DA 20-0279

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 1

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

Plaintiffs, Counter-Defendants,
and Appellees,

v.

NEW WEST HEALTH SERVICES,

Defendant and Appellee,

DARWIN SELECT INSURANCE COMPANY and
ALLIED WORLD ASSURANCE COMPANY and
DARWIN NATIONAL ASSURANCE COMPANY,

Defendant, Counter-Claimant,
and Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. CDV-2010-91
Honorable Kathy Seeley, Presiding Judge

COUNSEL OF RECORD:

For Appellant Allied World Assurance Company:

Martha Sheehy, Sheehy Law Firm, Billings, Montana

Randall G. Nelson, Nelson Law Firm, Billings, Montana

For Appellees Dana Rolan and the class she represents:

Erik B. Thueson, Attorney at Law, Helena, Montana

For Appellee New West Health Services:

Robert Lukes, Garlington, Lohn & Robinson, Missoula, Montana

Gary M. Zadick, Ugrin Alexander Zadick P.C., Great Falls, Montana

Submitted on Briefs: February 24, 2021

Decided: January 4, 2022

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Defendant Allied World Assurance Company (Allied), New West Health Service's (New West) insurer, appeals the Orders of the First Judicial District Court, Lewis and Clark County, granting Plaintiffs and New West's cross-motion for partial summary judgment finding Allied is equitably estopped from enforcing the "each Claim" policy limit and denying Allied's motion for partial summary judgment on indemnification. We restate and address the following issues on appeal:

1. *Whether the District Court erred by holding that Allied was estopped from enforcing the $1 million limit of liability under the MCEO Policy.*

2. *Whether the District Court erred by holding that the Policy's "Loss" provision does not exclude the class's damages from Allied's indemnity obligation.*

¶2 We reverse in part and affirm in part and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On November 16, 2007, Dana Rolan sustained serious injuries from an automobile accident resulting in $120,000 of immediate medical expenses. Rolan had health insurance through New West. The tortfeasor's liability insurance, Unitrin Services Group (Unitrin), paid $100,000 of Rolan's medical expenses directly to her medical providers under its liability policy. New West denied coverage to Rolan because Unitrin had paid medical costs in advance.

¶4 On January 26, 2010, Rolan filed a complaint against New West alleging individual and class claims for breach of contract, violation of made-whole rights, and unfair claims settlement practices under § 33-18-201, MCA. Rolan argued New West reduced her

insurance coverage by $100,000 in violation of its made-whole obligations. Rolan sought class certification based on New West's practice of failing to conduct a made-whole analysis and denying claims that were also covered by a liability insurer. New West tendered the defense to Allied.

¶5 Allied acknowledged a duty to defend New West under the Managed Care Organization Errors and Omissions Liability Policy ("MCEO Policy"). In a reservation of rights letter dated February 18, 2010, Allied's Senior Claims Analyst, Joseph Sappington, wrote:

> As the Complaint includes allegations sounding in a Managed Care Activity, and the allegations were apparently first made against an Insured in writing during the Policy Period, *the conditions precedent to the Insuring Agreement appear to be satisfied*. Accordingly, the MCEO Policy provides *for a Per Claim Limit of Liability of $1,000,000 and a Maximum Aggregate Limit of Liability of $3,000,000* subject to a $50,000 retention applicable to Loss, including Defense Expenses, for each Claim.
>
> Under the MCEO Policy the Underwriter has the right and duty to defend any Claim made against any Insured which is covered by this MCEO Policy even if the allegations of such Claim are groundless, false or fraudulent. (Insuring Agreement § I). In addition and pursuant to the MCEO Policy, *the amount stated in ITEM 3(a) of the Declarations shall be the maximum aggregate Limit of Liability of the Underwriter for all Loss, including Defense Expenses, resulting from all Claims for which this MCEO Policy provides coverage, regardless of the number of Claims, the number of persons or entities included within the definition of Insured, or the number of Claimants.*
>
> . . .
>
> Given the allegations in the Complaint, please appreciate the potential implication of the following MCEO Policy provisions, *which may operate to limit or preclude coverage* in this matter.
>
> . . .

> The MCEO Policy defines Loss as Defense Expenses and any monetary amount which an Insured is legally obligated to pay as a result of a Claim[.] . . . Loss, however, does not include:
>
> . . .
>
> > 2) fees, amounts, *benefits or coverage owed under any contract* with any party including providers of health care services, health care plan or trust, insurance or workers' compensation policy or plan or program of self-insurance[.]
>
> . . .
>
> Darwin National Assurance Company and Darwin Select Insurance Company respectfully reserve all of their rights and defenses under the Policies and available at law with respect to this matter.

(Emphasis added.) The reservation of rights letter further stated, "As we are assuming New West's defense in this matter I will be in contact with you shortly to discuss the retention of [attorneys] as counsel."

¶6 On May 7, 2012, the District Court certified the class and held New West liable for monetary losses. On August 6, 2013, this Court upheld the class certification in *Rolan v. New W. Health Servs.*, 2013 MT 220, 371 Mont. 228, 307 P.3d 291 (*Rolan I*). This matter came before us again in 2017, *Rolan v. New W. Health Servs.*, 2017 MT 270, 389 Mont. 228, 405 P.3d 65 (*Rolan II*), in which we reversed the District Court's ruling granting New West leave to amend.

¶7 On September 30, 2013, after New West retained its own coverage counsel, it confirmed in a letter to Allied's Senior Claims Analyst that Allied's reservation of rights letter accurately set forth coverages available for indemnification:

> Pursuant to your letter dated February 18, 2010, it appears that you agree there is coverage under the MCEO policy, unless New West committed

> willful misconduct or willfully violated a state law. Please contact me to confirm this.
>
> . . .
>
> As I am sure you are aware, in Montana, an insurer is required to acknowledge and act reasonably promptly upon communications. Mont. Code. Ann. § 33-18-201(2). Please contact me at your earliest convenience to discuss New West's insurance coverage under the MCEO policy.

New West's coverage counsel and a New West representative followed up the letter in a phone conversation with Allied's Senior Claims Analyst that Allied would only contest coverage for "willful misconduct or willful violation of state law."

¶8 Three years later, and six years into litigation, Allied clarified in an October 5, 2016 email that the $1 million "each Claim" limit applied to the class action lawsuit, rather than the $3 million aggregate-claim limit. Allied also asserted, for the first time, that it had no indemnity obligation under the MCEO Policy. New West's coverage counsel responded to Allied's change in position:

> There has been no supplemental reservation of rights issued [since the February 18, 2010 letter]. However, [New West's counsel], on behalf of your insured New West, wrote to [Allied's Senior Claims Analyst] on September 30, 2013 *confirming his understanding that New West was covered except to the extent of any willful misconduct or willful violation of state law.* [New West's counsel] also spoke with [Allied's Senior Claims Analyst] and he confirmed to them that *those were the only grounds upon which [Allied] was contesting coverage.*
>
> Of course, it is far too late to assert any additional ground for challenging coverage. [Allied] has been defending the case for six years under the February 18, 2010 reservation of rights. [Allied] would be estopped to raise any additional defenses at this late date.
>
> [New West] is concerned, however, because of a comment you made in an email to defense counsel . . . of October 5, 2016 in which you stated: "We issued a reservation of rights letter with respect to this matter, and our

> position is that there is no indemnity obligation under the policy." This comment is directly contrary to [Allied's] reservation of rights letter of February 18, 2010 in which [Allied's Senior Claims Analyst] acknowledged that there would be coverage except only to the extent of any conduct that would fall within Exclusion A [for willful acts].
>
> . . .
>
> Therefore, New West expects that [Allied] will continue to provide a defense and indemnify New West with respect to any recovery that is not within the scope of the very stringent limitation of [the willful-acts exclusion].

(Emphasis added.)

¶9 In 2016, New West announced it was going out of business. Rolan moved for a preliminary injunction and show cause hearing to ensure the Plaintiffs' interests were protected. On October 20, 2016, New West in its response brief opposing Rolan's motion assured the District Court that adequate insurance coverage still existed to cover Rolan's claim, as Rolan was still the only identified plaintiff:

> Although Plaintiff seeks a wide variety of relief designated for the class, it is important to recognize that *no class currently exists in the case*.
>
> . . .
>
> Although the company is going out of business, New West has insurance with an aggregate limit of $3,000,000 and with a per claim limit of $1,000,000. Although defense expenses reduce the policy limits, approximately $920,000 remains of the original policy limits. The insurer has issued a Reservation of Rights letter, but New West believes it only disclaims liability for intentional acts. Thus, this insurance policy appears to cover Plaintiff's claims in this case and the insurance coverage should continue to apply even after New West ceases business operations.

(Emphasis added.) The brief attached an affidavit of New West's CEO, Angela Huschka:

> New West possesses insurance with an aggregate limit of $3,000,000 and a per claim limit of $1,000,000. It is my understanding that of the $1,000,000 limit, approximately $920,000 remains available to cover Plaintiff's claims in the present case, should there be an adverse judgment against the

> company. The policy is reduced by defense costs. New West continues to defend the case and deny liability. The insurer has issued a Reservation of Rights letter for the present case, which New West understands to disclaim liability for intentional acts.

¶10 On October 28, 2016, eight days after New West had informed the District Court of its understanding of the MCEO Policy's limit of liability and the extent of Allied's indemnity obligation, New West advised Rolan of Allied's change in position in its Responses to Plaintiff's Ninth Discovery Request, Request for Admission No. 12:

> [T]here has been a development in this regard. [Allied] now claims that there is no indemnity under the policy, but they are paying the costs of the defense. This information is new to New West, as it had previously understood that there was coverage for claims other than intentional acts. New West has now retained coverage counsel to press this issue with [Allied].

¶11 On March 27, 2017, New West's coverage counsel wrote to Allied to request settlement of claims and gave consent to settlement. In response, Allied offered $50,000. After an unsuccessful court-ordered mediation, Allied did not respond to Plaintiffs' counsel's inquiry as to why coverage was now being limited. On April 6, 2017, Plaintiffs' counsel sought written confirmation from Allied as to its basis for limiting coverage. Allied responded, "Our position remains the same as that expressed at the time of the mediation."

¶12 In February 2018, Plaintiffs amended the complaint to join Allied to the lawsuit regarding the limit of liability issue. Allied moved for partial summary judgment, alleging coverage was limited to the $1 million "each Claim" limit instead of the $3 million aggregate-claim limit because, it argued, the class action constituted a single claim stemming from a single written notice, and all class claims would constitute "Related

Claims" under the policy. New West and the Plaintiffs filed a cross-motion for partial summary judgment for estoppel regarding enforcement of the "each Claim" limit of liability. On October 25, 2018, the District Court declined to address Allied's argument for partial summary judgment regarding limited coverage for "each Claim," holding instead that "Allied is estopped from asserting a limitation of coverage to $1 million based on a single claim or related claims."

¶13 On November 7, 2018, after almost nine years of litigation, Plaintiffs and New West filed a joint motion for approval of proposed compromise settlement and notice to the class. The proposed agreement settled claims against New West and assigned Plaintiffs New West's claims against Allied. The proposed settlement concluded that $3 million will be placed in a common fund for the benefit of the class and that the court would issue a judgment that "New West has acted illegally and/or in breach of contract by reducing benefits without making a 'made-whole' analysis." Plaintiffs then moved for entry of final judgment.

¶14 The District Court approved the proposed settlement agreement and issued a revised Certification Order. The Order defined the Common Fund of the class to include, in part, the $3 million aggregate coverage limits "minus legitimate and reasonable deduction of defense costs," and that the class is "eligible for consequential and compensatory damages caused by New West's violation of made-whole laws, either under a tort theory or a contract theory for breach of contract." It further provided that the fairness hearing for the settlement must await final determination of the amount of the available insurance

coverage and that if it was determined that no insurance exists to compensate the class, the class would be decertified, and class members would need to seek individual recoveries.

¶15 On January 9, 2019, Allied filed a response opposing the motion for final judgment, arguing that the proposed settlement amount was not covered by Allied under the MCEO Policy and that the terms of the proposed settlement were unreasonable. Allied moved for partial summary judgment alleging Allied had no indemnity obligation because the settlement was excluded by the "Loss" provision as defined in the MCEO Policy. Plaintiffs and New West again argued Allied was estopped from raising a new policy defense. The District Court found issues of fact and did not address the merits of equitable estoppel, however, it found that as a matter of law, the "Loss" provision did not preclude Allied's indemnity obligation.

¶16 On April 28, 2020, the District Court certified the limit of liability and indemnification issues for interlocutory appeal and approved the settlement between New West and Plaintiffs. Although Rolan remains the only named plaintiff, over 100,000 of New West's insureds were identified and scheduled to receive notices to potentially receive recoveries as a part of the class action.

STANDARDS OF REVIEW

¶17 We review a district court's summary judgment ruling de novo. *State Farm Mut. Auto. Ins. Co. v. Ferrin*, 2002 MT 196, ¶ 10, 311 Mont. 155, 54 P.3d 21 (citing *Wendell v. State Farm Mut. Auto. Ins. Co.*, 1999 MT 17, ¶ 9, 293 Mont. 140, 974 P.2d 623). Summary judgment is appropriate only when no genuine issue of material fact exists, and the moving

party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c); *Modroo v. Nationwide Mut. Fire Ins. Co.*, 2008 MT 275, ¶ 19, 345 Mont. 262, 191 P.3d 389.

¶18 Equitable estoppel requires the moving party to establish six separate elements through clear and convincing evidence. *Pennington v. Flaherty*, 2013 MT 160, ¶ 36, 370 Mont. 388, 303 P.3d 274 (citing *Avanta Fed. Credit Union v. Shupak*, 2009 MT 458, ¶ 42, 354 Mont. 372, 223 P.3d 863).

¶19 The district court's interpretation of an insurance policy is reviewed as an issue of law to determine whether the interpretation was correct. *Parker v. Safeco Ins. Co. of Am.*, 2016 MT 173, ¶ 14, 384 Mont. 125, 376 P.3d 114 (citing *Wendell*, ¶ 10). We interpret terms in an insurance policy according to their usual, common-sense meaning as viewed from the perspective of a reasonable consumer of insurance products. *Parker*, ¶ 14 (citing *Park Place Apartments, L.L.C. v. Farmers Union Mut. Ins. Co.*, 2010 MT 270, ¶ 12, 358 Mont. 394, 247 P.3d 236). We construe insurance policies against the insurer and in favor of the insured. *Parker*, ¶ 14 (citing *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc.*, 2005 MT 50, ¶ 17, 326 Mont. 174, 108 P.3d 469).

DISCUSSION

1. *Whether the District Court erred by holding that Allied was estopped from enforcing the $1 million limit of liability under the MCEO Policy.*

¶20 Equitable estoppel is a common law doctrine based on the principle that "a party cannot, through his intentional conduct, actions, language, or silence, induce another to unknowingly or detrimentally alter his position and then subsequently deny the just and legal consequences of his intentional acts." *Kapor v. RJC Inv., Inc.*, 2019 MT 41, ¶ 33,

349 Mont. 311, 434 P.3d 869 (quoting *MC, Inc. v. Cascade City-Cty. Bd. of Health*, 2015 MT 52, ¶ 31, 378 Mont. 267, 343 P.3d 1208). Estoppel "prevent[s] a party from taking an unconscionable advantage of his own wrong while asserting his strict legal right," 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." *Avanta Fed. Credit Union*, ¶ 41 (citations omitted).

¶21 To succeed on a claim of equitable estoppel, the party must show by clear and convincing evidence the following six elements: (1) the existence of conduct, acts, language, or silence amounting to a representation or a concealment of material facts; (2) these facts must be known to the party estopped at the time of the party's conduct, or at least the circumstances must be such that knowledge is necessarily imputed to that party; (3) the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon; (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 lead that party to act; and (6) the other party must in fact act upon it in such a manner as to change its position for the worse. *Selley v. Liberty Nw. Ins. Corp.*, 2000 MT 76, ¶ 10, 299 Mont. 127, 998 P.2d 156.[1]

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[1] Allied asserts that because it assumed New West's defense, equitable estoppel is inapplicable. The cases cited by Allied do not stand for this proposition. Also, it would be antithetical to the fundamental tenet of Montana insurance law to hold that an insurer, by the mere act of assuming an insured's defense, may avoid the consequences of its material representations to the insured's detriment. *Safeco Ins. Co. v. Ellinghouse*, 223 Mont. 239, 248, 725 P.2d 217, 223 (1986). Allied

¶22 While Allied argues that the District Court failed to find by clear and convincing evidence any of the six elements of equitable estoppel, it only substantively addresses two elements in its appeal: (1) whether Allied made any representations of material fact, and (2) whether New West suffered any detrimental reliance. We conclude the District Court erred by finding clear and convincing evidence that Allied made a material representation regarding the limits of liability. Because all six elements of equitable estoppel must be established, this error is dispositive.

¶23 Allied claims the District Court erred by finding Allied made representations of material fact. Allied characterizes its reservation of rights letter as alerting New West there was a liability limit of $1 million for "each Claim," that being the class action. Allied contends it accurately reported the Policy's "each Claim" and aggregate limits to New West in 2010 but have consistently relied on the "each Claim" limit. Appellees argue Allied's reservation of rights letter was inadequate to reserve its right to assert the "each Claim" limit of liability and its attempt to assert it at this point in the protracted litigation prejudiced New West.

¶24 As an initial matter, the parties have muddied the waters surrounding whether the limit of liability under the MCEO Policy is a defense to coverage or indemnity. An insurer

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cites *Draggin' Y Cattle Co. v. Junkermier, Clark, Campanella, Stevens, P.C.*, 2019 MT 97, ¶ 22, 395 Mont. 316, 439 P.3d 935, and asserts this Court "specified that it is the breach of the duty to defend that gives rise to estoppel." *Draggin' Y Cattle Co.* does not hold that equitable estoppel is inapplicable *unless* the insurer breaches its duty to defend, but rather addressed the application of estoppel as it pertained to whether an insurer's breach of its duty to defend may bind it to a reasonable settlement.

has an obligation to inform the insured of all policy defenses upon which the insurer intends to rely. Section 33-18-201(14), MCA; *Portal Pipe Line Co. v. Stonewall Ins. Co.*, 256 Mont. 211, 217, 845 P.2d 746, 750 (1993).[2] Section 33-18-201(14), MCA, of the UTPA requires an insurer to promptly provide a reasonable explanation for a *denial* of the claim including the "basis in the insurance policy in relation to the facts or applicable law." However, a policy's liability limits are not "policy defenses" to *coverage* as contemplated by the policy's language. *Portal Pipe Line Co.*, 256 Mont. at 217, 845 P.2d at 750. They are the monetary amounts potentially available to be paid for qualifying liability coverage upon a determination of the scope of an insurer's duty to indemnify. *Compare Liability Limit*, *Black's Law Dictionary* (11th ed. 2019) ("The maximum amount of coverage that an insurance company will provide . . . under an insurance policy. – Also termed *limit of liability*; *policy limits*."), *with Limitation of Liability*, *Black's Law Dictionary* (11th ed. 2019) ("A written statement, esp. a clause in a contract, *that restricts the conditions under which a party may be responsible for loss or damages*" (emphasis added)). An insurer's duty to indemnify is narrower than its duty to defend and "hinges not on the facts the claimant alleges and hopes to prove but instead on the facts, proven, stipulated or otherwise established that actually create the insured's liability." *State Farm Mut. Auto. Ins. Co. v.*

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[2] Allied incorrectly asserts the Montana Unfair Trade Practices Act (UTPA) is not incorporated into an equitable estoppel analysis. In *Ellinghouse* and *Portal Pipe Line Co.*, this Court specifically conducted an equitable estoppel analysis in conjunction with the duties imposed on insurers under the UTPA. *Ellinghouse,* 223 Mont. at 245, 725 P.2d at 221; *Portal Pipe Line Co.*, 256 Mont. at 217-18, 845 P.2d at 750.

Freyer, 2013 MT 301, ¶ 26, 372 Mont. 191, 312 P.3d 403 (quoting 43 Am. Jur. 2d *Insurance* § 676 (West 2013)). The applicability of the $1 million "each Claim" limit or $3 million aggregate limit is a question of the extent of Allied's indemnity obligation—not a coverage defense.

¶25 In any event, New West has not demonstrated by clear and convincing evidence that Allied made material representations that the $3 million limit to coverage applied to this lawsuit. The reservation of rights letter advised New West that the policy provides 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" for each claim. At the time of the 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. In the October 5, 2016, email to New West, Allied explained, "[t]his is an eroding policy, as you mentioned, so defense costs are within limits. The Limit of Liability is $1 million, and we have paid out a total of $74,710.23 in defense costs as of today." For New West's part, CEO Angela Huschka stated by affidavit, in October 2016, that "New West possesses insurance with an aggregate limit of $3,000,000 and a per claim limit of $1,000,000. It is my understanding that of the $1,000,000 limit, approximately $920,000 remains available to cover Plaintiff's claims in the present case, should there be an adverse judgment against the company." After learning of Allied's change in position regarding its indemnity obligation, New West's October 28, 2016, response to Rolan's discovery requests stated, "Approximately $920,000 of the coverage under the policy remains in the present case," citing Huschka's affidavit.

¶26 New West has failed to identify *any* affirmative communication in which Allied represented that the $3,000,000 aggregate limit applied to this litigation. To establish estoppel by acquiescence, "it must appear that the party to be estopped was bound in equity and good conscience to speak, and that the party claiming estoppel relied upon the acquiescence and was misled thereby to change his position to his prejudice." *Billings v. Pierce Packing Co.*, 117 Mont. 255, 267, 161 P.2d 636, 641 (1945) (citations omitted). "Mere silence cannot work as estoppel. To be effective for this purpose, the person to be estopped must have had an intent to mislead or a willingness that another should be deceived; and the other must have been misled by the silence." *Pierce Packing Co.*, 117 Mont. at 267, 161 P.2d at 641. New West has not established by clear and convincing evidence that Allied "acquiesced" to the understanding that the $3 million limit applied. Unlike *Selley*, in which this Court found an insurer's acquiescence for two years by reimbursing specific medical expenses amounted to a material representation, Allied has not engaged in conduct that could be construed as clear and convincing evidence of acquiescence. *Selley*, ¶ 15.

¶27 Both Allied and New West are insurance companies, well-versed in the nuances of policy coverage, limits of liability, and indemnity obligations, as well as the distinctions of that terminology. New West had a high burden—to show by clear and convincing evidence that Allied's conduct was "unconscionable" leading to a "gross injustice." *Avanta Fed. Credit Union*, ¶ 41. It is well established in Montana that under the reasonable expectations doctrine, the "objectively reasonable expectations of insurance purchasers regarding the terms of their policies should be honored notwithstanding the fact that a

painstaking study of the policy would have negated those expectations." *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 42, 354 Mont. 15, 221 P.3d 666 (quoting *Am. Family Mut. Ins. Co. v. Livengood*, 1998 MT 329, ¶ 32, 292 Mont. 244, 970 P.2d 1054). The policy behind this doctrine is that insurance contracts, "rather than being the result of anything resembling equal bargaining between the parties, are truly contracts of adhesion . . . ." *Giacomelli*, ¶ 42 (quoting *Couch on Insurance* vol. 2, § 22:11, 22-23). Montana considers whether a consumer's expectations are reasonable from the perspective of the "average consumer," not through the eyes of "any other single policyholder," but "of a consumer with average intelligence." *Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc.*, 2008 MT 2, ¶¶ 47-48, 341 Mont. 33, 174 P.3d 948. Being an insurance company itself, New West can hardly be considered an "average consumer" of insurance.

¶28 The District Court erred in its application of equitable estoppel. New West has not demonstrated by clear and convincing evidence that Allied's "conduct, acts, language, or silence" amounted to "a representation or concealment of material facts." *Selley*, ¶ 10. Because the District Court did not reach the merits of the limit of liability issue and, on appeal, Rolan has not briefed the merits, we reverse and remand 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.

2. *Whether the District Court erred by holding that the Policy's "Loss" provision does not exclude the class's damages from Allied's indemnity obligation.*

¶29 The MCEO Policy language at issue defines "Loss" as follows:

> (J) Loss means Defense Expenses and any monetary loss which an Insured is legally obligated to pay as a result of a Claim. Loss shall not include:
>
> . . .
>
> (2) fees, amounts, benefits or coverage owed under any contract with any party including providers of health care services, health care plan or trust, insurance or workers' compensation policy or plan or program of self-insurance.

¶30 This Court uses several key principles in interpreting insurance policies. *Petroleum Tank*, ¶ 34. We read the policy as a whole, and "if possible, reconcile its various parts to give each meaning and effect." *Petroleum Tank*, ¶ 34 (citing *Farmers All. Mut. Ins. Co. v. Holeman*, 1998 MT 155, ¶ 25, 289 Mont. 312, 961 P.2d 114). "If the terms of an insurance policy are ambiguous, obscure, or open to different constructions, the construction most favorable to the insured or other beneficiary must prevail, particularly if an ambiguous provision attempts to exclude the liability of the insurer." *Pablo v. Moore*, 2000 MT 48, ¶ 17, 298 Mont. 393, 995 P.2d 460 (citing *Head v. Cent. Reserve Life of N. Am. Ins. Co.*, 256 Mont. 188, 200-01, 845 P.2d 735, 742-43 (1993)).

¶31 Allied contends the proposed settlement agreement between Plaintiffs and New West contains only direct breach of contract damages, and therefore Allied is not obligated to indemnify New West because "benefits or coverage owed under any contract" are excluded under the "Loss" provision. Allied argues the damages agreed to in the proposed settlement do not stem from wrongful acts committed by New West but arise

entirely from New West's failure to pay "benefits" owed under its plan. Thus, Allied asserts it is not obligated to indemnify New West for payments that New West was contractually obligated to pay. There are no cases interpreting this type of "Loss" exclusion in Montana. This is an issue of first impression.

¶32 Under Montana contract law, "[w]hen one party breaches the contract, judicial enforcement of the contract ensures the nonbreaching party receives expectancy damages, compensation equal to what that party would receive if the contract were performed." *Arrowhead Sch. Dist. No. 75 v. Klyap*, 2003 MT 294, ¶ 20, 318 Mont. 103, 79 P.3d 250 (citations omitted). But the analysis does not end there. "For the breach of an obligation arising from contract, the measure of damages . . . is the amount which will compensate the party aggrieved for *all the detriment* which was proximately caused thereby or in the ordinary course of things would be likely to result therefrom." Section 27-1-311, MCA (emphasis added). The issue, then, is whether the "Loss" provision's exclusion of "benefits or coverage owed under any contract" defines expectancy damages, or *any* detriment proximately caused by New West's conduct.

¶33 The settlement agreement in this case requires New West to pay tort damages stemming from its violation of Montana's made-whole provision "and/or" for consequential damages stemming from any breach of contract. The language of the settlement itself acknowledges two possible avenues of legal redress—breach of contract and violation of an insurer's duty to make its insureds whole. It is well-settled in Montana law, that notwithstanding the terms of a contract, an "insured is entitled to be made whole for his entire loss and any costs of recovery, including attorney's fees, before the

insurer can assert its right of legal subrogation . . . ." *Swanson v. Hartford Ins. Co.*, 2002 MT 81, ¶ 18, 309 Mont. 269, 46 P.3d 584 (quoting *Skauge v. Mountain States Tel. & Tel. Co.*, 172 Mont. 521, 528, 565 P.2d 628, 632 (1977)). The made-whole doctrine does not stem from the terms of a contract but rather is "provided by the equitable principles inherent in the *Skauge* ruling." *Swanson*, ¶ 20 (quoting *DeTienne Assocs. L.P. v. Farmers Union Mut. Ins. Co.*, 266 Mont. 184, 190, 879 P.2d 704, 708 (1994)).

¶34 Allied's argument attempts to equate the class recovery to the contractual expectancy damages excluded by the "Loss" provision. This class settlement is not an amount due under a contract, rather it covers the class's damages stemming from New West's failure to fulfill its made-whole duty—under Montana law and independent of the terms of the Policy. The class recovery at issue here stems not solely from New West's failure to pay amounts owed under contract, but under the fundamental tenet in Montana law that an "insurer has been paid for the assumption of the liability for the claim, and that where the claimant has not been made whole, equity concludes that it is the insurer which should stand the loss, rather than the claimant." *Zacher v. Am. Ins. Co.*, 243 Mont. 226, 230-31, 794 P.2d 335, 338 (1990). The class recovery thus does not amount to expectancy damages from a mere breach of contract, but from New West's violation of settled Montana law.

¶35 At the very least, Allied's attempt to fit the tortious losses of the class into the "Loss" exclusion of "benefits owed under a contract" is open to more than one construction. Therefore, the construction most favorable to New West as the insured must prevail.

Pablo, ¶ 17. The damages stemming from New West's failure to conduct a made-whole analysis for the class members are not precluded from indemnification by Allied.

CONCLUSION

¶36 We reverse the District Court's holding that Allied is estopped from asserting the $1 million "each Claim" limit of liability under the MCEO Policy. We affirm the District Court's holding that Allied's "Loss" provision does not preclude Allied's indemnity obligation of the class's damages.

¶37 This matter is remanded to the District Court for further proceedings consistent with this Opinion.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

Justice Laurie McKinnon, dissenting.

¶38 I agree with the Court that the elements of equitable estoppel were not met here. However, under our de novo standard of review and the Policy's plain and unambiguous language, I would conclude that Rolan's claim, though fashioned as a class action, is a single claim governed by the $1,000,000 "each claim" limit and not the $3,000,000 aggregate limit governing multiple claims. Allied asks this Court to decide the coverage issue because it has already paid its "each claim" limit of $1,000,000 and enforcement of

the $1,000,000 limit would resolve this entire matter. I believe our de novo standard of review allows us to consider the plain and unambiguous terms of the Policy; thus, I would address coverage and hold that Rolan's claim is governed by the $1,000,000 "each claim" limit.

¶39 In Allied's Motion for Partial Summary Judgment, it asked the District Court to determine that its liability limit was $1,000,000, as provided by the "each claim" limit under the Policy, and that the plain and unambiguous language of the Policy makes clear "all Related Claims, whenever made, shall be deemed to be a single Claim." Rolan did not substantively respond to Allied's argument concerning the language of the Policy in the District Court; rather, Rolan relied on her estoppel arguments, pointed to discovery issues, and asserted there were distinctions in the types of claims Rolan had made. The District Court did not address the merits of Allied's motion and, instead, found Allied was estopped from asserting coverage limits. On appeal, Rolan again has not addressed the merits of the coverage limitation.

¶40 In *Chapman v. Maxwell*, 2014 MT 35, 374 Mont. 12, 322 P.3d 1029, the district court failed to engage in a Rule 56 analysis and address whether there were genuine disputes of material fact and whether the movant was entitled to judgment as a matter of law. M. R. Civ. P. 56. We concluded, however, that "in light of our obligation to conduct a de novo review, this error does not require reversal [and remand]." *Chapman*, ¶ 12. We explained, "[O]ur de novo standard of review of summary judgment decisions allows us to review the record and make our own determinations regarding the existence of disputed issues of fact and entitlement to judgment as a matter of law." *Chapman*, ¶ 12 (quoting

Wurl v. Polson School District No. 23, 2006 MT 8, ¶ 29, 330 Mont. 282, 127 P.3d 436). Moreover, as it pertains specifically to Rolan's failure to respond to the substance of Allied's arguments on appeal, we held in *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C.*, 2016 MT 218, ¶ 22, 384 Mont. 464, 380 P.3d 747, that:

> Either way, Junkermier's alleged failure to respond to Former Shareholders' arguments did 'not relieve the District Court of the duty to engage in a Rule 56 analysis with [Former Shareholders'] motion for summary judgment' . . . [and] . . .[t]hus, the District Court was required to look beyond the parties' briefs in concluding on summary judgment that the Employment Agreement was unenforceable.

Junkermier, ¶ 22 (citations omitted). In *Lee v. Traxler*, 2016 MT 292, ¶ 16, 385 Mont. 354, 384 P.3d 82, although the "skeletal nature" of the district court's summary judgment order prevented this Court from determining whether the order was supported under the law, we remedied the deficiency by reviewing the pleadings and documents filed in the case and undertook "our own analysis to determine whether the grant of summary judgment was appropriate." *Lee*, ¶ 16. Here, where Allied specifically argued and asked for a ruling from the District Court on the merits of its coverage issue based on the plain and unambiguous language of the Policy, I would undertake such an analysis to determine whether the language is ambiguous, whether there are genuine disputes of fact, and whether Allied is entitled to judgment under the Policy as a matter of law.

¶41 The Policy provides the Limits of Liability on its Declaration page:

> Item 3. Limit of Liability:
> (a) $1,000,000 Underwriter's maximum Limit of Liability for each Claim and $3,000,000 in the Aggregate of all Claims.

The Policy also provides a definition of "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**.

(Emphasis in original.) In my view, the language of the Policy is unambiguous and clear: a "Claim" is any "written notice" asserting a "wrongful act" and "such notice may be in the form of a[]. . . judicial . . . proceeding." Here, under the terms of the Policy, Rolan provided a single written notice by filing this lawsuit—a judicial proceeding. Rolan filed her Complaint against New West during the Policy period and New West reported Rolan's Complaint to Allied during the Policy period, which constitutes written notice in compliance with the "claims made and reported" policy condition. Accordingly, Allied's coverage under the "each claim" language is limited to $1,000,000.

¶42 The Policy further provides that "all **Related Claims**, whenever made, shall be deemed to be a single **Claim**." The Policy defines "Related Claims" as:

> "**Related Claims"** means 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.

(Emphasis in original.)

¶43 This clear Policy language leads to the conclusion that all claims, including class action claims, that are based on the same or related facts or transactions are subject to a single claim limit—a conclusion which multiple federal and state courts have already

drawn in prior cases involving identical or substantially similar policy language governing "Related Claims." *See Am. Med. Sec., Inc. v. Exec. Risk Specialty Ins. Co.*, 393 F. Supp. 2d 693, 707 (E.D. Wis. 2005) (holding that 38 underlying lawsuits against an insured—including several class actions—qualified as "related claims" as all suits were based on the same allegedly unlawful underwriting practice of the insured, thereby confining these claims to a "single claim" under the policy and affecting the amount of coverage available); *Continental Cas. Co. v. Wendt*, 205 F.3d 1258, 1263-64 (11th Cir. 2000) (holding that two different plaintiffs' claims—both of which alleged the insured made different misrepresentations concerning the legality of investments in a certain company—were related acts because they involved a series of actions which were intended to encourage investment in the company); *Gregory v. Home Ins. Co.*, 876 F.2d 602, 606 (7th Cir. 1989) (finding that the various claims of class members against a brokerage for a failed investment package designed to offer certain tax benefits were related to the cross-claim of the brokerage against the attorney who had drafted the documents such that the policy's single claim limit applied); *Liberty Ins. Underwriters, Inc. v. Davies Lemmis Raphaely Law Corp.*, 162 F. Supp. 3d 1068, 1078-79 (C.D. Cal. 2016) (finding that several separate lawsuits against a law firm, each alleging false representations as to sales of properties, constituted a "single claim" under a policy provision governing "related" claims because the lawsuits arose out of a "single course of conduct" reflecting a fraudulent scheme); *Barr v. Colo. Ins. Guar. Ass'n*, 926 P.2d 102, 104-05 (Colo. App. 1995) (finding claims against officers and directors of grocery cooperative for damages relating to a failed loan constituted a single claim under policy

providing "Losses arising out of the same Wrongful Act by one or more of the Directors and/or Officers . . . shall be considered a single Loss"); *cf. Lexington Ins. Co. v. Lexington Healthcare Grp., Inc.*, 311 Conn. 29, 39-40, 84 A.3d 1167, 1174 (2014) (finding multiple claims by nursing home residents injured by a fire not to be "related" under policy providing that "[a]ll claims arising from continuous, related, or repeated medical incidents shall be treated as arising out of one medical incident" and noting that "each individual claimant was differently situated").

¶44 Thus, in the event Rolan identifies any other member of her class besides herself, those claims would have a "common nexus" and be related to New West's business practice of failing to perform a "made whole" analysis. Based on the certified definition of the class, every future class member must assert that "all or part of their medical bills were paid by the person or company that injured them - rather than being paid by New West." Although any new members' claims may be based on a different legal theory, the common basis for the claims must be related to the definition of the class. Rolan's assertion that there are different types of claims does not make it an unrelated claim. The definition of the class guarantees and legally requires a significant relationship between members of the class. Thus, even if Rolan were to identify additional class members, all these additional claims would fall under the "Related Claims" definition of the Policy.

¶45 It is well-established that "where the 'language employed in an insurance contract is clear, the language controls,' and the court must enforce it as written." *Grimsrud v. Hagel*, 2005 MT 194, ¶ 35, 328 Mont. 14, 119 P.3d 47, quoting *Fire Insurance Exchange v. Tibi*, 51 F. Supp. 2d 1065, 1069 (D. Mont. 1995). I would apply the clear and

unambiguous language of the Policy and conclude that a single claim results in the application of the "each claim" limit and that any future class member's claim must, as a matter of law and because of the class definition, be related to the Rolan claim.

¶46 While I additionally do not agree with the Court's analysis of Issue 2, it is not necessary for me to address it based on my resolution of Issue 1.

/S/ LAURIE McKINNON