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STATE OF MONTANA

Case Number: DA 20-0279

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UGRIN ALEXANDER
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ANGIE SPARKS, Clerk of District Court
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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

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

Plaintiff,

v.

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

Defendants.

Cause No. CDV-2010-91

ORDER ON VARIOUS MOTIONS

ALLIED WORLD ASSURANCE COMPANY,

Counterclaimant,

v.

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

Counter-Defendants.

1 This matter involves a class action lawsuit by Dana Rolan and a
2 certified class against New West Health Services (New West). Allied World
3 Assurance Company (Allied) insures New West. Defendant/Counterclaimant
4 Allied filed a motion for partial summary judgment seeking a declaratory ruling
5 that its limit of liability under the Managed Care Errors and Omissions Liability
6 Policy (MCEO) is \$1 million, and that the Health Care Organization Directors
7 and Officers Liability Insurance Policy Including Employment Practices Liability
8 Coverage (HCDO) does not provide coverage. Plaintiffs/Counter-Defendants
9 Dana Rolan and the class filed a cross-motion for summary judgment against
10 Allied on coverage. Defendant New West also filed a cross-motion for summary
11 judgment that Allied provides coverage for all claims asserted by Rolan and the
12 class in the full amount of the aggregate limit (\$3 million) and is subject to an
13 excess verdict because of its failure to settle within limits.

14 Plaintiffs also ask for sanctions against Allied for discovery
15 violations. Allied requests that the motion for sanctions be stricken.

16 Finally, on September 21, 2018, Allied filed a motion to strike an
17 affidavit filed by Erik Thueson. That motion has been fully briefed.

18 **UNDISPUTED FACTS**

19 Plaintiffs filed a complaint against New West in January 2010. New
20 West contacted its insurer, Allied. Joseph Sappington, Esq., Allied World
21 Assurance Company Senior Claims Analyst, wrote a Reservation of Rights
22 (RoR) letter dated February 18, 2010 to Angela Huschka at New West.¹ The
23 letter states in part:

24 *////*

25 ¹ The complete RoR letter is included in the court file as Ex. A to the July 26, 2018 Affidavit of Gary Zadick.

1 SUMMARY OF FACTS

2 We have reviewed the Complaint (the “Complaint”) captioned, *Dana*
3 *Rolan v. New West Health Services*. . . .

4 Plaintiff, a resident of Montana, brings the Action on behalf of
5 herself and on behalf of those similarly situated. The Plaintiff claims
6 that she suffered injuries caused by the legal fault of others and has
7 not been made whole. It is further alleged that the Defendant has
8 avoided payment of medical bills that they are allegedly
9 contractually obligated to pay by claiming the medical costs are the
10 responsibility of those at fault. . . .

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

16 RoR, at 2, 3.

17 In the summary of coverage, a definition of “claim” is discussed:

18 “**Claim**” is defined in Definitions § IV(C) as any written notice
19 received by any **Insured** that a person or entity intends to hold an
20 **Insured** responsible for a **Wrongful Act** which took place on or
21 after the retroactive date listed in ITEM 7 of the Declarations. In
22 clarification and not in limitation of the foregoing, such notice may
23 be in the form of an arbitration, mediation, judicial, declaratory or
24 injunctive proceeding. A **Claim** will be deemed to be made when
25 such written notice is first received by any **Insured**.

26 RoR, at 3.

27 The RoR letter makes no reference whatsoever to the definition of
28 “Related Claims.”

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1 After the summary of coverage under the Managed Care Errors and
2 Omissions (MCEO) Policy, Sappington accepts coverage of New West under the
3 policy with Allied, stating:

4 As the Complaint includes allegations sounding in a **Managed Care**
5 **Activity**, and the allegations were apparently first made against an
6 **Insured** in writing during the Policy Period, the conditions
7 precedent to the Insuring Agreement appear to be satisfied.
8 Accordingly, the MCEO Policy provides for a **Per Claim** Limit of
9 Liability of \$1,000,000 and a Maximum Aggregate Limit of Liability
10 of \$3,000,000 subject to a \$50,000 retention applicable to **Loss**,
11 including **Defense Expenses**, for each **Claim**.

12 Under the MCEO Policy the **Underwriter** has the right and duty to
13 defend any **Claim** made against any **Insured** which is covered by
14 the MCEO Policy even if the allegations of such **Claim** are
15 groundless, false or fraudulent. (Insuring Agreement § I). In
16 addition and pursuant to the MCEO Policy, the amount stated in
17 ITEM 3(a) of the Declarations shall be the maximum aggregate
18 Limit of Liability of the **Underwriter** for all **Loss**, including
19 **Defense Expenses**, resulting from all **Claims** for which this MCEO
20 Policy provides coverage, regardless of the number of **Claims**, the
21 number of persons or entities included within the definition of
22 **Insured**, or the number of Claimants. . . .

23 RoR, at 4.

24 The letter notes that:

25 [U]nder the MCEO Policy, no **Insured** may incur any **Defense**
Expenses or admit liability for or settle any **Claim** without the
Underwriter's written consent. (Conditions § III(A)(3)). The
Underwriter will have the right to make investigations and conduct
negotiations and, with the consent of the **Insureds**, enter into such
settlement of any **Claim** as the **Underwriter** deems appropriate.

RoR, at 4-5.

1 denying coverage to its insured when the insurer had initially accepted coverage
2 of the claim and assumed defense of the claim without reservation.

3 In considering an argument for estoppel of insurance coverage, the
4 Montana Supreme Court looks to the Montana Unfair Trade Practices Act. “[The
5 Act] requires that the insurer ‘promptly provide a reasonable explanation of the
6 basis the insurance policy in relation to the facts or applicable law for denial of
7 the claim.’” *Ellinghouse*, 223 Mont. at 245, 725 P.2d at 221 (citing Mont. Code
8 Ann. § 33-18-201(14); 38 A.L.R.2d 1148). “It is well established in Montana
9 that an insurer has an obligation to inform the insured of all policy defenses it
10 intends to rely upon.” *Portal Pipe Line Co. v. Stonewall Ins. Co.*, 256 Mont. 211,
11 217, 845 P.2d 746, 750 (1993).

12 Allied argues that *Ellinghouse* has no application to this matter and
13 that New West and Plaintiffs do not identify or prove the required elements for
14 estoppel. Allied raises the six elements of estoppel, arguing that crossclaimants
15 fail to prove the requisite elements by clear and convincing evidence. See, e.g.
16 *Avanta Fed. Credit Union*, ¶ 42²; *King v. State Farm Fire Casualty Co.*, 2010
17 U.S. Dist. LEXIS 49029 (D. Mont. 2010).

18 Allied also claims the RoR letter does not limit its defense, but rather,
19 alerted New West to the limit of \$1 million for each “Claim” as defined by the
20 policy. Allied asserts its position on coverage limits has been consistent and that
21 New West never relied on the \$3 million aggregate limit.

22 ² (1) the existence of conduct, acts, language, or silence amounting to a representation or a concealment of a
23 material fact; (2) these facts must be known to the party estopped at the time of his conduct, or at least the
24 circumstances must be such that knowledge of them is necessarily imputed to him; (3) the truth concerning these
25 facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon by him;
(4) the conduct must be done with the intention, or at least the expectation, that it will be acted upon by the other
party, or under circumstances both natural and probable that it will be so acted upon; (5) the conduct must be
relied upon by the other party and, thus relying, he must be led to act upon it; and (6) he must in fact act upon it in
such a manner as to change his position for the worse.

1 When addressing the issue of estoppel regarding insurance coverage
2 in *Ellinghouse*, the Montana Supreme Court adopted the general rule set forth in
3 14 Couch, INSURANCE 2D, § 51.58 (2d ed. 1982):

4 Where an insurer, without reservation and with actual or
5 presumed knowledge, assumes the exclusive control of the defense
6 of claims against the insured, it cannot thereafter withdraw and deny
7 liability under the policy on the ground of noncoverage, prejudice to
8 the insured by virtue of the insurer's assumption of the defense
9 being, in this situation, conclusively presumed . . . the loss of the
right of the insured to control and manage the case is itself
prejudicial.

10 *Ellinghouse*, 223 Mont. at 245, 725 P.2d at 221.

11 In *Portal Pipe Line Co.*, at 217, 845 P.2d at 750, the Montana
12 Supreme Court distinguished *Ellinghouse* and rejected the principle that an
13 insurance company is strictly limited to those defenses detailed in a reservation of
14 rights letter. However, the facts in *Portal Pipe Line Co.* are very different from
15 those presented here, in that the insurer had no duty to defend Portal Pipe Line
16 Co., did not assume the insured's defense, and Portal Pipe Line Co. obtained
17 independent counsel throughout the litigation. As such, the Supreme Court held
18 that the insured was not prejudiced by the insurer's reliance on various exclusions
19 to coverage.

20 In *Barnard Pipeline, Inc. v. Travelers Prop. Cas. Co. of Am.*, 3 F.
21 Supp. 3d 865, 875, a United States district court judge, citing *Portal Pipeline Co.*,
22 clarified that "an insurer does not waive all policy defenses that are not included
23 in a reservation of rights letter." The decision also iterated the legal requirement
24 in Montana for an insurer to "promptly provide a reasonable explanation of the
25 basis in the insurance policy . . . for denial of a claim." (Citing Mont. Code Ann.

1 § 33-18-201(14)). It was noted in *Barnard* that the insured was always on notice
2 that the insurer intended to assert all policy defenses, as distinguished from the
3 current case, where the RoR relayed a different message related to coverage and
4 possible defenses.

5 The facts of this case are that New West was sued by Rolan and other
6 yet to be identified plaintiffs certified in the class action. The insurer, Allied,
7 knew the alleged facts and the nature of the class claims. While reciting the
8 policy in effect at the relevant time, the RoR sent by Allied to New West did not
9 mention application of any single claim limitation, including “related claims,” to
10 coverage in this matter. In fact, the RoR implied that there would be \$3 million
11 aggregate coverage. Allied assumed the defense of the case and hired attorneys
12 to represent New West.

13 Allied argues it has never controlled the defense of the case, has never
14 waived any defenses, and the *Ellinghouse* presumption of prejudice does not
15 apply. Citing *In re the Rules of Professional Conduct*, 2000 MT 110, 299 Mont.
16 321, 2 P.3d 806, Allied claims that modern defense practices do not require pre-
17 approval of the actions of New West’s counsel provided by Allied because under
18 the Montana Rules of Professional Conduct, New West is considered the sole
19 client of its defense counsel. Notwithstanding the relationship between New
20 West and counsel provided by Allied, Allied assumed defense of the case in
21 2010. “The loss of the right of the insured to control or manage the case is itself
22 prejudicial.” *Ellinghouse*, at 245, 775 P.2d at 221. Allied did not make clear its
23 current coverage position until 2016 – six years after the RoR was issued and
24 Allied assumed defense of the case. “The course cannot be rerun, no amount of
25 evidence will prove what might have occurred if a different route had been

1 taken.” *Id.*, citing *Transamerica Inc. Group v. Chubb and Son, Inc.*, 554 P.2d
2 1080, 1083 (1976).

3 An effective reservation of rights letter must communicate any
4 reservation to the insurer specifically and unambiguously.

5 The reservation of rights letter must inform the insured in detail of
6 every reason of which the carrier is aware, or should be aware,
7 supporting a denial or limitation of coverage. . . . The carrier must
8 advise the insured specifically why . . . there is a potential denial of
9 coverage. It is not sufficient just to cite to the pertinent policy
10 provisions without explanation. A reservation of rights letter should,
11 to the extent feasible, be written in lay terms and should not only set
12 forth the potential coverage defenses but also explain why they
13 apply. . . . The insurer must avoid ambiguity, since any ambiguity in
14 the reservation of rights will be resolved against the insurer.

15 Leitner, LAW AND THE PRACTICE OF INSURANCE § 8.9.

16 It is presumed the RoR letter was written thoughtfully and
17 intentionally. There is no evidence the RoR was supplemented or amended in
18 any way after February 2010. Allied knew the nature of the complaint and all
19 claims made therein. If the limitation of coverage based on a single claim or
20 related claims was available to it and intended to be relied upon, it was
21 incumbent upon the insurer to notify the insured of such limitation or defense.
22 Simply reciting the definition of “Claim” without explanation, clarification, or
23 assertion of limitation to coverage is vague and ambiguous. As such,
24 interpretation the letter must be construed against Allied and in favor of New
25 West and Plaintiffs.

26 This failure for years to inform of a limitation of coverage differs
27 from *Portal Pipe Line* or *Barnard* where defenses were timely raised and

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1 reserved. Allied's delayed communication of its interpretation of coverage
2 limitations presumptively prejudiced New West and Plaintiffs.

3 This Court finds that in consideration of the uncontested facts, Allied
4 is estopped from asserting a limitation of coverage to \$1 million based on a single
5 claim or related claims. Allied's argument for partial summary judgment for
6 limited coverage for "each Claim" therefore need not be addressed.

7 **HCDO Policy Coverage**

8 Allied asserts, and no party has refuted, that the HCDO Policy does
9 not apply to the Rolan/class complaint.

10 **Assumption of Risk of an Excess Verdict**

11 New West asks for a declaratory ruling that when Allied rejected a
12 demand of \$3 million, it assumed the risk of an excess verdict by refusing to
13 settle within policy limits, citing *Jessen v. O'Daniel*, 210 F. Supp. 317 (D. Mont.
14 1960). Allied counters that it had a reasonable basis in law for contesting
15 coverage, and therefore there was no duty to settle. *State Farm Mut. Auto. Ins.*
16 *Co. v. Freyer*, 2013 MT 301, 372 Mont. 191, 312 P.3d 403. "Without coverage,
17 a duty to settle does not arise, even if the facts of the [underlying case] indicate
18 that an insured's liability is reasonably clear." *Id.* ¶ 47.

19 When Allied refused to settle "within policy limits" of \$3 million, the
20 question of aggregate coverage had not been resolved. It is premature to declare
21 that Allied has assumed the risk of an excess verdict.

22 **Sanctions**

23 In February 2018, Plaintiffs were granted leave to amend the
24 complaint to bring Allied into the lawsuit regarding the issue of coverage. Allied
25 was served with an amended complaint and plaintiff's first discovery requests on

1 March 23, 2018. Allied answered the amended complaint on April 25, 2018. If
2 properly served with the discovery,³ Allied had forty-five days to respond. On
3 June 21, 2018, the legal assistant to Plaintiffs' counsel, Erik Thueson, sent an
4 email wondering if discovery requested in March had been provided and noting
5 she did not see it in her file. On June 22, 2018, the parties attended court-ordered
6 mediation, which proved unsuccessful. On July 5, 2018, Allied moved for partial
7 summary judgment on the issue of coverage, admitting coverage under the \$1
8 million single-claim limit of the MCEO policy. Plaintiffs claim that if the
9 discovery requested had been available at mediation the result may have been
10 different, and that Allied's failure to respond constitutes unfair prejudice to
11 Plaintiffs.

12 The parties agree that on May 7, 2018, Randy Nelson, attorney for
13 Allied, emailed Thueson, indicating he was aware Thueson was involved in an
14 out-of-state trial and that Nelson assumed discovery would be postponed until
15 after mediation. Unbeknownst to either Thueson or Nelson, the email address for
16 Thueson used by Nelson was not working, so Thueson did not receive the email.
17 Nelson sent a follow-up email on May 21, 2018, asking about his previous
18 request regarding discovery being postponed until after mediation. Although he
19 received no response, Nelson did not follow up with Thueson, nor reply to the
20 discovery.

21 The unsuccessful mediation was held on June 22, 2018. On
22 July 24, 2018, Thueson filed a motion for sanctions pursuant to Montana Rule of
23 Civil Procedure 37 due to Allied's failure to respond to discovery. On

24 ³ Allied argues that service by the Montana Commissioner of Securities and Insurance, as relied upon in this
25 matter, is inadequate for service of discovery because the Commissioner is not authorized to serve discovery upon
parties in a civil action pursuant to Montana Code Annotated § 33-1-601(1).

1 August 7, 2018, Allied responded to the discovery requests. Allied asks this
2 Court to strike Plaintiff's request for sanctions as an "insufficient defense [or]
3 immaterial matter. . . ." pursuant to Montana Rule of Civil Procedure 12. Allied
4 asserts that Plaintiffs failed to comply with the Rule 37 certification requirement
5 that a party asking the court for sanctions first confer in good faith with opposing
6 counsel before seeking court intervention. Montana Rule of Civil Procedure
7 37(d)(1)(A) states that the court may order sanctions when a party fails to answer
8 interrogatories or respond to a request for inspection. However, "[a] motion for
9 sanctions for failing to answer or respond must include a certification that the
10 movant has in good faith conferred or attempted to confer with the party failing
11 to act in an effort to obtain the answer or response without court action." Mont.
12 R. Civ. P. 37(d)(1)(B).

13 Plaintiffs assert they met the "confer and certify" requirement by
14 attempting to confer with Allied's counsel via the June 21, 2018 email from
15 Thueson's legal assistant reminding them of the discovery. Allied counters that
16 its attorneys accommodated Thueson's schedule for an out-of-state trial and then
17 Nelson attempted to contact Thueson to ask for a continuance in response to
18 discovery until after mediation.

19 When considering sanctions, the Montana Supreme Court has laid out
20 factors to consider:

21 [W]hether the sanction relates to the extent and nature of the actual
22 discovery abuse; whether the sanction relates to the extent of the
23 prejudice to the opposing party; whether the sanction is consistent
with the consequences expressly wared of by the district court, is a

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1 warning was issued; and whether the party disregarded the court's
2 orders and authority.

3 *Cox v. Magers*, 2018 MT 21, ¶ 27, 390 Mont. 224, 411 P.3d 1271 (citation
4 omitted).

5 There was no evidence presented that Allied's counsel attempted to
6 thwart or unnecessarily delay response to discovery propounded by Plaintiffs.
7 Further, Plaintiffs failed to certify that there was communication or any attempt
8 to confer about discovery issues and presented no evidence of a meaningful
9 attempt to confer in good faith with defense counsel prior to filing the motion for
10 sanctions.

11 Montana Rule of Civil Procedure 12(f) provides: "The court may
12 strike from a pleading an insufficient defense or any redundant, immaterial,
13 impertinent or scandalous matter."

14 Neither party is to blame for the email not going through to Thueson,
15 and both parties share responsibility for the failure to "confer" with the other
16 party before making assumptions about that party's position with respect to
17 discovery.

18 Sanctions are not warranted at this juncture, but the motion asking for
19 court intervention was not so extreme as to merit being stricken from the
20 pleadings.

21 **Motion to Strike Affidavit of Thueson**

22 The Court has not relied upon the affidavit of Thueson, and therefore
23 finds this motion should be denied as moot.

24 **ORDER**

25 Based on the foregoing, IT IS HEREBY ORDERED:

