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INSURANCE CONSUMER COUNSEL'S COLUMN

MONTANA LAW AND THE OUT-OF-STATE POLICY

BY PROFESSOR GREG MUNRO

Counsel for insurance consumers will often find that Montana law, especially that decided by the Montana Supreme Court, is more favorable to the interests of the claimant or consumer than the law of another state. For example, in auto insurance alone, Montana has invalidated the "family exclusion" clause in *Transamerica Ins. Co. v. Royle*¹; rejected auto insurers' subrogation to recover medical expense paid in *Allstate Ins. Co. v. Reitler*²; invalidated the physical contact requirement for UM coverage in *McGlynn v. Safeco Ins. Co.*³; struck the workers compensation offset against UM coverage in *Sullivan v. Doe*⁴; established the doctrine of reasonable expectations for auto insurance consumers in such cases as *Bennett v. State Farm*⁵; and invalidated provisions defeating coverage for which the insured has paid a separate premium in *Bennett v. State Farm* (for compulsory coverages) and in *Ruckdaschel v. State Farm*⁶ (for noncompulsory coverages).⁷ These are only a few examples of favorable law for auto insurance consumers in Montana.

The problem for counsel is making sure that Montana law applies when coverage is provided under an insurance policy issued in another state. The most common situation arises when an automobile insured under a policy in another state is involved in an accident in Montana. A policy issued in another state may appear to provide the coverage you need for your claimant under Medical Pay, Bodily Injury Liability, Uninsured Motorist, or Underinsured Motorist coverages. Yet, when you make demand for benefits under the coverage, the insurer may balk citing the law of the jurisdiction in which the policy was executed and issued. In such cases, the threshold question will be whether the law of Montana applies or the law of the foreign jurisdiction that issued the policy. Because zealous representation for the claimant's advocate depends on consumer friendly law, you likely will find it in your claimant's interest to persuade the insurer and eventually the court that Montana law governs the policy (contract) construction.

Consider this situation: Counsel represents an out-of-state driver who suffered multiple fractures in a collision caused by negligence of a Montana resident driver in Helena on April 30, 1996. (This was before the legislature passed the anti-stacking statute⁸ in the

1997 legislature.) Counsel's out-of-state driver carried \$100,000 limits of underinsured coverage and counsel likes the law of *Augustine v. Simonson*⁹ which allows her to proceed against her claimant's UIM carrier without having settled with the tortfeasor's insurer. However, the claimant's out-of-state insurer refuses counsel's UIM demand on the ground that the contract was executed in the foreign state which state requires exhaustion by settlement of the tortfeasor's liability coverage before any duty to settle UIM coverage arises. The claims examiner is adamant that a contract is construed according to the law of the place of execution and attaches a photocopy of legal authority which indeed indicates the general acceptance of that rule. However, a closer examination of this issue will yield real dividends. Consider the general rule and then the law in Montana:

As a general rule, most courts have decided that the law governing the interpretation of automobile

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casualty policies is the law of the place in which the contract was made.¹⁰ However, the "modern approach,"¹¹ applies the law of the state having the most significant relationship to the issue to be decided. Though the Montana Supreme Court claims to reject this "revisionist"¹² modern approach, it uses a "place of performance" test that results in applying Montana law in a case such as this.

In *Kemp v. Allstate*, Julie Kemp was killed in Butte, Montana in an auto accident caused by an uninsured motorist. Kemp was a passenger in an automobile insured by Allstate in Vermont. The policy covered two vehicles for each of which separate premiums had been paid and under which Julie was an "insured" for purposes of receiving uninsured motorist benefits. Julie Kemp's parents also insured three cars with Allstate in New York for which they paid separate premiums and which included Julie as an insured for uninsured motorist protection. The issue presented to the Montana Supreme Court was whether the question of stacking of those policies was governed by Montana law, which would allow stacking, or that of Vermont and New York which would not. Though the Montana court rejected the modern approach of the Restatement of Conflicts Sec. 6, it determined that "place of performance" and not place of execution governed under the Montana contract interpretation statute.¹³

A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indi-

cate a place of performance, according to the law and usage of the place where it is made.

On the basis of the statute, the court asserted that the law of the place of performance of the contract (*lex loci solutionis*) governed the contract interpretation and not the law

The problem for counsel is making sure that Montana law applies when coverage is provided under an insurance policy issued in another state.

of the place of contracting (*lex loci contractus*). Accordingly, the court analyzed the policy contract to see if it indicated a place of performance. The court coupled three standard policy provisions to determine that the insurance contract did indicate a place of performance:

First, the basic insuring agreement promised "to pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury. . . including death . . . sustained by the insured, caused by accident arising out of the ownership, maintenance or use, of such uninsured automobile."

Second, the territorial coverage agreement provided coverage within the United States which agreement the court found to contemplate payment in any state where the insured was liable.

Third, the "payment of loss" provision would result in payment of the Silver Bow County judgment being made to the deceased's representative in that court in Montana. Hence, the court ultimately held that the place where the judgment was

obtained was the place of performance of the contract as indicated in the insurance policy. Construing the policies under Montana law, the court then stacked each of the five Allstate UM coverages. It seems a fair interpretation to say that the court, in *Kemp*, found the place of performance under the standard auto insurance contract to be the place where the judgment will be paid. That conflict of laws part of the *Kemp* decision is still good law in Montana.

In 1993, in *Youngblood v. American States Ins. Co.*,¹⁴ American States Insurance Company issued an auto insurance policy to Alfred and Vivian Youngblood in Oregon. Their daughter, Mary, was injured in an auto accident in Montana and American States paid \$10,000 under the medical pay coverage and then tried to subrogate against Mary's recovery from the tortfeasor's liability insurance. Montana law forbids subrogation to recover medical pay coverage payments, but Oregon law allows such subrogation. The question was whether Montana or Oregon law would control the issue. The court noted that, in general, "the law of the place of performance controls legal construction and effect, while the law of the place where the contract is made governs on questions of execution and validity."¹⁵ The court held that the general policy language required American States to pay whatever damages were required in Montana, so that the contract was deemed to be performed in Montana.

The *Kemp* and *Youngblood* decisions in Montana make clear that the place of performance is the

place where the resulting tort judgment will be paid under the basic insuring agreement. Consequently, in the hypothetical above, jurisdiction and venue would be appropriate in the First Judicial District in Lewis and Clark County where judgment would ultimately be rendered. This in turn means that Montana law would control the legal construction and effect so that *Augustine* would govern to allow demand on the UIM carrier without prior exhaustion of the limits of the liability policy.

We should note that in *Youngblood*, the American State's policy actually contained a choice of law provision that constituted the "place of performance" and required application of Oregon law on the issue of subrogation. However, in *Youngblood*, the court found the policy medical pay subrogation provision unenforceable, because it violated public policy as expressed in Montana case decisions limiting insurer's rights of subrogation.¹⁶ This holding is important because in Montana, we also have at least three major decisions, *Bennet v. State Farm Mutual Automobile Ins. Co.*¹⁷; *Farmers Alliance Mutual v. Holeman*¹⁸; and *Ruckdaschel v. State Farm Mutual Auto. Ins.*¹⁹ which have found policy provisions defeating coverage for which the insured has paid separate premiums to be against public policy.²⁰ Consequently, even where an out-of-state insurer can show that its contract specifies the issuing state as place of performance, the court may still refuse to enforce a provision void as against public policy in Montana. In *Youngblood*, since the choice of law provision was unenforceable, the court, apparently using the *Kemp* analysis, then found that the policy indicated place of performance in Montana.

Hence, construction and interpretation of policies issued and executed out-of-state, insofar as they apply to injury and damage arising out of torts occurring in Montana, are likely governed by Montana law because Montana is the place of performance. If a Montana Judicial District Court has venue and jurisdiction over a tort that occurred in Montana, the resulting judgment will fall within the indemnity promise of the insurer and Montana becomes the place of performance of the insurance contract under 28-3-102 MCA. That being the case, issues of coverage will be governed by Montana law as set forth in the statutes and in the decisions of the Montana Supreme Court.

Kemp and *Youngblood* stand for the following important propositions: 1) The law of the place of performance governs insurance coverage issues in an insurance contract in Montana. 2) The court looks to

the insurance contract to see if it indicates place of performance. If it does not, the court looks to the place of contract for law governing interpretation. Using *Kemp* and *Youngblood*, claimant's counsel should be able to make a viable argument that any insurance contract with a standard basic insuring agreement and standard provisions for territorial coverage and payment of loss should be interpreted under the law of Montana as the "place of performance" under our contract interpretation statute. Extrapolation to any standard commercial general liability policy is only a step away.

1. 202 Mont. 173, 175, 656 P.2d 820, 821 (1983)
2. 192 Mont. 351, 628 P.2d 667 (1981)
3. 216 Mont. 379, 701 P.2d 735 (1985)
4. 159 Mont. 50, 495 P.2d 193 (1972)
5. 261 Mont. 386, 862 P.2d 1146 (1993)
6. 285 Mont. 395, 948 P.2d 700 (1997)
7. However, the anti-stacking statute, §33-23-203 MCA, applies after 5/2/97 and would defeat these statements of public policy for cases arising after that date.
8. §33-23-203 MCA
9. 283 Mont. 259, 940 P.2d 116 (1997)
10. 20 ALR 4th 738, "Conflict of Laws in Determination of Coverage Under Automobile Liability Insurance Policy."
11. 1 Restatement of Conflict. of Laws 2d, Sections 6 and 188
12. *Kemp v. Allstate*, 183 Mont. 526, 601 P.2d 20 (1979)
13. §28-3-102 MCA
14. 262 Mont. 391, 866 P.2d 203 (1992)
15. *Id.*, at 394, *Kemp*, at 601 P.2d 24.
16. See, *Allstate Ins. Co. v. Reiter*, note 2, above.
17. 261 Mont. 386, 862 P.2d 1146 (1993)
18. 278 Mont. 274, 924 P.2d 1315 (1996)
19. 285 Mont. 395, 948 P.2d 700 (1997)
20. See, note 7, above.

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