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; ALLIED WORLD ASSURANCE COMPANY; and DARWIN NATIONAL ASSURANCE COMPANY, Defendants.	Cause No.: DDV-2010-91 **OPINION AND ORDER ON MOTIONS**

Before the Court are the following motions:

1. Allied World Assurance Company (Allied)'s Motion for Summary Judgment (Dkt. 349), filed May 11, 2022;

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2. Rolan's Motion to Amend Complaint (Dkt. 355), filed May 31, 2022;

3. Rolan's Motions re: response to Allied's Motion for Summary Judgment (Dkt. 362), filed June 8, 2022;

4. Rolan's Motion for Attorney Fees and Costs Due to Allied's Multiplication of Proceedings (Dkt. 367), filed June 15, 2022;

5. Rolan's Rule 37(a) Motion (Dkt. 392), filed August 25, 2022;

6. Allied's Motion for Protective Order (Dkt. 394), filed September 12, 2022;

7. Allied's Objection to Filing of Affidavits (Dkt. 403), filed December 1, 2022;

8. Rolan's Motion for Court Approval of Class Notice (Dkt. 421), filed January 30, 2023;

9. Rolan's Motion to Revoke Approval of Preliminary Settlement and Other Relief (Dkt. 432), filed April 21, 2023;

10. Rolan's Motion for Rule 11 Relief (Dkt. 434), filed April 21, 2023;

11. Allied's (second) Motion for Protective Order (Dkt. 442), filed May 31, 2023;

12. New West Health Services's Motion for Release of Funds for Defense (Dkt. 469), filed July 6, 2023.

Plaintiffs Dana Rolan and the plaintiff class (collectively, Rolan) are represented by Eric B. Thueson, John Morrison, and Scott Thueson. Defendant New West Health Services (New West) is represented by Robert C.

Lukes and Gary M. Zadick. Defendant Allied is represented by Martha Sheehy and Randall Nelson. The Court shall do its best to undo this Gordian knot below.

BACKGROUND

Over sixteen years ago, on November 16, 2007, Dana Rolan sustained serious injuries as part of an automobile accident. The injuries caused her to incur $120,000 of immediate medical expenses. Rolan had liability insurance through Unitrin Services Group, which covered $100,000 of Rolan's medical expenses. Rolan also had health insurance through New West, who ultimately denied her claim because Unitrin had already provided coverage for medical costs.

Rolan embarked on this now-fourteen-year odyssey when she filed suit on January 26, 2010. The suit was based on New West's alleged failures to conduct a "made whole" analysis, breach of contract, and unfair claim settlement practice in violation of Mont. Code Ann. § 33-18-201. Rolan also sought class certification based on New West's failures to conduct a made-whole analysis and their denial of claims that were covered by a liability insurer.

New West had a Managed Care Organization Errors and Omissions Liability assurance policy (the Policy) through Darwin Select Insurance Company, now known as Allied World Assurance Company. Pursuant to the Policy, Allied tendered New West's defense in this lawsuit. In a reservation of rights letter dated February 18, 2010, Allied's senior claims analyst Joseph Sappington acknowledged Allied's duty to defend New West. The letter also acknowledged that the policy "provides for a Per Claim Limit of Liability of $1,000,000 and a Maximum Aggregate Limit of Liability of $3,000,000 subject to a $50,000 retention applicable to Loss, including Defense Expenses, for each

Claim" and that the policy provision "may operate to limit or preclude coverage in this matter."

On May 7, 2012, this Court certified the class and found New West liable for monetary loss; the class certification was upheld by the Montana Supreme Court in *Rolan v. New West Health Servs.*, 2013 MT 220, 371 Mont. 228, 307 P.3d 291 (*Rolan I*). On remand, New West and Rolan amended their pleadings and cross-moved for summary judgment. The Court granted summary judgment for New West, but Rolan appealed and obtained a reversal and remand. *See Rolan v. New West Health Servs.*, 2017 MT 270, 398 Mont. 228, 405 P.3d 65 (*Rolan II)*.

Meanwhile, New West announced in 2016 it was going out of business. After this announcement, New West assured Rolan and the Court that "approximately $920,000 remains of the original policy limits." Allied informed New West of its belief that the $1 million "each claim" limit applied to the class action. In 2018, Rolan successfully amended the complaint to add Allied as a defendant. Allied moved for partial summary judgment, arguing that coverage was limited to $1 million because the class action claim constituted a single claim stemming from a single written notice. The Court did not directly address Allied's argument, holding then that Allied was estopped from asserting the $1 million "each claim" limit.

Notwithstanding Allied's contentions, on November 7, 2018, New West and Rolan entered into a settlement agreement. This agreement called for New West to assign its claims against Allied to Rolan, place $3 million into a common fund for the class's benefit and stipulate to a judgment from the Court stating that "New West has acted illegally and/or in breach of contract by

reducing benefits without making a 'made-whole' analysis." The Court approved the proposed settlement agreement, and Rolan moved for entry of final judgment. Allied, however, opposed the final judgment because it argued the settlement was not covered by the Policy. The district court certified the policy limits and indemnification issues for interlocutory appeal. On appeal for the third time, the Supreme Court reversed and remanded "for consideration by the District Court as to whether this litigation presents a single claim governed by the $1,000,000 'each Claim' limit or multiple claims governed by the $3,000,000 aggregate limit." *Rolan v. New West Health Servs.*, 2022 MT 1, ¶ 28, 407 Mont. 34, 504 P.3d 464 (*Rolan III)*. The above-described motions have followed on remand.

STANDARDS

Summary judgment is appropriately granted where "the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). Summary judgment is appropriate where "the parties are not arguing over what happened or presenting conflicting evidence; they merely need to know which of them, under the uncontested facts, is entitled to prevail under the applicable law." *Corporate Air v. Edwards Jet Ctr. Mont. Inc.*, 2008 MT 283, ¶¶ 24, 28, 345 Mont. 336, 190 P.3d 1111.

DISCUSSION

As noted, there are a dozen motions requiring resolution. The Court will address each in turn.

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1. Allied's Motion for Summary Judgment[1]

Regardless of the outcome of the other motions, this Court must first decide whether the $1 million "each claim" or the $3 million aggregate policy limit applies here, consistent with the remand instructions from the Montana Supreme Court. *See Brown & Brown of Mont., Inc. v. Raty*, 2013 MT 338, ¶ 10, 372 Mont. 463, 313 P.3d 179 (district court must follow Supreme Court's instructions on remand)[2]. This requires the Court to interpret the policy.

The interpretation of an insurance contract is a question of law. *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 8, 389 Mont. 48, 403 P.3d 664. The Court reads an insurance policy "as a whole and reconcile[s] the policy's various parts to give each part meaning and effect." *Kilby*, ¶ 10 (citing Mont. Code Ann. § 33-15-316). The Court also applies the following standard:

> General rules of contract law apply to insurance policies, and we construe them strictly against the insurer and in favor of the insured. Courts give the terms and words used in an insurance contract their usual meaning and construe them using common sense. Any ambiguity in an insurance policy must be construed in favor of the insured and in favor of extending coverage. An ambiguity exists where the contract, when taken as a whole, reasonably is subject to two different interpretations. Courts should not, however, seize upon certain and definite covenants expressed in plain English with violent hands and distort them so as to include a risk clearly excluded by the insurance contract.

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[1] The Court sustains Allied's objection to consideration of the affidavits of Ian McIntosh (Dkt. 401) and Robert Lukes (Dkt. 402), both of which were filed after briefing on the summary judgment motion had closed and were submitted unsolicited.

[2] Because these are the Supreme Court's instructions on remand, this Court must do this regardless of Rolan's arguments about the continued viability of her estoppel theory.

Mecca v. Farmers Ins. Exch., 2005 MT 260, ¶ 9, 329 Mont. 73, 122 P.3d 1190 (quoting *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc.*, 2005 MT 50, ¶ 17, 326 Mont. 174, 108 P.3d 469 (internal citations omitted)). If the language of the policy is clear and explicit, the Court may not "rewrite the contract but must enforce it as written." *Daniels v. Gallatin County*, 2022 MT 137, ¶ 16, 409 Mont. 220, 513 P.3d 514.

The parties sharply dispute how the contract should be interpreted and which claim limit applies. There are two primary disputes: (1) the effect of the "claims made and reported" provision; and (2) the effect of the Related Claims provision.

a. Claims Made and Reported

In its very first paragraph, the Policy describes itself as a claim made and reported policy:

> THIS IS A CLAIMS-MADE AND REPORTED POLICY, WHICH APPLIES ONLY TO CLAIMS FIRST MADE DURING THE POLICY PERIOD. THE LIMIT OF LIABILITY AVAILABLE TO PAY DAMAGES OR SETTLEMENTS WILL BE REDUCED AND MAY BE EXHAUSTED BY THE PAYMENT OF DEFENSE EXPENSES. PLEASE READ AND REVIEW THE POLICY CAREFULLY.

(E&O Policy Decls. at 1, Dkt. 187 at 18 (boldface removed).) A claims-made-and-reported policy is "generally a more restrictive form of coverage" because "notice is the event that actually triggers coverage." *ALPS Prop. & Cas. Ins. Co. v. Keller, Reynolds, Drake, Johnson & Gillespie, P.C.*, 2021 MT 46, ¶ 15, 403 Mont. 307, 482 P.3d 638. This policy is no different, as revealed by two provisions. First, there is the Policy's provision that outlines reporting a claim:

> Insureds must, *as a condition precedent* to any right to coverage under this Policy, give the Underwriter *written notice* of such Claim as soon as practicable thereafter and in no event later than: (a) with respect to a Claim made during the Policy Period, ninety (90) days after the end of the Policy Period; or (b) with respect to a Claim made during an Extended Reporting Period, ninety (90) days after such Claim is first made.

(E&O Policy Decls. at 19–20, Dkt. 187 at 37 (emphasis added).) Second is the Policy's specific definition of a claim:

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

(*Id*. at 26.) The Policy clearly and explicitly requires New West to report any claim against an insured accused of a "Wrongful Act" in writing during the applicable time frame if it intends to seek coverage under the Policy. Thus, even if other claimants are identified as litigation progresses, that will not alter the fact that none submitted a claim to New West—and none were reported by New West—during the policy period.

Read as a whole, the Policy requires that New West must report any claim in writing and within the applicable time frame before it can obtain coverage under the Policy. To obtain coverage exceeding $1 million, New West must file multiple claims that are not "Related Claims" within the meaning of the Policy. Furthermore, New West can only recover for the claims it files. Thus, for

Rolan to achieve recovery beyond $1 million, she must show not only that multiple non-Related Claims exist, but that multiple non-Related Claims *were filed*. Rolan cannot show this, because only one claim was ever filed during the policy period. Indeed, to this day, Rolan remains the only class member identified by name in the record. *See Rolan III*, ¶ 25 ("At the time of the [reservation of rights] letter, there was a single claimant. At the time of the District Court's order, ten years later and after class certification, only a single claimant yet remained identified.").

The Court cannot ignore the claims-made-and-reported provision. It must interpret the policy as a whole, and "reconcile its various parts to give each meaning and effect." *Am. States Ins. Co. v. Flathead Janitorial & Rug Servs.*, 2015 MT 239, ¶ 19, 380 Mont. 308, 355 P.3d 735. Because there has only been one claim reported, the "each claim" limit applies.

b. Related Claims Provision

In the Court's view, the foregoing holding resolves the summary judgment motion and the Supreme Court's question for remand. In the interest of completeness and avoiding piecemeal review, however, the Court also addresses the parties' arguments about the effect of the Related Claims provision. Allied claims that the aggregate claim limit would not apply even if other claimants were identified because their claims would be Related Claims within the meaning of the Policy. Rolan responds that the Related Claims provisions conflict with the policy declaration statement, that the provisions are ambiguous, and that Allied's reading of the Related Claims provisions is overbroad and would render coverage illusory.

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The definitions here are important. A "Related Claim" is defined as "all Claims for Wrongful Acts based on, arising out of, resulting from, or in any way involving the same or related facts, circumstances, situations, transactions or events or the same or related series of facts, circumstances situations, transactions or events, whether related logically, casually or in any other way." (E&O Policy Decls. at 27–28, Dkt. 187 at 44–45.) The Policy also provides that "All Related Claims, whenever made, shall be deemed to be a single Claim." (*Id*. at 20, Dkt. 187 at 37.). This language, though broad, does not strike the Court as ambiguous in the abstract. A party's bare claim that a provision "is ambiguous or disagrees with the meaning of a provision does not make it so." *Kilby*, ¶ 11.

Rolan next argues that the definition of "Related Claims" is so broad that Allied could find any claim submitted by New West under the Policy to be a Related Claim, therefore defeating New West's ability to ever avail itself of the Aggregate Claim Limit. This is unpersuasive. As the Policy makes clear, there are many types of possible "Wrongful Acts" beyond made-whole violations—for instance, the term includes claims for medical privacy violations and sexual misconduct that are not implicated in this case—that would not even arguably be "related" to a made-whole claim. Thus, the term does not render coverage illusory. What these provisions do is to limit Allied's total liability to New West—no matter how many claims New West incurs—to $3 million. Put differently, New West only bought $3 million in insurance.

The parties contend this is a novel issue in Montana. Whether that is correct or not, it is not a novel issue elsewhere. In finding that the Related Claims Provisions are clear and explicit, this Court's decision is supported by the

decisions of courts around the county who have interpreted identical related claims provisions in policies issued by Allied. Of note, the parties arguing in favor of ambiguity all presented arguments similar to Rolan's. Nevertheless, each court found the substantively identical "Related Claims" provisions to be unambiguous.

In *Health First, Inc. v. Capitol Specialty Ins. Corp.*, 230 F. Supp. 3d 1285 (M.D. Fla. 2017), *aff'd*, 747 F. App'x 744 (11th Cir. 2018), the plaintiffs argued that the related claims provision was so broad that it rendered coverage under the policy illusory. 230 F. Supp. 3d at 1303. The Florida court disagreed and held that finding ambiguity would "nullify the plain language of the related claims provision[.]" *Id.* at 1297. Accordingly, that court followed the other "courts [who] have consistently held that related claims provisions with similar language are broad yet unambiguous and that such provisions should be enforced according to their terms." *Id.* at 1303–1304.

Likewise, in *Allied World Surplus Lines Insurance Company v. Day Surgery Limited Liability Company*, 451 F. Supp. 3d 577 (S.D. W. Va. 2020), the defendant argued that an identical related claims provision was "circular such that the meaning is indeterminate and could be used to relate any two claims." 451 F. Supp. 3d at 585. The court, in citing the decisions of other district courts, determined that "courts should defer to the plain language of broad related claims provisions." *Id*.

Lastly, in *Atlantic Specialty Insurance Company v. Independence Blue Cross, LLC*, 2021 U.S. Dist. LEXIS 161434, 2021 WL 3784242 (E.D. Penn. Aug. 26, 2021), the defendants argued that the related claims provision was so broad that it conflicted with other provisions in the policy, thus rendering the

related claims provision ambiguous and inapplicable. *Atl. Specialty*, 2021 U.S. Dist. LEXIS 161434, at *11. The Pennsylvania court disagreed, finding that the related claims provisions "cabin[ed]," or confined, coverage but did not altogether exclude additional coverage. *Id*. Thus, the provisions were "not ambiguous" because they worked together rather than in conflict. *Id*.

These are not the only decisions to uphold related claims provisions with similar language. *See Am. Cas. Co. v. Belcher*, 709 Fed. Appx. 606, 610 (11th Cir. 2017) (policy providing for $1,000,000 for each claim, and $3,000,000 in the aggregate, did not provide illusory coverage even though "related claims" were subject to $1,000,000 each claim limit); *Nomura Holding Am., Inc. v. Fed. Ins. Co.*, 629 F. App'x 38, 40 (2d Cir. 2015) (identical related claims provision was not ambiguous under New York state law because definition applied standard for determining whether a claim is related); *W.C. & A.N. Miller Dev. Co. v. Cont'l Cas. Co.*, 814 F.3d 171, 176 (4th Cir. 2016) (Under Maryland law, a broad related claims provision is enforceable where the language was unambiguous). *See also Direct Gen. Ins. Co. v. Houston Cas. Co.*, 139 F. Supp. 3d 1306, 1315 (S.D. Fla. 2015), *aff'd*, 661 F. App'x 980 (11th Cir. 2016). This Court finds the weight of authority persuasive. New West purchased its insurance policy from Allied at arms-length, on an equal playing field, and fully cognizant of the restricted coverage. That the coverage is restrictive does not make it either ambiguous or illusory. New West (and its assignee Rolan) is stuck with the terms of the bargain New West struck.

Rolan cites several cases that she contends offer contrary authority. These cases, however, are distinguishable.

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Rolan first cites to *Scott v. American National Fire Insurance Company,* 216 F. Supp. 2d 689 (N.D. Ohio 2002), where the issue was the definition of "related" in an attorney's malpractice insurance policy. The attorney provided representation to three separate individuals when they formed a limited liability company. The attorney owed separate fiduciary duties to each individual. When the LLC failed, his three clients all sued him for malpractice. Like this case, Scott's malpractice policy included a $200,000 limit for each claim, and a $600,000 aggregate for multiple claims. The policy provided that "Claims alleging, based upon, arising out of or attributable to the same or related acts, errors, or omissions shall be treated as a single claim regardless of whether made against one or more than one insured." *Id*. at 693. The court first determined that "related" was ambiguous because the term could include either a casual or logical connection between events, and the policy at issue was silent as to how broad the term should be defined. *Id*. at 694. Ohio law required resolving ambiguity in favor of extending coverage. Consequently, the court ultimately determined that because Scott owed "separate and distinct duties" to each of his former clients, their harms were also distinct. This rendered the claims unrelated and subject to the $600,000 policy limit instead of the $200,000 policy limit. *Id*. at 695.

Next, Rolan points the Court to *Lexington Ins. Co. v. Lexington Healthcare Group, Inc.*, 84 A.3d 1167 (2014). This case involved multiple negligence actions that followed a nursing home fire resulting in thirteen resident deaths. The parties disputed the term "related medical incidents" in a policy provision. In full, the provision provided that "All claims arising from continuous, related, or repeated medical incidents shall be treated as arising out of one medical incident. Only the [p]olicy in effect, when the first such claim is

made, shall apply to all such claims." *Id*. at 1174. The court determined it was unclear whether the parties intended for "multiple losses suffered by multiple people, each caused by a unique constellation of negligent acts, errors, and omissions, to be aggregated into a single loss, for purposes of coverage limits, simply because they shared a common, precipitating factor." *Id*. at 1177. Consequently, Connecticut law required the court to resolve the ambiguity in favor of extending coverage—Id. at 1176.

Rolan urges this Court to follow *Scott* and *Lexington* by ruling in favor of extending coverage. In *Scott* and *Lexington*, however, the term "related" was not defined in the policy. Indeed, it was this very omission that left the courts guessing as to whether the parties intended for the term to include a causal or logical connection. Here, however, the Policy offers an explicit definition of the term "Related Claims" that answers this question. For this reason, *Capital Specialty*, *Day Surgery*, and *Independence Blue Cross* provide better analogues. While the Court must err in favor of coverage in the face of an ambiguity, it may not find an ambiguity where none exists.

Finally, the parties dispute the implications of the Supreme Court's holding in *Hardy v. Progressive Specialty Ins. Co.*, 2003 MT 85, 315 Mont. 107, 67 P.3d 892. According to Rolan, *Hardy* prevents the Court from enforcing the Related Claims Provision because it does not meet the reasonable expectations of the insured. The facts of *Hardy* are worth exploring. Ned Hardy purchased three separate underinsured motorist policies on separate vehicles, each with a $50,000 limit for a total of $150,000 in coverage. The declarations page set out underinsured motorist coverage of $50,000 per person, and $100,000 per accident for each of the vehicles. *Hardy* ¶ 9. Under the policy, an "underinsured motor

vehicle" was defined as one that is insured. However, "the sum of all applicable limits of liability for bodily injury is less than the coverage limit for Underinsured Motorist Coverage shown on the Declarations Page." *Hardy*, ¶ 8. The policy also included an offset providing that the liability limits would be "reduced by all sums. . . paid because of bodily injury by or on behalf of any persons or organizations who may be legally responsible." *Hardy*, ¶ 8.

Hardy and his wife were injured in a collision and received $50,000 from the other party's liability insurance carrier, but this did not cover the full cost of their injuries. Hardy sought to stack his three underinsured motorist policies. Hardy's insurer, however, denied underinsured motorist coverage because the $50,000 equaled Hardy's coverage limit and the offset provision allowed the liability limit to be reduced by the $50,000 payout. The Supreme Court held that Hardy's underinsured motorist policies were illusory because they did not "provide Hardy with the amount of UIM [underinsured motorist] coverage that he thought he purchased" and Progressive's proposed interpretations were not "sufficient to overcome the fact that in nearly all conceivable situations, Progressive's promise to pay up to $50,000 of UIM coverage will not be honored." *Hardy*, ¶ 28.

New West is not Ned Hardy, and Allied's policy is not the insurer's UIM policy there. The reasonable expectation at issue there was that of "a consumer with *average intelligence* but not trained in the law or insurance business." *Hardy*, ¶ 14 (emphasis added). New West is a sophisticated consumer of insurance. A reasonable consumer would expect a UIM policy with a $50,000 liability limit to pay $50,000 beyond the tortfeasor's policy limits. However, the policy in *Hardy* was designed such that it only paid anything when the tortfeasor

had coverage between $25,000 and $50,000 (because uninsured motorists were not covered), and it was always subject to an offset for the $25,000 in State-mandated coverage. In other words, the promise of a $50,000 liability limit for each policy was a practical fiction.

By contrast, there is no reason to believe that New West did not know what it was getting: an aggregate policy that would cover at most $3 million in liability and only $1 million for each claim (including broadly defined related claims). New West knew to read the entire policy and its definitions carefully, it purchased a policy despite broad "related claims" limitations that are used in other insurance contracts—as the cases above demonstrate—and it had lawyers who could advise New West on the risks associated with that related-claims limitation, all of which could be priced into the premium paid. The analogy to an individual consumer of insurance fails.

There is no genuine dispute of material fact here. Under the plain language of the policy, Rolan can only collect those claims *made* and *reported* during the life of the policy. Additionally, other made-whole claims would be "related claims" within the meaning of the provision. Rolan is New West's assignee and thus is constrained by New West's decision to purchase restrictive coverage just as New West would be if it were asserting its own rights. Though restrictive, the Court does not find the relevant provisions to be unclear, ambiguous, against the reasonable expectations of New West, or tending to provide illusory coverage. The Court must enforce the language of the policy, and here that leads to but one outcome: the claims in this litigation are subject to the "each-claim" limit of $1 million.

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c. Coverage by estoppel

Finally, Rolan argues that regardless of the foregoing, Allied is estopped from denying coverage. In *Rolan III,* the Supreme Court reversed this Court's prior summary judgment grant predicated on the coverage-by-estoppel theory. Nonetheless, Rolan argues that the Supreme Court's reversal does not necessitate summary judgment for Allied on this issue and that fact issues remain. Allied maintains that the Supreme Court conclusively settled the matter in *Rolan III*.

The procedural posture of *Rolan III* was a Rule 54(b) interlocutory appeal of, among other things, this Court's order granting New West and Rolan's motion for partial summary judgment holding that Allied from enforcing the $1 million policy limit. *Rolan III*, ¶¶ 1, 12. The Supreme Court reversed because the record lacked clear and convincing evidence that Allied made a material representation regarding the limits of liability. *Rolan III*, ¶ 22.

Rolan's estoppel claim was premised on Joseph Sappington's February 18, 2010, reservation of rights letter. Rolan contends that letter represented that the $3 million aggregate limit would apply. The Supreme Court reviewed the communications between Allied and New West cited by Rolan, but found that "New West has failed to identify *any* affirmative communication in which Allied represented that the $3,000,000 aggregate limit applied to this litigation." *Rolan III*, ¶ 26. Likewise, although couched in terms of the clear and convincing standard of proof, the Supreme Court noted that there was *no* evidence in the record that established or even supported estoppel by acquiescence. *Rolan III*, ¶ 26. Thus, the Supreme Court did not merely hold that

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there were disputed facts of misrepresentation that needed to be resolved at trial; it held that there was no evidence at all.

Additionally, the Supreme Court, citing *Avanta Federal Credit Union v. Shupak,* 2009 MT 458, 354 Mont. 372, 223 P.3d 863, observed that equitable estoppel is meant to prevent "unconscionable" conduct causing a "gross injustice," citing. Specifically, in *Avanta,* the court explained:

> The doctrine of equitable estoppel is predicated on equity and good conscience and will grant relief to prevent a party from suffering a gross injustice at the hands of the other party who brought about the situation or condition. Although not generally favored, estoppel will be found to prevent a party from taking an unconscionable advantage of his own wrong while asserting his strict legal right.

Avanta, ¶ 41 (internal citations and quotation marks omitted). Applying this to New West, the Supreme Court held that, as an experienced insurer and sophisticated consumer of insurance contracts, New West could hardly complain of unconscionability. *Rolan III*, ¶ 27.

Finally, the Court considers the scope of the Supreme Court's remand instructions on this issue. Had the Supreme Court merely concluded that there was a dispute of fact regarding the applicability of equitable estoppel, it likely would have said so and remanded for additional factual development or trial. It did not do that. Instead, the Supreme Court remanded to this Court with instructions to consider the merits of the question as to which policy limit applies. *Rolan III*, ¶ 28.

Rolan contends that its ability to demonstrate equitable estoppel has been hampered by an inability to conduct discovery into Allied's claim file. Indeed, Rolan has filed a Rule 56(f) affidavit to that effect and argued for

additional discovery in the briefing. (Thueson Aff., Dkt. 388; Pls.' Reply in Support of Mot. to Amd., Dkt. 389 at 7–11.) But Rolan's claim foundered at the Supreme Court because of its failure to identify a misrepresentation from Allied to New West, information that would necessarily already be in New West's position. Rolan's position remains predicated primarily on the representations made in the 2010 reservation of rights letter, an issue the Supreme Court has already examined and ruled upon. None of the supplemental discovery sought by Rolan—all aimed at internal documents and practices of Allied—would remedy the failure to identify a material misrepresentation to New West. Likewise, none of the discovery sought could alter the Supreme Court's conclusion that New West's burden to show unconscionable conduct is particularly high given that it is a sophisticated party with substantially greater bargaining power than the typical consumer.

Rolan III leaves no room for further consideration of Rolan's coverage-by-estoppel theory. This Court is not free to second-guess the Supreme Court and is compelled to conclude that Allied may assert the $1 million "each-claim" policy limit.

2. Motion to Amend Complaint

Next, Rolan moves to amend her complaint. In addition to Rolan's individual and class claims against New West and her declaratory judgment claims against Allied, the proposed Third Amended Complaint (TAC) adds first-party Unfair Trade Practices Act (UTPA) claims against Allied, asserted on New West's behalf as its assignee, and brings new third-party UTPA claims against New West. Allied opposes the amendment.

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Rule 15 provides that the Court "should freely give leave" for parties to amend their pleadings "when justice so requires." Mont. R. Civ. P. 15(a)(2). The rule makes "allowance of amendments the general rule and denial the exception." *Estate of Mandich v. French*, 2022 MT 88, ¶ 32, 408 Mont. 296, 509 P.3d 6. This does not mean, however, "that a court must automatically grant a motion to amend." *French*, ¶ 32 (quoting *Allison v. Town of Clyde Park*, 2000 MT 267, ¶ 20, 302 Mont. 55, 11 P.3d 544). Leave may be denied where "the party opposing the amendment would incur substantial prejudice as a result of the amendment," or where the motion will cause "undue delay, is made in bad faith, is based upon a dilatory motive on the part of the movant or is futile." *Stevens v. Novartis Pharms. Corp.*, 2010 MT 282, ¶ 64, 358 Mont. 474, 247 P.3d 244; *see also Rolan II*, ¶ 15. Allied's objections are reviewed in light of these principles.

a. Scope of the Mandate

As an initial matter, Allied asserts that any amendment would violate the scope of the Supreme Court's mandate in *Rolan III*. The Court disagrees. To be sure, a district court must follow the Supreme Court's instructions on remand. *State ex rel. Olson v. Dist. Ct.*, 184 Mont. 346, 349, 602 P.2d 1002, 1003–1004 (1979). Rolan *III*, however, was not an appeal from a final judgment, but an appeal on discrete issues certified by this Court pursuant to Mont. R. Civ. P. 54(b). (Or. Certifying Rulings for Interlocutory Appeal, Dkt. 312.) The Supreme Court specifically instructed this Court to address the question of which claim limit applies, but it did not confine remand to this issue alone. Nor could it, for other proceedings remain in this case. As the Supreme Court has recognized:

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> On remand, the trial court may consider or decide any matters left open by the appellate court, and is free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision. . . . If the mandate speaks only in the light of the special facts found, the lower court is at liberty to proceed in all other respects in the matter that, according to its judgment, justice may require. The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. The mandate is to be interpreted according to the subject matter and, if possible, in a manner to promote justice.

Zavarelli v. Might, 239 Mont. 120, 126, 779 P.2d 489, 493 (1989) (quoting 5 Am. Jur. 2d 198, Appeal and Error § 755 (1962)). Thus, this Court must address the issues set forth in the Supreme Court's mandate, but it is not precluded from addressing other issues not foreclosed or settled by the Supreme Court. In *Rolan III*, the only issues before the Supreme Court were this Court's holding that Allied was estopped from enforcing the $1 million "each claim limit"; and (b) this Court's holding that the class's damages were not excluded from Allied's indemnity obligation. *Rolan III*, ¶ 1. As to the latter, this Court was affirmed. As to the former, this Court was reversed, and in this context, the Supreme Court directed this Court to address the merits of the question as to which liability limit applies. Nothing in *Rolan III* suggested that the Court was otherwise precluded from addressing issues raised on remand. Thus, the Court does not agree that the motion to amend violates the Supreme Court's mandate.

On one important point, however, Allied is correct. As discussed above, the Supreme Court's holding in *Rolan III* precludes a coverage-by-estoppel defense. Thus, to the extent the amendments are intended to expressly

assert equitable estoppel, such amendments would be futile and violate the Supreme Court's mandate.

b. First-Party UTPA Claims against Allied

Allied asserts amendment would be futile because the amendments adding the first party claims against Allied do not relate back to the original complaint and are therefore time-barred. Rule 15 provides that an amendment relates back to the date of the original pleading when, among other things, the "amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out -- or attempted to be set out -- in the original pleading." Mont. R. Civ. P. 15(c)(1).

The proposed TAC asserts a new first-party UTPA claim against Allied on behalf of New West. A claim by the New West against Allied would be a crossclaim. Mont. R. Civ. P. 13(g). Under Montana law, "a counterclaim, crossclaim, or third-party complaint for affirmative relief, other than a defensive claim where the defendant attempts to offset the amount a plaintiff can recover, such as by recoupment, contribution, or indemnity, must comply with the applicable statute of limitations" and does not relate back to the filing of the original complaint. *State ex rel. Egeland v. City Council*, 245 Mont. 484, 490, 803 P.2d 609, 613 (1990). A UTPA claim is not a purely defensive claim like a cause of action for contribution or indemnity. Thus, while an indemnification claim by New West against Allied would not be time-barred, the Court agrees with Allied that an amendment to add a first party UTPA claim on behalf of New West would not relate back.

The relation back doctrine primarily matters to the extent it permits a party to raise a claim that would otherwise be time-barred. Allied contends that

is precisely the case here because it claims the latest acts alleged in the TAC occurred in 2019, and neither New West nor Rolan-as-assignee asserted the claim until 2022. Mont. Code Ann. § 33-18-242(8)(a) (two-year statute of limitations for first party insured to bring a claim). Rolan appears to tacitly concede that, unless equitable tolling applies or the claims relate back, its claims would be time-barred. (*See* Pls.' Reply in Support of Mot. to Amend at 14, Dkt. 389 at 15.) Nevertheless, Rolan asserts that even if the claims do not relate back, the Court should apply equitable tolling.

Equitable tolling is available only in "limited circumstances." *Schoof v. Nesbit*, 2014 MT 6, ¶ 33, 373 Mont. 226, 316 P.3d 831. Procedural bars, including statutes of limitations, fulfill important public policy objectives, from protecting a defendant's interest in finality, certainty, and peace of mind to preventing inaccurate adjudication of issues because of evidence that has been lost or grown stale over time. *Cweklinsky v. Mobil Chem. Co.*, 837 A.2d 759, 768 (Conn. 2004); *Drakos v. Sandow*, 468 P.3d 289, 293 (Idaho 2020); *see also BNSF Ry. Co. v. Cringle*, 2012 MT 143, ¶ 21, 365 Mont. 304, 281 P.3d 203 (policies behind appeal deadlines); *Seifert v. Seifert*, 173 Mont. 501, 508 568 P.2d 155, 158–159 (1977) (policies underlying laches doctrine). Thus, statutes of limitations must be applied "regularly and consistently." *Schoof*, ¶ 34 (quoting *Weidow v. Uninsured Employers Fund*, 2010 MT 292, ¶ 28, 359 Mont. 77, 246 P.3d 704). Equitable tolling is intended to be available when depriving the plaintiff of her claim "would serve no policy purpose." *Schoof*, ¶ 34 (quoting *Weidow*, ¶ 28).

Even assuming (without deciding) there could be a basis for applying equitable tolling to the extent the UTPA claims are based on conduct

prior to 2019, there is no basis for applying equitable tolling beyond that year. However Allied's position on coverage may be characterized, it was no longer "secret" by 2017, and New West was aware of the factual basis for the proposed UTPA claims by 2019. There is no basis for claiming Allied concealed the basis for the cause of action beyond that time or that New West or Rolan (after reaching the preliminary settlement in 2020) faced any barrier in earlier bringing the UTPA claims, including before seeking Rule 54(b) certification of the Court's orders relating to coverage. Equitable tolling requires diligence on the part of the claimant. *Schoof*, ¶ 35. Applying equitable tolling here to allow a late-breaking amendment to the complaint would contravene the public policy interest in affording finality and certainty to the parties.

Rolan's proposed first-party UTPA claims against Allied, asserted on behalf of New West, do not relate back to the filing of the original complaint, appear to be time-barred, and are not subject to equitable tolling. Accordingly, permitting amendment to add these claims would be futile.

c. Third-Party UTPA Claims against Allied

The TAC alleges third-party UTPA claims against Allied by Rolan and the Plaintiff class. Rolan appears to concede, however begrudgingly, that a "third-party claimant may not file an action under this section until after the underlying claim has been settled or a judgment entered in favor of the claimant on the underlying claim." Mont. Code Ann. § 33-18-242. Neither the claims between Rolan and New West nor the claims between New West and Allied have been settled. Although Rolan and New West reached a tentative settlement, the Court has yet to approve it. Mont. R. Civ. P. 23(e) (settlement of class claims may only be with the Court's approval following notice to class members and a

final fairness hearing). The coverage controversy between New West and Allied has not been resolved. There is no final judgment as to any claim. This is dispositive. Rolan's third-party UTPA claims against Allied are not yet ripe.

d. Additional Defenses

Rolan seeks to amend the pleadings to assert contract defenses of reasonable expectations and illusory coverage. These issues are squarely implicated by the Supreme Court's remand instructions and are addressed above. Because the Court holds above that the application of the $1 million "each claim" limit applies and that its application neither violates New West's reasonable expectations nor results in illusory coverage, amendment of the pleadings would be futile.

3. Motion to Revoke Settlement and Rule 11 Motion

On January 27, 2020, this Court preliminarily approved the settlement between New West and Rolan. (Or. on Preliminary Settlement, Rule 23(b)(3) certification, and Revised Certification, Dkt. 284.) A final fairness hearing has not yet been held on the settlement. Rolan now contends that the Court should rescind its preliminary approval of the settlement, alleging that New West induced settlement by misrepresenting its financial position. Rolan requests an evidentiary hearing on the motion. New West opposes the motion. Allied takes no position.

First, some necessary background. New West is a now-dissolved domestic non-profit corporation consisting of two members, PacificSource and Billings Clinic. While this case was pending, New West began winding up its affairs. In December 2016, it stopped writing new policies, and in January 2017, it entered a "run-off" phase during which it continued to operate solely to satisfy

existing claims. In December 2018, it completed the runoff process and surrendered its certificate of authority to the Commissioner of Securities and Insurance (Commissioner). In 2020, New West's board approved dissolution, and the Commissioner on May 10, 2021, issued a notice of proposed agency action to approve the dissolution and invited any objecting members of the public to file a request for a hearing. No requests—including by Rolan or any hypothetical class members—were received, and the Commissioner approved the dissolution.

In 2018, Rolan and New West engaged in active settlement negotiations. After an unsuccessful mediation in June 2018, the parties continued direct settlement discussions. During those discussions, New West repeatedly expressed concern that its remaining assets would be exhausted if an agreement were not reached quickly. On June 28, 2018, counsel for New West emailed class counsel and stated that he was concerned the financial situation of New West might compromise payment to class claimants:

> Prior to the settlement conference, I had not foreseen these concerns; but now, there are significant issues that appear very problematic. For example, if we have limited funds available, how can we send out notices and start paying claimants, as that could result in a "first come - first served" situation, where claimants who sent in their claim first got paid in full, whereas someone who sent in their claim two months later got nothing, because the money ran out. This is now a very real concern because of New West's financial situation and the insurance coverage dispute. I don't think a court would knowingly approve such a plan and frankly, it would seem to open you up to claims from class members who got nothing.
>
> I am going to visit more with my contacts at New West on this situation to see what we can do to solve this dilemma n this unique situation. Please give me a few days to figure this out.

(Pls.' Reply in Support of Mots. Re: Revocation of Prelim. Settlement & Rule 11, Attach. 16, Dkt. 456 at 73.) In a July 27, 2018, email conversation, counsel for New West expressed its concerns about exhaustion of assets more directly: "If we are to do this, we should get a firm agreement soon, while New West still has the $250,000" and "I think we can easily avoid any concern that this is cooperation or some capitulation. You are grabbing the funds while they are available, and it will ultimately be approved by the Court." (*See, e.g.,* Br. re: Revocation of Prelim. Settlement, Attachment 1-1, Dkt. 433 at 16.) Likewise, New West had previously represented to the Court that it may be judgment-proof but for its insurance coverage from Allied. (New West's Resp. Br. Opposing Pl.'s Mot. for Inj. Relief & Show Cause Hrg., Dkt. 132 at 6.) As the parties continued to hammer out the terms of a settlement into 2019, New West repeatedly emphasized that time was of the essence because its funds were dwindling:

> New West is in the process of winding down and wants to pay the $250,000 while it is still operation and has the money. Can we pay it to the Court to hold?

(Apr. 4, 2019, Email, Pls. Br. re: Revocation of Prelim. Settlement, Attach. 2, Dkt. 433 at 19.) And:

> Even if you persuaded the Court to require New West to pay for the expense of sending the notices to the class members, this would only serve to eat away at the slim amount in their reserves, which are declining as we speak.
>
> Regardless of whether there is coverage from Allied World for nothing, $1 million or $3 million, there is no more money forthcoming (*sic*) from New West. We urge you to reconsider this point. Accept the $250,000 that remains available, obtain the

> assignment of all claims from New West, and release it from further liability."

(May 13, 2019, Email, Pls. Br. re: Revocation of Prelim. Settlement, Attach. 3, Dkt. 433 at 20.)

Rolan contends that New West overstated its financial distress. First, she notes that the Commissioner's examination following New West's submission of its plan for dissolution determined that New West's last quarterly financial report (covering June 30, 2020) "reported total capital and surplus of $3,586[,]769." (Matthews 6/15/2023 Decl., Pl.'s Reply Br. Attach. 12 at 2, Dkt. 456 at 58.)[3] The Commissioner maintains—and nobody appears to disagree—that New West was indeed solvent at the time of its dissolution. Rolan maintains these surplus assets could have satisfied New West's total obligations to the class.

Second, Rolan contends that New West had $49.5 million in surplus notes available to it to satisfy outstanding claims. During settlement negotiations, New West provided a two-page balance sheet, dated April 30, 2018, that reflected total net assets of $ 5,708,127, but included $ 49,500,236—presumably the value of the surplus notes—as "notes payable" under its long-term liabilities. (New West's Resp. Br. Opposing Pls.' Mot. to Revoke Settlement, Ex. A, Dkt. 448 at 4.) The balance sheet—which states it was prepared on a Generally Accepted Accounting Principles (GAAP) basis—does not identify the nature of the notes payable or otherwise disclose that they are surplus notes. Insurers, however, generally must file financial statements based

[3] In context, the use of a period instead of a comma in the verbatim reference to "$3,586.769" that appears in Matthews's declaration appears to be a typographical error.

on statutory rules applying Statements of Standard Accounting Principles (SSAP), rather than GAAP. (Matthews Decl. ¶ 2, Dkt. 456 at 56.) Here, the difference between GAAP and SSAP is material because surplus notes are reported as liabilities under GAAP but as assets under SSAP. Indeed, counsel for PacificSource (one of New West's two members) recognized that difference in 2017 communications with New West's counsel:

> What is he [class counsel] expecting in terms of a financial report? I can ask that someone prepare a financial statement for the end of November, I can get the latest filing with the NAIC (also filed with the state and a public document), or the latest year-end audited financials. I think the most relevant is a November 30th financial statement.
>
> We can oppose if you feel that is appropriate. There are a fair number of public documents for New West that includes financial information, so he could get that information and actually misunderstand New West's financial position (the $53 million in surplus notes show in statutory filings as a positive and not a liability).

(Pls.' Reply in Support of Mots. Re: Revocation of Prelim. Settlement & Rule 11, Attach. 11-3, Dkt. 456 at 54.)

In short, Rolan contends that the Court should revoke its preliminary approval because approval was induced by affirmative misrepresentations by New West. As the Court sees it, Rolan's motion presents two separate, but nevertheless intertwined, issues: (1) may Rolan rescind her approval of the settlement; and (2) should the Court revoke its preliminary approval of the settlement.

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a. Rescission

The first question is whether Rolan may rescind her approval of the settlement reached with New West. The Court agrees with New West that Rolan and New West entered a binding and enforceable settlement agreement. The contract has identifiable parties capable of contracting and a lawful object in the compromise and settlement of pending litigation. Rolan accepted an offer from New West to settle its claims in exchange for valuable consideration in the form of a monetary payment and assignment of New West's claims against Allied. Finally, the parties reduced that agreement to writing and submitted it to the Court for approval. elements of a contract are satisfied. Mont. Code Ann. § 28-2-102.

Further, the Court agrees that the necessity of judicial approval does not alter the binding nature of the agreement between Rolan and New West. As the Ninth Circuit has held: "the requirement that the district court approve a class action settlement does not affect the binding nature of the parties' agreement." *Pilkington v. Cardinal Health, Inc. (In re Syncor ERISA Litig.)*, 516 F.3d 1095, 1100 (9th Cir. 2008) (citing *Collins v. Thompson*, 679 F.2d 168, 172 (9th Cir. 1982)).[4] The requirement that courts approve class action settlements exists not so much to protect the named parties, but instead to protect the interests of *absent* class members. *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935, 946 (9th Cir. 2011). Thus, Rolan can only

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[4] Rolan's attempt to distinguish *Pilkington* is unpersuasive. Although *Pilkington* involved a defendant, there is no reason the same principle should not apply to the named plaintiffs in a class action. The purpose of judicial approval is to protect the rights of absent class members who did not participate in the formation of the settlement, not to provide an out for named class representatives who *did* fully participate but now regret their deal.

rescind her support of the settlement if she demonstrates an equitable or legal basis for doing so.

Consequently, Rolan can only rescind the contract "if the consent of the party rescinding or of any party jointly contracting with the party rescinding was given by mistake or obtained through duress, menace, fraud, or undue influence exercised by or with the connivance of the party as to whom the party rescinds." Mont. Code Ann. § 28-2-1711(1). Fraud for this purpose can be actual or constructive. *Id.* § 28-2-404. Actual fraud requires intent either to "deceive a party" *or* to "induce the other party to enter into the contract" by, among other things, "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though the person believes it to be true," or "the suppression of that which is true by one having knowledge or belief of the fact." *Id.* § 28-2-405(2), (3). Constructive fraud includes "any breach of duty that, without actually fraudulent intent, gains an advantage to the person in fault. . . by misleading another person to that person's prejudice." *Id.* § 28-2-406(1).

Even assuming (without deciding) there was no affirmative intent to deceive, Rolan has produced evidence that, construed in the light most favorable to Rolan, tends to suggest that New West, as part of its efforts to induce Rolan into reaching a settlement: (a) made unwarranted representations about the ability of New West to pay claims; (b) suppressed the existence of the surplus notes by providing financial statements that misreported them as liabilities rather than assets; and (c) affirmatively misled Rolan about the urgency of settling for $250,000.

New West argues that the foregoing does not vitiate Rolan's consent because class counsel had the means to determine the true facts (again, giving full weight to Rolan's evidence). To be sure, a party cannot complain of misrepresentations where "the means were at hand to ascertain the truth. . . of any representations made to him." *Aetna Life Ins. Co. v. McElvain*, 221 Mont. 138, 148, 717 P.2d 1081, 1087 (quoting *Turley v. Turley*, 199 Mont. 265, 649 P.2d 434 (1982)). If the party could have reasonably determined the falsity of a representation at the time of contracting, then that fact generally defeats a claim of fraud. *Id.*

The Court is persuaded that Rolan has produced evidence of material disputed facts that warrant an evidentiary hearing on the question of whether Rolan's consent was induced by actual or constructive fraud. The Court's primary concern is the disclosure issues around the surplus notes, a subject on which New West's response brief is largely silent. The balance sheet provided during negotiations does not appear to accurately describe their potential availability to satisfy a judgment. Perhaps this could have been discovered through 30(b)(6) depositions—as New West suggests—but the available record also suggests that at every turn New West emphasized the importance of settling immediately if Rolan was to recover anything. Given that New West's insurance policy with Allied is a "cannibalizing" policy and New West had represented it had limited funds to pay a judgment without insurance, this Court could rationally find that New West's misrepresentations discouraged the discovery necessary and that Rolan's consent to the settlement "would not have been given" but for New West's misrepresentations and omissions. Mont. Code Ann. § 28-2-401(2).

b. Preliminary Approval

The second question to be addressed is the effect of Rule 23. The claims, defense, and issues of a certified class may be settled "only with the court's approval." Mont. R. Civ. P. 23(e). A settlement may only be approved if, after a final fairness hearing, the Court finds that the settlement is "fair, reasonable, and adequate." *Id.* 23(e)(2). At this point, no final fairness hearing has taken place; so far, the Court has extended only preliminary approval to the settlement. Preliminary approval does not bind the parties; rather, it simply "ascertain[s] whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled in part on other grounds by Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998). Preliminary approval is not a definitive determination that the settlement is fair; most courts articulate the standard as merely one of "probable cause." *E.g. Ross v. Convergent Outsourcing, Inc.*, 323 F.R.D. 656, 659 (D. Colo. 2018).

In this case, the Court granted preliminary approval based on the representations of New West that its financial situation was dire, and it may be unable to pay claims to the class. In the joint motion to preliminarily approve the settlement, the parties represented that "[t]he risk of further litigation is that there will be less funds available" because of "New West's obligations to multiple creditors and the cannibalizing nature of the insurance coverages." (Joint Mot. for Preliminary Approval of Proposed Compromise Settlement, Dkt. 232 at 26.) In the 2019 joint motion to approve the settlement, the parties stated that New West was functionally judgment-proof. (Br. in Supp. of Joint Mots., Dkt. 275 at 4.)

The Court relied heavily on the parties' representations when it preliminarily approved the settlement, as its January 27, 2020, order repeatedly demonstrates. In its analysis of the strength of Rolan's case, the Court echoed the claim that New West is "essentially judgment-proof." (Or. on Prelim. Settlement, Dkt. 284 at 5.) As one of the risks, the Court stated that class decertification might be necessary "due to the lack of a common fund." (*Id.*) The order stated that the settlement funds included "virtually all funds available through New West which went out of business during this lawsuit." (*Id.*) The absence of collusion analysis noted the potential unavailability of funds to fully compensate the class. (*Id.* at 6.) Indeed, the Court's belief that New West could not pay meaningful compensation unless the proposed settlement was approved infuses every step of the approval.

Given the low value of the settlement from New West and how much the Court's preliminary approval order depended on New West's claims about its financial position, it is unlikely the Court would have extended preliminary approval if New West's finances were less imperiled, as Rolan now contends they were.

Whether to revoke preliminary approval is a question for the Court. Because there are material disputed facts that could, if true, warrant revocation of the Court's preliminary approval of the settlement, the Court agrees with Rolan that an evidentiary hearing is necessary.

Rolan has also filed a Rule 11 motion based on New West's alleged misrepresentations to the Court. Because Rolan's Rule 11 motion is predicated on the same grounds as its motion to revoke preliminary settlement,

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the Court will reserve ruling on the Rule 11 motion until the conclusion of the evidentiary hearing.

4. Motion for Protective Order

Allied and New West have moved for two protective orders. The first is moot because it sought a protective order only until the Court's ruling on pending motions. The second motion is premised on the purportedly limited scope of remand. The Court has rejected Allied's position on the scope of remand above. Additionally, the Court is entertaining Rolan's motion to revoke the Court's preliminary approval of the settlement with New West. Accordingly, some additional discovery is appropriate.

At the same time, litigation has been pending for fourteen years and extensive discovery appears already to have occurred. To ensure discovery is appropriately cabined, the Court will direct the parties to have a meet-and-confer within the next 30 days to develop a discovery plan in light of the Court's rulings. In the event they cannot agree, the Court will hold a Rule 26(f) conference as set forth in this Order.

5. Motion to Compel Production of Allied's Claims File

Rolan seeks a motion compelling production of Allied's claims file. Allied responds that the claim file is privileged in the original litigation with the insured. The Court has its doubts whether Allied can make a blanket claim of privilege to the entire claims file, as both cases it cites, *Kuiper v. District Court*, 193 Mont. 452, 632 P.2d 694 (1981), and *Cantrell v. Henderson*, 221 Mont. 201, 718 P.2d 318 (1986), involved document-by-document review of materials in the claims file. The ordinary course of business calls for a document-by-document privilege log. *See* Mont. R. Civ. P. 26(b)(6). At the same time, it is not clear what

relevance Allied's claims file would have to the remaining issues in the case given the Supreme Court's rejection of Rolan's equitable estoppel argument. The Court will therefore deny the motion to compel without prejudice. Should the parties fail to agree on a discovery plan going forward, then the Court will entertain this question further at the 26(f)-discovery conference.

6. Motion for Attorney Fees

Rolan has moved for attorney fees, contending Allied has vexatiously and unreasonably multiplied the proceedings. Mont. Code Ann. § 37-16-421. Relief under this statute is often sought, but rarely awarded. Most of Rolan's claim for attorney fees is a restatement of various arguments that the Court has disposed of above. The Court disagrees that any party—all of whom have experienced and capable counsel well-versed in complex litigation—has acted vexatiously and unreasonably such that the Court should award attorney fees on that basis. Whether Allied's conduct in the litigation entitles Rolan to any relief under the UTPA should be addressed through a UTPA claim. The Court declines to award relief under the UTPA here in the guise of an attorney fees award.

Rolan also cites the "*Foy*" exception, articulated in *Foy v. Anderson*, 176 Mont. 507, 580 P.2d 114 (1978), to contend that the Court should award attorney fees from Allied as an act of equity to make the class whole. As Allied correctly observed, the *Foy* exception is strictly limited to the defense of frivolous claims. *Watson v. Mont. Dep't of Fish, Wildlife, & Parks*, 2023 MT 239, ¶ 25, 414 Mont. 217, __ P.3d __. A claim is not frivolous merely because one party prevails, and the other does not. None of the claims or defenses raised in this case—including the ERISA defense—were frivolous. Likewise, the Court

sees no basis for awarding fees in relation to the ERISA defense beyond what the Court previously awarded.

Rolan seeks fees under Rule 37(a) based on long-ago discovery violations. The Court agrees with Allied that Rolan's request for attorney fees on this basis is now untimely and, indeed, is based on violations that occurred before Allied was joined as a party.

Finally, Rolan asserts the insurance exception. The Court agrees with Allied that the insurance exception is unavailable to third-party claimants, even if they assert the claim as an assignee. *See Woods v. Preferred Contractors' Ins. Co. Risk Retention Group*, 144 F. Supp. 3d 1166, 1172 (D. Mont. 2015).

7. Motion to Release Funds

New West's motion to release $50,000 in interpled funds to Allied for the purpose of paying for New West's defense will be granted. Nothing in Mont. Code Ann. §§ 26-1-701 through -706 precludes the Court-ordered return of interpled funds. These statutes—codified in the evidence code, not the civil procedure code—are intended only to encourage voluntary payments without fear that they will be construed as an admission of liability. Additionally, the return of the funds is consistent with the unambiguous terms of the insurance policy forming the basis for Allied's liability: the policy unequivocally deducts from its policy limits the cost of defense. Because the Court is holding a hearing on the motion to revoke the settlement with New West, the Court will permit the requested release of funds to permit New West to defend itself.

8. Motion for Approval of Class Notice

Rolan requests approval of a notice to identify potential class members. Notwithstanding the foregoing rulings, it makes sense to proceed

simultaneously with the task of identifying class members. Accordingly, the Court will approve the proposed class notice, except that it shall provide class members an **August 1, 2024,** deadline for responding.

CONCLUSION

Based on the foregoing,

IT IS ORDERED:

1. Allied's Motion for Summary Judgment (Dkt. 349), filed May 11, 2022, is **GRANTED**. To the extent Rolan has made a motion under Rule 56(f) with respect to the motion for summary judgment, it is **DENIED**.

2. Rolan's Motion to Amend Complaint (Dkt. 355), filed May 31, 2022, is **DENIED**.

3. Rolan's Motions re: response to Allied's Motion for Summary Judgment (Dkt. 362), filed June 8, 2022, are **DENIED**.

4. Rolan's Motion for Attorney Fees and Costs Due to Allied's Multiplication of Proceedings (Dkt. 367), filed June 15, 2022, is **DENIED**.

5. Rolan's Rule 37(a) Motion (Dkt. 392), filed August 25, 2022, is **DENIED** without prejudice.

6. Allied's (first) Motion for Protective Order (Dkt. 394), filed September 12, 2022, is **DENIED** as moot.

7. Allied's Objection to Filing of Affidavits (Dkt. 403), filed December 1, 2022, is **SUSTAINED**.

8. Rolan's Motion for Court Approval of Class Notice (Dkt. 421), filed January 30, 2023, is **GRANTED**. The class notice must use a deadline of August 1, 2024.

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9. Allied's (second) Motion for Protective Order (Dkt. 442), filed May 31, 2023, is **DENIED**.

10. New West Health Services's Motion for Release of Funds for Defense (Dkt. 469), filed July 6, 2023, is **GRANTED**.

11. On **March 15, 2024, at 9:00 a.m.** the Court will hold a hearing for the following purposes: (a) determining further proceedings in this matter; (b) conducting a Rule 26(f) discovery conference; and (c) scheduling an evidentiary hearing on Rolan's motion to revoke approval of the preliminary settlement.

12. **Fourteen days** prior to the hearing, the parties must meet and confer in good faith to attempt to develop a discovery plan for any remaining discovery in this matter.

DATED this 16th day of January 2024.

/s/ Christopher D. Abbott
CHRISTOPHER D. ABBOTT
District Court Judge

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Electronically Signed By:
Hon. Judge Christopher D. Abbott
Thu, Jan 18 2024 01:46:04 PM