No. 23-

IN THE

Supreme Court of the United States

RANDY TARUM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT L. LINDSAY; BETTY L. RADOVICH; WANDA WOODWICK; ROSALIE KIERNAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF REBECCA M. NICHOLSON, INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED; AND UNNAMED PUTATIVE CLASS REPRESENTATIVES,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Should cooperative federalism, comity, efficient federal practice, and the divergent decisions in the Circuits prompt the Court in the wake of *Lehman Bros. v. Schein*, 416 U.S. 386 (1974) to clarify and update the procedure for certifying questions of state law in diversity actions so that it is a predictable, if not mandated, process when the question is one of "first impression," significantly affecting the welfare of citizens in the state, and determinative of the cause of action in the federal forum?

2. Were petitioners denied a fair hearing in this diversity action when after acknowledging that a state-law insurance issue is one of "first impression" in Montana, the Panel refused to certify the question to the state's highest court, relegating petitioners to an inappropriate "Erie guess" in an unpublished memorandum?

Parties to the Proceeding.

All the parties in this proceeding are listed in the caption.

Statement of Related Cases.

United States Court of Appeals for the Ninth Circuit—*RandyTarum, as Personal Representative of the Estate of Robert L. Lindsay et al. v. State Farm Mutual Automobile Insurance Company*, C.A. Docket No. 22-35542. Judgment entered October 26, 2023.

United States District Court for the District of Montana—*Danny Pedersen, as Personal Representative of the Estate of Robert L. Lindsay et al. v. State Farm Mutual Automobile Insurance Company*, Civil Action No. 4:19-cv-00029–GF-BMM-JTJ. Judgment entered June 27, 2022.

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Citation of Opinions and Orders.

The unpublished Memorandum decision of the United States Court of Appeals for the Ninth Circuit in *RandyTarum, as Personal Representative of the Estate of Robert L. Lindsay et al. v. State Farm Mutual Automobile Insurance Company*, C.A. Docket No. 22-35542, decided and filed October 26, 2023, and reported at 2023 WL 7040320 (9th Cir. 10/26/2023), affirming the district court's grant of summary judgment to respondent and its denial of petitioners' motion to certify questions of state law to the Montana Supreme Court, is set forth in the Appendix hereto (App. 1a-5a).

The unpublished Opinion of the United States District Court for the District of Montana in *Danny Pedersen, as Personal Representative of the Estate of Robert L. Lindsay et al. v. State Farm Mutual Automobile Insurance Company*, Civil Action No. 4:19-cv-00029–GF-BMM-JTJ, decided and filed June 27, 2022, and reported at 2022 WL 2304042 (D. Mont. 6/27/2022), granting respondent's motion for summary judgment and denying petitioners' motion to certify questions of state law to the Montana Supreme Court, is set forth in the Appendix hereto (App. 6a-27a).

The unpublished Order of the United States District Court for the District of Montana in *Danny Pedersen, as Personal Representative of the Estate of Robert L. Lindsay et al. v. State Farm Mutual Automobile Insurance Company*, Civil Action No. 4:19-cv-00029-GF-BMM, decided and filed June 20, 2020, and reported at 2020 WL 2850137 (D. Mont. 6/2/2020), adopting the Magistrate Judge's Findings and Recommendations, granting in

part respondent's motion to dismiss petitioners' amended complaint, and denying respondent's motion to certify questions of law to the Montana Supreme Court, is set forth in the Appendix hereto (App. 28a-51a).

The unpublished Report and Recommendation of the Magistrate Judge for the United States District Court for the District of Montana in *Danny Pedersen, as Personal Representative of the Estate of Robert L. Lindsay et al. v. State Farm Mutual Automobile Insurance Company*, Civil Action No. 4:19-cv-00029-GF-BMM, decided and filed March 18, 2020, recommending that the district judge deny respondent's motion to dismiss petitioners' amended complaint, is set forth in the Appendix hereto (App. 52a-63a).

The unpublished Order of the United States Court of Appeals for the Ninth Circuit in *RandyTarum, as Personal Representative of the Estate of Robert L. Lindsay et al. v. State Farm Mutual Automobile Insurance Company*, C.A. Docket No. 22-35542, decided and filed December 4, 2023, denying petitioners' timely filed petition for Panel rehearing or for rehearing *en banc,* is set forth in the Appendix hereto (App. 64a-65a).

Basis for Jurisdiction in this Court.

The decision of the United States Court of Appeals for the Ninth Circuit affirming the district court's entry of summary judgment in favor of respondent and its denial of petitioners' motion to certify questions of state law to the Montana Supreme Court, was entered on October 26, 2023; and its Order denying petitioners' timely filed petition for Panel rehearing or for rehearing *en banc* was decided and filed on December 4, 2023 (App. 1a-5a;64a-65a).

This petition for writ of certiorari is filed within ninety (90) days of the date the Court of Appeals denied petitioners' timely filed petition for Panel rehearing or for rehearing *en banc*. 28 U.S.C. § 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

Constitutional, Statutory and Rule Provisions Implicated by This Petition.

United States Constitution, Amendment XIV:

> No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S.C. § 1332(a)(1) (Diversity of citizenship; amount in controversy; costs):

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States....

Fed. R. App. P. 32.1(a):

> **Citing Judicial Dispositions**
>
> (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial

opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007.

Ninth Circuit Rule 36-1. Opinions, Memoranda, Orders; Publication

Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam."

All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited.

Ninth Circuit Rule 36-2. Criteria for Publication

A written, reasoned disposition shall be designated as an OPINION if it:

(a) Establishes, alters, modifies or clarifies a rule of federal law, or

(b) Calls attention to a rule of law that appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

Ninth Circuit Rule 36-3(a). Citation of Unpublished Dispositions or Orders

> (a) Not Precedent. Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

Montana R. App. P. 15(3):

Certification Of Questions Of Law

> ....
>
> (3) Power to answer. The supreme court of this State may answer a question of law certified to it by a court of the United States or by the highest court of another State..., if:
>
> (a) The answer may be determinative of an issue in pending litigation in the certifying court; and
>
> (b) There is no controlling appellate decision, constitutional provision, or statute of this State.

Statement of the Case

Petitioners Betty L. Radovich and Wanda Woodwick ("petitioners") together with decedents Robert L. Lindsay and Rebecca M. Nicholson ("petitioners") sustained injuries in separate automobile accidents while being insured under policies issued by respondent State Farm Mutual Automobile Insurance Company ("State Farm").

The negligent drivers in each case had insufficient liability coverage to fully compensate petitioners for their respective injuries. While the policies issued by State Farm provided uninsured motorist coverage (UM), *no under*insured motorist coverage (UIM) was provided.

On April 9, 2019, petitioners together with the personal representatives of the decedents' estates (Danny Pederson, representing the Estate of Robert L. Lindsay and Rosalie Kiernan, representing the Estate of Rebecca M. Nicholson) (collectively "petitioners") brought this civil action in the federal district for the District of Montana against State Farm. Asserting diversity jurisdiction under 28 U.S.C. § 1332(a)(1), they alleged *inter alia* that State Farm's agents were negligent in failing to explain or offer UIM coverage when petitioners bought automobile liability insurance.

Petitioners claimed that their State Farm agents had a professional duty to act in a reasonable manner under the circumstances, an issue of law; and based upon expert testimony offered by petitioners, it was a breach of the standard of care, an issue of fact, for the agents not to explain or offer UIM coverage to every insured. Petitioners alleged that they would have purchased UIM coverage if their agents had offered it and that, in failing to do so, they breached their common law duty of reasonable care. Petitioners further alleged that as a result of the prior decision applying Montana law to very similar facts, see *Moss v. State Farm Mut. Auto. Ins. Co.*, Civil Action No. CV-99-124-GF-DWM (D. Mont. 3/21/2001), State Farm's agents knew or should have known that their failure to explain and offer UIM coverage created a high probability of injury and exposed State Farm's agents to negligence claims.

The *Moss* decision was appended to petitioners' complaint as an exhibit. Citing *Fillinger v. Northwestern Agency, Inc.*, 938 P.2d 1347, 1355-56 (Mont. 1997), federal Judge Molloy: (1) defined the common law duty of insurance agents in Montana as the exercise of ordinary care under the circumstances; (2) held that this duty of ordinary care was not relieved by the absence of a statute compelling the agent to act in certain way; (3) ruled that as the degree of risk increases, so does the duty to exercise ordinary care; and (4) determined that it is a jury question whether failing to explain or offer UIM coverage is negligence. Petitioners sought declaratory relief and tort damages for the agents' negligence, common law bad faith, deceit and punitive damages. Petitioners also requested class certification under Fed. R. Civ. P. 23 for those State Farm insureds who were similarly situated.

On May 31, 2019, State Farm moved to dismiss the complaint arguing that petitioners failed to allege facts which could give rise to an absolute duty under Montana law to explain or offer UIM coverage. On July 31, 2019, petitioners amended their complaint to include particularized facts showing why their respective State Farm agents were obligated to explain and offer UIM coverage (App. 56a). They alleged that State Farm's agents "encouraged [petitioners] to trust, value and rely on their specialized insurance knowledge;" that they held themselves out as experts in the field of automobile insurance; and that petitioners "relied on [their] agent[s] for advice on which coverages were necessary to protect [them] from catastrophic losses and damage[ ]" (*Id.*).

Petitioners again appended to their complaint the *Moss* decision defining the common law duty of insurance

agents in Montana. The thrust of the amended complaint and subsequent discovery and expert disclosures was that despite the *Moss* decision alerting State Farm to the heightened risk to insureds caused by not explaining or offering UIM coverage, State Farm substantially stopped instructing its Montana agents to offer UIM coverage in 2007; and that its failure was a breach of duty under Montana law to exercise the skill and knowledge normally possessed by insurance agents in Montana. Petitioners' expert disclosures supported the standard of care in Montana, i.e., it is a breach of duty not to explain and offer UIM coverage to existing or new insureds and to require signed rejection forms from those insureds who refused to select UIM coverage. Under the substantive law of Montana, petitioners alleged, State Farm acting through its agents was negligent as to petitioners and those similarly situated.

State Farm renewed its motion to dismiss contending that, even as amended, the complaint failed to allege facts that could "give rise to [a] purported duty to offer and explain UIM coverage" under Montana law (App. 56a). The district court referred the motion to the Magistrate Judge for findings and recommendations under 28 U.S.C. § 636(b)(1)(B) (App. 53a).

On March 18, 2020, the Magistrate issued his Findings and Recommendations (App. 52a-63a). Instead of reading petitioners' amended complaint as alleging a claim under the substantive law of Montana defining the common law duty of insurance agents, i.e, whether they breached their duty to exercise the skill and knowledge normally possessed by insurance agents in the state, the Magistrate *sua sponte* inserted a theory of recovery *never*

claimed by petitioners, i.e., that State Farm's agents had a duty to explain and offer UIM coverage *only* if there was a "special relationship" with the insured petitioners (App. 57a). Citing New Hampshire law and calling this an issue of "first impression" in Montana, the Magistrate made an "*Erie* guess" that Montana would adopt a special relationship test foreign to Montana law (App. 57a;61a).

Contrary to the substantive law of Montana, the Magistrate determined that under state law, insurance agents owe their insureds a duty of ordinary care but it does *not* include a duty to explain and offer UIM coverage to customers unless it meets the "special relationship" test (App. 58a-59a). While this duty of ordinary care *could* include the duty to explain and offer UIM coverage, the Magistrate concluded this duty could arise *only* in certain circumstances based entirely on other states' case law foreign to Montana (App. 59a).

Regardless, the Magistrate ruled that *Moss* did not address—nor has the Montana Supreme Court considered—the "unsettled question" raised by petitioners' claims, i.e., whether agents must explain and offer UIM coverage (App. 59a-60a). The Magistrate utilized a New Hampshire decision agreeing with this proposition and adopted its four qualifying characteristics of a "special relationship" which could trigger such a duty (App. 60a citing *Sintros v. Hamon*, 810 A.2d 553 (N.H. 2002)). The Magistrate expressed confidence that the Montana Supreme Court would agree with him that an insurance agent's duty to explain and offer UIM coverage to an insured would arise *only* where a "special relationship" existed between the agent and insured as defined in *Sintros* (App. 61a). Because petitioners had alleged

some indicia of a "special relationship" as described in *Sintros*, the Magistrate recommended the district judge deny State Farm's motion to dismiss with further discovery addressing whether petitioners had a "special relationship" with their agents (App. 62a).

Petitioners challenged the Magistrate's ruling that an agent's duty includes a special relationship requirement. They also asserted, consistent with their complaint, that § 299A of the Restatement (Second) of Torts (1965) constitutes the duty for insurance professionals in Montana, i.e., to exercise the skill and knowledge normally possessed by insurance agents in similar communities in rendering services to their customers (A.37a). State Farm also moved to have the question of an insurance agent's professional duty of care certified to the Montana Supreme Court for determination.

On June 2, 2020, the district court, Morris, J., adopted the Findings and Recommendations (App. 28a-51a). He rejected petitioners arguments, agreeing with the Magistrate that "the Montana Supreme Court would conclude that a special relationship between the insurance agent and an insured" was required for the agent to have a professional duty to advise an insured on coverage (App. 41a).

Judge Morris also declined to certify the duty question to Montana's highest court (App. 48a-49a). While answering the professional duty question could dispose of the case, and despite his belief that Montana courts have not yet addressed the issue, both factors favoring certification under Mont. R. App. P. 15(3), Judge Morris concluded that the Magistrate's reasoning was consistent

with Montana law, making certification "marginally helpful at best" (App. 49a;50a).

Further discovery ensued and in 2021, the New Hampshire Supreme Court abandoned its decision in *Sintros*, renouncing its"special relationship" factors as ones which did not necessarily have to be satisfied. See *101 Ocean Blvd., LLC v. Foy Ins. Grp.,* 261 A.2d 250, 260 (N.H. 2021). Because this ruling undercut the Magistrate's reliance on *Sintros* as requiring the need for a "special relationship," petitioners sought reconsideration of the earlier ruling that an insurance agents' duty included a special relationship test (A.7a). Petitioners also adduced proof of four expert insurance professionals who asserted that the standard of care (an issue of fact) for insurance agents in Montana includes explaining and offering UIM to existing or new insureds and to require signed rejection forms from those insureds who declined UIM coverage; and that State Farm's agents deviated from the professional standard of care for Montana insurance agents. The district judge denied the motion to reconsider the professional duty standard for insurance agents (App. 7a;9a).

Petitioners then moved to certify the question of insurance agents' professional duty to the Montana Supreme Court (App. 7a-9a). State Farm moved for summary judgment arguing that petitioners could not establish facts supporting a "special relationship" as required by the court's previous rulings (App. 18a-19a). On June 27, 2022, the district court denied petitioners' motion to certify (App. 8a-11a). Judge Morris noted that an insurance agent could owe the insured a duty to offer and explain UIM coverage *but only if* a special relationship

existed between them, just as the Magistrate determined in his "*Erie* guess" about how the Montana Supreme Court would rule on the issue. Judge Morris concluded that certifying the question would not save time, energy, or judicial resources....[and] would serve only to require the Montana Supreme court to address a question that has been touched upon in multiple prior decisions, and that this Court has repeatedly analyzed" (App. 11a).

Judge Morris then granted summary judgment for State Farm, ruling the petitioners had failed to show a factual basis for a "special relationship" that "would require a State Farm agent to explain and offer UIM coverage" (App. 18a;21a-25a). Nor did petitioners make a case for affirmatively imposing such a duty on agents when they discuss UIM coverage with their customers (App. 22a-24a). Ruling that no special relationship or assumed duty of care exists between petitioners and their State Farm agents, the court dismissed their negligence claims (App. 25a). With these claims dismissed, petitioners' motion for class certification was denied as moot (App. 26a;27a).

Petitioners appealed and on November 14, 2022, nearly a year before oral argument, petitioners filed a motion in the Circuit court again seeking certification to the Montana Supreme Court of the question of the duty of an insurance agent in a tort-based negligence cause of action. Petitioners argued that the district court wrongly relied upon foreign law ruling that an agent's duty to advise exists only when there is a "special relationship" with the insured; that this "*Erie* guess" based upon New Hampshire law was contrary to Montana's substantive law which requires no such special relationship for a

professional duty; that the issue significantly affects the citizens of Montana; and that it is a question of first impression— indeed, dispositive of petitioners' recovery in this case—which should as a matter of comity and federalism be settled by the state's highest court.

Petitioners asserted that, if given the opportunity, Montana's highest court would most likely hold that §299A of the Restatement (Second) of Torts (1965) correctly states the duty of an insurance professional in Montana, i.e., to exercise the skill and knowledge normally possessed by insurance agents in similar communities in rendering services to their customers; and this duty was devoid of any special relationship requirement.

On October 26, 2023, the court of appeals issued an unpublished, non-precedential memorandum affirming the district court and, in a footnote, denied petitioners' motion to certify the state-law question (App. 1a-5a). The Panel ruled that this "case turns on whether the insurance agents had a heightened duty to offer and explain UIM coverage even though [petitioners] did not ask for it" (App. 3a). Because petitioners relied on only a "standard insured-insurer relationship" and made no showing of any special relationship or other circumstances giving rise to such a "heightened duty," granting summary judgment for State Farm was proper as a matter of law (App. 3a-4a). The Panel gave no reason in its footnote for the denial of petitioners' motion to certify and did not conduct any analysis under the Ninth Circuit's established case law, see, e.g., *Kremen v. Cohn*, 325 F.3d 1035 (9th Cir. 2003), concerning certification (App. 5a).

On December 4, 2023, the Panel and the court of appeals, respectively, denied petitioners' timely filed petition for Panel rehearing or for rehearing *en banc* (App. 64a-65a).

Argument.

1. Cooperative Federalism, Comity, Efficient Federal Practice, And The Divergent Decisions In The Circuits Should Prompt The Court In The Wake Of *Lehman Bros. v. Schein*, 416 U.S. 386 (1974) To Clarify And Update The Procedure For Certifying Questions Of State Law In Diversity Actions So That It Is A Predictable, If Not Mandated, Process When The Issue Is One Of "First Impression," Significantly Affecting The Citizens In The State, And Is Determinative Of The Cause Of Action In The Federal Forum.

State Farm's decision in 2007 to no longer require their agents to explain and offer UIM coverage to its insureds or to require signed forms from those refusing to select this coverage leaves petitioners and thousands of Montana motorists unprotected from catastrophic financial injury. Having received no explanation or offer of UIM coverage from State Farm—nor being required to sign a rejection of UIM coverage—these uninformed and unprotected Montana citizens like petitioners face the prospect of incurring life-altering injuries and financial losses which could have been insured against but for State Farm's negligence.

State Farm is an outlier among Montana insurers because of the high number of its insureds without UIM

coverage. According to petitioners' expert witnesses, most insurers in the state have close to 100% of their insureds with *both* UM and UIM coverages with avoidance of UM and/or UIM coverage only if there are signed rejections. State Farm has not used rejection forms since 2007, and yet the *Moss* lawsuit in 2001 established the duty of ordinary care and bespeaks State Farm's deliberate and self-interested decision since 2007 to limit its financial exposure by not requiring written rejections of UIM coverage.

Petitioners seek redress by demanding that State Farm's agents hew to the duty of care which applies to other insurers in Montana: the duty to exercise the skill and knowledge normally possessed by insurance agents in similar communities in rendering services to their customers, a standard of care which includes the need to explain and offer UIM coverage to existing or new insureds and to require signed rejections from those insureds who decline UIM coverage.

The *Moss* decision, appended to petitioners' complaints and citing *Fillinger v. Northwestern Agency, Inc.*, 938 P.2d 1347, 1355-56 (Mont. 1997), defines this duty of care for agents in Montana as simply the exercise of ordinary care; it is a duty which is not relieved by the absence of a statute compelling the agent to act in certain way; and as the degree of risk increases, so does this duty to exercise ordinary care. It is a jury question requiring expert testimony as to whether failing to explain or offer UIM coverage is negligence. This is the substantive law of Montana that petitioners sought and the federal court circumvented by an "*Erie* guess" premised upon law foreign to Montana.

The Magistrate, however, engrafted onto their complaint an entirely *new* theory of recovery *petitioners never claimed*, i.e., that State Farm's agents had a duty to advise an insured *only if* they shared a "special relationship" with the insured petitioners. This unfair, unjustified reading of petitioners' complaint ignores both *Moss* and *Fillinger*, relies on questionable New Hampshire case law to create new substantive Montana law in conflict with the existing duty of care for insurance agents in Montana, and sounds the death knell for petitioners' attempt to hold State Farm liable for its negligence in failing to explain and offer UIM coverage to its insureds, and the requirements for class certification.

As the Court wrote in *Day Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975), "[a] federal court in a diversity case is *not* free to engraft onto those state rules [and decisions] exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Id.* (emphasis supplied). Yet this is precisely what both federal courts below have done to petitioners' detriment.

Here the federal courts went far beyond an "*Erie* guess" of the duty of Montana insurance agents. The federal courts ignored established Montana law which points to imposing on licensed insurance agents a duty of ordinary care akin to that found in § 299A of the Restatement (Second) of Torts (1965), i.e., to exercise the skill and knowledge normally possessed by insurance professionals rendering services to their customers. Instead, relying on a New Hampshire decision which has since been substantially qualified, these federal courts

inserted into this duty formula a "special relationship" requirement which Montana law does *not* require and the Montana Supreme Court most likely would never sanction after *Moss* and *Fillinger*, given its implementation of the § 299A duty of care for other Montana professionals such as doctors, lawyers, and accountants.

Petitioners submit that when it appears that the substantive state-law question is of "first impression," novel or unsettled; when it implicates an important issue of public safety affecting the welfare of thousands of state citizens; and when its resolution determines petitioners' cause of action in the federal forum, certifying the question to the state's highest court—a procedure requested here by *both* parties, *three* times in *two* different courts below—should mandate a *required* certification procedure. The Panel's denial of certification in a footnote to its unpublished, non-precedential memorandum decision is an abuse of discretion requiring mandatory certification.

The interests of cooperative federalism, comity, efficient federal practice and the divergent decisions of the Circuit courts justify clarifying the certification procedure so that it is governed by overarching principles from this Court to make it a mandatory process in proper circumstances. The present procedure is a chaotic exercise for litigants, its success compromised by time limits for seeking relief when federal courts possess the power *sua sponte* to certify, regardless of motions to do so; by a Panel's resort, as here, to an unpublished, non-precedential memorandum decision to deny certification while creating new state substantive law affecting thousands of state citizens; and by out-of-state litigants encouraging federal courts to make speculative "*Erie* guesses" rather than have the highest state court determine its own law.

For litigants seeking to vindicate their state-created rights in a federal forum, the certification procedure is a valuable lifeline to avoid dismissal of their suits when federal courts make untethered "*Erie* guesses" about arguably unsettled questions of state law. The Circuits in the wake of *Lehman Bros. v. Schein*, 416 U.S. 386 (1974), lack guidance about when there is an abuse of discretion for not certifying such unsettled or novel questions to the state's highest court. The Court should take this opportunity to provide such needed guidance now.

The federal courts' misreading of petitioners' complaint to allege claims *they never made* and then to dismiss them on summary judgment for failure of proof—based on a duty definition borrowed from another state and unanchored in Montana law—is egregiously unfair, denying petitioners due process and a fair hearing. The Court should vacate the decision in State Farm's favor and order the issue of the duty of insurance professionals under Montana law be certified to the Montana Supreme Court for resolution. If Montana rejects a "special relationship" requirement, the district court's rulings should be reversed and the case remanded to the district court for further proceedings consistent with Montana's substantive law, including reinstatement of their claims for negligence, deceit, common law bad faith, and punitive damages as well as their motion for class certification.

A. The Case For Mandatory Certification of State-Law Questions.

Certifying state-law questions reduces delay, saves time, eliminates "*Erie* guesses," lessens litigation administrative costs, discourages forum shopping and most likely produces a definitive response from the state court on an important question of state law, thereby respecting our system of cooperative federalism and the state's own sovereignty in deciding state-law issues for itself. See *Carney v. Adams*, ___ U.S.___, ___;141 S.Ct. 493, 504 (2020) (Sotomayor, J., concurring); *McKesson v. Doe*, ___ U.S.___;___;141 S.Ct. 48, 50-51 (2020) (*per curiam*) (certification advisable when issue involves value judgments peculiarly deserving of state-court attention); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76; 78-79 (1997); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 396 (1986) (certification "expeditious" way to obtain a state court's construction of a statute); *Lehman Bros. v. Schein*, 416 U.S. at 390-391 and *id.* at 394-395 (Rehnquist, J., concurring); *Bush v. Gore*, 542 U.S. 692, 740-742 (2000) (Rehnquist, C.J., concurring).

The decision to certify rests in the sound discretion of the federal court. *Lehman Bros.*, 416 U.S. at 391. When state law is clear, a federal court should *not* certify. *Houston v. Hill*, 482 U.S. 451, 471 (1986). On the other hand, when state law is unclear or nonexistent, and the issue is significant to the state or its citizens, the federal court *should* certify. See *Arizonans for Official English v. Arizona*, 520 U.S. at 78; *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985). Other than these broad strokes, this Court has provided little guidance for the fifty years since *Lehman Bros.* about the certification

standards federal courts ought to apply when deciding whether to certify a state-law question. There simply is no bright line as to when the refusal to certify is to be considered an abuse of discretion.

Because of this lack of guidance, the Circuits have developed widely divergent standards as to how a federal court should exercise its discretion to certify a state-law question. For example, the D.C Circuit asks whether the local law is "genuinely uncertain" and the case of "extreme public importance" (*Nationwide Mut. Ins. Co. v. Richardson*, 270 F.3d 948, 950 (2001)); the First Circuit requires that the state law issue be "controlling" precedent and determinative of the case (*Nett ex rel. Nell v. Bellucci*, 269 F.3d 1, 8 (2001)); the Fourth Circuit asks whether the state-law question is "novel" (*Grattan v. Bd. of Sch. Com'rs of Baltimore City*, 805 F.2d 1160, 1164 (4th Cir. 1988)); the Fifth Circuit is generally hesitant to certify at all without "compelling reasons to do so" (*Wiltz v. Bayer CropScience, Ltd. P'ship*, 645 F.3d 690, 703 (2011)); the Seventh Circuit requires a recurring issue of "vital public concern" (*United States v. Franklin*, 895 F.3d 954, 961 (2018); the Ninth Circuit will certify "significant" questions not yet resolved by state courts (*Kremen v. Cohen*, 325 F.3d 1035, 1037-1038 (2003)); and the Tenth Circuit will not routinely certify even with an unsettled question of state law (*Anderson Living Trust v. Energen Res. Corp.*, 886 F.3d 826, 839 (2018)).

Confirming this confusion is a 2021 study by the Federal Judicial Center, the education and research agency of the United States Federal Courts. Using a sample of 218 instances of certification from 2010 to 2018 by the Third, Sixth, and Ninth Circuit courts of appeals,

the Center found these Circuits varied dramatically in their respective certification rates. Cantone, J. A. & Giffin, C., *Certified Questions of State Law: An Empirical Examination of Use in Three U.S. Courts of Appeals*, 53 U. Tol. L. Rev. 1, 32-33;43 (2021). The Ninth Circuit certified 93% of questions inviting certification, denying just one certified question motion. *Id.* The Third Circuit certified just 49% of those questions and denied 22 certified question motions while Sixth Circuit certified only 17% of those questions inviting certification while denying 30 certified question motions. *Id.* at 44.

According to the study, 85% of the certified questions in the Ninth Circuit were ordered *sua sponte* while only 15% resulted from motions. *Id.* at 34. The Third Circuit decided 90% of its certifications *sua sponte* and the Sixth Circuit's *sua sponte* rate was 60% *Id.* Significantly, the study found that "[i]nsurance cases are the most commonly certified type of case in both the Ninth and Third Circuit[s]..." *Id.* at 44. The study also found that while certification makes more work for state court judges, "several findings...suggest that it is not the deluge some expected." *Id.* at 48.

This confusion and the widely divergent certification rates among the Circuits suggest that the *Lehman Bros.* abuse of discretion standard has led to an *ad hoc* approach to the certification process devoid of predictable standards. It invokes from this Court in its superintendence power over the federal courts an opportunity to establish a mandatory process when it appears that the substantive state-law question is of "first impression," novel or unsettled; when it implicates an important issue of public safety affecting the welfare

of the state's citizens; and when its resolution determines petitioners' cause of action in the federal forum. See also Clark, B. R., *Ascertaining the Law of the Several States: Positivism and Judicial Federalism*, 145 U. Pa. L. Rev. 1459, 1549 & n. 476 (1997) (presumption that certification should be used when unsettled state law combines with significant policymaking discretion).

Because the most definitive Montana law points to imposing on licensed insurance agents a duty of ordinary care akin to § 299A of the Restatement (Second) of Torts, certification is not just an option here; *it is a necessity*. The courts below created a new duty for insurance agents based on the existence of a "special relationship," a requirement *which simply does not exist under Montana law*. See, e.g., *Dulaney v. State Farm Fire & Cas. Ins. Co.*, 324 P.3d 1211, 1216 (Mont. 2014); *Fillinger*, 938 P.2d at 1355-1356. There is a compelling need to provide clarity to state substantive law which is only available by the certification process. A timely, early decision by an uncongested Montana Supreme Court addressing this determinative duty issue would have lessened the burden on the district court, reduced uncertainty in the litigation and avoided needless federal administrative costs while building a cooperative judicial federalism.

Regardless of the repeatedly denied motions to certify below, the federal court always possessed the power to certify *sua sponte*, especially when state insurance law will be determinative and there is no "controlling precedent in the decisions of the Montana Supreme Court." *High Country Paving, Inc. v. United Fire & Casualty Co.*, 14 F. 4th 976, 978 (9th Cir. 2021). Once certified, the question of the insurance agent's duty is treated by the Montana

Supreme Court as "purely an interpretation of the law as applied to the agreed facts underlying the action." *N. Pac. Ins. Co. v. Stucky*, 338 P.3d 56, 60 (Mont. 2014). In this pragmatic way,

> [c]ertified questions can...help establish uniform, definitive judgments on unsettled issues of state law. From one perspective, it is inherently more efficient for state courts to weigh in on unsettled questions of state law, rather than have federal courts decide without state input. As a state supreme court is the final arbiter of that state's laws, its decision would be definitive.

Cantone, J. A. & Giffin, C., *supra*, 53 U. Tol. L. Rev. at 16 citing Eisenberg, E., *A Divine Comity: Certification (At Last) in North Carolina*, 58 Duke L. J. 69, 76 (2008). See also *Resolving Unsettled Questions of State Law: A Pocket Guide for Federal Judges*, Fed. Jud. Ctr. (2022) at 18, reproduced at https://www.fjc.gov/content/373468/resolving-unsettled-questions-state-law-pocket-guide-federal judges ("When [state–federal judicial] relationships are strong, [certification] can help promote comity and cooperation between federal and state courts, which benefits judges, litigants, and the rule of law.").

When *Lehman Bros.* was decided some fifty years ago, only a few state courts, including Montana, authorized certification. Now every state court has implementing rules allowing the process. See, e.g., Montana R. App. P. 15(3). Given this willingness of every state to provide definition to its respective substantive law when necessary, this Court needs to advance specific certification criteria so that inferior federal courts will know when certification

is not only a presumptive choice, but also the mandatory one. This option was unavailable at the time of the Lehman Bros. decision because of the dearth of state statutes implementing certification. *Lehman Bros., supra*, 390 n. 7. If certification as advocated had occurred at the district court level, the clarity of a defined duty for Montana insurance agents could only have had positive results of promoting resolution of the matters at issue.

Petitioners respectfully propose that when it appears that the substantive state-law question is of "first impression," novel or unsettled; when it implicates an important issue of public safety affecting the welfare of the state's citizens; and when its resolution determines petitioners' cause of action in the federal forum, certifying the question to the state's highest court should *not* be decided as a matter of discretion, but instead should be *required* as a matter of law.

B. The Panel's Use of An Unpublished, Non-Precedential Memorandum Decision Was Inappropriate Given The Substantial Matters At Issue.

Compounding the unfairness of the Panel's refusal in a footnote to certify the issue of an insurance agent's duty, is the Panel's avoidance of a determinative decision detailing the rationale for denying certification. Petitioners submit that the cursory denial of their motion to certify by the Panel in this manner is incompatible with a fair hearing, a denial of due process, and contrary to the *Erie* and *Lehman Bros.* requirements.

All the federal rules, including Ninth Circuit Rule 36, "shall be construed and administered to secure the *just*, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1(emphasis supplied). The right of every litigant to meaningful appellate review is deeply embedded in the federal rules' concept of fair play and substantial justice. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14 (1978); *Arnett v. Kennedy*, 416 U.S. 134, 142-146 (1974); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950). These embedded notions are founded on the principle that petitioners' cause of action and their right to have their claims fairly heard and decided in federal court is a valuable property right entitled to due process protection. See *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972).

Ninth Circuit Rule 36-2, on the other hand, allows the Court of Appeals to summarily declare that any of its decisions will be published and therefore become precedential when any of seven preconditions are met, e.g., if the opinion alters, modifies or clarifies a rule of federal law or when it involves a legal or factual issue of unique interest or substantial public importance. There is no requirement that the Panel explain why none of these preconditions exist or to identify which of the reasons apply for publishing its opinion and making it precedential.

The Panel's decision here ratifies the lower courts' misreading of petitioners' complaint to allege claims *they never made* and then to dismiss them on summary judgment for failure of proof, based on a duty definition borrowed from another state and unsupported by Montana law. But sitting in diversity, the Panel was obligated to apply the substantive law of Montana consistent with *Erie*

R. Co. v. Tompkins, 304 U.S. 64 (1938). Contrary to *Erie* and its own requirement in *Kremen v. Cohen*, 325 F.3d 1035, 1037-1038 (9th Cir. 2003), the Panel failed to certify the duty question to Montana's Supreme Court upon petitioners' motion. See *Lehman Bros., supra*, 416 U.S. at 390-391; *Clay v. Sun Insurance Office*, 363 U.S. 207, 210-212 (1960). This important decision affects thousands of Montana citizens who are unknowingly unprotected from life-altering injuries and financial losses due to State Farm's negligence.

In the absence of any reasoned explanation for the Panel for doing so, its decision to invoke Ninth Circuit Rule 36-1 to make its ruling unpublished (a) denies equal justice to the parties who have briefed and argued the case, see *U.S. v. Commonwealth of Massachusetts*, 781 F. Supp.2d 1, 19 (D. Mass. 2011) (Young, J.); (b) prevents meaningful review by the Supreme Court, see *McIncrow v. Harris County*, 878 F.2d 835, 836 (5th Cir. 1989); (c) avoids or inhibits *en banc* review by the Circuit court, see *Sambrano v. Airlines, Inc.*, 2022 U.S. App. LEXIS 4347 at *89 n. 95 (5th Cir. 2/17/2022); (d) could prevent similar cases from being brought in Montana state courts, foreclosing them from weighing in on the issue, see *Herrara v. Zumiez*, Inc., 953 F.3d 1063, 1080-1081 (9th Cir. 2020); (e) creates needless conflict in both state and federal outcomes involving the same issue, see *Matter of McLinn*,739 F.2d 1395 (9th Cir. 1984); (f) sets up potential conflicts between published and unpublished federal court decisions involving state law; (g) undermines the Circuit Court's ability to provide meaningful guidance to lower federal courts for future decisions involving the same issues; and (h) fails to demonstrate to the public that the Circuit is providing transparent doctrinal

development and proper judicial oversight of a vital part of its jurisdiction, the enforcement of state-created rights in civil actions based on diversity.

While Memoranda dispositions permit Circuit Courts to work at a faster pace to clear their backlogged docket, the abbreviated process has been criticized as unfair and at odds with the due process requirement of providing published precedential opinions. In *Anastasoff v. United States*, 223 F.3d 898, 904-905, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (*en banc*), the Eighth Circuit decided that its rule prohibiting the use of unpublished decisions as precedent was unconstitutional as an impermissible expansion of judicial power under Article III. *Id.* Even though the court eventually vacated its decision as moot, the decision's practical implications raise due process concerns.

Once the Panel decided that its decision would not be published, petitioners' multiple certification requests lost any traction; and petitioners' motions to certify, no matter how meritorious, could never receive a fair hearing on the merits because certification by its own terms requires as a precondition an opinion or published order initiating the process. By deciding not to publish, the Panel has thrown out the baby (certification) with the bath water (an unpublished ruling) and, in the process, rejected a jury determination of petitioners' valid state-law claims of State Farm's negligence premised upon omission of UIM coverage.

Rule 36's abbreviated procedure for deciding which decisions will become published and therefore precedential absent any explanation or rationale does not comport with due process because it is incompatible with the concept

of a fair hearing and equal justice. The articulation of reasons for a decision by an appellate court, especially its ruling not to certify the state-law question, is crucial to the parties affected because its rationality legitimizes the process, justifying the result by reference to prior authority and fostering predictability and normalcy in outcomes. Anything less deprives parties before the court of a meaningful hearing with a fair opportunity to present their claims. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982).

2. Petitioners Were Denied A Fair Hearing When The Panel Refused To Certify A State-Law Issue Of "First Impression" To The State's Highest Court, Relegating Petitioners To An Inappropriate "Erie Guess" In An Unpublished Memorandum.

Especially where the state-law issue involves the duty of insurance agents when selling automobile coverage to citizens in the state, a federal court's deference to and respect for the interpretation of the state's highest court regarding this multitudinous insurance issue should be paramount. *Bliss Sequoia Ins. & Risk Advisors, Inc. v. Allied Prop. & Cas. Ins. Co.*, 52 F.4th 417, 424-425 (9th Cir. 2022) (O'Scannlain, J., dissenting). Insurance law is traditionally a state interest and while "federal judges may be tempted to take an "*Erie* guess," even the best judges should proceed with caution when filling the void of state [insurance] law with our intuition of what is 'reasonable.'" *Id.* at 425. *See also Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 497 (1942) ("and it is not for us to attempt to pronounce independently upon Missouri law. To do so would be to disregard the limitations in our Appellate jurisdiction.").

The fairest route, exemplified by *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1071-1073 (9th Cir. 2019), would have been to timely certify this insurance question involving "important policy ramifications for Montana that have not yet been resolved by the Montana Supreme Court." *Id.* at 1072. In *Murray*, the Circuit court *en banc* reconsidered and withdrew its prior published opinion determining the rights to deposits of vertebrate fossil specimens worth millions of dollars so that the state's highest court could have the first and last word on the issue thereby avoiding different outcomes in federal and state courts as well as saving time, administrative costs and judicial resources. *Id.* at 1073.

Murray amply illustrates how early certification can greatly reduce federal administrative time and conserve judicial resources. In *Murray*, final disposition of litigation removed to federal court hinged on the simple question of whether dinosaur fossils belong to the surface estate or mineral estate thus being capable of reservation in a mineral deed. *Id.* at 1072. Significant dinosaur discoveries worth millions were uncovered subsequent to a real estate transfer subject to a mineral reservation including two dueling tyrannosaurus rex dinosaurs locked in combat. *Id.* at 1073. Huge dollars flowed with the answer to the question: Are dinosaur fossils minerals under Montana substantive law? Why the federal district court or none of the litigants initially requested certification of the controlling question of first impression to the Montana Supreme Court is puzzling. Certification finally was ordered by an *en banc* court based upon one sentence in a petition for rehearing. Perhaps *Lehman Bros.*'s deference to discretion has resulted in discounting certification into an obscure option for courts and litigating parties. End

result, discretion is so unfettered it has devoured *Erie's* edict.

Think of the substantial saving of appellate resources had the *Murray* litigants or district court simply certified the same question ultimately raised for the first time on rehearing early in the proceedings. No appeal, no panel hearing, no petition for rehearing resulting in huge administrative savings and conservation of judicial resources. Similar benefits of certification as in the matter *sub judice* are being relegated into improper disposition because certification as an on-target arrow in the federal courts' quiver, is being woefully overlooked. This Court has within its powers the ability to right the certification ship by implementing procedures as to the required judicial processes for all federal courts to use when certification is requested or considered *sua sponte*.

Contrasted with *Murray*, the Panel's decision here bespeaks an unfair rush to judgment in aid of clearing the court's own calendar. The federal courts have not only dismissed petitioners' claims under Montana law via summary judgment but also refused—in an unpublished memorandum decision— multiple requests by both parties to certify the question of first impression as to an insurance professional's duty to the Montana Supreme Court. The difficulty in ascertaining uncertain but existing state law is no excuse for not certifying the question; in fact, it is one of the best reasons for doing so. *Lehman Bros.*, 416 U.S. at 391 ("[R]esort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of [state] law.").

Certification is also especially apt when State Farm as a non-resident defendant will always be able to remove to the federal forum any suit brought against it in Montana courts. Certification prevents State Farm or any other out-of-state insurer from inventing substantive state law of its own choosing. Certification to answer this important state-law issue is a way out of this strategic bind which favors State Farm and prejudices petitioners and similarly situated State Farm insureds.

The Court in *Lehman Bros.*, 416 U.S. at 390-391, and *Clay v. Sun Insurance Office Ltd.*, 363 U.S. at 212, instructed lower federal courts to employ certification in circumstances like these where it would save time, energy and resources and "build a cooperative judicial federalism." If the Panel thought petitioners' theory of liability was an impermissible innovation of Montana insurance law when addressing an agent's tort-based liability—indeed, an open question of "first impression" as the Magistrate and district judge concluded—the Panel should have given the Montana Supreme Court the opportunity to decide whether § 299A of the Restatement (Second) of Torts established the duty for Montana insurance professionals.

It is egregiously unfair to deny petitioners' argument about the tort liability of State Farm agents when failing to explain and offer customers UIM coverage and then to deny them a hearing before the very tribunal which should have the last word on the subject. See *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 799 n. 9 (Tex. 1992) ("By answering certified questions for those federal appellate courts that are *Erie*-bound to apply Texas law, we avoid the potential that the federal courts

will guess wrongly on unsettled issues, thus contributing to, rather than ameliorating confusion about the state of Texas law. We find such cooperative effort to be in the best interests of an orderly development of our own unique jurisprudence....").

There is simply no basis in Montana law for engrafting onto petitioners' complaint an entirely *new* requirement of recovery which *petitioners never claimed*, i.e., that State Farm's agents had no duty to explain and offer UIM coverage unless there was a "special relationship" with the insured petitioners. Under *Day Zimmerman, Inc. v. Challoner*, 423 U.S. at 4, the federal courts were not free to make this distended analysis and petitioners deserved to have the validity of their claims assessed *first* by the Montana Supreme Court upon timely certification, which petitioners sought by motion in both in district court and the court of appeals.

Finally, in both *Schein Bros.* and *Murray*, the certification request was made in petitions for rehearing and the timing of the certification requests was not deemed a reason for denying certification. The same result should apply here, especially when petitioners requested certification at both the district court and the court of appeals by motion, briefing, and by a petition for rehearing *en banc*.

Conclusion.

A writ of certiorari should issue to the Ninth Circuit Court of Appeals vacating its memorandum decision affirming summary judgment in State Farm's favor; and the Court should order the issue of the professional duty of an insurance agent be determined under Montana law by certifying the issue to the Montana Supreme Court. If the Montana court's answer to the certified question rejects a "special relationship" requirement, the district court's rulings should be reversed and the case remanded to that court for further proceedings consistent with Montana's substantive law, including a revival of the claims of negligence, deceit, common law bad faith, punitive damages and the motion for class certification; or the Court should provide petitioners with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 26, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-35542

RANDY TARUM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT L. LINDSAY; *et al.*,

Plaintiffs-Appellants,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the District of Montana. D.C. No. 4:19-cv-00029-BMM-JTJ. Brian M. Morris, District Judge, Presiding.

October 19, 2023, Argued and Submitted, Portland, Oregon
October 26, 2023, Filed

Appendix A

MEMORANDUM[*]

Before: GILMAN,[**] KOH, and SUNG, Circuit Judges.

Plaintiffs appeal from the district court's grant of summary judgment in favor of State Farm, the district court's denial of Plaintiffs' motion for class certification as moot, the district court's denial of Plaintiffs' motion to certify questions to the Montana Supreme Court, the district court's denial of Plaintiffs' motion to compel discovery, and the district court's denial of Plaintiffs' motion for leave to file a Second Amended Complaint. Because the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court did not err in awarding summary judgment to State Farm. We review de novo both the district court's grant of summary judgment and its interpretation of Montana state law regarding the duty of an insurance agent with respect to underinsured motorist (UIM) coverage. *See Diaz v. Kubler Corp.*, 785 F.3d 1326, 1329 (9th Cir. 2015). In the absence of a binding decision from the state's highest court, "a federal court must predict how the highest state court would decide the issue . . . ." *PSM Holding Corp. v. Nat'l Farm Fin.*

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Corp., 884 F.3d 812, 820 (9th Cir. 2018) (internal citations omitted). In Montana, "duty is a question of law" for the court to decide. *Monroe v. Cogswell Agency*, 2010 MT 134, 356 Mont. 417, 234 P.3d 79, 86 (Mont. 2010). The ordinary duty of an insurance agent under Montana law is "well established": A Montana insurance agent "owes an absolute duty to obtain the insurance coverage which an insured directs the agent to procure." *Id.* In *Monroe*, the Montana Supreme Court did not completely rule out the possibility of recognizing a professional duty of care for insurance professionals, *id.*, but it has not recognized such a duty in any pertinent case since then. Rather, the Montana Supreme Court has recognized only that an insurance agent may owe a heightened duty of care when the factual circumstances indicate more than a standard insurer-insured relationship. *See Dulaney v. State Farm Fire & Cas. Ins. Co.*, 2014 MT 127, 375 Mont. 117, 324 P.3d 1211, 1212-16 (Mont. 2014) (noting the possibility that a heightened duty arose where a plaintiff told her insurance agent that she had "absolutely no idea" of the value of the property she wanted covered and that she wanted the agent to visit the building and assess it for himself).

Here, Plaintiffs do not allege that they asked their insurance agents to procure UIM coverage. Therefore, this case turns on whether the insurance agents had a heightened duty to offer and explain UIM coverage even though Plaintiffs did not ask for it. Plaintiffs have made no factual showing of a special relationship between the Plaintiffs and the insurance agents or other special circumstances that would give rise to a heightened duty to offer and explain UIM coverage. The facts that

Plaintiffs point to establish only a standard insured-insurer relationship. Consequently, we agree with the district court that there is no genuine dispute as to any material fact and that State Farm is entitled to judgment as a matter of law.

2. The district court did not err in denying Plaintiffs' motion for class certification as moot. If a claim is without merit as applied to the named plaintiffs, a "district court need not inquire as to whether that meritless claim should form the basis of a class action." *Corbin v. Time Warner, Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069, 1085 (9th Cir. 2016) (collecting cases).

3. The district court did not abuse its discretion in declining to certify questions to the Montana Supreme Court regarding the duty of a Montana insurance agent in a negligence context. "We review for abuse of discretion the district court's decision whether to certify a question to a state supreme court." *Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1009 (9th Cir. 2009). But "[e]ven where state law is unclear, resort to the certification process is not obligatory." *Id.* (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 390, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974)). The district court was entitled to consider whether it could reasonably predict how the Montana Supreme Court would decide the issue, *Syngenta Seeds, Inc. v. County of Kauai*, 842 F.3d 669, 681 (9th Cir. 2016), as well as whether the timing of Plaintiffs' motion would unnecessarily prolong the litigation, *Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008). Here, the district court reasonably relied on both factors in denying Plaintiffs' motion.

4. The district court did not abuse its discretion in denying Plaintiffs' request for further discovery. A district court does not abuse its discretion when it denies a motion to compel for failure to comply with local rules or procedural requirements. *See Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1010 (9th Cir. 2004). Plaintiffs do not dispute that their motion to compel was both untimely and procedurally deficient.

5. The district court did not abuse its discretion in denying Plaintiffs' motion for leave to file a Second Amended Complaint because Plaintiffs' motion was untimely by more than a year, and they did not show good cause for the delay as required by Fed. R. Civ. P. 16.

AFFIRMED.[1]

1. Plaintiffs-Appellants' Unopposed Motion to Amend the Caption (Dkt. Entry No. 13) is GRANTED. Plaintiffs-Appellants' Motion to Certify to the Montana Supreme Court (Dkt. Entry No. 17) is DENIED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION, FILED JUNE 27, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CV 19-29-GF-BMM-JTJ

DANNY PEDERSEN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT L. LINDSAY; BETTY L. RADOVICH; WANDA WOODWICK; AND ROSALIE KIERNAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF REBECCA NICHOLSON; INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Defendants.

ORDER

INTRODUCTION

Plaintiffs Betty Radovich, Wanda Woodwick and decedents Robert Lindsay and Rebecca Nicholson (collectively, "Plaintiffs") sustained injuries in separate automobile accidents while insured under automobile

insurance policies issued by State Farm Mutual Automobile Insurance Company ("State Farm"). The negligent party in each accident possessed insufficient liability coverage to compensate Plaintiffs fully for their damages. Plaintiffs' automobile insurance policies included liability coverage and uninsured motorist (UM) coverage, but did not include underinsured motorist (UIM) coverage. Plaintiffs allege that their State Farm insurance agents acted negligently by failing to explain and offer UIM coverage to them. (Doc. 44.) Plaintiffs claim that they would have purchased UIM coverage if their insurance agents had offered it. Plaintiffs contend that their insurance agents breached their common law duty of reasonable care when they failed to explain and offer UIM coverage. Plaintiffs have asserted claims against State Farm for declaratory relief, negligence, professional negligence, deceit, common law bad faith, and actual malice. (Doc. 44 at 27-39.)

The Court determined previously that State Farm agents possessed the duty to explain and offer UIM coverage only if a State Farm agent shared a special relationship with an individual Plaintiff. (Doc. 69 at 11-18.) Absent establishing a special relationship between the State Farm agent and the insured, Plaintiffs would fail to demonstrate that State Farm was required to explain and offer UIM coverage. (*Id.*)

Plaintiffs have sought reconsideration of the Court's determination that an insurance agent does not have a standard duty to explain and offer UIM coverage. The Court denied Plaintiffs request. (Doc. 202 at 2-5.) Plaintiffs now seek to certify this question to the Montana

Supreme Court. The Court will deny Plaintiffs motion for the reasons discussed in Part I of this order.

Plaintiffs also have moved the Court to compel State Farm's compliance with Plaintiffs' discovery requests. Plaintiffs seek to record a State Farm agent that did not sell automobile insurance to the Plaintiffs as that agent interfaces with the State Farm insurance software. (Docs. 179 & 227.) Plaintiffs' second motion seeks to compel compliance with numerous other requests. (Doc. 229.) The Court will deny Plaintiffs motions to compel compliance for the reasons discussed in Part II of this order.

Plaintiffs additionally have moved for leave to file a second amended complaint. The Court will deny Plaintiffs' motion for lack of good cause as discussed in Part III of this order.

State Farm's motion for summary judgment (Doc. 214) is ripe for review. The Court will grant State Farm's motion for the reasons discussed in Part IV of this order.

Plaintiffs motion to certify a class (Doc. 262) is denied as moot, as discussed in Part V of this order.

ANALYSIS

I. Plaintiffs' Motion to Certify Questions to the Montana State Supreme Court (Doc. 211)

Plaintiffs request that the Court certify the following questions to the Montana Supreme Court:

- What is the common law duty of a Montana licensed insurance professional in a tort-based negligence cause of action?

- How is a breach of duty to be established in a tort-based negligence cause of action against a licensed insurance professional?

(Doc. 263 at 35.) The Court answered these questions previously. Magistrate Judge John T. Johnston determined that that an insurance agent owes an insured a duty of ordinary care under Montana common law and would be obligated to explain and offer UIM coverage only if the insured and insurance agent shared a special relationship. (Doc. 52 at 7-8, 11-12.) Plaintiffs objected to Magistrate Judge Johnston's Findings and Recommendations. (Doc. 55.)

The Court reviewed the Findings and Recommendations de novo. The Court agreed with Magistrate Judge Johnston's determination and adopted his findings and recommendations. (Doc. 69 at 9-22.) Plaintiffs subsequently filed a motion for leave to file a motion for reconsideration of the Court's adoption order. (Doc. 168.) The Court determined that Plaintiffs posed merely the same arguments made in their objection to Judge Johnston's Findings and Recommendations. The Court addressed those arguments once more and denied the motion for leave to file a motion for reconsideration. (Doc. 202.)

Plaintiffs now claim that certification of these questions would be appropriate because the issue presents

important public policy ramifications and because the Court purportedly erred in its interpretation of the Montana Supreme Court's prior rulings. (*See generally* Doc. 212.)

The Montana Rules of Appellate Procedure provide that a federal district court in Montana may certify questions to the Montana Supreme Court for instruction. Mont. R. App. P. 15(3). Certification proves proper only in certain situations: (1) "[t]he answer may be determinative of an issue in pending litigation in the certifying court;" and (2) "there is no controlling appellate decision, constitutional provision, or statute of [Montana]." *Id.* A federal court possesses no obligation to certify a question when there exists uncertainty, but doing so may save time, energy, and resources. *See Lehman Bros. v. Schein*, 416 U.S. 386, 390-91, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974).

Little uncertainty exists that the Montana Supreme Court would agree that an insurance agent's duty is one of ordinary care. The Montana Supreme Court stated plainly in *Monroe v. Cogswell Agency*, 2010 MT 134, 356 Mont. 417, 234 P.3d 79 (Mont. 2010), that the insurance agent's duty is to obtain insurance coverage "which an insured directs that agent to procure." *Monroe*, 234 P.3d. at 86. That outcome, as this Court has explained thrice now, is not surprising given that the Montana Supreme Court repeatedly has focused its duty inquiry on the relationship between an insurer and an insured. *See, e.g., Dulaney v. State Farm Fire and Cas. Ins. Co.*, 2014 MT 127, 375 Mont. 117, 324 P.3d 1211, 1215-16 (Mont. 2014); *Bailey v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 119, 370 Mont. 73, 300 P.3d 1149, 1151-55 (Mont. 2013); *Fillinger v. Northwestern*

Agency, Inc. of Great Falls, 283 Mont. 71, 938 P.2d 1347, 1355-56 (Mont. 1997). Judge Johnston's conclusion that an insurance agent could owe an insured a duty to offer and explain UIM coverage if a special relationship exists between the two proves entirely consistent with Montana Supreme Court precedent.

At this late stage of the litigation, certifying Plaintiffs' questions to the Montana Supreme Court would not save time, energy, or judicial resources. To the contrary, certifying Plaintiffs' question now would only serve to delay this litigation. Plaintiffs waited for nearly two years to request certification of their question after the date of Judge Johnston's Findings and Recommendations. Certification would serve only to require the Montana Supreme Court to address a question that it has touched upon in multiple prior decisions, and that this Court has repeatedly analyzed. The Court can say with near certainty that certifying the questions presented by Plaintiffs would only cause an undue delay.

The Court will thus deny Plaintiffs' Motion to Certify Questions of Substantive Law to the Montana Supreme Court. (Doc. 211.)

II. Plaintiffs' Motion to Compel Compliance of State Farm Agent Riley McGiboney and State Farm to Subpoena for Attendance and Inspection (Docs. 179 & 227) and Motion to Compel (Doc. 229)

Plaintiffs move for the Court to compel compliance with their subpoena of State Farm Agent Riley McGiboney ("Agent McGiboney"). (Docs. 179 & 227.) Plaintiffs would

require that Agent McGiboney demonstrate how State Farm agents use their software while interacting with clients and potential clients. Agent McGiboney did not sell an automobile policy to any of the Plaintiffs. Plaintiffs have been given screenshots of the interface in the discovery process.

The Court previously heard argument on Plaintiffs' motion to compel the deposition of Agent McGiboney and to record Agent McGiboney's use of State Farm's computer and software used for State Farm automobile insurance applications. (Doc. 207.) The Court denied Plaintiffs' motion to compel, but allowed Plaintiffs to revisit the issue if "the screenshots of State Farm's electronic insurance application proved inadequate" after taking depositions of the State Farm agents that sold automobile insurance policies to the Plaintiffs. (*Id.* at 2.) Plaintiffs claim that the screenshots prove inadequate.

The screenshots of the insurance application—in conjunction with the depositions taken of the State Farm agents that actually sold automobile policies—provide sufficient information about State Farm's automobile insurance sales process. Plaintiffs have failed to state any reasonable need to observe how a State Farm agent—especially one who never served any of the Plaintiffs—works through the computer interface. Plaintiffs have had the opportunity to depose the agents that sold them automobile insurance, which would provide the best source of information available to determine whether a special relationship existed. No legitimate purpose would be furthered by this additional request.

Appendix B

Plaintiffs' second motion to compel requests that the Court direct State Farm to answer five of Plaintiffs' discovery requests. (*See* Doc. 229 at 3-4.) The Court first notes that Plaintiffs' second motion to compel fails to comply with the Court's scheduling order. This Court ordered that any motion to compel must be filed within 10 days after the Rule 37 meet-and-confer occurred. (Doc. 93 at ¶ 7.) The moving party also must certify they advised their clients "that the Court may require the loser to pay the opposing party's associated fees and costs." (*Id.*) Plaintiffs failed to file their motion in a timely manner. Plaintiffs state that their meet-and-confer with Defendants occurred on March 16, 2022, but they did not file their motion until April 6, 2022. Plaintiffs also provide no certification that they have advised their clients of the fees or costs associated with this motion. The Court would deny Plaintiffs motion for failure to comply with the procedural requirements for a motion to compel alone. *See Sundquist v. Ashland, Inc.*, No. CV-13-75-GFBMM-RKS, 2014 U.S. Dist. LEXIS 192891, 2014 WL 12591681, at *1 (D. Mont. Oct. 9, 2014); L.R. 26.2 (c)(1), (2)(C)(ii).

Plaintiffs' motion also fails to demonstrate that any of the requests were not adequately answered by State Farm. Plaintiffs' Request for Production No. 1 asked State Farm to produce complete copies of all information for each of the named plaintiffs' from their State Farm agents' files, including insurance policies that predate the current insurance policies by 10 years. State Farm has provided Plaintiffs the information related to the named Plaintiffs insurance plans. Yet Plaintiffs continue to request more. Plaintiffs specifically seek copies of their

original "application" document. State Farm repeatedly has informed Plaintiffs that an original "application" document does not exist—the application process results in a series of separate data points indicating the totality of Plaintiffs insurance plan, all of which has been provided. Plaintiffs effectively ask State Farm to produce new documents that have never existed.

State Farm also has stated plainly that it does not create renewal application forms and that no UIM-related forms exist for the named Plaintiffs. This outcome makes sense in light of the fact that none of Plaintiffs elected UIM coverage. Plaintiffs complain essentially that documents that do not exist are not being produced. Plaintiffs have all of the information that State Farm is capable of providing related to this request. The Court cannot compel anything further.

Plaintiffs' Request for Production Nos. 4 and 6 requested the "manuals" related to the decision in *Moss v. State Farm Mut. Auto. Ins. Co.*, CV 99-124-GFDWM, 10 (D. Mont. March 21, 2001), and all revisions to those manuals. State Farm produced all training documents related to UIM coverage for the State of Montana from 2007 onward and any UIM reference materials from 2001 onward. State Farm's production is sufficient given that Plaintiffs' interactions with State Farm did not begin until 2013. State Farm's production also comports with the Court's prior orders. (*See* Doc. 97 at 73.)

Plaintiffs' Interrogatory No. 2 and Request for Production No. 21 seek information about potential class

members. Plaintiffs are not permitted to obtain a class list before certification. *See In re Williams-Sonoma, Inc.*, 947 F.3d 535, 539 (9th Cir. 2020). Plaintiffs do not seek class member information for any bearing that it might have on issues related to this case. Plaintiffs seek the class member information for precisely the reason it was not allowed by the Ninth Circuit in *Williams-Sonoma*—to find plaintiffs that may be able to adequately represent a class. (*See* Doc. 230 at 18 ("Other insureds may also be able to provide evidence of any and all factors relevant to the determination of a special relationship such as whether they believe their agent is a professional, gave them advice, and whether they relied on that advice.")). The Court bifurcated class discovery and discovery for the named Plaintiffs in light of the difficulty the Court predicted Plaintiffs would have to overcome in demonstrating a special relationship. (Doc. 92.)

Plaintiffs' Ninth Discovery Requests and Request for Admission No. 61 asked State Farm to admit that State Farm's Montana agents do not use written rejection forms. State Farm made that admission. Plaintiffs appear convinced that the forms do in fact exist, but provide no substantial reason for that belief. Once again, the Court cannot compel State Farm to produce documents that do not exist.

State Farm consistently has supplied Plaintiffs with relevant discovery, provided admissions when requested, and objected properly to Plaintiffs overly broad requests. Plaintiffs' further requests for discovery are improper and well-beyond the needs of this case to demonstrate that a

special relationship may have existed between Plaintiffs and their State Farm agents. The Court will thus deny Plaintiffs' motions to compel any further production. Discovery in this case is closed.

III. Plaintiffs' Motion for Leave to File a Second Amended Complaint (Doc. 260)

Plaintiffs seek leave to file a second amended Complaint. (Doc. 260.) Plaintiffs seek to add an additional Plaintiff, Carol Ramberg, to serve as a Fed. R. Civ. P. 23(b)(2) class representative; to substitute Randy Tarum for Danny Pedersen as personal representative for Robert Lindsay's estate; and to dismiss without prejudice Betty Radovich as a Plaintiff. (*Id.*) The deadline for the Parties to amend pleadings in this case was February 12, 2021. (Doc. 93 at 1.)

In situations where the deadline for amendments to the pleadings has passed, courts undertake a two-part inquiry to determine whether a party should be granted leave to amend. *See Butler v. Unified Life Ins. Co.*, 2018 U.S. Dist. LEXIS 237441, 2018 WL 10811782 at *3-4 (D. Mont. 2018). The Court first must determine whether "good cause" exists under Rule 16(b)(4). Fed. R. Civ. P. 16(b)(4); *see also Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000). The "good cause" standard under Rule 16(b) primarily relies on the diligence of the party seeking the amendment. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). Good cause to excuse noncompliance with the scheduling order exists only if the pretrial schedule "cannot reasonably be met despite the

diligence of the party seeking the extension." *Id.* (quoting Fed. R. Civ. P. 16 Advisory Committee's Notes (1983 Amendment)). If the party seeking the extension was not diligent in bringing the counterclaim, the inquiry should end. *Johnson*, 975 F.2d at 609.

If good cause exists the Court turns to the Rule 15(a) standard for amendment. *Butler*, 2018 U.S. Dist. LEXIS 237441, 2018 WL 10811782 at *3-4. The Ninth Circuit requires that courts observe five factors when evaluating whether good cause exists to grant a Rule 15 motion to amend pleadings: 1) bad faith; 2) undue delay; 3) prejudice to the opposing party; 4) futility of amendment; and 5) whether the moving party previously amended its complaint. *In re Western States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d 716, 737-38 (9th Cir. 2013). Courts generally consider prejudice the most important consideration. *Id.*

The Court determines that good cause to amend does not exist with respect to adding Carol Ramberg to their Complaint. Plaintiffs filed this motion fifteen months past the deadline to amend pleadings. Plaintiffs admit that the purpose of adding Carol Ramberg is to achieve standing necessary for injunctive relief. (*See* Doc. 261 at 4.) Plaintiffs should have been aware of the requirements of Fed. R. Civ. P. 23 at the onset of this litigation. Plaintiffs delayed adding a class representative for the purpose of class action standing under Rule 23(b)(2). Plaintiffs supply no reason to suggest that Plaintiffs had good cause to wait and no explanation why Plaintiffs could not have amended their pleadings by the Court-mandated

deadline. Plaintiffs failed to exercise diligence in seeking this amendment and so good cause does not exist under Fed. R. Civ. P. 16(b)(4).

The Court likewise finds that good cause does not exist to dismiss Betty Radovich without prejudice. Radovich participated in this case through discovery and only now asks to be removed from the case without prejudice. The Court notes that this motions comes after the filing of State Farm's motion for summary judgment. Plaintiffs state only that Radovich "concluded that her current circumstances are not beneficial to any class representation and has requested to terminate her involvement in this litigation." (Doc. 260 at 4.) Plaintiffs' explanation fails to demonstrate good cause to allow for dismissal without prejudice at this late stage. The Court will grant a motion to dismiss Radovich with prejudice should Plaintiffs file such a motion.

The Court will grant substitution of Randy Tarum for Danny Pedersen as personal representative for Robert Lindsay's estate. The Court will construe this request as a motion to substitute for a proper party. The Court will otherwise deny the motion for leave to file a second amended Complaint.

IV. State Farm's Motion for Summary Judgment (Doc. 214)

State Farm moves for summary judgment on all claims. (Doc. 214) State Farm argues that none of the named Plaintiffs establish facts that could support the

existence of a special relationship between Plaintiffs and the State Farm insurance agents. State Farm contends that, absent the duty to offer and explain UIM coverage, all of Plaintiffs' claims fail as a matter of law. The Court agrees for the reasons discussed below.

Legal Standard

Summary judgment is proper if the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of informing the Court of the basis for its motion and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (internal quotation marks omitted).

The movant satisfies its burden when the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Where the moving party has met its initial burden, the party opposing the motion "may not rest upon the mere allegations or denials of his pleading, but [. . .] must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 248 (internal quotation marks omitted).

Appendix B

Analysis

A. Plaintiffs' Negligence and Standard of Care Claims

The Court previously determined that Plaintiffs' negligence claims required demonstrating the existence of a special relationship. (Doc. 69 at 11-18.) "[W]hether a 'special relationship' exists between two parties such as would give rise to a fiduciary duty is a question of law, not fact, for the relationship and the duty are two sides of the same coin." *McCoy v. First Citizens Bank*, 2006 MT 307, 335 Mont. 1, 148 P.3d 677, 683 (Mont. 2006) (quoting *PTE v. United Banks*, 2006 MT 236, 333 Mont. 505, 143 P.3d 442, (Mont. 2006)); *see also Wolfe v. Flathead Electric Cooperative, Inc.*, 2017 WL 8184352, at *4 (Mont. Dist. Ct. Dec. 21, 2017).

Under most circumstances, an insurance agent owes an insured a duty of ordinary care under Montana common law. *Fillinger v. Northwestern Agency, Inc. of Great Falls*, 283 Mont. 71, 938 P.2d 1347, 1355-56 (Mont. 1997). Courts generally have limited this duty to an obligation to obtain the insurance coverage that the insured directs the agent to procure. *Bailey v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 119, 370 Mont. 73, 300 P.3d 1149, 1153 (Mont. 2013); *Monroe v. Cogswell Agency*, 2010 MT 134, 356 Mont. 417, 234 P.3d 79, 86 (Mont. 2010); *Gunderson v. Liberty Mutual Ins.*, 2020 MT 197N, 401 Mont. 555, 468 P.3d. 367, *6 (Mont. 2020). That is, the scope of the agent's duty depends on what the insured asks the agent to do. *Bailey*, 300 P.3d at 1154. This duty of ordinary care that an insurance agent owes to an insured does not include an absolute duty to

explain and offer optional UIM coverage, *see Monroe*, 234 P.3d at 86, but the facts of a particular case may cause a special relationship to arise. *See Moss v. State Farm Mut. Auto. Ins. Co.*, CV 99-124-GFDWM, 10 (D. Mont. March 21, 2001) (concluding that an insurance agent's duty may include an obligation to offer UIM coverage under certain circumstances).

The Court's decision in *Moss* demonstrates one instance when a special relationship might exist. In *Moss*, the Court analyzed Montana common law and determined that the duty of ordinary care that an insurance agent owes to an insured may include an obligation to offer UIM coverage when the insurance company's manuals directed its insurance agents to offer UIM coverage to prospective insureds, but the insurance agent failed to offer that coverage. *Id.* at 10-11. The Court ruled that any failure by the insurance agent to follow the company manual represented evidence that the jury could consider in determining whether the insurance agent had breached her duty. *Id.*

Plaintiffs argue here that State Farm's policies recommend that its agents offer and explain UIM coverage. (Doc. 239 at 7-10.) The Court finds no support for this argument. The State Farm policy document that Plaintiffs cite plainly states that insurers are not required to offer UIM coverage in Montana. (*See* Doc. 230-5 at 19.) Plaintiffs fail to supply any other argument that might support the existence of a special relationship that would require a State Farm Agent to explain and offer UIM coverage.

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Plaintiffs present one alternative argument to a special relationship requiring that State Farm's agents explain and offer UIM coverage. In some instances, State Farm's agents voluntarily discuss UIM coverage with their clients. Plaintiffs argue that, by explaining what UIM coverage is and making it available, State Farm agents have voluntarily assumed a duty of care under an "affirmative action" theory. (Doc. 249 at 11.)

Plaintiffs misinterpret the relevant case law for the assumption of a special duty. Plaintiffs rely on *Maryland Casualty Co. v. Asbestos Claims Court*, 2020 MT 70, 399 Mont. 279, 460 P.3d 882 (Mont. 2020), to support their assertion that a special duty exists in this case. (*See* Doc. 249 at 12-14.) In *Maryland Casualty*, a vermiculite mining company in Libby, Montana knowingly caused its workers to be exposed to asbestos. 460 P.3d at 288-90. The Montana Supreme Court was presented with the question of whether the mining company's worker's compensation insurer, Maryland Casualty, had a common law duty to warn the mine workers of the asbestos health risks upon becoming aware of those risks. *Id.* at 296.

The Montana Supreme Court reasoned that the vermiculite mining company had a general common law duty to provide a reasonably safe workplace and instrumentalities for employees regarding reasonably foreseeable risks of harm in the workplace. *Id.* at 315. This obligation includes the duty to warn of unsafe conditions. *Id.* The Montana Supreme Court then reasoned that, because Maryland Casualty had assumed significant affirmative risk management services related to the

mine's operations, Maryland Casualty also had assumed the mining company's duty to warn workers of unsafe conditions. *Id.* at 315-16.

Maryland Casualty does not support Plaintiffs argument, but, in fact, demonstrates the weaknesses of this case. The Court notes at the outset of this analysis that, unlike *Maryland Casualty*, no third-party relationship exists in which State Farm assumed a duty to Plaintiffs that originally fell upon another party. Application of *Maryland Casualty* would be only partially apposite. Taking the principle of what constitutes an assumption resulting in a special duty of care from *Maryland Casualty*, it is plain that Plaintiffs fail to demonstrate any such relationship.

The Montana Supreme Court began its analysis in *Maryland Casualty* by noting that the legislative purpose of workers' compensation insurance is to "protect and benefit workers." *Id.* at 315-16. Despite the legislative mandate for workers' compensation, the Montana Supreme Court noted that workers compensation insurers generally do not provide risk management activities and programs for the direct benefit of third-party workers. *Id.* Where insurers chose to participate in such programs, however, the "mere undertaking of affirmative workplace risk management programs and activities incident to providing workers' compensation insurance" would alone be insufficient to "establish an act or intent to assume all or part of an employer's independent duty to provide workers with a reasonable safe working environment." *Id.* at 316.

Appendix B

The Montana Supreme Court established plainly that an insurer assuming a special duty of care presented a high bar. The Montana Supreme Court determined that Maryland Casualty had assumed part of the mining company's duty of care only because Maryland Casualty "was exclusively providing the only employee-specific, asbestos-disease-related professional medical evaluations, recommendations for more frequent radiological monitoring, and recommendations as to whether and under what circumstances those employees could continue to safely work." *Id.* at 318.

This case provides a stark contrast to *Maryland Casualty*. Unlike *Maryland Casualty*, no duty of a third-party exists to assume during a standard insurance purchase. The Montana Supreme Court has made clear that the insurer possesses the duty to procure the insurance requested by the client. *Bailey*, 300 P.3d at 1153; *Monroe*, 234 P.3d at 86; *Gunderson*, 468 P.3d. at *6. It is difficult to imagine what heightened duty of care Plaintiffs believe State Farm's agents assume when they choose to voluntarily explain and offer UIM coverage. State Farm's agents that explain UIM coverage are doing exactly what Plaintiffs complain should be mandatory. There appears to be no reasonable duty of care left for State Farm to assume. Perhaps Plaintiffs want the Court to require that State Farm's clients knowingly waive UIM coverage, but the Montana Supreme Court has made clear that the duty of an insurer does not extend to those lengths. *Bailey*, 300 P.3d. at 1153.

The Court notes that the Montana legislature has not determined that UIM coverage should be required, as it

has done with UM coverage. Mont. Code. Ann. § 33-23-201. The Court will not fault State Farm for complying with Montana's insurance statutes, absent an additional requirement imposed by the Montana Supreme Court. The Court determines that no special relationship or assumed duty of care exists between the Plaintiffs and their State Farm Agents. Absent a duty of care, the negligence claims must be dismissed. *Monroe*, 234 P.3d at 86 (noting Montana's status as a procurement state).

B. Plaintiffs' Deceit and Bad Faith Claims

Plaintiffs' additional claims also fail. Plaintiffs premise their deceit claim on the failure of State Farm to advise its insureds that their policies lack UIM coverage. (Doc. 249 at 24-25.) "A deceit, within the meaning of subsection (1), is either . . . the suppression of a fact by one who is bound to disclose it or who gives information of other facts that are likely to mislead for want of communication of that fact[.]" Mont. Code Ann. § 27-1-712(2)(c). As established above, State Farm had no responsibility to advise its insureds about whether their individual polices lacked UIM coverage. As a matter of law, State Farm did not suppress any information it was bound to disclose.

Plaintiffs' Bad Faith claim fails for the same reason. Montana common law imposes liability for bad faith when the concealment of material facts are "material to the subject of the trust or the duty of the fiduciary." *Gibson v. W. Fire Ins. Co.*, 210 Mont. 267, 682 P.2d 725, 741 (Mont. 1984). State Farm's agents did not develop a special relationship with Plaintiffs and, therefore, had no duty to "offer" and "explain" UIM coverage. Additionally,

no facts demonstrate that State Farm made any attempt to conceal the existence of UIM coverage or whether Plaintiffs' policies included UIM coverage. State Farm acted reasonably with respect to Plaintiffs' auto insurance policies. *See Blome v. First Nat'l Bank of Miles City*, 238 Mont. 181, 776 P.2d 525, 529-530 (Mont. 1989). Plaintiffs' deceit and bad faith claims fail.

Absent any remaining substantive claims, Plaintiffs' punitive damages claims fail as a matter of law. *See Feller v. First Interstate Bancsystem, Inc.*, 2013 MT 90, 369 Mont. 444, 299 P.3d 338, 344 (Mont. 2013);

V. Plaintiffs motion for class certification (Doc. 262)

In light of the Court's ruling on summary judgment against all named Plaintiffs, Plaintiffs motion for class certification (Doc. 262) must be denied as moot. The Court notes, however, that Plaintiffs fail to adequately demonstrate the Rule 23(a)(2) requirement for commonality. A common question "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir. 2022) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)). Plaintiffs' motion fails to demonstrate that the special relationship inquiry could be answered in one stroke. Whether a special relationship between an automobile insurer and its insured exists poses an individualized inquiry in these circumstances.

For the reasons set forth above, it is hereby **ORDERED** that:

1. Plaintiffs' Motion to Certify Questions of Substantive Law (Doc. 211) is **DENIED;**

2. Plaintiffs' Motions to Compel (Docs. 227 and 229) are **DENIED;**

3. Plaintiffs' Motion for Leave to File a Second Amended Complaint (Doc. 260) is **DENIED, IN PART, AND GRANTED, IN PART**. Plaintiffs' motion is denied in all respects except to allow substitution of Randy Tarum for Danny Pedersen as personal representative for Robert Lindsay's estate. In that respect, Plaintiffs' motion is construed as a motion to substitute for a proper party;

4. State Farm's motion for Summary Judgment (Doc. 214) is **GRANTED**; and

5. Plaintiffs' Motion to Certify Class (Doc. 262) is **DENIED AS MOOT**.

DATED this 27th day of June, 2022.

6. The Clerk of Court is directed to close this case.

/s/ Brian Morris
Brian Morris, Chief District Judge
United States District Court

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION, FILED JUNE 2, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CV-19-29-GF-BMM

DANNY PEDERSEN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT L. LINDSAY; BETTY L. RADOVICH; WANDA WOODWICK; AND ROSALIE KIERNAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF REBECCA NICHOLSON; INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Defendant.

ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS AND DENYING DEFENDANT'S MOTION TO CERTIFY QUESTIONS OF LAW TO THE MONTANA SUPREME COURT

Appendix C

INTRODUCTION

Plaintiffs Betty Radovich and Wanda Woodwick and decedents Robert Lindsay and Rebecca Nicholson (collectively, "Plaintiffs") sustained injuries in separate automobile accidents while insured under automobile insurance policies issued by State Farm Mutual Automobile Insurance Company ("State Farm"). The negligent party in each accident possessed insufficient liability coverage to compensate Plaintiffs fully for their damages. Plaintiffs' automobile insurance policies included liability coverage and uninsured motorist (UM) coverage, but did not include underinsured motorist (UIM) coverage.

Plaintiffs allege that their State Farm insurance agents acted negligently by failing to explain and offer UIM coverage to them. (Doc. 44.) Plaintiffs claim that they would have purchased UIM coverage if their insurance agents had offered it. Plaintiffs contend that their insurance agents breached their common law duty of reasonable care when they failed to explain and offer UIM coverage. Plaintiffs have asserted claims against State Farm for declaratory relief, negligence, professional negligence, deceit, common law bad faith, and actual malice. (Doc. 44 at 27-39.)

State Farm has moved to dismiss all of Plaintiffs' claims under Fed. R. Civ. P. 12(b)(6). (Doc. 11.) State Farm argues that the Court should dismiss Plaintiffs' claims because the insurance agents had no legal obligation to explain and offer UIM coverage to Plaintiffs. (Doc. 12.) The Court referred State Farm's motion to United States

Magistrate Judge Johnston under 28 U.S.C. § 636(b)(1)(B) for findings and recommendations. (Doc. 8.)

Judge Johnston issued his Findings and Recommendations on March 18, 2020. (Doc. 52.) Judge Johnston determined that an insured, in some situations, may have a special relationship with his or her insurance agent that would give rise to an obligation of the insurance agent to explain and offer UIM coverage. (Doc. 52 at 11-12.) Judge Johnston accordingly recommended that the Court deny State Farm's Motion to Dismiss (Doc. 11). (Doc. 52 at 12.)

BACKGROUND

Plaintiffs allege in their Amended Complaint (Doc. 44) that their State Farm insurance agents had a duty to explain and offer UIM coverage because their State Farm agents had "encouraged [them] to trust, value and rely on their specialized insurance knowledge" and they "relied on [their] agent[s] for advice on which coverages were necessary to protect [them] from catastrophic losses and damages. (Doc. 44 at ¶¶ 56, 57, 65, 66, 75, 76, 84 and 85.) State Farm argued in support of its motion to dismiss that Plaintiffs have failed to allege facts that could "give rise to [a] purported duty to offer and explain UIM coverage." (Doc. 47 at 12.)

Judge Johnston understood that Plaintiffs are alleging that their State Farm agents had a duty to explain and offer UIM coverage because they shared a special relationship, even though Plaintiffs did not use the words

"special relationship." (Doc. 52 at 6.) Plaintiffs argue State Farm agents held themselves out as experts in the field of automobile insurance and encouraged Plaintiffs to trust, value, and rely on that expertise. Plaintiffs assert that they did rely, in fact, on their State Farm agent's expertise regarding the coverages that they needed. (Doc. 44 at ¶¶ 56, 57, 65, 66, 75, 76, 84 and 85.)

Judge Johnston explained that whether an insurance agent is obligated to explain and offer UIM coverage when he or she shares a special relationship with an insured presents an issue of first impression in Montana. (Doc. 52 at 6.) A federal court sitting in diversity in Montana must predict how the Montana Supreme Court would decide an issue of first impression. *See Medical Laboratory Mgmt. Consultants, Inc.*, 306 F.3d at 812. The federal court may look to Montana law and to well-reasoned decisions from other jurisdictions when considering an issue of first impression. *Burlington Ins. Co. v. Oceanic Design & Construction, Inc.*, 383 F.3d 940, 944 (9th Cir. 2004).

Judge Johnston noted that an insurance agent owes an insured a duty of ordinary care under Montana common law. (Doc. 52 at 7-8); *Fillinger v. Northwestern Agency, Inc. of Great Falls*, 283 Mont. 71, 938 P.2d 1347, 1355-56 (Mont. 1997). Courts generally have limited this duty to an obligation to obtain the insurance coverage that the insured directs the agent to procure. *Bailey v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 119, 370 Mont. 73, 300 P.3d 1149, 1153 (Mont. 2013); *Monroe v. Cogswell Agency*, 2010 MT 134, 356 Mont. 417, 234 P.3d 79, 86 (Mont. 2010). That is, the scope of the agent's duty depends on what the

insured asks the agent to do. *Bailey*, 300 P.3d at 1154. This duty of ordinary care that an insurance agent owes to an insured does not include an absolute duty to explain and offer optional UIM coverage. *See Monroe*, 234 P.3d at 86.

Judge Johnston reasoned further that an obligation to explain and offer UIM coverage could arise based on the facts presented in a particular case, even though the duty of ordinary care that an insurer owes to an insured does not include an absolute obligation to explain and offer UIM coverage. (Doc. 52 at 8); *Moss v. State Farm Mut. Auto. Ins. Co.*, CV 99-124-GF-DWM, 10 (D. Mont. March 21, 2001) (concluding that an insurance agent's duty may include an obligation to offer UIM coverage under certain circumstances). Courts from other jurisdictions generally agree that an insurance agent's duty of ordinary care may include an obligation to explain and offer optional coverages if the insurance agent engaged in a special relationship with the insured that went beyond the standard insurer-insured relationship. *See, e.g., Sintros v. Hamon*, 148 N.H. 478, 810 A.2d 553, 555 (N.H. 2002) (collecting cases); *Tiara Condominium Ass'n, Inc. v. Marsh, USA, Inc.*, 991 F. Supp. 2d 1271, 1280-81 (S.D. Fla. 2014); *Franklin County Commission v. Madden*, 2019 U.S. Dist. LEXIS 108535, 2019 WL 2716310 *3 (N.D. Ala. June 28, 2019); *Somnus Mattress Corp. v. Hilson*, 280 So. 3d 373, 384-85 (Ala. 2018); *Wilson Works, Inc. v. Great American Insurance Group*, 2012 U.S. Dist. LEXIS 198005, 2012 WL 12960778 * 4 (N.D. W.V. June 28, 2012); *Nelson v. Davidson*, 155 Wis. 2d 674, 456 N.W.2d 343, 347 (Wis. 1990). Whether a special relationship exists in

a particular case depends on the facts and circumstances regarding the insurer-insured relationship. *Sintros*, 810 A.2d at 556. Judge Johnston expressed confidence that the Montana Supreme Court would agree that an obligation to explain and offer optional insurance coverages could arise when an insurance agent and his client share a special relationship. (Doc. 52 at 11.)

Judge Johnston discussed that a court may find a special relationship triggering an enhanced obligation to advise an insured about optional coverages in various situations, including where the agent held himself out as having expertise in the field of insurance being sought by the insured, and the insured relied on the agent's representations regarding the coverage needed. (Doc. 52 at 10 (citing *Sintros*, 810 A.2d at 556; *Marsh*, 991 F. Supp. 2d at 1281).) Judge Johnston took as true all of the allegations in Plaintiffs' Amended Complaint and concluded that Plaintiffs alleged sufficiently a special relationship that could give rise to an obligation to explain and offer UIM coverage. (Doc. 52 at 10-11.) Plaintiffs allege that their State Farm agents "encouraged [them] to trust, value and rely on their specialized knowledge," and that they "relied on [their] agent[s] for advise" regarding their insurance coverage needs. (Doc. 44 at ¶¶ 56, 57, 65, 66, 75, 76, 84, and 85.) Judge Johnston noted that facts developed during discovery would reveal whether each Plaintiff had a special relationship with his or her State Farm agent. (Doc. 52 at 12.) He recommended that the Court deny State Farm's motion to dismiss. (*Id.*)

Appendix C

DISCUSSION

State Farm has filed an objection to Judge Johnston's Findings and Recommendations. (Doc. 54.) Plaintiffs have filed a Motion to Modify Judge Johnston's Findings and Recommendations. (Doc. 55.) State Farm also has filed a Motion to Certify Questions of Law to the Montana Supreme Court. (Doc. 57.) Plaintiffs oppose State Farm's motion to certify. (Doc. 63.) The Court heard argument on May 20, 2020, and will now address, in turn, the parties' arguments about Judge Johnston's Findings and Recommendations and State Farm's Motion to Certify.

I. Judge Johnston's Findings and Recommendations

a. Applicable Law

Plaintiffs have invoked this Court's diversity jurisdiction under 28 U.S.C. § 1332. The Court will apply Montana substantive law and federal procedural law. *See Medical Laboratory Mgmt. Consultants v. American Broadcasting Companies, Inc.*, 306 F.3d 806, 812 (9th Cir. 2002). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is appropriate under Rule 12(b)(6) if the complaint asserts claims that are not cognizable as a matter of law, or if the complaint lacks sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinela Hospital Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

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To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege sufficient factual matter "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). A claim appears plausible on its face when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Factual allegations that permit the court only to infer "the mere possibility of misconduct" fall short. *Id.* at 679. When evaluating a Rule 12(b)(6) motion, the court must accept as true all allegations of material fact contained in the complaint. *Johnson v. Lucent Technologies Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011). The court is not required, however, to accept conclusory allegations as true. *Id.*

The Court reviews de novo those Findings and Recommendations to which a party timely objected. 28 U.S.C. § 636(b)(1). The Court reviews for clear error the portions of the Findings and Recommendations to which the party did not specifically object. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

b. State Farm's Objections

State Farm raises four specific objections to Judge Johnston's Findings and Recommendations. (Doc. 54.) The Court addresses the four specific objections. State Farm first argues that Plaintiffs did not raise the question of whether a special relationship gives rise to a heightened

duty. As a result, State Farm contends that the Court should not consider the issue. (Doc. 54 at 11.)

State Farm next asserts that the special relationship exception is inconsistent with Montana law. (Doc. 54 at 12.) State Farm asserts that Montana courts have refused to create a heightened duty of care based on a special relationship and that no statutory or public policy justification exists for such a rule. (Doc. 54 at 12-21.) Third, State Farm argues that, even if the Court adopts the special relationship test, Plaintiffs have failed to plead facts that satisfy the test. (Doc. 54 at 21-25.) State Farm finally argues that the Findings and Recommendations failed to rule on State Farm's arguments regarding its motion to dismiss Plaintiffs' other claims. (Doc. 54 at 25-28.) State Farm had offered separate bases for the dismissal of Plaintiffs' claims one, three, four, and five. (Doc. 54 at 26 (citing Docs. 12 & 47).)

c. Plaintiffs' Motion to Modify

Plaintiffs have filed a motion to modify Judge Johnston's Findings and Recommendations. (Doc. 55.) Plaintiffs assert that Judge Johnston acted prematurely in defining the scope of State Farm's duty of care. (Doc. 56 at 9.) Judge Johnston concluded that an insurance agent does not possess an absolute obligation to explain and offer UIM coverage, but that an obligation may arise based on the facts presented in a particular case. (Doc. 52 at 8.) Plaintiffs seek a ruling that State Farm agents possess an absolute obligation to explain and offer optional UIM coverage. (Doc. 56 at 9.) Accordingly, Plaintiffs assert that

the Court should defer ruling on the scope of State Farm's duty until the parties have presented expert testimony on the record. (Doc. 56 at 9.)

d. Analysis

Judge Johnston analyzed Montana insurance law and case law from other jurisdictions and concluded that an insurance agent's duty of ordinary care may include an obligation to explain and offer optional UIM coverage if the insurance agent and insured had a special relationship that went beyond the standard insurer-insured relationship. (Doc. 52 at 9-12.) Both parties disagree with Judge Johnston's conclusion, but for different reasons. State Farm asserts that Judge Johnston should not have considered whether a special relationship gives rise to a duty because Plaintiffs did not raise the question. (Doc. 54 at 11.) Plaintiffs respond that Judge Johnston acted prematurely because they plan to present expert testimony to establish that an insurance agent's duty of ordinary care includes the obligation to offer and explain UIM coverage to existing and new customers, regardless of the relationship between the insurer and insured. (Doc. 62 at 13-14.) State Farm further asserts that the special relationship exception conflicts with Montana law. (Doc. 54 at 12.)

The Court has reviewed de novo Judge Johnston's analysis and conclusion that an insurance agent's duty of ordinary care may include an obligation to explain and offer optional UIM coverage if the insurance agent and insured had a special relationship. *See* 28 U.S.C. § 636(b)(1). The

Court agrees with Judge Johnston. Montana statutory law requires an insurer to provide an insured with UM coverage unless the insured specifically rejects it. Mont. Code Ann. § 33-23-201. No Montana statute requires an insurer to offer optional UIM coverage to the insured. *See Farmers Alliance Mutual Insurance Co. v. Holeman*, 278 Mont. 274, 924 P.2d 1315, 1318-19 (Mont. 1996); *Grier v. Nationwide Mutual Insurance Co.*, 248 Mont. 457, 812 P.2d 347, 349 (Mont. 1991).

An insurance agent owes an insured a duty of ordinary care under Montana common law. *Fillinger v. Northwestern Agency, Inc. of Great Falls*, 283 Mont. 71, 938 P.2d 1347, 1355-56 (Mont. 1997). This duty of ordinary care generally involves a duty to obtain the insurance coverage that the insured directs the agent to procure. *Bailey v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 119, 370 Mont. 73, 300 P.3d 1149, 1153 (Mont. 2013); *Monroe v. Cogswell Agency*, 2010 MT 134, 356 Mont. 417, 234 P.3d 79, 86 (Mont. 2010). Thus, the scope of the agent's duty is defined by what the insured asks the agent to do. *Bailey*, 300 P.3d at 1154; *Dulaney v. State Farm Fire and Cas. Ins. Co.*, 2014 MT 127, 375 Mont. 117, 324 P.3d 1211, 1215-16 (Mont. 2014). When it comes to automobile insurance, an insurance agent does not owe an absolute duty to explain and offer optional UIM coverage. *See Monroe*, 234 P.3d 86.

The Montana Supreme Court never has analyzed directly whether an insurance agent possesses a duty to explain and offer optional UIM coverage. The Montana Supreme Court has recognized that certain situations exist where an insurance agent may have an obligation to

explain or offer UIM coverage. In *Bailey v. State Farm*, 300 P.3d at 1151, the Baileys moved from Oregon, where they had been State Farm customers for many years, to Montana. The couple went to a State Farm Agency in Cut Bank, Montana, where an insurance agent assisted them. The Baileys remembered presenting their Oregon State Farm insurance cards to the agent and requesting that the agent transfer to Montana the same coverage that they had carried in Oregon. *Id.* The agent did not remember her specific conversation with the Baileys, but noted that it was her habit and practice to review UIM coverage with new customers. *Id.*

The Montana automobile insurance policy that the agent procured for the Baileys did not match their Oregon policy. *Id.* at 1152. Notably, the Baileys' Montana policy did not include UIM coverage, while their Oregon policy had included mandatory UIM coverage under Oregon law with limits of $300,000 per person, or $500,000 per occurrence. The Baileys contended that State Farm acted negligently in failing to obtain UIM coverage for them. *Id.* Montana law, unlike Oregon, does not mandate UIM coverage. The Montana Supreme Court reviewed an Idaho Supreme Court decision that concluded the scope of an insurance company's duty depends on what the insured asked the agent to provide. *Id.* at 1154 (citing *Featherston v. Allstate Ins. Co.*, 125 Idaho 840, 875 P.2d 937, 940 (Idaho 1994)). The Montana Supreme Court determined that genuine issues of material fact existed as to whether State Farm acted negligently in transferring the Baileys' Oregon policy to Montana without having obtained UIM coverage. *Id.* at 1154-55.

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The Montana Supreme Court decided *Dulaney v. State Farm*, 324 P.3d at 1212, one year after *Bailey*. Deborah Dulaney operated a floral shop that she had insured under a State Farm insurance policy. *Dulaney*, 324 P.3d at 1212. Dulaney contended that when she was selecting her coverage she told her State Farm insurance agent that she had "absolutely no idea" what the property's value was and that she wanted the agent to view the property himself. *Id.* The agent contended that Dulaney had told him that her former business property limit was sufficient. *Id.* at 1213. A fire destroyed Dulaney's new floral shop. *Id.*

Dulaney brought a negligence suit against State Farm in which she alleged that the agent had a duty to ascertain the value of Dulaney's business property and inventory in order to make sure that her insurance policy adequately would cover her needs. *Id.* at 1214. The Montana Supreme Court determined that Dulaney needed to present expert testimony to identify the standard of care that binds an insurance agent. *Id.* The court distinguished Dulaney's circumstances from those in *Fillinger*, 938 P.2d at 1355-56, where the court had determined that an insurance agent owes an insured a duty of ordinary care under Montana common law. *Dulaney*, 324 P.3d at 1215.

Fillinger presented the question of whether an insurance agent provided the insureds with the coverage that they requested. Thus, the plaintiff in *Fillinger* did not need to present expert testimony to establish the standard of care because "the determination of whether an insurance agent reasonably fulfilled his or her duty

and procured the coverage requested is easily within the common experience and knowledge of lay jurors." *Fillinger*, 938 P.2d at 1355. In *Dulaney*, by contrast, Dulaney's damages allegedly resulted from the agent's failure to procure a policy that adequately covered her business assets, rather than from the agent's failure to procure a specific type of policy. *Dulaney*, 324 P.3d at 1215. The question of duty in *Dulaney* went beyond that articulated in *Fillinger* and required expert testimony to establish the relevant factors that an insurance agent should consider when procuring insurance coverage in certain circumstances. *Id.*

Judge Johnston's conclusion that the Montana Supreme Court would conclude that a special relationship between an insurance agent and an insured could give rise to a duty to explain and offer UIM coverage comports with *Fillinger, Bailey, Dulaney*. (*See* Doc. 52 at 11.) The Montana Supreme Court has emphasized repeatedly that the duty an insurance agent owes to an insured proves fact-dependent—that is, an agent's duty in one situation may differ from an agent's duty in another situation. *See, e.g., Dulaney*, 324 P.3d at 1215; *Bailey*, 300 P.3d at 1151-55; *Fillinger*, 938 P.2d at 1355-56. On the most basic level, an agent has the duty to obtain for an insured the insurance coverage that the insured requests. *Fillinger*, 938 P.2d at 1355-56. An agent's duty changes from insured to insured based on the coverage requested. The inquiry becomes more complicated when additional factors get added, such as a business owner's general request for coverage that adequately will cover her business assets. *See Dulaney*, 324 P.3d at 1215.

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The Montana Supreme Court also has recognized that the relationship between an insured and an insurer represents an important factor to consider when examining an insured's duty to read an insurance contract. For instance, the court recognized in *Robertus v. Farmers Union Mut. Ins. Co.*, 2008 MT 207, 344 Mont. 157, 189 P.3d 582 (Mont. 2008), that an insured's duty to read an insurance policy does not prove absolute. Instead, "the extent of an insured's obligation to read the policy depends upon what is reasonable under the facts and circumstances of each case." *Robertus*, 189 P.3d at 591 (quoting *Thomas v. Nw. Nat. Ins. Co.*, 1998 MT 343, 292 Mont. 357, 973 P.2d 804, 808 (Mont. 1998)). To use a special relationship test to determine when an insurance agent owes an insured the duty to offer an explain UIM coverage—based on the facts and circumstances of each case—comports with the Montana Supreme Court's fact-intensive duty analysis in the insurance context. *See, e.g., Dulaney*, 324 P.3d at 1215; *Bailey*, 300 P.3d at 1151-55; *Fillinger*, 938 P.2d at 1355-56.

This Court's decision in *Moss* further supports Judge Johnston's determination. This Court analyzed Montana common law and determined that the duty of ordinary care that an insurance agent owes to an insured may include an obligation to offer UIM coverage under certain circumstances. *Moss* at 10. State Farm's company manuals in *Moss* directed its insurance agents to offer UIM coverage to prospective insureds. The insurance agent failed to offer UIM coverage to the client. *Moss* at 10-11. This Court ruled that the insurance agent's failure to follow the company manual represented evidence that the jury could consider in determining whether the insurance agent had breached her duty of ordinary care. *Id.*

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In formulating the special relationship inquiry, Judge Johnston relied appropriately on case law from other jurisdictions that similarly require an insurer to secure the insurance that an insured requests. For example, the district court noted in *Marsh* that Florida law long has recognized that an insurance broker owes an obligation to an insured to secure coverage at the client's direction. *Marsh*, 991 F. Supp. 2d at 1280, *compare Fillinger*, 938 P.2d at 1355-56. The district court went on to determine that an insurer has a duty to advise the insured on an appropriate level of coverage, or affirmatively to recommend specific types and amounts of coverage, when an insurer encourages and engages in a special relationship with his client. *Marsh*, 991 F. Supp. 2d at 1281. Montana law recognizes a similar ordinary standard of care, and it makes sense to similarly expand an insurance agent's duty to an insured when a special relationship exists.

Because the special relationship test is rooted in legitimate legal analysis from other courts and because the special relationship test comports with Montana Supreme Court precedent, State Farm's first and second objections fail, as does Plaintiffs' motion to modify. Judge Johnston was not bound by the parties' proposed analyses—he remained free to conduct his own research and formulate a legal analysis that he believed best set forth the law in this area.

State Farm's third objection, that Plaintiffs have not pled facts to indicate that they had a special relationship with their State Farm agents, also fails. (*See* Doc. 54 at 21.) Judge Johnston set forth the special relationship

analysis from *Sintros*, 810 A.2d at 556, and concluded that Plaintiffs had alleged sufficiently that the second type of special relationship existed: that the "agent held himself out as having experience in the field of insurance being sought by the insured, and the insured relied on the agent's representations regarding the coverage needed." (Doc. 52 at 10-11 (citing *Sintros*, 810 A.2d at 556).)

State Farm asserts that Plaintiffs failed to allege specific facts because *Sintros* made clear that "an insured must do more than allege facts showing the standard insurer-insured relationship and further confirmed that the alleged existence of a special relationship still 'depends upon the particular relationship between the parties and is determined on a case-by-case basis.'" (Doc. 54 at 21-22 (quoting *Sintros*, 810 A.2d at 556).) *Sintros* also requires the insured to demonstrate that he or she justifiability relied upon that relationship. (Doc. 54 at 22.) The Supreme Court of New Hampshire determined in *Sintros* that no duty existed when the Plaintiffs had not set forth facts establishing a special relationship at summary judgment. *Sintros*, 810 A.2d at 557.

This dispute comes to the Court at the motion to dismiss phase. Plaintiffs' claims may proceed as long as they have alleged sufficient factual matter "to state a claim to relief that is plausible on its face." *See Iqbal*, 556 U.S. at 678-79. Plaintiffs have pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See id.* at 678. Plaintiffs have alleged that their State Farm agents "encouraged [them] to trust, value and rely on their

specialized knowledge," and that they "relied on [their] agent[s] for advise" regarding their insurance coverage needs. (Doc. 44 at ¶¶ 56, 57, 65, 66, 75, 76, 84, and 85.) These allegations prove sufficient to survive State Farm's motion to dismiss. The parties will have the opportunity during discovery to develop the factual record.

State Farm's fourth objection deals with State Farm's motions to dismiss Counts One, Three, Four, and Five. (Doc. 54 at 25 (citing Docs. 12 & 47).) Count One alleges a claim for declaratory judgment; Count Three alleges a claim for breach of the professional standard of care; Count Four alleges a claim for deceit; and Count Five alleges a claim for common law bad faith. (Doc. 44 at 27-38.) State Farm faults Judge Johnston for not addressing its motions to dismiss those counts in addition to its motion to dismiss, Plaintiffs' general negligence claim in Count Two. (Doc. 54 at 25.)

Regarding Count One, the parties dispute whether declaratory judgment is appropriate in this case where the Court is not determining rights under a contract, statute, or other writing. (*Compare* State Farm's Doc. 54 at 26 (citing Mont. Code. Ann. § 27-8-202 (who may obtain declaratory judgment); *Tarlton v. Kaufman*, 2008 MT 462, 348 Mont. 178, 199 P.3d 263, 271 (Mont. 2008) (reciting the purpose of declaratory relief: to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations"), *with* Plaintiffs' Doc. 62 at 19 (stating that declaratory relief remains available to determine rights when any justiciable controversy exists but not citing any negligence cases in support of that

contention).) State Farm also asserts that declaratory relief is not available where disputed material facts exist. (Doc. 54 at 26 (citing *Teeter v. Mid-Cent. Ins. Co.*, 2017 MT 292, 389 Mont. 407, 406 P.3d 464, 468 (Mont. 2017)).)

The Court agrees with State Farm's assessment of Plaintiffs' declaratory judgment claim. Plaintiffs clearly stated during argument that their claims arise in tort, not contract, law. *See also Tarlton*, 199 P.3d at 271. Even if this were an appropriate case for declaratory judgment, the Court remains unwilling to declare that an insurance agent always possesses a duty to offer UIM coverage. The Court will dismiss Count One.

Plaintiffs allege in Count Three that State Farm breached the professional standard of care that insurance agents owe to insureds. (Doc. 44 at 32.) This claim follows the general negligence claim in Count Two. (*See Id.* at 29.) Four elements must be present to support a negligence claim: duty, breach of that duty, causation, and damages. *Massee v. Thompson*, 2004 MT 121, 321 Mont. 210, 90 P.3d 394, 400 (Mont. 2004). State Farm asserts that Count Three is not an appropriate stand-alone claim under Montana law. (Doc. 54 at 26.) The Court agrees. Plaintiffs allege in Count Two that State Farm acted negligently. Count Two therefore subsumes the allegation in Count Three of an alleged breach of a specific duty. The Court will dismiss Count Three. *See M.M. v. Lafayette Sch. Dist.*, 681 F.3d 1082, 1091 (9th Cir. 2012) (noting that district courts have the power to dismiss duplicative claims).

Plaintiffs allege deceit in Count Four. (Doc. 44 at 35.) Deceit involves either "the suppression of a fact by one who

is bound to disclose it or who gives information of other facts that are likely to mislead for want of communication of that fact." Mont. Code Ann. § 27-1-712(2)(c). Plaintiffs allege that State Farm deceived Plaintiffs by failing to inform them of the fact that their polices did not cover UIM coverage. (Doc. 44 at 35.) "Deceit is essentially grounded in fraud therefore, Rule 9(b)'s heightened pleading standard apples." *Pfau v. Mortenson*, 858 F. Supp. 2d 1150 (D. Mont. 2012). State Farm argues that Plaintiffs have failed to allege the "who, what, where, or how," relating to their deceit claim. (Doc. 54 at 27.)

Plaintiffs have alleged sufficient facts to withstand State Farm's motion to dismiss as it relates to them specifically. Plaintiffs state that their State Farm agents failed to inform them that their polices did not carry UIM coverage and that State Farm agents had a duty to offer and explain UIM coverage. (Doc. 44 at 35-36.) As discussed above, the duty to offer and explain UIM coverage may arise in some situations where a special relationship exists. Plaintiffs' attempt to assert a universal duty to offer UIM coverage on behalf of a class fails, however, due to the fact-intensive nature of the duty inquiry. Accordingly, Plaintiffs' deceit claim as it relates to "those similarly situated" also fails. The Court will not dismiss Count Four as it relates to Plaintiffs specifically.

In Count Five, Plaintiffs allege that State Farm breached the common law duty not to act in bad faith. (Doc. 44 at 37.) Plaintiffs claim that State Farm remains subject to liability for bad faith because its agents have concealed the absence of UIM coverage from their insureds' personal automobile policies. (*Id.*) State Farm asserts that Plaintiffs

offer only "threadbare recitals" without alleging any facts to show that State Farm acted in bad faith. (Doc. 54 at 28 (quoting *Iqbal*, 556 U.S. at 678).) The Court disagrees. Plaintiffs have alleged that their personal automobile insurance policies issued by State Farm lack UIM coverage and lack written rejections of UIM coverage by the insureds. (Doc. 44 at 38.) Plaintiffs further allege that State Farm's concealment of the absence of UIM coverage represents a breach of the common law duty of good faith and fair dealing. (*Id.*) At this point in the proceeding, Plaintiffs allege facts sufficient to withstand State Farm's motion to dismiss Count Five as it relates to Plaintiffs specifically. Plaintiffs' common law bad faith claim as it relates to "those similarly situated" fails for the same reasons the deceit claim fails on behalf of "those similarly situated."

II. State Farm's Motion to Certify Questions of Law to the Montana Supreme Court

State Farm requests that the Court certify four questions of law to the Montana Supreme Court. (Doc. 57 at 2-3.) State Farm points out that no Montana court ever has considered the issue of whether a special relationship could give rise to a duty to offer and explain UIM coverage. (Doc. 57 at 2.) State Farm seeks to have the Montana Supreme Court address four questions related to that issue. (*Id.*) Plaintiffs oppose State Farm's motion to certify. (Doc. 63.)

The Montana Rules of Appellate Procedure provide that a federal district court in Montana may certify

questions to the Montana Supreme Court for instruction. Mont. R. App. P. 15(3). Certification proves proper only in certain situations: (1) "[t]he answer may be determinative of an issue in pending litigation in the certifying court;" and (2) "there is no controlling appellate decision, constitutional provision, or statute of [Montana]." *Id.* A federal court possesses no obligation to certify a question when there exists uncertainty, but doing so may save time, energy, and resources. *See Lehman Bros. v. Schein*, 416 U.S. 386, 390-91, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974).

State Farm argues that its request meets both criteria. (Doc. 58 at 7-8.) First, the questions that it seeks to certify may be dispositive of this case. Plaintiffs' Amended Complaint would fail if the Montana Supreme Court determined that a special relationship did not give rise to a duty to offer and explain UIM coverage. *See* Mont. R. App. P. 15(3)(a). Second, there indisputably exists no Montana state court decision, statute, or constitutional provision on point. *See* Mont. R. App. P. 15(3)(b).

The Court does not disagree with State Farm that the circumstances here could render certification to the Montana Supreme Court appropriate under Montana Rule of Appellate Procedure 15(3) . As explained above, however, Judge Johnston's Findings and Recommendations prove consistent with existing Montana law. The Montana Supreme Court repeatedly has focused its duty inquiry on the relationship between an insurer and an insured. *See, e.g., Dulaney*, 324 P.3d at 1215; *Bailey*, 300 P.3d at 1151-55; *Fillinger*, 938 P.2d at 1355-56. Judge Johnston's conclusion that an insurance agent could owe an insured a duty to

offer and explain UIM coverage if a special relationship exists between the two proves entirely consistent with that precedent.

The special relationship examination necessarily would be fact-dependent and requires a case-by-case inquiry into the circumstances surrounding the relationship. At this motion-to-dismiss stage of the proceeding, the fact-dependent nature of the inquiry renders certification to the Montana Supreme Court marginally helpful, at best. The Court can predict with near certainty the Montana Supreme Court's answer to State Farm's proposed questions: "It depends." Some situations may exist where a special relationship exists between the insurer and the insured that could give rise to a duty to offer and explain UIM coverage. Asking the Montana Supreme Court to answer the questions at this point in the proceeding would not save time, energy, and resources—in fact, it unnecessarily would expend the time, energy, and resources of this Court, the Montana Supreme Court, and the parties. *See Lehman Bros.*, 416 U.S. at 390-91. The Court will deny State Farm's motion to certify questions of law to the Montana Supreme Court.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that:

1. Judge Johnston's Findings and Recommendations (Doc. 52) are **ADOPTED**.

2. Plaintiffs' Motion to Modify Judge Johnston's Findings and Recommendations (Doc. 55) is **DENIED**.

3. State Farm's Motion to Dismiss (Doc. 11) is **GRANTED, IN PART**, and **DENIED, IN PART**. Claims One and Three in Plaintiffs' Amended Complaint (Doc. 44) are **DISMISSED**.

4. State Farm's Motion to Certify Questions of Law to the Montana Supreme Court (Doc. 57) is **DENIED**.

DATED this 2nd day of June, 2020.

/s/ Brian Morris
Brian Morris, Chief District Judge
United States District Court

APPENDIX D — FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION, FILED MARCH 18, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CV 19-29-GF-BMM-JTJ

DANNY PEDERSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT L. LINDSAY; BETTY L. RADOVICH; WANDA WOODWICK; AND ROSALIE KIERNAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF REBECCA NICHOLSON; INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Defendant.

FINDINGS AND RECOMMENDATIONS

INTRODUCTION

Plaintiffs Betty Radovich and Wanda Woodwick and decedents Robert Lindsay and Rebecca Nicholson (collectively Plaintiffs) were injured in separate automobile

accidents while they were insured under auto insurance policies issued by State Farm Mutual Automobile Insurance Company (State Farm). The negligent party in each accident had insufficient liability coverage to fully compensate Plaintiffs for their damages. Plaintiff's auto policies included liability coverage and uninsured motorist (UM) coverage, but did not include underinsured motorist (UIM) coverage. Plaintiffs allege that their State Farm insurance agents failed to explain and offer UIM coverage to them. Plaintiffs allege that they would have purchased UIM coverage if it had been offered. Plaintiffs allege that their State Farm insurance agents breached their common law duty of reasonable care when they failed to explain and offer UIM coverage.

Plaintiffs have asserted claims against State Farm for declaratory relief, negligence, professional negligence, deceit, common law bad faith, and actual malice. Plaintiffs have also requested that this lawsuit be certified as a class action under Fed. R. Civ. P. 23.

State Farm has moved to dismiss all of Plaintiffs' claims under Fed. R. Civ. P. 12(b)(6). State Farm argues that Plaintiffs' claims should be dismissed because their insurance agents did not have a legal obligation to explain and offer UIM coverage to the Plaintiffs.

State Farm's motion has been referred to the undersigned under 28 U.S.C. § 636(b)(1)(B) for findings and recommendations. The motion has been fully briefed. The Court is prepared to issued its Findings and Recommendations.

Appendix D

APPLICABLE LAW

Plaintiffs have invoked this Court's diversity jurisdiction under 28 U.S.C. § 1332. The Court must therefore apply Montana substantive law and federal procedural law. *Medical Laboratory Mgmt. Consultants v. American Broadcasting Companies, Inc.*, 306 F.3d 806, 812 (9th Cir. 2002).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is appropriate under Rule 12(b)(6) if the complaint asserts claims that are not cognizable as a matter of law, or if the complaint lacks sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinela Hospital Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege sufficient factual matter "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). A claim is plausible on its face when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. Factual allegations that only permit the court to infer "the mere possibility of misconduct" are not sufficient. *Id* at 679.

When evaluating a Rule 12(b)(6) motion, the court must accept all allegations of material fact contained in

the complaint as true. *Johnson v. Lucent Technologies Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011). The court is not required, however, to accept conclusory allegations as true. *Id.*

BACKGROUND

Plaintiffs' filed their original Complaint in this matter on April 9, 2019. (Doc. 1). All of the claims asserted in Plaintiffs' original Complaint were premised on the novel legal theory that State Farm's insurance agents had an absolute legal duty to explain and offer UIM coverage to every insured, regardless of the circumstances surrounding the insured's purchase of insurance. (Doc. 1 at ¶¶ 50, 67). Because Plaintiffs' claims were based on an absolute legal duty explain and offer UIM coverage, Plaintiffs did not allege any facts regarding their individual relationships, communications, or dealings with their respective State Farm agents beyond stating that they had "a history and relationship with [their] State Farm agent[]," and that they had "interacted" with their State Farm agent "regarding choices of insurance coverage." (Doc. 1 at ¶ ¶ 20, 22).

State Farm filed the present motion to dismiss on May 31, 2019. State Farm argued that all of the Plaintiffs' claims should be dismissed under Rule 12(b)(6) because the claims were premised on an absolute duty to explain and offer UIM coverage that did not exist under Montana law. State Farm argued correctly that no absolute duty to explain and offer UIM coverage existed under Montana statutory law or Montana common law.

Appendix D

The Court conducted a hearing on State Farm's motion to dismiss on July 31, 2019. During the hearing, Plaintiffs moved for leave to amend their Complaint. The Court granted the motion. The Court gave Plaintiffs an opportunity to amend their Complaint to include particularized facts showing why their respective State Farm agents possessed a duty to explain and offer UIM coverage to them.

Plaintiffs filed their Amended Complaint on September 13, 2019. The Amended Complaint added 49 new paragraphs. (Doc. 44). The most significant newly added paragraphs are paragraphs 56, 57, 65, 66, 75, 76, 84 and 85. In these paragraphs, Plaintiffs offer the generic and repeated assertion that their State Farm insurance agents had a duty to explain and offer UIM coverage because their State Farm agents had "encouraged [them] to trust, value and rely on their specialized insurance knowledge" and they "relied on [their] agent[s] for advice on which coverages were necessary to protect [them] from catastrophic losses and damages." (Doc. 44 at ¶ ¶ 56, 57, 65, 66, 75, 76, 84 and 85).

State Farm argues that Plaintiffs' Amended Complaint should be dismissed because the Amended Complaint suffers from the same defect that plagued Plaintiffs' original Complaint. State Farm argues that Plaintiffs have failed to allege facts in their Amended Complaint that could "give rise to [a] purported duty to offer and explain UIM coverage." (Doc. 47 at 12).

Although Plaintiffs do not use the words "special relationship" in their Amended Complaint, it appears

that Plaintiffs are now alleging that their State Farm agents had a duty to explain and offer UIM coverage to them because they shared a special relationship. Plaintiffs allege that a special relationship existed because their State Farm agents held themselves out as experts in the field of auto insurance, their State Farm agents encouraged them to "trust, value and rely" on that expertise, and they did, in fact, rely on their State Farm agent's expertise regarding the coverages they needed. (Doc. 44 at ¶ ¶ 56, 57, 65, 66, 75, 76, 84 and 85).

Whether an insurance agent may be obligated to explain and offer UIM coverage when he or she shares a special relationship with an insured, is an issue of first impression in Montana. To the extent that this case raises an issue of first impression under Montana law, this Court, sitting in diversity, must predict how the Montana Supreme Court would decide the issue. *Medical Laboratory Mgmt. Consultants, Inc.*, 306 F.3d at 812. The Court may look to Montana law and to well-reasoned decisions from other jurisdictions when undertaking this task. *Burlington Ins. Co. v. Oceanic Design & Construction, Inc.*, 383 F.3d 940, 944 (9th Cir. 2004).

DISCUSSION

a. Montana Law

The duties that an insurer and its agents owe to an insured in Montana are established by statutory law and common law. Montana statutory law requires that all auto liability insurance policies must include UM coverage unless rejected by the named insured. Mont. Code Ann.

§ 33-23-201. However, no Montana statute compels an insurer to offer optional UIM coverage to the insured. See *Farmers Alliance Mutual Insurance Co. v. Holeman*, 278 Mont. 274, 924 P.2d 1315, 1318-19 (Mont. 1996); *Grier v. Nationwide Mutual Insurance Co.*, 248 Mont. 457, 812 P.2d 347, 349 (Mont. 1991); *Moss v. State Farm Mut. Auto. Ins. Co.*, CV 99-124-GF-DWM (D. Mont. March 21, 2001). The Montana legislature has rejected all attempts to pass legislation imposing an absolute duty on insurers to offer UIM coverage to insureds. The Montana Legislature rejected proposals to amend Mont. Code Ann. § 33-23-201 to require insurers to offer UIM coverage in both the 2017 and 2019 legislative sessions. (*See* House Bill Nos. 141 and 544).

Montana common law provides that an insurance agent owes an insured a duty of ordinary care. *Fillinger v. Northwestern Agency, Inc. of Great Falls*, 283 Mont. 71, 938 P.2d 1347, 1355-56 (Mont. 1997). The duty of ordinary care that an insurance agent owes to an insured is generally limited to a duty to obtain the insurance coverage that the insured directs the agent to procure. *Bailey v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 119, 370 Mont. 73, 300 P.3d 1149, 1153 (Mont. 2013); *Monroe v. Cogswell Agency*, 2010 MT 134, 356 Mont. 417, 234 P.3d 79, 86 (Mont. 2010). The scope of the agent's duty to procure insurance depends on what the insured asks the agent to do. *Bailey*, 300 P.3d at 1154; *Dulaney v. State Farm Fire and Cas. Ins. Co.*, 2014 MT 127, 375 Mont. 117, 324 P.3d 1211, 1215-16 (Mont. 2014). If an insurance agent fails to procure the insurance requested by the client, the agent may be liable for the damages suffered due to the

absence of such insurance. *Bailey*, 300 P.3d at 1153. The duty of ordinary care that an insurance agent owes to an insured does not include, however, an absolute obligation to explain and offer optional UIM coverage. See *Monroe*, 234 P.3d at 86.

Although the duty of ordinary care that an insurer owes to an insured does not include an absolute obligation to explain and offer UIM coverage, an obligation to explain and offer UIM coverage could arise based on the facts presented in a particular case. See *Moss*, CV 99-124-GF-DWM. For example, in *Moss*, the insurer had company manuals that directed its insurance agents to offer UIM coverage to prospective insureds. The insurance agent in *Moss* failed to offer UIM coverage to her client despite this directive. *Moss*, at *10-11. The Court, the Honorable Donald W. Molloy presiding, ruled that the duty of ordinary care that an insurance agent owed to an insured may include an obligation to offer UIM coverage under the circumstances presented. *Id.* at 10. The Court ruled that the insurance agent's failure to follow her own company manual was evidence that the jury could consider in determining whether the insurance agent had breached her duty of ordinary care. *Id.*

b. Other Jurisdictions

Although Montana Supreme Court has not yet had an opportunity to determine whether an insurance agent may have an obligation to explain and offer optional coverages when a "special relationship" exists, courts from other jurisdictions have considered the issue. These

courts generally agree that an insurance agent's duty of ordinary care may include an obligation to explain and offer optional coverages if the insurance agent engaged in a special relationship with the insured that went beyond the standard insurer-insured relationship. See e.g., *Sintros v. Hamon*, 148 N.H. 478, 810 A.2d 553, 555 (N.H. 2002) (collecting cases); *Tiara Condominium Ass'n, Inc. v. Marsh, USA, Inc.*, 991 F. Supp. 2d 1271, 1280-81 (S.D. Fla. 2014); *Franklin Cty. Comm'n v. Madden*, 2019 U.S. Dist. LEXIS 108535, 2019 WL 2716310 *3 (N.D. Ala. June 28, 2019); *Somnus Mattress Corp. v. Hilson*, 280 So. 3d 373, 384-85 (Ala. 2018); *WWilson Works Inc. v. Great Am. Ins. Group*, 2012 U.S. Dist. LEXIS 198005, 2012 WL 12960778 * 4 (N.D. W.V. June 28, 2012); *Nelson v. Davidson*, 155 Wis. 2d 674, 456 N.W.2d 343, 347 (Wis. 1990).

Whether a special relationship exists in a particular case is dependent upon the facts and circumstances surrounding the insurer-insured relationship. *Sintros*, 810 A.2d at 556. A special relationship triggering an enhanced obligation to advise an insured about optional coverages may be found to exist: 1) where the agent voluntarily assumed the responsibility for selecting the appropriate insurance policy for the insured by express agreement or promise; 2) where the agent held himself out as having expertise in the field of insurance being sought by the insured, and the insured relied on the agent's representations regarding the coverage needed; 3) where the agent exercised broad discretion to service the insured's needs, and received compensation above the customary premium that was paid for the expert advice provided; and 4) where the agent was intimately

involved in the insured's business affairs, or regularly gave the insured advice or assistance in maintaining proper coverage. See *Sintros*, 810 A.2d at 556; *Tiara Condominium Ass'n, Inc.*, 991 F. Supp. 2d at 1281. However, "[t]he mere allegation that a client relied upon an insurance agent and had great confidence in him is insufficient" to create a special relationship. *Nelson*, 456 N.W. 2d at 347.

Whether a special relationship exists is normally a question of fact for the jury to determine. *Tiara Condominium Ass'n, Inc.*, 991 F. Supp. 2d at 1281-82. The trier of fact may consider multiple factors in determining whether an insurance agent shared a special relationship with his client. These factors include: 1) the representations made by the insurance agent about his expertise; 2) the representations by the insurance agent about the breadth of the insurance coverages obtained; 3) the length and depth of the insurance agent's relationship with his client; 4) the extent of the insurance agent's involvement in the client's decision making regarding his insurance needs; 5) the information volunteered by the insurance agent about his client's insurance needs; and 6) whether the insurance agent received additional compensation for advisory services. *Id.* at 1281.

The Court is confident that the Montana Supreme Court would agree with these courts that an obligation to explain and offer optional insurance coverages could arise when an insurance agent and his client share a special relationship.

Here, Plaintiffs appear to have alleged the second type of special relationship described above. Plaintiffs allege that their State Farm agents "encouraged [them] to trust, value and rely on their specialized insurance knowledge," and Plaintiffs allege that they "relied on [their] agent[s] for advice" regarding their insurance coverage needs. (Doc. 44 at ¶ ¶ 56, 57, 65, 66, 75, 76, 84 and 85). Taking all of the allegations in Plaintiffs' Amended Complaint as true, the Court finds that Plaintiffs have sufficiently pled a special relationship that could give rise to an obligation to explain and offer UIM coverage. The facts developed during discovery will reveal whether each Plaintiff did, in fact, have a special relationship with his or her State Farm agent.

Accordingly, IT IS HEREBY RECOMMENDED:

That Defendant's Motion to Dismiss (Doc. 11) be DENIED.

NOTICE OF RIGHT TO OBJECT TO FINDINGS AND RECOMMENDATIONS AND CONSEQUENCES OF FAILURE TO OBJECT

The parties may serve and file written objections to the Findings and Recommendations within 14 days of their entry, as indicated on the Notice of Electronic Filing. 28 U.S.C. § 636(b)(1). A district court judge will make a de novo determination regarding any portion of the Findings and Recommendations to which objection is made. The district court judge may accept, reject, or modify, in whole or in part, the Findings and Recommendations.

Appendix D

Failure to timely file written objections may bar a de novo determination by the district court judge.

DATED this 18th day of March, 2020.

/s/ John Johnston
John Johnston
United States Magistrate Judge

APPENDIX E — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 4, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDY TARUM, AS CURRENT PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT L. LINDSAY; *et al.*,

Plaintiffs-Appellants,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Defendant-Appellee.

No. 22-35542

D.C. No.
4: 19-cv-00029-BMM-JTJ
District of Montana,
Great Falls

ORDER

Before: GILMAN,* KOH, and SUNG, Circuit Judges.

* The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Appendix E

The panel has voted to deny the petition for panel rehearing. Active Judges Koh and Sung have voted to deny the petition for rehearing en banc, and Visiting Judge Gilman has so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.