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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 FOR ATTORNEY FEES AND COSTS**

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

I. SUMMARY

Rolan's attorney fee and cost motion is predicated on the following factual assertions:

1. In 2013, this case was over. This assertion cannot be disputed. It was then that the Montana Supreme Court affirmed this Court's Orders that New West had violated the made-whole rights of its insureds and must immediately pay restitution. *Rolan I*, 2013 MT 220.

2. The defense then authorized an ERISA defense which was "beyond the bounds of reason." This, too, is hard to contradict, since the Montana Supreme Court held in 2017 that the District Court's decision to allow Allied to amend was "beyond the bounds of reason." *Rolan II,* 2017 MT 270, ¶24. This ERISA defense proximately caused delay until *Rolan II, supra*, in 2017.

3. Rolan was provided an E & O policy in 2013 which, on its face, expressly stated that $3,000,000 in aggregate insurance limits existed to cover the Class claims. This fact is undisputed. This has proximately caused most of the remaining delay after 2013.

If these facts are undisputed, then Rolan should be entitled to her attorney fees and costs, in part or in full, since the case would have otherwise resolved in 2013 upon the entry of *Rolan I, supra*. Had Allied denied coverage at that time,

New West would have two possible options: (1) Offer to pay Rolan in full ($110,000 according to defense counsel). If accepted, this would have ended Rolan's legal status to be class representative and thus, effectively ended this class action; or (2) Pay both Rolan and the Class the restitution due, since it was not near insolvent in 2013 as it would be in 2018 when a preliminary settlement was forced on the Class. New West could have then sought relief against Allied, including a declaratory judgment on coverage, bad faith or any other claims available. At any rate, the case would have ended much sooner and much differently had Rolan known there was a coverage dispute. Ten years of unnecessary and wasted court proceedings and the associated attorney fees and costs would have been avoided.

Once Allied answers relevant discovery, we will know how Allied's actual conduct was either a proximate cause or substantial factor in causing unnecessary delay, making it accountable for attorney fees and costs.

II. ALLIED'S CONTENTIONS

The major contentions are addressed separately below.

A. ALLIED'S CONTENTION AN INSURANCE COMPANY CANNOT BE REQUIRED TO PAY ATTORNEY FEES AND COSTS

This contention is untrue under controlling Montana law. First, as was discussed in Rolan's opening brief: In *Tigart v. Thompson*, 244 Mont. 156, 796 P.2d 582 (1990), the Montana Supreme Court held the insurance company can be held

liable for unreasonably multiplying proceedings through "conduct at odds with the letter and spirit of pretrial discovery." "[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'..." *Id.* at 585. Allied's litigation decisions were unreasonable and multiplied the proceedings and therefore, Allied is accountable for paying excess attorney fees and costs.

Second, all insurance companies have independent duties when conducting litigation. Specifically, the Unfair Trade Practices Act, § 33-18-201, MCA sets forth several duties that require insurance companies to act fairly and in good faith towards all parties during the course of litigation. The Montana Supreme Court recognizes these duties are engrafted on all Montana policies and laws designed to regulate an insurance company's conduct. *See, Ellinghouse v. SafeCo,* 725 P.2d 217 (Mont. 1986).

B. ALLIED'S CONTENTION IT DID NOT CONTROL THE DEFENSE

Whether or not Allied technically controlled all aspects of the defense is not relevant. Everyone "is responsible not only for the results of the person's willful acts but also for an injury occasioned to another by the person's want of ordinary care or skill." § 27-1-701, MCA. Allied can be held jointly and severally liable. Moreover, Allied, alone, decided not to reveal coverage defenses until 2016—which has engendered most of the rest of the delay. As set forth above, Allied has independent

duties that govern its conduct during litigation under *Tigart, supra* and the Unfair Trade Practices Act.

C. ALLIED'S CONTENTION NO EVIDENCE EXISTS TO MAKE IT ACCOUNTABLE

Allied contends "there is no evidence—none—that Allied controlled the defense …." There is, however, available evidence. More importantly, Allied cannot make this contention where it has blocked any discovery into this issue for the past several years.

1. Allied is in no position to argue no evidence exists when it has blocked discovery into that very issue. The background or timeline is as follows:

In 2016, New West announced it was going out of business. Rolan requested a show cause hearing to assure New West had assets to cover any potential judgment. DN 124-126.

New West responded no show cause hearing was necessary, since it had $3,000,000 to cover the Class's claims. DN 133, p. 3. A few days later, however, Allied informed New West, for the first time, it was denying that any coverages existed under still unidentified exclusions. New West relayed this information to Court and counsel: "The information is new to New West, as it had previously understood that there was coverage for claims other than intentional acts." DN 143, Attachment 1.

On November 30, 2017, the Montana Supreme Court held it was beyond the "bounds of reason" to allow the defense to raise an ERISA defense. On remand, Rolan added Allied as a party through a declaratory judgment action on coverage. DN 169-170. She served her First Discovery Requests on Allied, along with the Complaint. New West filed a cross-claim that Allied must be estopped from denying coverage, since it waited over six years to reveal it had any coverage defenses.

On July 3, 2018, without answering discovery, Allied moved for summary judgment that the $3,000,000 aggregate limits did not apply because of a "related-claims" defense. DN 186-187.

On July 24, 2018, Rolan notified the Court that Allied's Motion for Summary Judgment needed to be delayed: "Allied certainly cannot be permitted to pursue a summary judgment on coverage where, as here, it has seen fit not to allow discovery." DN 193, p. 7.

On the same date, Rolan's response to Allied's summary judgment was due. She was forced to raise the estoppel defense without all the evidence. She again objected: "It is fundamental that parties should not be allowed to raise summary judgment motions when they have prevented the opposing party from learning the facts." DN 192, p. 11.

Allied never provided discovery answers relevant to the estoppel defense. On August 7, 2018, it objected that any such information was "protected by the attorney client privilege and work product." It would not produce its "claims file" or related documents, which would have documented what control it asserted over the lawsuit. The same file would have disclosed claims analyst Sappington's intent in failing to raise coverage defenses for over half a decade, including whether he negligently misled New West. Finally, these documents would disclose his and Allied's motives for refusing to acknowledge coverage attorney McIntosh's request in 2013 to acknowledge full coverage existed. *See* Exhibit 1, Allied's Responses to Plaintiffs' First Discovery Requests, pp. 6-8.

Applying these background facts, Allied was permitted to move for summary judgment on coverages in 2018 without providing any evidence through discovery. This evidence is needed before Allied can be allowed to gain summary judgments on either estoppel or its contention it had no control over this case.

To rectify this situation, Rolan has served her second discovery requests on Allied. They direct Allied to answer Rolan, in her own capacity, and as assignees of rights New West has against it. This should eliminate the privilege claims Allied is using to conceal this evidence. It cannot hide its claims file from its own insured concerning the insured's estoppel claim.

2. Evidence exists. Even when considering the incomplete evidence available, however, there is evidence Allied asserted control. For instance, under the Unfair Settlement Practices Act, § 33-18-201(6), an insurer, liked Allied, has a legal obligation "to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." In 2013, defense counsel communicated to Allied in writing that liability was not only reasonably clear, but for all intents and purposes, absolutely clear: New West had a legal duty to pay Rolan's claims in 2007 when they were first incurred under settled Montana law. Therefore, defense counsel recommended that *Allied* immediately settle with Rolan, since to fail to do so only increased New West's exposure to punitive damages for delaying payment. Despite the prejudice and conflict of interest with its insured, Allied decided not to settle. In the same letter, defense counsel asked Allied if it wanted to try to raise an ERISA defense, although defense counsel indicated he did not think it would fly. *See* Exhibit 2, *supra. See also*, Rolan's Proposed Third Amended Complaint, ¶¶38-48 (quoting and discussing this document).

Three years later, defense counsel again advised Allied that extensive legal research—including that performed by a separate law firm, specializing in ERISA, displayed that ERISA would not preempt Rolan's state made-whole claims. Nevertheless, defense counsel and Allied decided to "continue the battle." *See*

Exhibits 3 and 4; *see also*, Proposed Third Amended Complaint, ¶¶63-69 (quoting and discussing communications between defense and Allied).

Allied also made the decision to conceal its coverage position for six years. In 2013, New West was ready to pay the Class's restitution as had been directed in *Rolan I, supra*. It hired the Crowley firm to verify the coverages with Allied. Crowley attorney, Ian McIntosh, discussed and communicated in writing with Joseph Sappington, the Allied claims analyst in charge of the case. He wrote:

> 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.

Allied chose not to respond. McIntosh telephoned Sappington who continued to avoid a response. *See* Exhibit 5, McIntosh Affidavit with letter.

In summary on this point, it is untrue that no evidence exists to support the claim that Allied was controlling the defense by unilaterally making the strategic and tactical decisions which caused the decade delay. The available evidence is to the contrary. Discovery will be served on Allied to find out what relevant evidence exists in its own files. We suspect it will answer the question concerning Allied's control of the case and whether or not it can defeat an estoppel claim.

D. CONTENTION ALLIED CANNOT BE RESPONSIBLE FOR FEES RELATED TO ERISA DEFENSE

Allied notes the District Court previously awarded attorney fees and costs related to the late raising of an ERISA defense under the *Foy* exception. Those fees, however, were only awarded for the time period before ERISA was raised in 2013. They do not cover fees and costs the Class incurred subsequent to that date. Therefore, they do not include Rolan's fees and costs expended in the federal court having the case remanded back to state court; her battle over ERISA in the district court after this; and the successful reversal of ERISA in 2017 in *Rolan III, supra*.

Moreover, Allied paid the pre-2013 attorney fees and costs out of the $1,000,000 coverage available, reducing the limits available to the Class. It should have paid out of its own pocket. Whether or not it technically controlled the defense, it worked closely with the defense attorneys throughout this lawsuit and has independent duties governing its conduct when in litigation under the Unfair Settlement Practices Act, *supra.*

It took four years to clear up the frivolous ERISA defense. The Supreme Court's 2017 decision in *Rolan II, supra* at ¶24, concluded allowing it went "beyond the bounds of reason." This at least infers Allied's decision to employ it also was "beyond the bounds of reason" (And the Supreme Court did not even have access to the communications between the defense and Allied, *supra*, showing Allied knew

all along that the ERISA defense would not fly but pursued it anyway.). When a party (including the party's insurer) multiplies proceedings through "unreasonable conduct, it must pay the attorney fees and costs of the other party. *Tigart, supra.* Therefore, this Court can, and should, impose this remedial sanction on Allied, which made the decision. Deducting attorney fees for the defense's mistakes from the Class recovery is hardly equitable or fair. It is directly contrary to the equitable doctrines in Montana which provide for fee shifting when a party engages in misconduct during the course of litigation.

E. CONTENTION ROLAN IS NOT ENTITLED TO PARTIAL ATTORNEY FEES FOR THE SUCCESS ACHIEVED THROUGH DECLARATORY JUDGMENT

Allied contends Rolan cannot obtain fees and costs for successfully achieving the $1,000,000 single limit coverage. *Cramer v. Farmers Ins. Exch*., 2018 MT 198, 423 P.3d 106 is a case where the insurance company argued the plaintiff's partial success in a declaratory judgment action precludes recovery of costs and fees. The Montana Supreme Court disagreed: "Because Cramer was forced to bring this action to obtain the full benefit of her insurance contract, she is entitled to recover attorney fees. Farmer's argument that a party must prevail on all claims to be awarded fees is unavailing and the cases it cites do not support that position." *Id.* at ¶27.

Allied contends Rolan is not entitled to fees because she is the third-party beneficiary of the policy—not the insured. Rolan, however, stepped into the shoes of the insurer, New West, when New West assigned its claims to Rolan.

F. CONTENTION SUPREME COURT RULED ON SOME OF THESE ISSUES IN *ROLAN III*.

Contrary to Allied's contentions, the Supreme Court did not rule on these issues in *Rolan III.*

First, the Supreme Court did not address nor rule upon the fact that Rolan received an E & O policy during discovery in 2011 that expressly stated class action claims were covered to the full $3,000,000 limit. The policy had nothing to do with New West's estoppel claim, which was the only issue discussed. The fact Rolan received incorrect insurance information in 2011 was not raised nor mentioned by the Court or parties in *Rolan III.*

Nor did the issue of "controlling the defense" come up in *Rolan III.* The term "controlling the defense" or even "control" is not mentioned in the decision at all. Based upon the incomplete evidence available (because Allied blocked discovery), the appeal was decided on the following basis: "New West has not demonstrated by clear and convincing evidence that Allied made material representations that the $3 million limit to coverage applied to this lawsuit." *Id.* at

¶25. There is no ruling that Allied did not "control the defense." It is not relevant to the denial of summary judgment on estoppel.

Further, Allied's liability for fees is not based on any technical definition of "controlling the defense." As previously discussed, an insurance company, as well as the defendant party, is accountable for its own conduct whether or not it technically controlled other aspects of the defense. *See, e.g., Tigart, supra*; *Ellinghouse, supra.* Thus, discussions about its waiving cooperation clauses late in the game in 2018 are not relevant to decisions it made about ERISA and coverage revelations.

G. CONTENTIONS REGARDING INAPPLICABILITY OF EQUITABLE FEE SHIFTING

Once the discovery mentioned above is completed, it will be quite clear that Allied was making the unreasonable litigation, strategic and tactical decisions that caused years of unnecessary delay, costs and fees—independent or in joint concert with New West. Given the flexible and multiple equitable doctrines for shifting fees and costs under Montana law, Allied's technical attacks will prove to be unmerited. This is especially true when the statute prohibiting multiplying proceedings through unreasonable conduct is considered.

H. CONCLUSION

Allied's multiple objections are unmerited and only confuse the issues. If Allied's own acts and omissions unreasonably caused delay, then it is accountable under one or more of the pertinent fee-shifting doctrines for fees and costs.

DATED this 3rd day of August, 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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DATED this 3rd day of August, 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 **PLAINTIFFS' EXHIBITS TO REPLY IN SUPPORT OF MOTION FOR ATTORNEY FEES AND COSTS**

INDEX TO EXHIBITS

Exhibit 1	-	8/7/2018 Allied World's Responses to Plaintiffs' First Discovery Requests
Exhibit 2	-	10/8/2013 Lukes letter evaluation to Sappington
Exhibit 3	-	6/2/2016 Lukes letter to Allied World M. Querijero
Exhibit 4	-	4/26/2017 Lukes letter to Allied World M. Querijero
Exhibit 5	-	8/23/2018 McIntosh Affidavit with attachment

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EXHIBIT 1

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND 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. CDV-2010-91 Judge Kathy Seeley **ALLIED WORLD ASSURANCE COMPANY'S RESPONSES TO PLAINTIFFS' FIRST DISCOVERY REQUESTS**

These responses are made only for the purpose of, and in relation to, this action. Each response is given subject to all appropriate objections (including, but not limited to, objections concerning competency, relevancy, materiality, propriety, and admissibility) which would require the exclusion of any statement contained herein if the request were asked of, or any statements contained herein were made by, a witness present and testifying in Court. In addition to any objections specifically stated herein, all of the aforesaid objections and grounds therefore are hereby reserved and may be interposed at trial.

In response to Plaintiffs' First Discovery Requests, Allied World Assurance Company ("Allied") advises and informs Plaintiffs that Allied's counsel has not fully completed the discovery in this action, and has not completed the preparation for trial. Accordingly, the responses contained herein are based only upon such information, matters, and documents which are presently available and known to Allied's counsel, based upon such information and belief. It is anticipated further discovery, investigation, legal research, and analysis may supply additional facts, may add meaning to the known facts, as well as possibly establishing new or different facts, all of which may lead to changes, modifications, and additions to the answers and responses set forth herein.

The following responses are given without prejudice to Allied's right to produce evidence of any new facts, subsequently discovered facts, or facts which Allied may later recall. Allied accordingly hereby reserves the right to change any and all of the responses contained herein as additional facts are ascertained, or other facts (different or otherwise) may be learned, analyses are made, legal research is completed, and contentions are made. These responses contained herein are made in a good faith effort to supply as much factual information as is presently known, but should in no way be to the prejudice of Allied in relation to further discovery, research, or analysis.

SCOPE OF RESPONSES: The scope of discovery is prescribed by Rule 26(b). "Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense. . . ." These responses are made on behalf of Allied World as a defendant in this lawsuit. Only one claim is asserted against Allied World, and it is set forth in Count V of the Seconded Amended Complaint as a claim for declaratory or injunctive relief. Specifically, Plaintiffs seek "a declaratory judgment holding that Rolan and her class are covered (a) under one or both of the E and O policies in question; and (b) this coverage includes both the individual and aggregate limits." Accordingly, Allied World's responds as a defendant in declaratory action, and not as an insurer to other parties in this lawsuit. Discovery regarding the allegations asserted against New

West should be directed to New West, and fall outside the scope of discovery allowed against Allied World.

DISCOVERY REQUEST NO. 1: (Drafters)

Set forth the names, addresses, and job descriptions of each and every person who participated in answering these discovery requests. Further indicate the number of the discovery request that said person provided an answer to.

ANSWER: Answering only with respect to the claim asserted against Allied World in Count V, and the defenses asserted by Allied World as a defendant, Allied World provides the following information: Allied World objects to this response to the extent that it seeks information protected by the attorney client privilege and the attorney work product doctrine. Subject to and without waiving those objections, Allied World responds that Amy Markim, Senior Claims Analyst, verified the responses to these discovery requests, which were prepared with the assistance of counsel of record. Ms. Markim may be contacted through counsel.

DISCOVERY REQUEST NO. 2: (Potential Witnesses)

Furnish the name, address, occupation, job description and present location of all persons known to you or your attorneys who have knowledge of relevant facts pertaining to the above-entitled claim or any of your defenses. This request is intended to include all witnesses known to you or to your attorneys or to any other agent.

ANSWER: Answering only with respect to the claim asserted against Allied World in Count V, and the defenses asserted by Allied World as a defendant, Allied World provides the following information:

1. Amy Markim
   Senior Claims Analyst
   Allied World Insurance Company
   Ms. Markim may be contacted through counsel.

2. Michelle L. Querijero
   Senior Claims Analyst
   Allied World Insurance Company
   Ms. Querijero may be contacted through counsel.

3. Joseph Sappington.
Former Senior Claims Analyst and Assistant Vice President
Allied World Insurance Company
As a former employee, Mr. Sappington should be contacted through counsel.

4. Taylor Norton
Assistant Vice President
Allied World Insurance Company
Ms. Norton may be contacted through counsel.

5. Kevin Fisher
Vice President
Allied World Insurance Company
Mr. Fisher may be contacted through counsel.

6. Ian McIntosh
Crowley Fleck
P.O. Box 10969
Bozeman, MT 59719-0969

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

8. Kimberly Beatty
Browning Kaleczyk Berry & Hoven, PC
P.O. Box 1697
Helena MT 59624

DISCOVERY REQUEST NO. 3: (Documents)

(1) Identify each and every document obtained, generated or possessed by you or your attorneys at any time authored, generated by, or reflecting any statements of any person or entity, including your own personnel which could lead to the discovery of information relevant to the claims and/or defenses in this lawsuit.

(2) Pursuant to Mont. R. Civ. P. 34, provide copies of each of the documents identified in subpart (1) or make them available for inspection and copying.

RESPONSE: Allied World answers only with respect to the claim asserted against Allied World in Count V, and the defenses asserted by Allied World as a defendant. Allied World does not intend or attempt to respond on behalf of its insured, New West Health Services. The only

claim asserted against Allied World in the Second Amended Complaint is Count IV, Claim for Declaratory and Injunctive Relief, seeking "A declaratory judgment holding that Rolan and her class are covered (a) under one or both of the E and O policies in question; and (b) this coverage includes both the individual and aggregate limits." (Second Amended Complaint, prayer for relief, p. 14). Other than Court orders, the documents relevant to that dispute are:

1. Darwin Select Insurance Company MCEO Policy No. 0303-5534 issued to New West for the policy period April 1, 2009 to April 1, 2010. This policy was provided to Plaintiffs on June 21, 2018 by Allied World, and is also on file with the court as Ex. 2, Dkt. 187, Brief in Support of Allied World's summary judgment motion.
2. Darwin National Assurance Company HCDO Policy No. 0303-5533 issued to New West for the policy period April 1, 2009 to April 1, 2010. This policy was provided to Plaintiffs on June 21, 2018 by Allied World, and is also on file with the court as Ex. 2, Dkt. 187, Brief in Support of Allied World's summary judgment motion.
3. Reservation of rights letter from Allied World (Joseph Sappington) to New West (Angela Huschka) dated 2-18-2010, previously provided by New West (hereinafter "RoR letter"). The RoR letter is in Plaintiffs' possession, and is attached as an Exhibit to the Second Amended Complaint.

DISCOVERY REQUEST NO. 4: (Experts)

Provide complete Rule 26(b)(4) disclosures for all individuals you expect to call as expert witnesses at trial.

RESPONSE: Answering only with respect to the claim asserted against Allied World in Count V, and the defenses asserted by Allied World as a defendant, Allied World has not identified expert witnesses. Given that the complaint against Allied World seeks only declaratory relief based on the terms of an insurance contract, Allied World does not anticipate calling expert witnesses but reserves the right to supplement this response.

DISCOVERY REQUEST NO. 5: (Investigation & Claims File)

(1) Describe the factual information that has been uncovered in any investigation you have conducted related to this lawsuit and identify the source of the information.

(2) Pursuant to Rule 34, Mont. R. Civ. P., produce:

a. all documents generated by or in connection with any investigation you conducted of the matters alleged in plaintiffs' complaint or with regard to the plaintiffs .

b. A complete and unadulterated copy of your claims file up through the date of this litigation.

RESPONSE: Allied World reiterates the "Scope of Responses" limitation set forth in the preamble to these responses. Allied World responds to the "lawsuit" insofar as it involves allegations against Allied World in Count V of the Complaint, and does not respond on behalf of New West.

(1) Any factual information uncovered in the investigation of the claims against Allied World regarding the coverages afforded to New West:

This information is protected by the attorney client privilege and work product privilege. Without waiving those objections, the "facts" necessary to determine coverage are contained in the two policies of insurance at issue in the complaint and previously produced as Ex. 1 and 2 to Dkt. 187; the claims as asserted in the Second Amended Complaint; and the RoR letter attached to the Second Amended Complaint.

(2) a. Documents generated in the investigation conducted of the matters alleged in Plaintiffs' Complaint against Allied World:

This information is protected by the attorney client privilege and work product privilege. Without waiving those objections, the "facts" necessary to determine coverage are contained in the two policies of insurance at issue in the complaint and previously produced as Ex. 1 and 2 to Dkt. 187; the claims as asserted in the Second Amended Complaint; and the RoR letter attached to the Second Amended Complaint.

b. A complete and unadulterated copy of Allied World's claims file up through the date of this litigation.

In response to this request, Allied World reiterates the "Scope of Responses" limitation set forth in the preamble to these responses. Allied World responds to the "lawsuit" insofar as it involves allegations against Allied World in Count V of the Complaint, and does not respond on behalf of New West. In 2010, Allied World opened a "claims file" on behalf of New West with respect to the allegations asserted by Plaintiffs against New West. Allied World objects to the request for the "claims file" based on the attorney client privilege and the work product privilege. Montana law recognizes that claim files are protected from discovery by the attorney client and work product privileges. *Kuiper v. Dist. Ct. of the Eighth Judicial Dist*., 632 P.2d 695, 699 (Mont. 1981); *Cantrell v. Henderson*, 718 P.2d 318 (Mont. 1986). Work product privilege is afforded at the time the claim file is opened, as litigation is anticipated at that point. *Kuiper*, 632 P.2d at 701. The entire claims file is privileged in this case, because the complaint initiating suit constituted notice of the claims against New West.

Montana courts recognize that the insured and the insurers occupy a "privileged community or magic circle" within which confidential information may be shared without waiver of attorney-client privilege or work product privilege. *In Re Rules of Professional Conduct*, 2 P.3d 806, 818 (Mont. 2000); *Draggin'y Cattle Co., Inc. v. Addink*, 312 P.3d 451,460 (Mont. 2013). Members of the magic circle do not waive the privileges by sharing information within this circle. *Id.* New West and Allied World occupy a privileged community or magic circle with respect to this litigation. *Id.*

Allied World notes that it opened a litigation file when suit was initiated against Allied World in Count V of the Second Amended Complaint. The file is privileged for all the reasons set forth with respect to the claim file, and incorporated herein. In addition, the litigation file does not constitute a "claims file" as that term is normally understood, as the "claim" at issue is the coverage litigation against the insurance company, not the handling of a claim on behalf of an insured.

DISCOVERY REQUEST NO. 8 (sic): (Omnibus on Documents)

Insofar as not previously provided, produce, pursuant to Rule 34, Mont. R. Civ. P., all statements, reports or records obtained by you from any person, including (but not limited to) the plaintiffs, in connection with the occurrence alleged in the plaintiffs' Complaint, or relevant to any matter in controversy in this action.

RESPONSE: Object to the extent this request seeks copies of plaintiffs own documents, as unnecessary and unduly burdensome. Object to the extent seeks copies of documents obtained by Allied World as part of the privileged community or magic circle as New West's insurer. Allied World objects based on the attorney client privilege and the work product privilege, as fully set forth in response to Discovery Request 5. During the years of litigation which preceded Allied Worlds joinder in this lawsuit, Allied World received documents as part of the privileged community. Allied World does not interpret this request as seeking correspondence among attorneys to this lawsuit.

Without waiving its objection, Allied responds that the only claim against Allied World is an action for declaratory and injunctive relief seeking an interpretation of the policies issued to New West. Allied World has been represented by counsel, and the statement and reports of counsel, in any form, are privileged. Allied has taken no statements of witnesses, drafted no reports regarding coverage, other than the RoR letter attached to the Second Amended Complaint, and obtained no records other than the policies already produced, and the information regarding the claims supplied by the Plaintiffs and New West in the course of this lawsuit.

DISCOVERY REQUEST NO. 9: (Identity of Insurance Policies)

Identify and describe every liability insurance policies between you and New West Health Services which has been in effect at any time between 2001 to the present date. The term "liability insurance" should be construed broadly to include any and all errors and omissions coverages; or other types of liability coverages, etc. With respect to each policy provide the following:

(1) The identification number of the policy.

(2) The type of insurance (E and 0, liability, etc.).

(3) The name of the insured and insurer.

(4) The period over which the policy was in effect.

(5) Pursuant to Mont. R. Civ. P. 34, please provide a copy of the policy, the dec page, endorsements and any and all other documents which affect the scope of coverage.

(6) State whether or not it is your position that the policy applies or does not apply to any of the allegations and/or damages and recoveries set forth in the complaint by the plaintiffs.

(7) The date in which you first concluded that coverage was not available.

ANSWER: With respect to questions (1) through (5), Allied World first provided coverage to New West in 2007, and has issued the following policies to New West:
MCEO 0303- 5534; five annual policies incepting in 2007 and ending in 2018.
HCDO 0303-5533; eleven annual policies incepting from 2007 to 2012
0304-5485: three annual policies incepting in 2009 and ending in 2012;
306-5239; one annual policy incepting on April 1, 2011 and ending on April 1, 2012.

The information requested in questions (1) through (4) is stated on the declarations page of each policy, and production of the policies responds to question (5). The policies are numbered 1 - 1002 and are produced electronically at:
https://drive.google.com/drive/folders/1jaghJfvYbVb7YKkIuLUHIVW-gBYMcnnQ
The parties are responsible for downloading and saving them. If you encounter any problems, please contact the Nelson law Firm.

As to questions (6) and (7), the original complaint was filed on or about January 26, 2010. New West's legal counsel, Kimberly Beatty of Browning Kaleczyc Berry & Hoven PC., "tendere[ed] this claim to [Allied World] for defense under its E&O Policy No. 0303-5534 and its D&O Policy No. 0303-5533." (Doc. 1003-1019). Allied World analyzed the coverage as tendered, pursuant to the MCEO Policy and the HCDO Policy in effect from April 1, 2009 to April 1, 2010. Those policies have previously been produced to Plaintiffs on June 21, 2018 and

as Exhibits 1 and 2 to Allied World's Brief in Support of Partial Summary Judgment, Dkt. 187. The MCEO Policy is produced herein as 807-836; the HCDO Policy is produced herein as 70-109.

As set forth in Allied World's Motion for Partial Summary Judgment, the relevant policy is MCEO Policy 0303-5534 for April 1, 2009 to April 1, 2010 Policy Period, which is the policy in place at the time of the original complaint which provides E&O coverage. The original complaint constitutes the "claim" as defined by the policy, and was first made and reported to Allied World in the policy period for April 1,2009 to April 1, 2010. (See Doc. 1003-1019). Allied World relies upon the "claims made and reported" condition of the MCEO policy, Ex. 1, Dkt. 187.

The MCEO Policy is applicable to plaintiffs' wrongful act allegations (Counts II and IV) according to the terms and conditions of the policy where not otherwise excluded, limited, or outside of the insuring agreement. Allied World incorporates the policy provisions and legal standards set forth in its Brief in Support of Partial Summary Judgment, and incorporates the "Summary of Coverage under the MCEO Policy" set forth on pages 3 through 8 of the RoR Letter.

By February 18, 2010, Allied World determined that it owed a duty to defend New West for the allegations asserted by Rolan and the class under the MCEO policy. By February 18, 2010, Allied World determined that a potential for coverage existed for the allegations asserted by Plaintiffs with respect to wrongful acts, subject to policy limitations, and set forth its reservation of rights by letter of that date. Allied World incorporates all reservations contained in the letter.

By February 18, 2010, Allied World determined that the HCDO policy did not provide coverage for the allegations asserted by Plaintiffs against New West, and provided the explanation for that coverage determination in the letter dated February 18, 2010. Allied World incorporates the policy provisions and legal standards set forth in its Brief in Support of Partial

Summary Judgment, and incorporates the "Summary of Coverage under the HCDO Policy" set forth on pages 8 through 9 of the RoR Letter.

With respect to the other policies produced herein, Allied World did not make a formal determination of coverage under these policies. The insured specifically tendered the claim under the MCEO and HCDO policies in effect from April 1, 2009 to April 1, 2010. The MCEO Policy provides coverage for "wrongful acts" during that policy, and Allied World determined that coverage was available under the MCEO for that policy period. Allied World acknowledged a duty to defend and has defended New West pursuant to the February 18, 2010 reservation of rights throughout this litigation.

DISCOVERY REQUEST NO. 10:

For each policy in Discovery Request No. 9, where you have denied coverage in any way for the damages and/or remedies requested by the plaintiffs in the above-entitled action, please provide the following information:

(1) Each and every reason you contend that makes the particular policy inapplicable to the allegations, damages and/or recoveries in this lawsuit.

(2) Explain in detail the foundation and support you maintain supports your position, including express reference to the portion of the policy which you claim defeats coverage and citation to any legal authority that you allege supports your position. Include any explanation for denying part or full recovery for the types of coverages at issue (different coverage limits, etc.).

(3) Pursuant to Rule 34, *supra*, identify all documents pertaining to your position, including any letters, correspondence emails or other documents generated by you or anyone else concerning the coverage issue.

ANSWER: With respect to the policies produced in response to Discovery Request 9, Allied World has denied coverage under HCDO 0303-5533 and has reserved its rights regarding coverage under the MCEO 0303-5534, both with policy periods April 1, 2009 to April 1, 2010.

(1) and (2) Allied World provided this information to Plaintiffs and New West in its draft

motion for partial summary judgment on June 21, 2018. The motion and brief have now been filed, and Allied World incorporates the briefing here.

DENIAL OF COVERAGE UNDER THE HCDO POLICY.

With respect to HCDO 0303-5533 for policy period of April 1, 2009 to April 1, 2010, coverage is unavailable for the reasons set forth in the Motion for Partial Summary Judgment and RoR letter, both of which are incorporated by reference herein. Those reasons include but are not limited to the fact that HCDO Policy 0303-5533 specifically excludes coverage for any claim arising out of acts, errors, or omissions in the performance of or failure to perform Managed Care Organization Business Activities. (HCDO, p. 31; Section II.C.5). The HCDO Policy unequivocally excludes coverage for Plaintiffs' Complaint against New West because the allegations are "based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving" Managed Care Organization Business Activities. (HCDO, p. 31).

COVERAGE UNDER THE MCEO POLICY

The pertinent policy provisions upon which Allied World relies are set forth in the RoR letter, which is incorporated herein. Without waiving any policy provisions, the following coverage inclusions and limitations have been identified by Allied World.

1. The single claim limit of $1,000,000 applies.

As set forth in the Motion for Partial Summary Judgment which is incorporated herein, Allied World has always acknowledged that MCEO 0303-5534 provides some coverage for the matters asserted by Plaintiffs against New West in the complaint. Since receipt of the original complaint, Allied World has reserved its rights, asserting that policy conditions and exclusions may preclude coverage for some of the allegations asserted by Plaintiffs against New West. Allied World incorporates that reservation of rights letter herein. (RoR letter, attached to Second Amended Complaint). Allied World has always asserted that the Policy has limits of $1,000,000 for each claim made and reported in the Policy Period and $3,000,000 in the aggregate for all claims made and reported in the Policy Period. (RoR letter; Allied World's Answer, ¶8). The

Complaint, made and reported during the policy period, constitutes a single claim by definition. In addition, the allegations of any eventually-identified class members are already contained within the Complaint/"Claim." Thus, the "each claim" limit of $1,000,000 applies.

Allied World has moved for partial summary judgment for a declaration that the $1,000,000 limit applies, relying on two documents: the MCEO policy and the Second Amended Complaint. The briefing is incorporated herein.

2. Coverage for "Loss" as a Result of a "Claim".

As set forth in the RoR letter, the MCEO policy provides coverage for any "Loss" which the Insured is legally obligated to pay as a result of a Claim first made and reported during the Policy Period. "Loss" is a defined terms in the MCEO Policy, and it does not include:

> 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 or self-insurance.

Therefore, inasmuch as the allegations in Counts I and III of the Complaint for breach of contract seek recovery for amounts, benefits, or coverage allegedly owed by New West to plaintiffs pursuant to the contracts of health insurance between them, those amounts do not constitute "Loss" and no coverage is available for them.

3. Legally Obligated to Pay

The MCEO Policy does not provide coverage until there exists a "Loss" which the Insured becomes legally obligated to pay. Rolan alleges breach of contract in Count I and violation of the Unfair Trade Practices Act ("UTPA") in Count II. Class members allege breach of contract in Count III and UTPA violations in Count IV. No class members have been identified, and no specific "Loss" has been determined. Allied World continues to reserve its rights as to all provisions and exclusions stated in the RoR letter for the allegations in Counts III and IV, given that no "loss" and no complaining parties have been identified. Based on the allegations of the Complaint regarding the unidentified class members' allegations, the breach of contract damages asserted in Counts I and III do not meet the definition of "Loss" and are not

covered.

With respect to Counts II and IV, which allege violations of the UTPA, Plaintiffs have not established liability on the part of New West, and New West has asserted legitimate defenses. In short, New West has not been adjudged, and may not ever be adjudged, liable to pay damages for the assertions in Counts II and IV.

(3) The documents pertaining to Allied World's position are: MCEO Policy 0303-5534 (Dkt. 187, Ex. 1; 807-836); HCDO 0303-5533 (Dkt. 187, Ex. 2; 70-109); Second Amended Complaint (describing claims) (Dkt. 169); and RoR letter (Exhibit to Dkt. 169) (setting forth Allied World's legal basis for acknowledging duty to defend under MCEO 0303-5534, reserving rights as to policy provisions which may preclude or limit coverage; and setting forth Allied World's legal basis for denying that coverage exists under HCDO 0303-5533). Allied World also incorporates the Motion for Partial Summary Judgment and supporting brief.

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Pursuant to § 1-6-105, MCA, I declare under penalty of perjury and under the laws of the State of Montana that the foregoing is true and correct.

Date and Place 8/7/18 Farmington, CT

Amy Markin, Sr. Claims Analyst (Name/Title)
ALLIED WORLD ASSURANCE COMPANY

AS TO OBJECTIONS:

Randall G. Nelson
2619 St. Johns Avenue, Suite E
Billings, MT 59102

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of August, 2018, a copy of the foregoing was duly served by first class mail, postage prepaid, upon the following, as well as by email:

Erik B. Thueson
THUESON LAW OFFICE
P.O. Box 280
Helena, MT 59624-0280
Attorney for Plaintiffs

Erik@thuesonlawoffice.com
Elayne@thuesonlawoffice.com

Robert Lukes
GARLINGTON, LOHN & ROBINSON
P.O. Box 7909
Missoula, MT 59807-7909
Attorneys for New West Health

Rclukes@garlington.com

Gary Zadick
UGRIN ALEXANDER ZADICK, P.C.
#2 Railroad Square, Suite B
P.O. Box 1746
Great Falls, MT 59403-1746
Attorneys for New West Health

Gmz@uazh.com

Theresa Vincent

Exhibit 1-15

From: Sappington, Joseph
To: Robert C. Lukes
Cc: "kheaney@crowleyfleck.com"; "imcintosh@crowleyfleck.com"
Subject: Re: Rolan v. New West - Montana case
Date: Tuesday, October 8, 2013 6:57:42 PM

Bob- Thanks very much for this very helpful review. I agree that the ERISA issue should be investigated and hopefully we can act on it as a defense to the matter.

Joe

EXHIBIT 2

From: Robert C. Lukes [mailto:rclukes@GARLINGTON.COM]
Sent: Tuesday, October 08, 2013 04:07 PM
To: Sappington, Joseph
Cc: 'Kevin P. Heaney' <kheaney@crowleyfleck.com>; 'Ian McIntosh' <imcintosh@crowleyfleck.com>
Subject: RE: Rolan v. New West - Montana case

Joe,

I have completed my initial review of materials in the *Rolan* case. This includes all pleadings, discovery, documents produced and depositions. I write to provide you with my initial thoughts and evaluation on the case.

These cases all arose in conjunction with the Montana Supreme Court's determination in the matter of *State Auditor v. Blue Cross Blue Shield*, see http://www.crowell.com/pdf/ManagedCare/Blue-Cross-Blue-Shield-of-Montana_v_Montana-State-Auditor.pdf. That case was decided in September of 2009. Although the decision strictly involved the denial by the State Auditor of proposed language for a health insurance policy, the ruling has been read much more broadly. These cases all concern the application of provisions concerning the "coordination of benefits," or COB. In simple terms, COB determines which policy is primary and which is secondary in a situation where there are multiple policies from insurers having an obligation to pay. The particular situation in these cases arises when there is a liability policy that has an obligation to pay a medical expense arising out of a tortfeasor's conduct. It is typically an auto policy, but the same analysis would apply to a premises liability policy. These COB provisions typically specify that in these situations, the health insurance will be secondary and will only pay in the event the liability coverage does not pay.

The concern here is that Montana requires an insurer to undertake a made whole analysis prior to subrogation and the subrogation can only occur if the claimant has been "made whole." For discussion of this concept, I will attach hereto our "opening brief" which was recently filed in the matter of *Diaz v. State of Montana*, which touches on these principles. As you may know, *Diaz* is seen as the leading case where certain critical issues will be decided that are relevant to a number of other cases involving COB. What arguably changed in Montana law in the *State Auditor* case is that our Supreme Court interpreted the application of a COB provision in conjunction with payment from a liability carrier to constitute a form of subrogation. In legal parlance, it is now referred to as a type of *de facto subrogation.* Even though an insurer is not filing a claim to recover an amount paid (as in traditional subrogation), the insurer is withholding payment of an amount due under a policy because of the liability of a third party. It does so without a made whole analysis, which is in violation of Montana's laws. As an aside, I should note that almost whenever a made whole analysis of a claimant is done, it inevitably reveals that the claimant is not made whole because there is always attorneys' fees unpaid, more emotional distress, lost wages that have not been covered, etc. Although somewhat debatable, this area of the law in Montana appears to have been established by the *State Auditor* case, i.e., an insurance company cannot apply a COB provision in this situation. Naturally, Plaintiffs' counsel will insist this has always been the law in Montana, but it was just finally enunciated in the *State Auditor* case. We strongly suspect that *Diaz* decision as anticipated from our Supreme Court will confirm the substance of the same.

In the *State Auditor* case, the situation with BCBS had to do with policies that were to be offered by BCBS for sale. So in the context of a health insurance company selling a policy, application of the COB provision violates Montana law. One issue in this context which has not yet been decided is whether the *State Auditor* rule should also apply to public entities that are not insurance companies. You can see our presentation of this issue in the *Diaz* briefing, attached, wherein we argue that the rule on *de facto subrogation* which was created should not apply to public entities. As noted therein, we are currently defending such cases not only on behalf of the State of Montana, but also for the Montana University System and a case brought indirectly against Lincoln County, by one of its employees.

In many ways, the facts of the present case are very similar to the other cases I have going on in this area of the law. We have a situation where Ms. Rolan was injured in a car accident and the tortfeasor's insurance (Unitrin) paid for the medical expenses. Although the New West policy provided coverage, under the COB provision, it was secondary and thus, withheld payments or in a number of circumstances, made payments and these were returned by the physicians/hospitals as duplicative of payments received from Unitrin. Ms. Rolan's auto accident took place on November 16, 2007. So, it was approximately 2 years before the *State Auditor* case was decided. But unfortunately, given the nature of the decision, it is read to have applied existing Montana law, not to have changed the law, for the made whole doctrine evolved in Montana during the mid-1970s. So, the rule from *State Auditor* applies to the present case. This means that New West cannot withhold payment simply because the medical bills were paid by a third party insurer.

The question remains whether there is any exception to this general rule which might apply. In *Diaz* and the other cases I am currently handing, an exception arguably exists because these are public entities funded by taxpayer dollars and there is some question as to whether the *State Auditor* rule which was adopted in the context of Title 33 insurance company should apply. Another exception that can apply to these claims is for employee benefit health plans, as these are typically governed and by federal laws under ERISA. Although this issue has not been litigated yet in Montana, the general belief is that ERISA would preclude application of Montana's unique laws on subrogation.

So, turning to the present case, it would not appear as though any exception applies. The health insurance at issue from New West arose from the employment of the Plaintiff's mother, Charma Rolan. She is an employee of St. Peter's Hospital. As part of her employment, Charma Rolan receives health insurance in a plan from New West. From what we have learned to date, it would appear as though St. Peter's Hospital takes the position that its benefit plans are non-ERISA plans, because of St. Peter's connection to the church. Although we have not yet researched the issue, Kevin Heaney at the Crowley firm has turned up these discussions on the subject which are very interesting.

See
http://blog.fraplantools.com/new-lawsuits-allege-catholic-hospital-plans-not-church-plans/

http://www.erisaexchangeblog.com/2013/04/29/class-action-lawsuits-target-hospital-church-plans/

http://www.mondaq.com/unitedstates/x/174370/Employee+Benefits+Compensation/The+ERISA+Church+Plan+ExceptionThe+Courts+Throw+A+Curvehttp://www.dol.gov/ebsa/programs/ori/advisory95/95-07a.htm#f3. This last DOL opinion is most interesting.

Although not yet developed, this investigation into a possible preemption by ERISA seems to be our only avenue in the case to avoiding liability. Unless there is some drastic revision of the *State Auditor* rule by our Supreme Court in the *Diaz* decision (anticipated no later than Spring 2014), we believe that New West will be liable in the present case for all amounts withheld from the treatment of Ms. Rolan. From our review, this would appear to be approximately $110,000 (plus interest at 10% per annum). In addition, the case is certified as a class action. Documents I have reviewed indicate that New West has identified another $200,000 (plus interest) that would be liable to other class members. Because the case was brought as a declaratory judgment action, they will most likely have to pay the Plaintiffs' attorneys' fees, as well.

The case also has significant concerns regarding potential punitive damages, as well. This would be under the Unfair Claims Practices Act, basically for malice. I see two issues here. The first has to do with New West's failure to respond to the initial letters of Erik Thueson in a timely manner. In sum, he wrote to them on several occasions over a period of many months before New West ever responded. The second concern arises because New West did not cure the issue once it had notice of the September 2009 *State Auditor* decision. Once it became aware of that case, arguably, it had the obligation to go back and to make payments on all of the non-ERISA cases where it had applied the COB provision. Indeed, that conduct and failure to cure continues to this day. At the deposition of New West Claims Manager Katherine Bahrman, opposing counsel asked her why these amounts have still not been paid. The only reason she proffered was because the bills/claims from Ms. Rolan had not really been submitted. Given that we have all of these records as part of the lawsuit, the response appears a bit disingenuous, at the least. The only other rationale as to why New West has not yet paid Ms. Rolan the $110,000 plus interest is because it is waiting for the outcome of the *Diaz* case. Remember, the primary issue in *Diaz* is whether the State of Montana should be treated as a Title 33 insurer under Montana law for the application of the *State Auditor* rule. Again, in the present context, it seems very unlikely that the *Diaz* decision will do anything other than confirm the application of the *State Auditor* rule as it applies to insurers, like New West. At a minimum, it would seem that New West should be prepared to make the payment to Ms. Rolan once the *Diaz* decision is announced (presuming it affirms the *State Auditor* case). Should it fail to do so, the ramifications for a punitive damages award at trial will be enormously increased.

The other concern is the "unidentified" class members. Most likely, New West has other customers where it never even received claims because the liability insurance was paying the medical bills. Under the class action definition adopted by the Court in this case, as approved in the recent Supreme Court order, these unidentified individuals are part of the class. In *Diaz,* the Plaintiffs have just taken steps to try and identify such individuals (see discovery attached, as recently submitted to BCBS). I suspect we shall see similar discovery in *Rolan* in the near future. Exactly how many such class members there are in *Rolan* and the potential liability remains completely unknown. These claims would go back for 8 years before the Complaint was filed (i.e., back to January 2003).

I think we need to quickly explore the possible ERISA exemption, as that would appear to be just about the only hope in avoiding liability in the case. It may be that once we complete our analysis of the ERISA preemption, we either move towards a settlement conference or alternatively, motions to amend our answer and a motion for summary judgment based on the ERISA preemption.

Please let me know your thoughts in this regard.

Thanks,
Bob Lukes

10-8-13

elayne@thuesonlawoffice.com

From: Robert C. Lukes <rclukes@GARLINGTON.COM>
Sent: Thursday, June 2, 2016 4:32 PM
To: Querijero, Michelle
Subject: RE: Rolan v. New West Serv., your file 2010000725
Attachments: ERISA- article.pdf

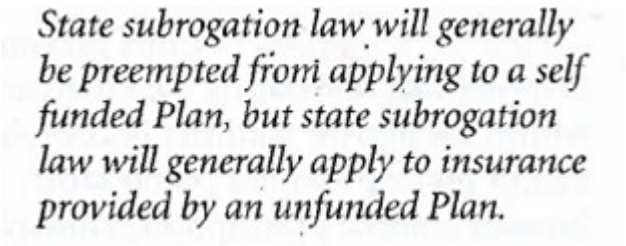
EXHIBIT 3

Michelle,

We've been working on our SJ brief and the response to Plaintiff's motion for 'orders post remand.' The more we dig into the merits of the matter, the more I'm concerned we are going to lose this battle on ERISA preemption of the state law claims. They are so many twists and turns in the ERISA analysis it is just remarkable. But ultimately, I believe it comes down to a few things, all of which seem to work against us.

If a health benefit plan is self-funded, then most of the state claims can be preempted. But the New West plan at issue is a self-insured plan and it is therefore, it is not self-funded. There is also some case law out there under ERISA discussing that if a plan excludes application of the made whole doctrine, this can be successful in avoiding these claims. However, the New West plan has language to the effect that "we won't subrogate until you have been made whole," which is just the opposite.

In my continuing review of the law in this area and in searching for law review articles on point, I discovered an industry article that does a decent job of summarizing the law in this area. A copy is attached for your review. One paragraph sums up the concern nicely, stating:


State subrogation law will generally be preempted from applying to a self funded Plan, but state subrogation law will generally apply to insurance provided by an unfunded Plan.

In the terms used above, this is a self-insured plan, so it is 'an unfunded Plan.'

We are going to continue to fight this battle, but I wanted to let you know this most recent development in our analysis. Please let me know if you have any questions in this regard.

Thanks,
Bob Lukes

6-2-16

Robert C. Lukes

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A Professional Limited Liability Partnership
Attorneys at Law Since 1870

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elayne@thuesonlawoffice.com

From: Robert C. Lukes <rclukes@GARLINGTON.COM>
Sent: Wednesday, April 26, 2017 2:13 PM
To: Querijero, Michelle
Subject: RE: Rolan v New West. Montana file: 2010000725
Attachments: RCL to Renigar consulting agreement on ERISA preemption.pdf

EXHIBIT 4

Michelle,

I wanted to provide you with an update in the *Rolan* case.

As we discussed, we have retained attorneys Paul Ondrasik and Gwen Renigar as consultants on the ERISA issue. A copy of the consulting agreement with them is attached. They agreed to lower their fees somewhat for us, but they are still high. We limited their work to 10 hours of attorney time.

A few weeks ago, I provided Paul and Gwen a number of documents to review. Yesterday, we had a phone conference to discuss the case, ERISA preemption and our best strategy. Although they had some helpful ideas on our response, they agree the position is tough. The traditional and correct analysis of the situation takes us to Section 514 and because of the 'Deemer Clause' and our status as a not being self-funded ultimately means that the claim is most likely not preempted. Regardless, they did have some good ideas on how to present certain issues and a few cases that may be helpful, so I think this is definitely worth it.

We have an extension to file our Answer Brief with the Montana Supreme Court until May 20. I've done a lot of work on it already, but now I am going to go back to revise some items and then add more of what Paul and Gwen had to offer. Upon completion, we will provide you with a copy of the same. In the meantime, if you have questions, please let me know.

Thanks,
Bob Lukes

4-26-17

Robert C. Lukes

garlington|lohn|robinson
A Professional Limited Liability Partnership
Attorneys at Law Since 1870

PO Box 7909 (350 Ryman Street)

Missoula, MT 59807-7909
Phone: (406) 523-2500, Fax: (406) 523-2595
www.garlington.com

Exhibit
5

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

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

Plaintiffs,

v.

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

Defendants.

ALLIED WORLD ASSURANCE COMPANY,

Counterclaimant,

v.

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

Counter-Defendants.

Cause No. CDV-2010-91
Judge Kathy Seeley

AFFIDAVIT OF IAN McINTOSH

STATE OF MONTANA)
: ss.
County of Gallatin)

I, Ian McIntosh, being first duly sworn say:

1. I am an attorney with the law firm Crowley Fleck, PLLP.

2. In August, 2013, I was asked to review several insurance issues for New West Health Services ("New West").

3. As part of my work, I reviewed the letter from Joseph Sappington, Esq., to Angela Huschka of New West dated February 18, 2010.

4. I prepared a letter to Mr. Sappington dated September 30, 2013, a true and correct copy attached hereto as exhibit A.

5. My September 30, 2013 letter was sent via email and U.S. Mail.

6. On October 2, 2013, Mr. Sappington responded via email to my letter dated September 30, 2013. A copy of Mr. Sappington's October 2, 2013 is attached hereto as Exhibit B. Mr. Sappington's October 2, 2013 email included two attachments, the "New West MCEO Policy" and an excel spreadsheet titled "New West Rolan Defense Costs." These attachments are not included with Exhibit B.

7. My September 30, 2013 letter to Mr. Sappington stated, in part, "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."

8. To the best of my knowledge, Mr. Sappington never responded to this portion of my September 30, 3013 letter to him.

FURTHER, AFFIANT SAYETH NOT.

DATED this 23rd day of August, 2018.

Ian McIntosh

SUBSCRIBED and sworn to before me, the undersigned, this 23rd day of August, 2018.

Jennifer J. Rockman
Notary Public for the State of Montana
Residing at Belgrade, Montana
My Commission expires: December 19, 2018

(SEAL)

JENNIFER J ROCKMAN
NOTARY PUBLIC for the
State of Montana
Residing at Belgrade, Montana
My Commission Expires
December 19, 2018

CROWLEY | FLECK PLLP
ATTORNEYS

IAN MCINTOSH
P.O. BOX 10969
BOZEMAN, MT 59719-0969
DIRECT DIAL: (406) 522-4521
FACSIMILE: (406) 556-1433
IMCINTOSH@CROWLEYFLECK.COM

September 30, 2013

VIA E-MAIL & U.S. MAIL
Joseph Sappington, Esq.
Senior Claims Analyst
Allied World National Assurance Co.
9 Farms Springs Rd.
Farmington, CT 06032

Re: Insured: New West Health Services
Insurer: Darwin Select Insurance Co.
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

Dear Mr. Sappington:

As I indicated in my voicemail to you on September 17, 2013, we represent New West Health Services. I called you to discuss New West's insurance coverage in the Dana Rolan matter. More specifically, I called to discuss coverage under the Managed Care Organization Errors and Omissions Liability Policy (the "MCEO Policy"). The MCEO Policy is policy number 0303-5534 and the Darwin reference number is 2010000725.

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.

The MCEO policy also apparently includes defense expenses as part of the policy limits. Thus, to determine the amount of coverage New West has remaining, please provide me with a detailed report of the defense expenses paid to date, and please confirm the remaining policy limits.

EXHIBIT
tabbies
A
Exhibit 5-4

Please also provide me with a certified copy of the MCEO policy.

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.

Sincerely,

CROWLEY FLECK PLLP

Ian McIntosh

IM/wma

cc: Angela Huschka (via e-mail)

Ian McIntosh

From: Sappington, Joseph <Joseph.Sappington@awac.com>
Sent: Wednesday, October 2, 2013 7:02 AM
To: Ian McIntosh
Cc: Angela Huschka; Robert C. Lukes; Sappington, Joseph
Subject: RE: Rolan v. New West; Ref. No. 2010000725
Attachments: New West MCEO Policy.pdf; New West Rolan Defense Costs.xlsx

Ian - Pursuant to your request please find a copy of the policy attached hereto. Costs associated with Rolan are still within the SIR at our last audit however we have not received bills from counsel in some time in part I believe because the matter was stayed. Let me know if you need anything else.

Joe

-----Original Message-----
From: Ian McIntosh [mailto:imcintosh@crowleyfleck.com]
Sent: Monday, September 30, 2013 5:39 PM
To: Sappington, Joseph
Cc: Angela Huschka; Robert C. Lukes
Subject: Rolan v. New West; Ref. No. 2010000725

Mr. Sappington:

Enclosed is a letter to you. I look forward to hearing from you.

Ian McIntosh
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59719-0969
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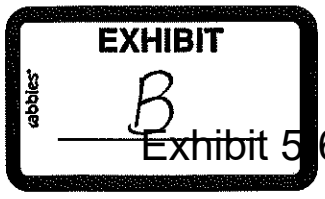

Exhibit 5-7