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FILED

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ANGIE SPARKS, Clerk of District Court
By MARY M GOYINS Deputy Clerk

COPY

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

<p>DANA ROLAN, on her own behalf and on behalf of the class she represents,</p> <p style="text-align: right;">Plaintiffs,</p> <p>vs.</p> <p>NEW WEST HEALTH SERVICES, DARWIN SELECT INSURANCE COMPANY and ALLIED WORLD ASSURANCE COMPANY and DARWIN NATIONAL ASSURANCE COMPANY,</p> <p style="text-align: right;">Defendants.</p>	<p>Cause No. DDV 2010-91</p> <p>Honorable Christopher D. Abbott</p> <p style="text-align: center;">PLAINTIFFS' BRIEF IN SUPPORT OF RULE 37 MOTION</p>
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Plaintiffs above-named provide the following Brief in Support of the Rule
37 (a) Motion to compel defendant to produce its claims file.

I. FACTUAL AND PROCEDURAL BACKGROUND

The factual background appears in numerous briefs supporting pending motions. A summary follows.

Plaintiffs sued New West Health Services in class action in 2010. New West immediately notified its insurance carrier, Allied World Assurance Company, providing a copy of the complaint and a request for coverage. Allied drafted a detailed coverage letter indicating the class claims were covered by \$3,000,000 in insurance.

However, in 2016, seven years into the litigation, insurer Allied announced it was denying that any coverage existed. It relied on coverage defenses never before disclosed.

On February 23, 2018, the plaintiffs made Allied a defendant in this suit, requesting a declaratory judgment that coverage existed. In its answer, Allied contended there was no coverage under a “loss” provision and a “related-claims” provision. Both New West and plaintiffs disputed this and alleged Allied should be estopped from raising defenses seven years into the lawsuit.

Pertinent to this motion, plaintiffs served discovery requests upon Allied with the 2018 complaint. *See* Exhibit 1. Among other things, plaintiffs requested that Allied produce all documents generated during the investigation of the claim and litigation thereon:

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.

See Exhibit 1, pp. 2–3.

Plaintiffs also requested the claims file:

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.

Exhibit 1, *supra*.

Initially, Allied did not respond. Plaintiffs moved to compel discovery. The Court denied the motion based upon Allied’s position that the delay had been caused by a misunderstanding. Therefore, Allied was granted additional time to respond.

Without answering any discovery, Allied moved for summary judgment on its coverage defenses. See DN 186-187. Plaintiffs objected the motions were premature because Allied had yet to answer discovery. DN 192. Plaintiffs and New West also filed their own summary judgment on the ground Allied should be estopped. Because Allied had still not responded to discovery, the estoppel motion was based only on the evidence then available. DN 190-192.

The Court allowed the summary judgment motions to proceed in the absence of pretrial discovery. On August 7, 2018, Allied responded to discovery, but refused to provide its claims file and other related documents, contending the documents were protected by the work-product and attorney-client privileges. *See* Exhibit 1, *supra*. (Arguably, these objections were legitimate at the time, since plaintiffs had not yet been granted an assignment of New West's rights against Allied. They are, however, no longer proper now that plaintiffs have the assignment and therefore, are placed in the shoes of New West.).

On October 24, 2018, the Court held Allied was estopped from denying coverages. DN 330. On April 19, 2019, the Court denied Allied's motion grounded on the "loss" exclusion and estopped it from contesting the \$3 million aggregate limit. DN 230.

The Court did not have the advantage of a full record since Allied still had not responded to discovery. In late January 2020, however, the plaintiffs were

assigned all rights New West had against Allied by virtue of a preliminarily approved settlement. DN 284. Shortly thereafter, the District Court certified the estoppel decision to the Montana Supreme Court for interlocutory review.

The case remained on interlocutory review until February 2022. The Montana Supreme Court denied New West's estoppel summary judgment on the ground the available evidence did not show clear and convincing evidence it applied. The case was remanded and a new judge assigned. Several motions followed, which are now submitted.

Thus, the present status is we are now on remand and the plaintiffs have stepped into the shoes of New West by virtue of the assignment made in the above-described settlement. Therefore, plaintiffs have requested that Allied provide its claims file, as well as related documents, under the assignment of New West's rights. Allied refuses to do so, necessitating this Rule 37 (a) motion.

II. SUMMARY OF PLAINTIFFS' POSITION

“Claims files are the hard-drive of an insurance carrier. In these files, carriers record all information about a claim: opinions, discovery, reserves, witness statements, etc. With this information, insurance adjusters evaluate claims and apply their expertise in order to pay, adjust or disclaim a claim.” *Insurance Claims Files: How Privileged Are They?* <https://mdafny.com/index.aspx?TypeContent=>

[CUSTOMPAGEARTICLE&custom_pages_articlesID=16540](#). As an insured, New West and its assignees, are entitled to these files as a matter of right.

A. INSURERS SHOULD BE ENTITLED TO THE CLAIMS FILE AS A MATTER OF RIGHT.

Allied generated the claims file on behalf of its insured, New West, as part of its ordinary course of business. It has stringent duties towards New West under both Montana common and statutory law. There should be no secrets between insured and insurer concerning how the latter conducted its investigation and participated in the defense.

The insured should have a right as an insurance consumer to examine files, showing how its fiduciary handled the claim. The extraordinary delays and expenses displayed by this case demonstrate the reasons for such a rule. Lawyers, doctors, accountants and other professionals are required to share their files with their clients and patients. There is no legitimate reason for granting insurance companies an exception—especially given their legal status as fiduciaries subject to the Unfair Claims Settlement Practices Act at § 33-18-201, MCA.

B. GIVEN THE ISSUES RAISED, THE CLAIMS FILE IS DISCOVERABLE IN THE CONTEXT OF THIS CASE.

The pending motions should be decided in the context of an evidentiary background—not in an evidentiary vacuum, which currently exists given Allied’s resistance to any discovery. By way of example, the following issues are before the

Court:

(1) Should Allied be estopped from denying coverage once this Court, or a jury, has a complete evidentiary basis for making that decision?

(2) Is Allied being candid when it opposes the current pending motions by contending there is “no evidence” it took any part in the decisions that have caused a decade of delay?

(3) How can Allied contend that amending the complaints to include bad faith claims is futile if we are not allowed to discover the evidence?

Virtually all courts recognize the claims file is fully discoverable as a business record generated by the insurer, which is not privileged as to the insured either under the work product or attorney-client privilege. This interpretation is buttressed in this case by the Billing and Reporting Agreement between Allied and defense counsel, stressing the importance of open communications among insurer, insured and counsel.

For these reasons, we request an order compelling Allied to immediately produce its claims file and associated documents as soon as possible. This serves the overriding policy that cases be decided on the merits, which can only be achieved in the background of full disclosure of the evidence.

III. PLAINTIFFS' POSITION EXPLAINED

Each of the above three matters is discussed in greater detail below.

A. THE INSURED SHOULD BE ENTITLED TO THE CLAIMS FILE AS A MATTER OF RIGHT.

As a matter of public policy, insureds should be entitled to the file purportedly generated to defend its interests in a lawsuit. How else will they find out if they have received fair and honest treatment?

Allied is the fiduciary for its insured, New West:

[A]n insurance company owes ... a fiduciary duty to its insured, the policyholder. This duty is no less than that of a trustee. The insurance company is bound to act in the highest good faith toward the insured and may not obtain any advantage over the insured by misrepresentation, **concealment**, threat, or adverse pressure **of any kind**.

Furthermore, a fiduciary insurance company is liable for constructive fraud if it made any false statements of fact or withheld or concealed facts which misled the plaintiffs or misled their insureds. *Id.* at 1125.

See e.g., Tynes v. Bankers Life Co., 244 Mont. 350, 730 P.2d 1115, 1124-1125 (1987). Because it is a fiduciary, Allied “may not obtain any advantage therein over the [insured] by the slightest misrepresentation, **concealment**, threat, or adverse pressure of any kind.” *Id.* at 1126 (Emphasis added). Allied seeks to conceal the claims file from New West and therefore, violates its duty.

The policies of the Unfair Settlement Practices Act further support the policy an insured should have an unfettered right to the claims file. It was created to prevent insurance companies from engaging in “unfair or deceptive practices.” §

33-18-102, MCA. When engaging in claims settlement practices, the insurer has a legal duty to respond promptly to inquires of its insureds regarding all aspects of a claim, including providing complete information about coverages and the reasonableness of its investigation “based upon all available information.” § 201(2), (3). The insurer is prohibited from “misrepresenting pertinent facts. *Id.* at (1). It must “promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.” Certainly, this indicates a duty to disclose the written information in the claims file about these subject matters upon the insured’s request. The Act does not state a lawsuit is necessary to obtain this information.

Furthermore, in order to represent the insured, Allied requires defense counsel to sign a contract that emphasizes there must be a free flow of information among the insured, insurer and defense counsel in order to best protect the insured’s interests. Exhibit 2, Billing and Reporting Agreement.

Based upon this authority, plaintiffs submit public policy requires the insurer to divulge the claims file to the insured. Other than a request from the insured, no further requirements for production should exist.

B. THE CLAIMS FILE IS DISCOVERABLE IN THE CONTEXT OF THIS CASE.

“Discovery rules are to be ‘liberally construed to make all relevant facts available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage’.” *Cox v. Magers*, 2018 MT 21, ¶15, 390 Mont. 224, 411 P.3d 1271 (quoting *Richardson v. State*, 2006 MT 43, ¶24, 331 Mont. 231, 130 P.3d 634) (emphasis in original)... *Henderson v. Mont. Third Judicial Dist.*, OP22-0069 (Mont. 2022).

Where, as here, an insured questions the legality of its insurer’s handling of a claim, the “the insured is entitled to the entire claim file prepared for the underlying lawsuit, because the insurer created the file primarily on behalf of the insured.” The file is not, therefore, privileged under either the attorney-client or work product doctrines. *Palmer by Diacon v. Farmers Ins. Exchange*, 261 Mont. 91, 861 P.2d 895 (1993). (It is only in cases where the insured and insurer are in an adversary position during the underlying case that restrictions on discovery arise. *Palmer, supra* (insured sued insurer for uninsured motorist coverage)).

Here, New West is questioning the legality of Allied’s handling of plaintiffs’ claims. It has raised several evidentiary issues in its responses to pending motions, which make the claims file relevant. Among other things, it is arguing “no evidence” exists that it exerted any control over the defense of the case. Whether it did or not will be disclosed by the claims file. By its “no evidence” argument, Allied has

opened the door to that source of information.

Allied also argues it would be futile to allow the complaint to be amended on the ground of insurance bad faith. The answer lies in the claims file.

Allied argues the estoppel claim should be dismissed with prejudice on the ground that insufficient evidence exists to support it. How can Allied fairly make that argument when it has prevented the evidence from coming to light? How can this Court decide the issue in the absence of the claims file, which will most likely contain critical evidence on that issue?

In summary, to be discoverable, the evidence does not even have to be admissible at trial. It need only lead to the discovery of admissible evidence. Mont. R. Civ. Pro. 26. Plaintiffs are entitled to that evidence because “discovery rules are ... liberally construed to make all relevant facts available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage’.” Without the claims file, plaintiffs are at an unfair disadvantage as they cannot respond to New West’s allegations. All of the “relevant facts” cannot be brought to this Court’s attention so fair rulings can be made on pending motions and the proper outcome determined in this case.

C. RELIEF REQUESTED

As assignees of New West’s rights against Allied, plaintiffs request the Court order Allied to produce the claims file and related documents before oral argument

and a decision on the pending motions. This will allow the motions to be decided in the context of evidence.

Plaintiffs request attorney fees and costs. The defendant and its lawyers are well aware that plaintiffs, as assignees of New West, are entitled to the claims file. This entitlement existed since 2020. Plaintiffs have complied with their duty to bring this motion to the defendant's attention before filing it, but defendant still refuses to produce the claims file.

DATED this 25th day of August, 2022.

THUESON LAW OFFICE



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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 25th day of August, 2022.


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10

11 MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

12	DANA ROLAN, on her own behalf and on) Cause No. CDV-2010-91
	behalf of the class she represents,)
13) Judge Kathy Seeley
	Plaintiffs,)
14)
	vs.) ALLIED WORLD ASSURANCE
15) COMPANY'S RESPONSES TO
	NEW WEST HEALTH SERVICES,) PLAINTIFFS' FIRST DISCOVERY
16	DARWIN SELECT INSURANCE) REQUESTS
	COMPANY and ALLIED WORLD)
17	ASSURANCE COMPANY and DARWIN)
	NATIONAL ASSURANCE COMPANY,)
18)
	Defendants.)
19)

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

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

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

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

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

3 **DISCOVERY REQUEST NO. 1:** (Drafters)

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

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

14 **DISCOVERY REQUEST NO. 2:** (Potential Witnesses)

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

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

- 22 1. Amy Markim
23 Senior Claims Analyst
24 Allied World Insurance Company
25 Ms. Markim may be contacted through counsel.
- 26 2. Michelle L. Querijero
Senior Claims Analyst
Allied World Insurance Company
Ms. Querijero may be contacted through counsel.

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

3
4 4. Taylor Norton
Assistant Vice President
Allied World Insurance Company
5 Ms. Norton may be contacted through counsel.

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

8
9 6. Ian McIntosh
Crowley Fleck
P.O. Box 10969
10 Bozeman, MT 59719-0969

11 7. Angela Huschka
New West Health Services
12 130 Neill Ave.
Helena, MT 59601

13
14 8. Kimberly Beatty
Browning Kaleczyk Berry & Hoven, PC
P.O. Box 1697
15 Helena MT 59624

16
17 **DISCOVERY REQUEST NO. 3:** (Documents)

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

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

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

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

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

18 **DISCOVERY REQUEST NO. 4:** (Experts)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 Montana courts recognize that the insured and the insurers occupy a “privileged
14 community or magic circle” within which confidential information may be shared without waiver
15 of attorney-client privilege or work product privilege. *In Re Rules of Professional Conduct*, 2
16 P.3d 806, 818 (Mont. 2000); *Draggin’y Cattle Co., Inc. v. Addink*, 312 P.3d 451,460 (Mont.
17 2013). Members of the magic circle do not waive the privileges by sharing information within
18 this circle. *Id.* New West and Allied World occupy a privileged community or magic circle with
19 respect to this litigation. *Id.*

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

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

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

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

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

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

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

- 26 (1) The identification number of the policy.

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

2 (3) The name of the insured and insurer.

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

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

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

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

9 **ANSWER:** With respect to questions (1) through (5), Allied World first provided
10 coverage to New West in 2007, and has issued the following policies to New West:

11 MCEO 0303- 5534; five annual policies incepting in 2007 and ending in 2018.

12 HCDO 0303-5533; eleven annual policies incepting from 2007 to 2012

13 0304-5485: three annual policies incepting in 2009 and ending in 2012;

14 306-5239; one annual policy incepting on April 1, 2011 and ending on April 1, 2012.

15 The information requested in questions (1) through (4) is stated on the declarations page
16 of each policy, and production of the policies responds to question (5). The policies are
17 numbered 1 - 1002 and are produced electronically at:

18 <https://drive.google.com/drive/folders/1jaghJfvYbVb7YKkIuLUHIVW-gBYMennQ>

19 The parties are responsible for downloading and saving them. If you encounter any problems,
20 please contact the Nelson law Firm.

21 As to questions (6) and (7), the original complaint was filed on or about January 26,
22 2010. New West's legal counsel, Kimberly Beatty of Browning Kaleczyc Berry & Hoven PC.,
23 "tendere[ed] this claim to [Allied World] for defense under its E&O Policy No. 0303-5534 and
24 its D&O Policy No. 0303-5533." (Doc. 1003-1019). Allied World analyzed the coverage as
25 tendered, pursuant to the MCEO Policy and the HCDO Policy in effect from April 1, 2009 to
26 April 1, 2010. Those policies have previously been produced to Plaintiffs on June 21, 2018 and

1 as Exhibits 1 and 2 to Allied World’s Brief in Support of Partial Summary Judgment, Dkt. 187.
2 The MCEO Policy is produced herein as 807-836; the HCDO Policy is produced herein as 70-
3 109.

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

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

17 By February 18, 2010, Allied World determined that it owed a duty to defend New West
18 for the allegations asserted by Rolan and the class under the MCEO policy. By February 18,
19 2010, Allied World determined that a potential for coverage existed for the allegations asserted
20 by Plaintiffs with respect to wrongful acts, subject to policy limitations, and set forth its
21 reservation of rights by letter of that date. Allied World incorporates all reservations contained
22 in the letter.

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

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

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

10 **DISCOVERY REQUEST NO. 10:**

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

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

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

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

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

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

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

3 **DENIAL OF COVERAGE UNDER THE HCDO POLICY.**

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

13 **COVERAGE UNDER THE MCEO POLICY**

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

17 **1. The single claim limit of \$1,000,000 applies.**

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

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

4 Allied World has moved for partial summary judgment for a declaration that the
5 \$1,000,000 limit applies, relying on two documents: the MCEO policy and the Second Amended
6 Complaint. The briefing is incorporated herein.

7 **2. Coverage for “Loss” as a Result of a “Claim”.**

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

11 fees, amounts, benefits or coverage owed under any contract with any party
12 including providers of health care services, health care plan or trust, insurance or
workers’ compensation policy or plan or program or self-insurance.

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

17 **3. Legally Obligated to Pay**

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

1 covered.

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

6 (3) The documents pertaining to Allied World's position are: MCEO Policy 0303-5534
7 (Dkt. 187, Ex. 1; 807-836); HCDO 0303-5533 (Dkt. 187, Ex. 2; 70-109); Second Amended
8 Complaint (describing claims) (Dkt. 169); and RoR letter (Exhibit to Dkt. 169) (setting forth
9 Allied World's legal basis for acknowledging duty to defend under MCEO 0303-5534,
10 reserving rights as to policy provisions which may preclude or limit coverage; and setting forth
11 Allied World's legal basis for denying that coverage exists under HCDO 0303-5533). Allied
12 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 Markim, 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:

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Theresa Vincent

Billing and Reporting Guidelines for Defense Counsel

I. PREFACE

Allied World Assurance Company (US) Inc. and its affiliates (including Darwin National Assurance Company and Darwin Select Insurance Company) (“Allied World/Darwin”) expect to work closely with counsel representing its policyholders to achieve the best result for each insured in an efficient and cost-effective manner. By accepting an assignment from Allied World/Darwin, your firm agrees to abide by these guidelines.

Nothing contained herein is intended to restrict any counsel’s independent exercise of his or her professional judgment in rendering legal services for any insured. If you believe in any individual matter that any part of these guidelines is inappropriate and/or would not be in the best interest of your client or Allied World/Darwin, that issue will be discussed with the appropriate Allied World/Darwin representative.

II. CASE DEVELOPMENT

An effective and strategically sound legal defense is the responsibility of counsel and will be developed in a timely manner. In this context, please be aware that:

- A. Allied World/Darwin’s goal is to timely identify those claims for which there is apparent liability and to pursue early settlement opportunities when possible. The activities necessary to defend a given claim and bring it to appropriate resolution should be addressed early and the steps necessary to achieve that resolution should be jointly agreed upon as between Allied World/Darwin and defense counsel. Without waiving any of its rights, Allied World/Darwin acknowledges that counsel’s professional judgment shall prevail in the event that there is any dispute in this regard.
- B. An early resolution of lawsuits is desirable and the use of alternative dispute resolution is encouraged.
- C. If defense counsel is involved in settlement negotiations, settlement authority must be obtained from Allied World/Darwin in advance of any settlement offer being made.

III. STAFFING PHILOSOPHY

Your firm should designate one attorney to have primary responsibility for each case on which services are requested. The case should be staffed economically and effectively. Obviously, a balance must be struck between the efficiency a more experienced lawyer at your firm brings to a given task and the advantages of having the task performed by a junior lawyer or a paralegal. Duplication of effort within the firm is to be avoided.

(Effective 5/09)

Billing and Reporting Guidelines for Defense Counsel

To achieve the best efficiency and value, the role and responsibilities of each assigned staff member are to be clearly defined and appropriate to each individual's qualifications, level of experience, and billing rate. Defense counsel should delegate work to subordinates wherever possible to achieve efficiency and cost-effectiveness without compromising quality.

IV. REPORTING REQUIREMENTS

A. Reports

Unless otherwise directed, counsel will be expected to provide a written report at the outset of each matter and, at a minimum, quarterly intervals thereafter. The appropriate Allied World/Darwin representative will be kept informed of all significant events, and further written reporting may be required upon Allied World/Darwin's request. Reports will be provided to both Allied World/Darwin and the subject insured.

1. Initial Report:

Within 60 days after receipt of an assignment, counsel will send a written initial report with the following information:

- a. A summary of the allegations in the complaint, the factual basis for the litigation, a summary of the information developed during the preliminary investigation and a preliminary evaluation of liability and damages.
- b. A litigation plan providing: (a) a description of each significant activity counsel proposes to initiate (e.g., investigation, motion, discovery, legal research, etc.); (b) a description of any discovery activity or motion activity that has been or is likely to be initiated by other parties; and (c) an estimate of the fees and expenses that will likely be incurred in connection with (a) or (b) above.
- c. A discussion of the potential for early disposition of the case by settlement, and recommendations with respect to arbitration, mediation or direct settlement negotiations.
- d. A discussion of the potential success of dispositive motions prior to or after the commencement of discovery and, if applicable to the circumstances, an indication of when a motion to dismiss or for summary judgment will be appropriate.

Billing and Reporting Guidelines for Defense Counsel

2. Quarterly Report:

Defense counsel will provide an update to the initial report at intervals no greater than 90 days. Quarterly reports will provide a detailed description of the current disposition of the case and, if applicable:

- a. Summaries of depositions or other discovery garnered during the reporting period.
- b. An updated discussion of settlement options.
- c. An updated evaluation of the client's liability and damages.
- d. An updated litigation plan and budget.

3. Supplemental Reports:

Defense counsel will notify Allied World/Darwin of any significant development as soon as it is practicable to do so.

4. Trial Report:

If it is anticipated the case will proceed to trial, 30 days before the scheduled trial date, counsel will submit a detailed report describing the issues that will be tried and estimating the fees and costs that will likely be incurred through trial and, if applicable, any expected post-trial activity.

B. Documentation

Unless specifically requested, counsel need not provide copies of routine internal research memoranda, insignificant discovery materials, or deposition transcripts.

Counsel will, however, provide copies of all pleadings and amended pleadings filed by or against the party that he or she is defending. Counsel also will send Allied World/Darwin copies of all executed releases, final judgments and/or dismissal orders. Counsel will consult with the appropriate Allied World/Darwin representative on the appropriate means of communication, whether by e-mail, fax or regular mail to avoid duplication.

Counsel will comply with all reasonable requests for information and documents, provided however, that any documents or information that are privileged or intended by the insured to be confidential shall not be disclosed, absent consent from the insured.

Billing and Reporting Guidelines for Defense Counsel

V. BILLING

A. Billing Procedure

1. Frequency of Billing. Bills should be issued on a monthly basis.
2. Billing Format
 - a. Heading. The first page of the bill must state: (a) the firm's IRS number; (b) the caption of the case; (c) the name of the insured; and (d) the claim number.
 - b. Body. The bill must be prepared with daily entries showing: (a) the date the work was performed; (b) the initials of the person providing the service; (c) a description of the work performed (single activities); and (d) the actual time spent on the activity measured in increments not exceeding one-tenth of an hour.
 - c. End of Bill Summary. The bill must include: (a) the full name of each attorney/paralegal; (b) the status of each timekeeper (i.e., partner, associate, paralegal); (c) the hourly rate of each timekeeper; and (d) the total time recorded and total amount charged for each timekeeper during the billing period.

B. Charges for Service

1. Single Entry Timekeeping. Unless otherwise directed, the time for each activity must be separately stated. Grouping multiple activities under a single time charge ("block billing") is not acceptable absent authorization from Allied World/Darwin.
2. Informational Descriptions of Services. Descriptions of services must be informative of the nature, purpose or subject of the work performed, and the specific activity or project to which it relates. The following are examples of generic descriptions that will not be honored: attention to matter, motion work, review case and issues, work on project or case, conference, pleadings, review correspondence, work on file, arrangements, prepare for meeting, telephone call, work on discovery, discovery, receive/review documents, trial preparation, research, meeting, analysis, strategize, organize.

Billing and Reporting Guidelines for Defense Counsel

3. **Compensation.** Allied World/Darwin will pay the hourly rates that it agrees to at the outset of the case. Unless otherwise agreed, unilateral rate increases will not be honored.
4. **Internal Conferencing.** Where counsel consults with another attorney in the firm, it is Allied World/Darwin's experience and expectation that the input of the most senior attorney in attendance will best advance the substantive and procedural aspects of a given case. Thus, unless otherwise agreed, Allied World/Darwin will only pay for the reasonable and necessary time recorded by the most senior attorney involved in any such consultation.
5. **Multiple Attendance.** Counsel will inform Allied World/Darwin in advance where it is anticipated that more than one attorney's attendance is necessary at trial, court appearances, meetings, depositions, witness interviews, inspections and other functions.
6. **Legal Research.** Counsel will inform Allied World/Darwin in advance before undertaking a legal research project requiring over three hours of time. Copies of research memoranda derived from any such project shall be provided to Allied World/Darwin upon its request.
7. **Travel Time.** Allied World/Darwin will not pay for travel time, except to the extent that casework is performed en route and is so indicated in the corresponding time entry.
8. **Messenger/Courier/Delivery/Express Mail Services.** The use of expedited delivery services is discouraged and will be reimbursed only if its use is reasonable and necessary to the defense of the case.

C. Disbursement

1. **Internal Expenses.** Allied World/Darwin will pay: (a) photocopying at actual cost not to exceed fifteen (15) cents per page (bills must indicate number of pages and the per page rate or charges for copying will not be honored); (b) actual long distance telephone charges (bills must indicate that charges are for long distance only or telephone charges will be disallowed); and (c) outgoing faxes at actual cost (bills must indicate that the charge is for outgoing faxes only and itemize the telephone transmission and supply costs).

Billing and Reporting Guidelines for Defense Counsel

2. **External Expenses.** Charges for service by outside vendors will be reimbursed at their actual cost. Expenses over \$300 may be forwarded to Allied World/Darwin for direct payment. Disbursements will be itemized on the law firm's statement with the following information, unless back-up documentation is provided: (a) the name of the vendor; (b) the date incurred; and (c) a specific description of the expense. Where back-up documentation is provided, the law firm statement need only set forth a description of the expense and amount incurred.
3. **Travel Expenses.** Counsel will inform Allied World/Darwin in advance before incurring travel expenses, including but not limited to any air or ground transportation and meal expenses. Allied World/Darwin will reimburse defense counsel for reasonable and necessary travel expenses, and personal automobile mileage will be reimbursed using the I.R.S. mileage reimbursement rate in effect at the time the expense is incurred. Unless otherwise agreed, all expenditures of \$50 or more must be supported with receipts attached to the law firm's statement.
4. **Professional Services.** Counsel will inform Allied World/Darwin in advance before associating with another firm or incurring expenses for experts, consultants, investigators, temporary attorneys or outside paralegals, or other professional services.
5. **Secretarial and clerical activities.** Allied World/Darwin will not pay for secretarial and clerical work, including but not limited to receipt and distribution of mail, new file set up, maintenance of office and attorney calendars, transcribing, copying, posting, faxing, e-mailing, inserting documents into and retrieving documents from the file, maintaining order in the file, stamping documents, tabbing sub-files and assembling materials.
6. **Overhead.** Allied World/Darwin will not pay for overhead, including but not limited to expenses associated with the use of computer research databases such as Westlaw or Lexis, regular postage, overtime, rent, conference rooms, equipment rental, utilities, computer equipment, software, reporters, books/periodicals, seminars, refreshment during meetings, local telephone, office supplies, incoming faxes, non-attorney/non-paralegal staff (such as library staff), secretarial services, word processing, time spent proofreading, date stamping, collating, velobinding, copying, faxing, calendaring, making travel arrangements, and opening/closing matters, managing clerical work, and staff overtime, meals and transportation.

Billing and Reporting Guidelines for Defense Counsel

D. Payment

Allied World/Darwin will pay undisputed fees and expenses on a quarterly basis unless an alternative payment arrangement has been authorized.

VI. BILL AND FILE REVIEW

Allied World/Darwin reserves the right to review all charges for services and disbursements pertaining to litigation, including without limitation all charges paid by the insured with respect to such litigation, whether pursuant to self-insured retentions or deductibles under Allied World/Darwin's insurance policies or otherwise. Counsel agrees to comply with all reasonable requests for information and documents, provided that such documents or information are not privileged or intended by the insured to be confidential. Allied World/Darwin reserves the right to decline to pay or to seek reductions and/or refunds with respect to charges that fail to comply with the requirements set forth herein, and which are not fully explained or documented by the firm after reasonable inquiry.