Bolin v. Allstate Indemnity Company Doc. 28

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

JENNIFER BOLIN, individually and on behalf of all others similarly situated, Plaintiffs, vs. ALLSTATE INDEMNITY COMPANY, and all parent, affiliate and subsidiary companies thereof, Defendant.	)	Cause No. CV 09-83-BU-RFC ORDER

This is a class action suit brought by named Plaintiffs Jennifer Bolin and others similarly situated against Defendant Allstate Indemnity Company ("Defendant"). Presently before the Court are the Parties' Cross-Motions for Partial Summary Judgment. The Motions are fully briefed and the Court is prepared to make a ruling at this time.

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Defendant's motion seeks partial summary judgment on Plaintiffs' claims that Defendant Allstate is required to compensate Plaintiff Bolin, and all class members, for attorneys' fees and costs as alleged uncompensated damages under medical payments coverage, uninsured motorist coverage, or underinsured motorist coverage.[1]

Plaintiffs move for partial summary judgment on their claims that Defendant's "programmatic claims adjustment" practice of taking credit for other personal, portable first party insurance benefits when adjusting its insured's claims constitutes *de facto* subrogation.

BACKGROUND

This case was initiated in Montana's Eighteenth Judicial District Court, Gallatin County, on October 13, 2009. Defendant removed the case to this Court on November 13, 2009. On March 29, 2010, upon the Defendant's Motion, this Court dismissed Plaintiffs' Class Complaint without prejudice. On April 7, 2010, Plaintiffs filed an Amended Class Action Complaint and Jury Demand.

In representing the putative class, Plaintiff Bolin alleges that on July 1, 2007, she was injured in an automobile accident. Plaintiff suffered injuries with medical expenses in excess of $15,000.

[1] *AMENDED COMPLAINT ¶¶ 14-23.*

Plaintiff Bolin was insured by Defendant Allstate with per person per accident coverage of $50,000 underinsured motorist ("UIM") coverage and $5,000 Medical Payments Coverage ("MPC"). Upon Plaintiff's request, Allstate paid the medical payment limits arising from the accident, but refused payment at that time under the UIM coverage.

The tortfeasor was insured by Farmers Insurance and had Bodily Injury ("BI") policy limits it he amount of $30,000 per person per accident. Farmers paid Plaintiff Bolin the $30,000 BI limits without a release of all claims for its insured.

At the time of the accident Plaintiff Bolin was also insured by Sentinel/Hartford Insurance Company ("Hartford") with stackable limits totaling $100,000 for UIM coverage and $10,000 MPC. Upon Plaintiff's request, Hartford paid Bolin the $10,000 MPC limits for medical expenses incurred from the accident. However, they paid nothing under the UIM coverage policy. At the time of the accident, Plaintiff was paying premiums to Hartford for UIM and MPC coverage.

In total, Plaintiff Bolin received $45,000 for her related injuries arising from the July 1, 2007 automobile accident. In addition, as a result of the accident, Plaintiff alleges that she incurred $14,499 attorney fees in recovering her losses

arising from the July 1, 2007 accident.[2] She further alleges that she continues to suffer accident-related pain and limitations in her activities of daily living.[3]

On March 29, 2010, this Court issued an Order granting Defendant's Motion to Dismiss the Original Complaint without prejudice. In granting the Order, this Court rejected Plaintiff Bolin's claim that "because she has not been reimbursed for her attorney fees and costs from the tortfeasor, she has not been made whole."[4] However, in that same Order, the Court did allow Plaintiffs to renew their claims if Plaintiff Bolin could allege recoverable damages, other than attorney fees and cost, that were in excess of the payments she had already received.[5] Plaintiff has since filed an Amended Class Action Complaint alleging that she continues to suffer accident-related pain and limitations in her activities of daily living.

STANDARD OF REVIEW

Pursuant to Fed.R.Civ.P. 12(b)(6), the court cannot grant the motion to dismiss " 'unless it appears beyond doubt that plaintiff can prove no set of facts in

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[2] *PLAINTIFFS' COMBINED STATEMENT OF GENUINE ISSUES AND STATEMENT S OF UNDISPUTED FACTS, ¶ 13.*

[3] *Id., ¶ 13.*

[4] *See Doc.# 11, pp 3-4.*

[5] Id.

support of his claim which would entitle him to relief.' " Sun Sav. and Loan Ass'n v. Dierdorff, 825 F.2d 187, 191 (9th Cir.1987) (*quoting* Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

With respect to the summary judgment motion, summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party has the initial burden of "identifying for the court those portions of the materials on file in the case that it believes demonstrate the absence of any genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support its legal theory. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir.1979). In a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party. State Farm Fire and Cas. Co. v. Martin, 872 F.2d 319, 320 (9th Cir.1989).

DISCUSSION

1. Defendant's Motion for Partial Summary Judgment

Defendant seeks partial summary judgment on the claim that it is required to compensate Plaintiff Bolin, and all members of the class she purports to represent,

for attorney's fees and costs as alleged uncompensated damages under MPC, UIM and UM coverage.

In support, Defendant cites to this Court's prior Order of March 29, 2010, wherein this Court held that attorney's fees are not an element of damages that are recoverable in tort law.[6]

Plaintiff's sole response to Defendant's Motion is that she has sufficiently alleged in her Amended Class Action Complaint that she has incurred damages in excess of the underlying BI limits of $30,000. As such, Plaintiff asks this Court to deny the Defendant's partial summary judgment motion.

However, Defendant concedes that Plaintiff has alleged damages in excess of $30,000. Rather, Defendant asks that this Court enforce its prior March 29, 2010 ruling that attorney's fees are not an element of damages recoverable in tort law.

Having reviewed the Parties' arguments, this Court concludes that Plaintiffs have raised no genuine issue of fact that would required this Court to reconsider its prior ruling of March 29, 2010. Defendant's Motion for Partial Summary Judgment on this issue is GRANTED.

2. Plaintiffs' Motion for Summary Judgment

Plaintiffs bring their present suit alleging that Defendant's "programmatic

[6]*Doc. #11, pp. 3-4.*

claims adjustment" practice of taking credit for other personal, portable first-party insurance benefits when adjusting its insured's claims violates Montana's "made whole" doctrine and constitutes *de facto* subrogation.

In response, Defendant contends that it is not attempting to avoid paying any underinsured motorist coverage benefits. Rather, under the "duplicate payments" provision of its MPC and UIM policy with insured, it has the right to reduce the damages recoverable by other payments that Plaintiff has already received.

From the Court's review, Plaintiff does not want the Defendant to consider Hartford's $10,000 medical payment coverage in its calculations of damages recoverable as underinsured motorist benefits. Rather, Plaintiff would have this Court ignore Hartford's payment so that she may receive that same amount through her underinsured motorist policy with Defendant.

A. ***Credits, duplicate payments and offsets***

Plaintiff Bolin, on behalf of the Class, contends that Defendant's act of taking credit for other personal, portable first-party insurance benefits when adjusting constitutes *de facto* subrogation. However, this Court's review of Montana cases reflects support, within the insurance context, for the use of credits, offsets and exclusions on duplicate payments.

In Farmers Alliance Mut. Ins. Co. v. Miller, 869 F.2d 509, 513 (9th Cir.

1989), the Ninth Circuit Court looked at Montana's underinsured motorist law and noted that underinsured motorist coverage "presupposes some liability insurance but acts as a gap-filler, ensuring that the insured recovers at least the amount he is insured for, even if the tortfeasor's insurance coverage is deficient." Id. Recovery in excess of the gap between the victim's underinsured motorist coverage and the tortfeasor's liability coverage would not be underinsured motorist recovery at all; it would effectively be recovery under a judicially created collision policy. Id.

Although the Miller Court limited its reasoning to offsets that resulted from liability insurance held by a tortfeasor, it nevertheless acknowledged the possible applicability of offsets from other sources. Id.

In Liedle v. State Farm, 283 Mont. 129 (1997), the Montana Supreme Court upheld a reduction, under the collateral source reduction statute, of medical pay insurance benefits received. In reaching that conclusion, the Montana Court noted that the statute did not "authorize collateral source payments to be deducted from the claimant's available underinsured motorist coverage, but authorized that such payments be entered into ***the calculation of the claimant's compensable injuries and losses***." Id., 283 Mont. at 134. Further, the Liedle Court rejected plaintiff's argument that State Farm's offset was "the equivalent of allowing an insurance company to subrogate against its own insured . . ." Id., 283 Mont. at 133.

In Olson v. Daughenbaugh, 307 Mont. 371 (2001), the Montana Supreme Court held that an employee that was injured while working for an uninsured employer could not receive benefits from the Uninsured Employers Fund and pursue an independent cause of action against the employer. In finding in favor of the employer, the Court noted that plaintiff was seeking full compensation for his work-related injury twice--once from the UEF and again from the employer. Id., 307 Mont. at 375. The Court concluded that Montana law does not allow for double recovery or duplicate payments of workers' compensation benefits.

Citing back to its ruling in Thayer v. Uninsured Employers' Fund, 297 Mont. 179 (1999), the Olson Court noted that its present rationale was consistent with its previous decisions. The Olson Court noted that, in Thayer, "[W]e held that the claimant was not entitled to recover from both the UEF and the uninsured employer because the Uninsured Employers' Fund is merely a safety net which stands in the place of the uninsured employer, and the setoff provisions are uniquely necessary to assure some payment to as many uninsured employees as possible." Olson, 307 Mont. at 377. Consequently, a double recovery was not permitted. Id.

Although Thayer and Olson involved Workers' Compensation, on the issue of double recovery, this Court can rely on those holdings to conclude that double

payments are not permitted. Here, Plaintiff asks this Court to ignore the $10,000 that she has actually received from Hartford in order to recover that same amount from Defendant.

Further, in Newbury v. State Farm Fire & Cas. Ins. Co. of Bloomington , Ill, 343 Mont. 279 (2008), the Montana Court also considered the issue of the "other payments." In Newbury, Plaintiff was struck by another vehicle during the course of his employment. He subsequently filed a claim for and received worker's compensation medical benefits. Because his resulting medical expenses were in excess of the benefits paid by the Worker's Compensation, Newbury turned to his two automobile insurance policies with State Farm which allowed for $5,000 per policy for medical expenses arising from bodily injury sustained "through being struck as a pedestrian by a motor vehicle." Id., 343 Mont. at ¶ 9. Newbury sought to obtain medical payment coverage from both policies in the amount of $10,000. State Farm paid the $1,175.80 in medical expenses not covered by worker's compensation and denied any further payment. In their denial, State Farm relied on a provision stating that there would be no coverage "to the extent Workers' Compensation benefits are required to be payable." Id. Newbury brought suit attacking the validity of the provision, among others, on public policy grounds. Id., 343 Mont. at ¶ 12.

In Newbury, the Montana Supreme Court concluded that the clause at issue did not violate public policy. Specifically, they found that "[I]n Montana, parties to an insurance contract may include provisions that exclude coverage without violating public policy if the exclusion applies to optional, rather than mandatory coverage." Id., 343 Mont. at 288.[7] The Newbury Court went on to state that provisions regarding optional coverage in an insurance contract are "at the sole discretion of the parties to the contract" and not a violation of public policy. Id. Therefore, where an insured is injured in a vehicle, it is permissible for a policy to limit or even exclude coverage to the extent other primary insurance like that of the driver and/or tortfeasor is available and required to be payable. Id., 343 Mont. at ¶ 38.

The Newbury Court rejected the plaintiff's request that it ignore the Worker's Compensation benefits he received and give him the full medical payment limits of his auto policy. Essentially, the Newbury Court recognized State Farm's right to credit what was already paid by the Workers' Compensation Fund in considering what it was liable for under its insured's medical payment policies. Like the plaintiff in Newbury, Bolin asks this Court to ignore payments she has

[7]In Montana, medical payment and underinsured motorist coverage are optional coverage provisions. M.C.A. §§ 61-6-103(2), 301(1). However, uninsured motorist coverage is mandatory unless rejected by the insured. M.C.A. § 33-23-201.

already received in order to trigger her policy's coverage.

Most recently, this Court, in Gettle v. Prop. & Cas. Ins. Co. of Hartford, followed the line of reasoning stated in Newbury and recognized that a provision that prioritized an insurer's obligation to pay med pay, UM and UIM coverage until other primary insurance has been collected up to the policy limits, was not *de facto* subrogation and thus did not violate Montana's public policy.[8] In Gettle, this Court conclude that "excess coverage" provisions in a UIM policy which took into consideration other insurance payments in determining what an insurer owed its insured was not a violation of public policy.

Looking at Plaintiff Bolin's policy with Allstate, both her medical payments coverage and underinsured motorist coverage expressly state that no "duplicate payments for the same elements of loss" would be paid under those coverages.[9] Although Defendant has paid the policy limits of Plaintiff's med pay coverage of $5000, it contends that it is not obligated to pay any amounts under Plaintiff's underinsured motorist policy. In support of this, Defendant notes that its adjuster has found Plaintiff Bolin's total loss to be $42,000.

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[8]CV 09-43-RFC (U.S.D.C. Mont., February 9, 2010, *Doc. #17*)

[9]*DEFENDANT'S STATEMENT OF GENUINE ISSUES IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, Doc. #26, ¶5, Exhibits A & B.*

The Court notes that she has already received the $30,000 Bodily Injury limits from the tortfeasor, $10,000 Med Pay limits from Hartford Insurance and $5,000 Med Pay limits from Defendant Allstate. Based on this, Defendant contends that Plaintiff has been fully compensated for all recoverable damages. To the extent Plaintiff seeks to recover any attorneys' fees, Defendant argues and this Court agrees that, under the American rule and by prior Order this Court, they are not an element of damages that are recoverable in tort law.

As evidenced by the aforementioned Montana cases, there has been a long history of recognition in the insurance and Workers' Compensation arena, of credits, offsets and the exclusion of double recoveries and payments. Our present case is no different. Moreover, Montana Courts have recognized that "parties to an insurance contract may include provisions that exclude coverage without violating public policy if the exclusion applies to optional, rather than mandatory coverage." Newbury, 343 Mont. at 288. The Newbury Court went on to state that provisions regarding optional coverage in an insurance contract are "at the sole discretion of the parties to the contract" and not a violation of public policy. Id.

1. ***DE FACTO SUBROGATION CLAUSES***

Plaintiff Bolin contends that Defendant Allstate's practice of taking credit for other personal, portable, first party insurance benefits when adjusting its insured's

claims constitutes *de facto* subrogation and is contrary to Montana law. Extensive discussion on the issue of subrogation and the "made whole" doctrine was made in this Court's opinion in the separate case of Gettle v. Prop. & Cas. Ins. Co. of Hartford.[10] As such, a reiteration of the state of the law on subrogation shall not be made here.

Plaintiffs allege that Defendant's present action of taking credit for other MPC, UM and/or UIM coverage constitutes *de facto* subrogation and thus denying coverage even though Plaintiffs have paid valuable consideration. The consequence of Defendant taking credit for another insurance company's policy, according to Plaintiffs, are that Defendant has effectively subrogated before Plaintiffs have been made whole.

In researching cases that discuss the concept of *de facto* subrogation as a cause of action, this Court was only able to find two cases: Thayer v. Uninsured Employers' Fund, 297 Mont. 179 (1999) and Blue Cross and Blue Shield of Montana, Inc. v. Montana State Auditor, 352 Mont. 423 (2009). It does not go without notice that both cases come from the Montana State Supreme Court.

In Thayer, Uninsured Employers' Fund's (UEF) was paying death benefits to

[10]The Court notes that the same attorneys in the *Gettle* case represent the same respective Parties in this case.

the widow of an employee whose employer carried no Workers' Compensation insurance. The widow brought suit against the employer and the employer settled for $100,000. Upon notice of the settlement with the employer, UEF informed Thayer that she was no longer entitled to further benefits. UEF claimed a statutory right of setoff to the remaining balance due ($74,301) against the $100,000 settlement from the employer. UEF did not seek recovery of any benefits paid prior to Thayer's settlement with her husband's employer. Id, 297 Mont. at 181.

Thayer contended that UEF was not applying a statutory right of setoff. Rather, UEF was claiming a subrogation interest in the settlement she received from the employer. Id. According to Plaintiff, this allowed UEF to have a *de facto* subrogation interest before Plaintiff had been made whole. Id.

Ultimately, the Montana Court concluded that its prior subrogation cases did not apply to Thayer because the UEF was not an insurer and did not receive premiums from the employer. Rather, it was a legislatively created source to minimize the hardships of an injured worker that is unable to get Workers' Compensation benefits and was not intended to provide full payment. Id. Further, the Montana Court found that because the UEF was "merely a safety net" and stands in the place of the uninsured employer, it was reasonable to condition UEF's obligations "on the extent to which the employer fails to provide compensation."

Id., 297 Mont. at 185.

In Blue Cross Blue Shield ("BCBS"), the Montana Supreme Court affirmed the Montana State Commissioner of Insurance's decision to disapprove Blue Cross's insurance forms that contained policy language wherein BCBS would not pay health care benefits to its beneficiaries for: "services, supplies, and medications provided to treat any injury to the extent the member receives, or would be entitled to receive where liability is reasonably clear, benefits under an automobile insurance policy. . ." Id. 312 Mont at 425. In finding in favor of the State Commissioner, the Montana Court concluded that, in the health insurance context, a provision that allowed Blue Cross Blue Shield to "avoid any payment of benefits to its insured if the insured is 'entitled to receive' benefits from any other auto or premises liability policy, whether or not the insured actually receives any of those benefits, and whether or not the insured has been made whole" was in violation of Mont. Code Ann. §§ 33-30-1101 & 33-30-1102 and unlawfully allowed BCBS to claim subrogation before its insured had been made whole. Id. 312 Mont. at 429.

It is evident that the offending action and language that the BCBS Court's conclusion was focused on was the avoidance of payments of benefits when BCBS' insured was "entitled to receive" benefits from another source and not whether BCBS's insured actually received benefits from another source. Id.

Here, there is no evidence in the record that Allstate denied UIM coverage based Plaintiff Bolin being entitled to receive benefits from another auto or premises liability policy. Consequently, this Court concludes Blue Cross Blue Shield to be inapplicable to our present case.

More importantly, this Court notes that the discussions of *de facto* subrogation in both these cases were dicta. Neither cases' holdings explicitly recognized nor created *de facto* subrogation as a new cause of action. This is in contrast to the cases cited by the Court that explicitly recognize the application of credits, offsets and exclusion of duplicate payments in the insurance and Workers' Compensation arena.

For the foregoing reasons, this Court concludes that Defendant's "programmatic claims adjustment" practice of taking credit for other personal, portable first-party insurance benefits when adjusting its insured's claims is a recognized legal practice. Further, as is the case here, parties to an insurance contract may include provisions that exclude coverage without violating public policy if the exclusion applies to optional, rather than mandatory, coverage.

Following the reasoning of this Court in its Gettle case, as well as the Newbury Court's line of reasoning, this Court concludes that Defendant merely used its freedom to contract in to order preclude the double payments. Plaintiff

neither argues nor does the record reflect that beyond taking the $10,000 credit from Hartford's med pay benefits, Defendant has refused to compensate any additional losses under Plaintiff's UIM policy. Plaintiff's Motion for Partial Summary Judgment is DENIED.

IT IS HEREBY ORDERED that:

1. Defendant's Motion for Partial Summary Judgment (*Doc. #14*) is GRANTED;

2. Plaintiff's Motion for Partial Summary Judgment (*Doc. #19*) is DENIED.

DATED this 18th day of October, 2010

/s/ *Richard F. Cebull*
RICHARD F. CEBULL
U.S. DISTRICT JUDGE