class members cannot sue until the class action suit is over.).

All three equitable-tolling elements are established here: First, having assumed the defense of the class action claims since 2010, there has clearly been timely notice to Allied. Moreover, it has been a party to this suit since 2017, regarding a claim relying on the same transaction that forms the basis of bad faith claims. Rolan put Allied on notice it would be sued for bad faith in 2017 and so did New West. *See* Attachments 2 and 3.[1] Second, there is no prejudice in collecting

1 In late 2016 and again in early 2017, class counsel informed Allied, through counsel, that: "Rolan intends to file an insurance bad faith lawsuit against the carrier on her own behalf and on behalf of the people in the class, who have been affected adversely by all of this delay. The primary allegation will be that set forth in §33-18-201 (6), MCA, which prohibits an insurance company from failing to resolve claims promptly, fairly and in good faith and

evidence. Allied worked closely with defense counsel in prosecuting the defense and has well-documented evidence in its possession. Indeed, as the proposed Amended Complaint demonstrates, much of the critical evidence are admissions set forth in Allied's communications with defense counsel. Third, Rolan has exercised good faith. She relies on the plain language of Rule 23 that no class action settlement or judgment can currently exist, since there has been no approval of the absent class and no final class action judgment entered.

Likewise, Allied would lose under Rule 15(c), which expressly recognizes that amended claims—even where the statute of limitations has technically expired—relate back when: (1) "Justice so requires" and the new claim arises out of the same transaction of existing claims. Both requirements are satisfied. As discussed above, both the first and third-party claims are based on the same transactions which form the already pled estoppel claim. One need only review *Rolan III, supra*, to confirm this.

In summary, "the burden of proving that the cause of action, or some part of it, [should be] barred by the statute of limitations" is on the party asserting it, in this case Allied. *E.g.*, *Girson v. Girson*, 112 Mont. 183 (1941); *Stewart v. Atlantic*

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also sanctions an award of punitive damages." Attachment 2. Defense counsel informed Allied this was an "empty threat" because "he cannot do so under Montana law until after a judgment against the insured has been achieved or the case has been settled. Thus for now, it is an empty threat." Attachment 3. At the same time, New West's coverage counsel informed Allied New West would file for bad faith as well. Zadick letter dtd. 11/2/16, Attachment 4.

Richfield Co., 2004 MT 26, ¶10. If two possible dates exist for accrual, then the longer one applies. *Mangas*, *supra*. Allied cannot carry its burden under this law and the circumstances.

C. ILLUSORY/REASONABLE EXPECTATIONS CONTENTION IS ALLOWED.

In her response brief to the motion involving the validity of the related-claims provision, Rolan contended the provision cannot be enforced under Montana law because it is either or both illusory and/or contrary to the reasonable expectations of Allied. If, in fact, amended pleadings were necessary to make these allegations, it would be authorized by the liberal pleading rules of Rule 15(c), *supra*.

D. ROLAN ACTED IN GOOD FAITH CAUSING NO APPRECIABLE PREJUDICE.

The last portion of Allied's brief is devoted to ascribing bad motives to Rolan in an attempt to defeat the liberal pleadings rules. The facts and common sense show differently. The Montana Supreme Court has seldom given credence to the type of attack Allied is trying to launch. This is because of the overriding policy that cases should be resolved on the merits rather than technical statute of limitation defenses. *See, e.g.*, *Sooy v. Petrolane Steel Gas, Inc*., 218 Mont. 418, 708 P.2d 1014, 1016 (1985); *Citizens Awareness Network, supra.*at ¶¶21-22.

1. No Bad Faith. Rolan and her counsel have no motive to act in bad faith. They have a duty to represent the interests of an absent class. They have done so for over 13 years. They have no incentive to cause delay. Rolan has not been paid for 13 years—although it is undisputed she was entitled to compensation from the beginning. Class counsel has not been paid and therefore, certainly has no motive to protract the proceedings unnecessarily. Both wanted this class action over in 2013 when it was initially certified and approved by the Montana Supreme Court. The only reason there has been another decade of delay is because Allied asserted an unmerited ERISA claim at that time and when that failed, belatedly raised coverage defenses. For Allied to argue Rolan and class counsel are seeking delay is both hypocritical and frivolous under these circumstances.

2. No Meaningful Unfair Prejudice Has Befallen Allied. Under Allied's theory, Rolan should have filed her bad faith claims by 2021. She actually filed them in 2022 as soon as the Montana Supreme Court reversed her estoppel defense, thus depriving the Class of adequate funds for restitution. Allied points to no prejudice caused by this delay. The doctrines of equitable estoppel and relating back provide that absence any prejudice, a party like Allied, who has been intimately involved in the underlying claim for years is not entitled to protection of the statute of limitations.

Finally, the bad faith claims are not futile. Unless the language on settlement or judgment in Rule 23, *supra*, is ignored, these cases are not frivolous, but are strong on the merits. Even if the language of Rule 23 were disregarded, the bad faith claims cannot be futile unless the guiding laws on relating back and equitable estoppel are disregarded. Finally, even if Allied's other technical arguments were followed, it would only mean the third-party claims would have to be separately filed. It is hard to see, however, why the first-party claims would not relate back at any rate.

E. RELIEF REQUESTED

Rolan requests the following relief:

(1) Deny Allied's contention this Court has lost all jurisdiction due to interlocutory appeal and allow discovery before Allied is permitted to bring a summary judgment of its own on the estoppel issue.

(2) Order the bad faith claims be filed separately, but only if the Court determines the settlement/judgment requirements of Rule 23, *supra* determine when the statute of limitations runs. In the alternative, rule those claims relate back or are equitably tolled and must be made in this lawsuit.

(3) If necessary, grant Rolan's motion to employ the doctrine of illusory coverage and reasonable expectations for the purpose of showing the inequities of enforcing the "related-claims" provision.

(4) Grant whatever other relief is necessary so as to protect the absent class's right to due process and justice.

DATED this 20th day of July, 2022.

THUESON LAW OFFICE

_____

ERIK B. THUESON
58 South View Road
Clancy, MT 59634

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:

Robert Lukes 350 Ryman St, PO Box 7909 Missoula MT 59807-7909 *Attorneys for New West Health*	□ U.S. Mail □ Federal Express □ Hand-Delivery ☒ E-mail rclukes@garlington.com
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DATED this 20th day of July, 2022.

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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 **AFFIDAVIT OF ERIK B. THUESON**

STATE OF MONTANA)
: ss.
Lewis & Clark County)

ERIK B. THUESON, being first duly sworn, deposes and states as follows:

1. This Affidavit is submitted pursuant to M. R. Civ. P. 56(f), which states:

> (f) When Affidavits Are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) deny the motion;
>
> (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
>
> (3) issue any other just order

2. As stated in Rolan's Reply re: Motion to Amend, I am the attorney representing the Class. I have not been permitted to conduct discovery with regard to Allied's motion that aggregate coverage is precluded by a "related-claims" provision. The evidence is needed to determine whether or not estoppel exists in this case on that issue. The reasons are set forth in the brief, *supra*.

3. More specifically, the issue is whether or not Allied intended or negligently led its insured to believe coverage existed in this case. The answer can be found in Allied's claim's activity log and associated intra-company communications concerning the coverage issue. Moreover, whether or not the coverage letter presented to New West in 2010 was defective will be revealed in Allied's training and claims manuals.

4. After this information has been produced in discovery by Allied, I can take the depositions of those Allied personnel involved with the coverage issue, chiefly Joseph Sappington, who provided New West with a coverage letter in 2011 and then failed to respond in 2013 when asked if the letter was intended to provide full $3,000,000 aggregate coverage limits.

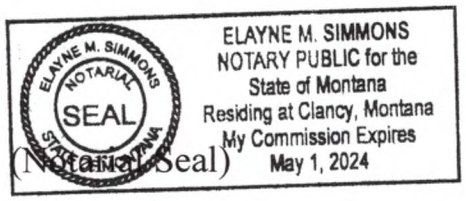
5. By allowing this discovery, the Court will obtain a full evidentiary record in which to consider a motion by Allied on the validity of the "related-claims" provision at issue. If it turns out evidence exists which indicates Allied either intentionally or negligently misled its insured, then Allied has violated its fiduciary duty to disclose and is subject to estoppel. Without the information, the truth-determination process will be compromised, allowing Allied to obtain a judgment unsupported by evidence and in contradiction to the fundamental right to trial by jury.

DATED this 19th day of July, 2022.

THUESON LAW OFFICE

ERIK B. THUESON
58 South View Road
Clancy, MT 59634

SUBSCRIBED AND SWORN to before me this 19th day of July, 2022.



(Notarial Seal)

Notary Public for State of Montana

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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DATED this 20th day of July, 2022.

Elayne M. Simmons
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claim from Ms. Rolan. As you are aware, there is strong authority that ERISA preempts her claims and this question remains pending before Court at the present time.

Please also remember that as a third party claimant, Ms. Rolan can only bring a claim for bad faith under Montana law after she, as a third party claimant, has secured a judgment or the underlying claim is settled. *See* Mont. Code Ann. § 33-18-242(6)(b). Should questions or concerns remain in this regard, please let me know.

Thank you,
Bob Lukes

11-7-16

Robert C. Lukes

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From: Elayne [mailto:elayne@thuesonlawoffice.com]
Sent: Wednesday, November 02, 2016 9:57 AM
To: Robert C. Lukes
Subject: Rolan v. New West

[*from Erik*]

Dear Bob:

Yesterday, Elayne sent you plaintiffs' replies to the two motions related to the show cause hearing and attorney fee award.

For your information and that of your insurance carrier, please be advised that Ms. Rolan will be filing an insurance bad faith lawsuit against the carrier on her own behalf and on behalf of the people in the class, who have been affected adversely by all of this delay. The primary allegation will be that set forth in §33-18-201 (6), MCA, which prohibits an insurance company from failing to resolve claims promptly, fairly and in good faith and also sanctions an award of punitive damages.

If you would like to talk to me about any of the above subjects, please let me know.

Sincerely yours,

THUESON LAW OFFICE

Erik B. Thueson

EBT: ems

Elayne M. Simmons
Legal Assistant
Thueson Law Office
PO Box 280
Helena MT 59624-0280
(406) 449-8200
Blessed are they who maintain justice, who constantly do what is right.

elayne@thuesonlawoffice.com

From: Robert C. Lukes <rclukes@GARLINGTON.COM>
Sent: Monday, February 20, 2017 11:38 AM
To: Querijero, Michelle
Subject: RE: Insured: New West; claimant: Rolan; our file: 2010000725
Attachments: Appellants' Statement of Position.pdf; 2178591.pdf

Michelle,

The Appellate Rules of Procedure in Montana require each party prepare a "Statement of Position" for the required appellate mediation. A copy of both the Plaintiff's Statement and New West's Statement are attached hereto, for your records and review. These Statements are not actually filed with the Supreme Court; rather, they are just provided to the mediator and opposing counsel.

Please note that Plaintiff's counsel again claims he is going to file a lawsuit against New West's insurer for bad faith. However, as discussed previously, he cannot do so under Montana law until after a judgment against the insured has been achieved or the case has been settled. Thus for now, it is an empty threat.

As soon as we have proposed dates for the mediation, we will let you know. In the meantime, if you have any questions, please advise.

Thanks,
Bob Lukes

2-20-17

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From: Robert C. Lukes
Sent: Tuesday, February 14, 2017 8:54 AM
To: 'Querijero, Michelle'
Subject: RE: Insured: New West; claimant: Rolan; our file: 2010000725

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

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NEIL E. UGRIN
1945 - 2007

November 2, 2016

File No.: NE41-03

Via Email Only: michelle.querijero@awac.com

Michelle L. Querijero
Senior Claims Analyst
Allied World Insurance Company
1690 New Britain Ave., Suite 101
Farmington, CT 06032

Re: Rolan v. New West
Claim #: 2010000725

Dear Ms. Querijero:

I am counsel for your insured New West with respect to coverage for New West under the Allied World MCEO policy. A reservation of rights letter was issued on February 18, 2010 by Joseph Sappington on behalf of Allied World. I have attached a copy for your convenience.

In the reservation of rights letter, Mr. Sappington advised Allied was assuming the defense of New West. With respect to the MCEO policy Mr. Sappington acknowledged that the conditions precedent "appear to be satisfied." February 18, 2010, page 4 of 10. Mr. Sappington raised Exclusion A – willful misconduct, willful violation or gaining a profit which the insured was not legally entitled. Pursuant to the policy endorsements and the law of Montana, these determinations are made in the underlying action. As you are aware, the Complaint alleges additional conduct that would constitute a "wrongful act" and would be covered.

There has been no supplemental reservation of rights issued. However, Ian McIntosh, on behalf of your insured New West, wrote to Mr. Sappington 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.

Your insured is concerned, however, because of a comment you made in an email to defense counsel Robert C. Lukes 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. Proof of "willful violation of law, willful misconduct, fraudulent conduct, criminal or malicious conduct" is a very high burden and it is very likely that there will be coverage and that there will not be proof of willful conduct or fraudulent conduct.

I also remind you that Allied World owes a fiduciary responsibility to its insured to protect it and to place its interests at least as high as its own even when defending under a reservation of rights.

Therefore, New West expects 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 of Exclusion A. I further request that I be included on all correspondence between Allied World and defense counsel.

Lastly, please advise me whether Allied World has separated its file between coverage and defense. Based upon the email correspondence, it is my assumption that you are overseeing both the defense and coverage of the litigation on behalf of Allied World. I look forward to your prompt response.

Sincerely,

UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

Gary M. Zadick

GMZ/ajc
Enclosure

cc: Robert C. Lukes

ALLIED WORLD
ASSURANCE COMPANY

Joseph Sappington, Esq.
Senior Claims Analyst

V (860)284-1724
F (860)284-1725
E Joseph.Sappington@awac.com

VIA E-MAIL ahuschka@nwhp.com

February 18, 2010

To: Angela Huschka
New West Health Services
130 Neill Ave.
Helena, MT 59601

Re:

Insured:	New West Health Services
Insurer:	Darwin Select Insurance Company
Policy No.:	0303-5534 (MCEO Policy)
Policy Period:	04/01/2009 to 04/01/2010
Policy Limit:	$1,000,000 for each Claim made in the Policy Period and $3,000,000 in the aggregate for all Claims
Retention:	$50,000
Subject:	Rolan, Dana
Darwin Ref. No.:	2010000725

Insured:	New West Health Services
Insurer:	Darwin National Assurance Company
Policy No.:	0303-5533 (HCDO Policy)
Policy Period:	04/01/2009 to 04/01/2010
Policy Limit:	$1,000,000 for each Claim made in the Policy Period and $3,000,000 in the aggregate for all Claims
Retention:	$50,000[1]
Subject:	Rolan, Dana
Darwin Ref. No.:	2010000750

Dear Ms. Huschka:

I am writing on behalf of Allied World National Assurance Company, claims manager for Darwin National Assurance Company ("DNA") with respect to the referenced Health Care Organization Directors and Officers Liability Insurance Policy Including Employment Practices Liability Coverage Policy (the "HCDO Policy") and Darwin Select Insurance Company ("DSI") in respect to the Managed Care Organization Errors and Omissions Liability Policy (the "MCEO

[1] Applies to Insuring Agreement B(1) & (2).

Policy") (HCDO Policy and MCEO Policy collectively, the "Policies"; DSI and DNA collectively "Darwin"). This letter provides you with a summary of coverage under the above Policies in connection with the above referenced action. We previously acknowledged receipt of this matter on February 11, 2010.

This letter will refer to certain allegations asserted by the plaintiff. We recognize that such allegations are unsubstantiated contentions at this time. We cite the allegations only for analytical reasons. Nothing in this letter is intended to suggest or imply that the allegations have any legal or factual merit.

This letter does not modify any of the terms and conditions of the Policy. Please note that the words that appear in **bold** print below are defined in the Policy.

SUMMARY OF FACTS

We have reviewed the Complaint (the "Complaint") captioned, *Dana Rolan v. New West Health Services*, filed on or about January 26, 2010 in the Montana First Judicial District Court, Lewis & Clark County (the "Action"). This summary of facts is based on the allegations contained in the Complaint.

Plaintiff, a resident of Montana, brings the Action on behalf of herself and on behalf of those similarly situated. The Plaintiff claims that she suffered injuries caused by the legal fault of others and has not been made whole. It is further alleged that the Defendant has avoided payment of medical bills that they are allegedly contractually obligated to pay by claiming the medical costs are the responsibility of those at fault. The Plaintiff alleges that Defendant's failure to pay benefits violates Montana's constitution, statutory law, common law and established public policy. More specifically, the Plaintiff alleges that the Defendant's actions violate Montana's "made whole" law which is enumerated in MCA §33-18-201, *et seq.*

Plaintiff Rolan alleges that that in November 2007 she was severely injured as a result of a motor vehicle collision. The person who negligently caused the accident was insured by Unitrin Services Group. It is alleged that Unitrin paid medical costs of approximately $100,000 directly to the Plaintiff's medical providers under its liability policy. Allegedly, upon demand by the Plaintiff, defendant New West declined to pay the benefits because the tortfeasor's liability carrier, Unitrin, had advance paid medical costs. Plaintiff claims that New West illegally reduced the Plaintiff's insurance coverage by approximately $100,000 in violation of "made whole" obligations. By allegedly violating Montana's "made whole" laws, Plaintiff claims that the Defendant was unjustly enriched at the Plaintiff's expense.

It is alleged that the conduct of the Defendant violates MCA §§33-18-201 *et seq.* which prohibits failures to pay claims on a variety of grounds, including but not limited to breach of the insurance contract, and by asserting denials or failing to pay claims due to the existence of third party liability when the defendants allegedly knew there existed no reasonable or lawful ground for doing so given Montana's "made whole" laws. Lastly, the Plaintiffs allege that the Defendants violated MCA §§33-18-201 *et seq.* sounding in unfair trade practices.

The Complaint further sets forth actions for class certification, declaratory relief and payment, and other class claims for payment and breach of contract and similar Montana statutes as those referred to above. Plaintiffs seek both monetary damages, punitive damages, attorneys' fees and costs.

SUMMARY OF COVERAGE UNDER THE MCEO POLICY

The Insuring Agreement to the MCEO Policy (§ I) states that the **Underwriter** will pay on behalf of any **Insured Loss** which the **Insured** is legally obligated to pay as a result of a **Claim** that is first made against the **Insured** during the **Policy Period** or during any applicable Extended Reporting Period. New West Health Services ("New West") is an **Insured Entity** and is therefore an **Insured** under the MCEO Policy. (Definitions §§ IV(G), (H)).

"**Claim**" is defined in Definitions § IV(C) as 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**.

"**Wrongful Act**" is defined as

> (1) any actual or alleged act, error or omission in the performance of, or any failure to perform a **Managed Care Activity** by any **Insured Entity** or by any **Insured Person** acting within the scope of his or her duties or capacity as such;
>
> (2) any actual or alleged act, error or omission in the performance of, or any failure to perform, **Medical Information Protection**, by an **Insured Entity** or by any **Insured Person** acting within the scope of his duties or capacity as such; and
>
> (3) any **Vicarious Liability** for:
>
> > (a) the performance of, or any failure to perform:
> >
> > > (i) a **Managed Care Activity**;
> > >
> > > (ii) **Medical Information Protection**;
> >
> > (b) the rendering of, or failure to render, **Medical Services**; provided, that **Wrongful Act** shall not include any **Insured's** actual or alleged direct liability for the rendering of, or failure to render, **Medical Services**; or

> (c) any actual or alleged **Sexual Activity**; provided, that **Wrongful Act** shall not include any **Insured's** actual or alleged direct liability for any **Sexual Activity**.

(Definitions §IV(W).

The definition of "**Managed Care Activity**" means any of the following services or activities: **Provider Selection**; **Utilization Review**; advertising, marketing, selling, or enrollment for health care or workers' compensation plans; **Claim Services**; establishing health care provider networks, reviewing the quality of **Medical Services** or providing quality assurance; design and/or implementation of financial incentive plans; wellness or health promotion education; development or implementation of clinical guidelines, practice parameters or protocols; triage for payment of **Medical Services**; and services or activities performed in the administration or management of health care plans or workers' compensation plans. (Definition § IV(K)).

Specifically, "**Utilization Review**," is defined to mean "the process of evaluating the appropriateness or necessity of **Medical Services** for purposes of determining whether payment or coverage for such **Medical Services** will be authorized or paid for under any health care plan, but only if performed by an **Insured**" and "**Claim Services**" is defined to mean "the submission, handling, investigation, payment or adjustment of claims for benefits or coverages under health care or workers' compensation plans." (Definition § IV(U), (D)).

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 appear 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**.

Under the MCEO Policy the **Underwriter** has the right and duty to defend any **Claim** made against any **Insured** which is covered by this MCEO Policy even if the allegations of such **Claim** are groundless, false or fraudulent. (Insuring Agreement § I). 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 of the **Underwriter** for all **Loss**, including **Defense Expenses**, 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. (Conditions § III(A)(1)). Further, "The obligation of the **Underwriter** to pay **Loss**, including **Defense Expenses**, will only be in excess of the applicable retention set forth in ITEM 4 of the Declarations." (Conditions § III(A)(3)).

Note also that under the MCEO Policy, no **Insured** may incur any **Defense Expenses** or admit liability for or settle any **Claim** without the **Underwriter's** written consent. (Conditions § III(D)(1)). The **Underwriter** will have the right to make investigations and conduct negotiations and, with the consent of the **Insureds**, enter into such settlement of any **Claim** as the

Underwriter deems appropriate. 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 set forth in ITEM 3(a) of the Declarations, the **Underwriter's** liability for such **Claim** will not exceed:

(a) the amount for which such **Claim** could have been settled by the **Underwriter** plus **Defense Expenses** up to the date the **Insureds** refused to settle such **Claim** (the "Settlement Amount"); plus

(b) sixty percent (60%) of any **Loss** and/or **Defense Expense** in excess of the Settlement Amount incurred in connection with such **Claim**. The remaining forty percent (40%) of **Loss** and/or **Defenses Expenses** in excess of the Settlement Amount will be carried by the **Insured** at its own risk and will be uninsured.

In addition, pursuant to Conditions § III(B)(1), if during the **Policy Period** or any applicable Extended Reporting period, any **Claim** is first made against any **Insured**, the **Insureds** must, as a condition precedent to any right to coverage under this Policy, give the **Underwriter** written notice of such **Claim** as soon as practicable thereafter and in no event later than:

(a) with respect to a **Claim** made during the **Policy Period**, ninety (90) days after the end of the **Policy Period**; or

(b) with respect to a **Claim** made during an Extended Reporting Period, ninety (90) days after such **Claim** is first made.

Further, pursuant to Conditions § III(D)(2) the **Underwriter** will have no obligations to pay **Loss**, including **Defense Expenses**, or to defend or continue to defend any **Claim** after the **Underwriter's** maximum aggregate Limit of Liability, as set forth in ITEM 3(a) of the Declarations, has been exhausted by the payment of **Loss**, including **Defense Expenses**. If the **Underwriter's** maximum aggregate Limit of Liability, as set forth in ITEM 3(a) of the Declarations, is exhausted by the payment of **Loss**, including **Defense Expenses**, the premium will be fully earned.

As we are assuming New West's defense in this matter I will be in contact with you shortly to discuss the retention of Kimberly Beatty and Leo Ward of Browning, Kaleczyc, Berry & Hoven as counsel.

Given the allegations in the Complaint, please appreciate the potential implication of the following MCEO Policy provisions, which may operate to limit or preclude coverage in this matter.

The MCEO Policy stipulates that, except for **Defense Expenses**, the **Underwriter** shall not pay **Loss** for any **Claim** brought about or contributed to by:

(1) any willful misconduct or dishonest, fraudulent, criminal or malicious act, error or omission by any **Insured;**

(2) any willful violation by any **Insured** of any law, statute, ordinance, rule or regulation; or

(3) any **Insured** gaining any profit, remuneration or advantage to which such **Insured** was not legally entitled.

Determination of the applicability of Exclusion A may be made by an admission or final adjudication in a proceeding constituting a **Claim**, or in a proceeding separate from or collateral to any proceeding constituting a **Claim**. (Exclusions § II(A) as amended by Endorsement No. 6).

Section II Exclusions § (C)(6), sets forth that the **Underwriter** shall not pay any **Loss**, including **Defense Expenses**, for any **Claim** for any actual or alleged express or assumed liability of any **Insured** under an indemnification agreement; provided, that this EXCLUSION (C)(6) shall not apply to any tort liability that would have attached to the **Insured** in the absence of such agreement and is otherwise insured under the Policy.

Section II Exclusions § (C)(7), sets forth that the **Underwriter** shall not pay any **Loss**, including **Defense Expenses**, for any **Claim** based upon, arising out of, resulting from, or in any way involving any actual or alleged:

(a) failure to obtain, implement, effect, comply with, provide notice under or maintain any form, policy, plan or program of insurance, stop loss or provider excess coverage, reinsurance, self-insurance, suretyship or bond.

(b) commingling or mishandling of funds with dishonest intent;

(c) failure to collect or pay premiums, commissions, brokerage charges, fees or taxes.

The MCEO Policy defines **Loss** as **Defense Expenses** and any monetary amount which an **Insured** is legally obligated to pay as a result of a **Claim**; including punitive, exemplary or multiplied damages ("Punitive Damages") awarded in connection with any **Claim** covered by this Policy, other than **Claims** for **Antitrust Activity**, and only if such Punitive damages are insurable under applicable law. law.[2] **Loss**, however, does not include:

1) fines, penalties, or taxes and punitive, exemplary or multiplied damages provided that:

(a) if punitive, exemplary or multiplied damages (hereafter referred to as "Punitive Damages") are awarded in connection with any **Claim** covered by this Policy, other than **Claims** for **Antitrust Activity**, the maximum

[2] Endorsement No. 7 to the Policy discusses which jurisdiction's law shall apply when determining the insurability of Punitive Damages.

amount payable by the **Insurer** attributable to Punitive Damages for any **Claim**, or in the aggregate for all **Claims**, is $3,000,000. This Punitive Damages Limit of Liability is part of, and not in addition to, the aggregate Limit of Liability indicated in ITEM 3(a) of the Declarations; and

(b) if fines, penalties or Punitive Damages are awarded in connection with any **Claim** for **Antitrust Activity**, the maximum amount payable by the **Insurer** is the amount indicated in ITEM 3(b) of the Declarations. This Antitrust Limit of Liability is part of, and not in addition to, the aggregate Limit of Liability indicated in ITEM 3(a) of the Declarations; and

(c) the coverage described in subparagraphs (a) and (b) above shall apply unless prohibited by law;

2) fees, amounts, benefits or coverage owed under any contract with any party including providers of health care services, health care plan or trust, insurance or workers' compensation policy or plan or program of self-insurance;

3) non-monetary relief or redress in any form, including without limitation the cost of complying with any injunctive, declaratory or administrative relief; or

4) matters which are uninsurable under applicable law,

(Definitions § IV(J) as amended by Endorsement No. 5).

Note that pursuant to Conditions § III(G)(1), the MCEO Policy shall be excess of and shall not contribute with:

(a) any other insurance or plan or program of self-insurance, unless such other insurance or self-insurance is specifically stated to be in excess of this Policy; and

(b) any indemnification to which an **Insured** is entitled from any entity other than another **Insured**.

This Policy shall not be subject to the terms of any other policy or insurance or plan or program of self-insurance.

Accordingly, please immediately (1) advise whether there are any other insurance policies available to respond to the allegations in this matter; (2) advise what steps have been taken to secure coverage on behalf of the **Insured** under any other potentially applicable insurance policy; and (3) send us a copy of the coverage position(s) issued by any other insurance carrier(s) in connection with this matter. We expressly reserve all rights with respect to any and all other insurance and indemnification.

In addition, Conditions § III(G)(2), if any other policy or policies issued by the Underwriter or any of its affiliated companies, or by any predecessors or successors of the Underwriter or its affiliated companies, shall apply to any **Claim**, then the aggregate limit of liability with respect to all **Loss** under this Policy and all covered loss under such other policies shall not exceed the highest applicable limit of liability, subject to its applicable deductible or retention, that shall be available under any one of such policies, including this Policy. This Condition (G)(2) shall not apply with respect to any other policy which is written only as specific excess insurance over the Limit of Liability of this Policy.

SUMMARY OF COVERAGE UNDER THE HCDO POLICY

After reviewing the foregoing materials in conjunction with the HCDO Policy, we regret to inform you that for the following reasons, there does not appear to be any coverage available for this matter under the HCDO Policy.

The Insuring Agreement to the HCDO Policy (§ I(B)(2)) states that the **Insurer** will pay on behalf of an **Insured Entity Loss** from **Claims** first made against an **Insured Entity** during the **Policy Period** for **Wrongful Acts**. New West Health Services ("New West") is identified in the HCDO Policy as the **Parent Corporation** and is therefore both an **Insured Entity** and an **Insured** under the HCDO Policy. **Insured Entity** means the **Parent Corporation** and any **Subsidiary** created or acquired on or before the Inception Date in ITEM 2(a) of the Declarations. (Policy II(H)).

"**Claim**" is defined in § II(B) of the HCDO Policy in relevant part as (1) any written demand for monetary relief; or (2) any civil proceeding in a court of law or equity, which is commenced by the filing of a complaint, motion for judgment or similar proceeding. Section II(Z)(5) of the HCDO Policy defines **Wrongful Act** as including "any other actual or alleged act, error, omission, misstatement, misleading statement or breach of duty by any **Insured Entity**".

As the Complaint is a written demand for monetary damages and is a civil proceeding, was first made against an **Insured Entity** during the **Policy Period**, and is based, in part, on the actions of an **Insured Entity**, the conditions precedent to the Insuring Agreement appear to be satisfied. However, certain specific exclusions to the HCDO Policy preclude coverage for this **Claim** in its entirety.

Exclusion III(C)(5) provides:

> C. This Policy shall not provide coverage for any **Claim** based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving:
>
> (5) any actual or alleged act, error or omission in the performance of, or failure to perform, **Managed Care Organization Business Activities** by any **Insured** or by any individual or entity for whose acts, errors or omissions an **Insured** is legally responsible, except that this Exclusion

C(5) shall not apply to **Claims** for **Provider Selection Practices** performed solely for an **Insured Entity**, and provided that the **Insured Entity** is not a **Managed Care Organization**.

"**Managed Care Organization Business Activities**" means "services or activities performed in the administration or management of healthcare plans; **Provider Selection Practices, Utilization Review**; case management; disease management; advertising, marketing or selling healthcare plans or healthcare insurance products; handling, investigating, or adjusting claims for benefits or coverages under healthcare plans; establishing healthcare provider networks; and reviewing the quality of **Medical Services** or providing quality assurance." (Policy §II(N)). "**Utilization Review**" means "the process of evaluating the appropriateness, necessity, or cost of Medical Services for purposes of determining whether payment or coverage for such Medical Services will be authorized or paid for under any health care plan. **Utilization Review** shall include prospective review of proposed payment or coverage for Medical Services, concurrent review of ongoing **Medical Services**, and retrospective review of already rendered **Medical Services** or already incurred costs." (Policy §II(X)).

The allegations in the Complaint indicate that the **Claim** arises from and is directly related to New West's conduct of **Managed Care Organization Business Activities**, including but not limited to, **Utilization Review** services, handling, investigating or adjusting claims for benefits or coverages under healthcare plans. As such, there is no coverage for the **Claim** under the HCDO Policy.

As it appears that there is no coverage for this **Claim** in its entirety under the HCDO Policy, we are not providing any additional comment regarding other coverage issues that may exist with respect to this **Claim**. If you possess any additional information that you believe would bear on coverage in this matter, please forward that information to me at your earliest convenience.

DNA's position with respect to this matter is based on the information provided to date, and is subject to further evaluation should additional information become available. DNA continues to expressly reserve all rights and defenses under the HCDO Policy, and available at law and in equity, with respect to this matter, including but not limited to, the right to assert additional terms and conditions of the HCDO Policy which may become applicable as new information is learned, and the right to deny coverage for this matter on additional and/or alternative bases.

CONCLUSION

Please keep us advised of any significant developments in this matter, and send us copies of significant motions, pleadings, orders, correspondence and other documents.

Darwin National Assurance Company and Darwin Select Insurance Company respectfully reserve all of their rights and defenses under the Polices and available at law with respect to this matter.

Please feel free to contact me if you have any questions.

Very truly yours,

Joseph Sappington