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PRECAP; *Ibsen v. Caring for Montanans, Inc.*: Can You Sue Your Insurance Company for Violating the UTPA?

Brandon Shannon

I. QUESTION PRESENTED

Does a private consumer of insurance have a cause of action against an insurer to recover damages caused by a violation of the UTPA, or does the enforcement of the UTPA outside the claims handling process lie exclusively with the State Auditor?

II. FACTUAL BACKGROUND

Appellant Mark Ibsen, Inc. (Ibsen) brought this claim alleging Appellee Caring for Montanans, Inc. (CFM) charged kickbacks on its healthcare premiums.¹ These kickbacks went to the Montana Chamber of Commerce, who promoted CFM health care plans to its members.² The Montana State Auditor³ found this practice violated the Unfair Trade Practices Act (UTPA), specifically Mont. Code Ann. §§ 33–18–208 and 33–18–212, and fined CFM \$250,000.⁴ CFM emphasizes that it gave full benefits, charged nothing additional, and that the violation came only from the manner in which it itemized on billing statements.⁵ Ibsen sought class certification and argued that consumers, including Ibsen who paid its employee’s health care premiums, were entitled to damages for the fees charged in violation of the UTPA, breach of fiduciary duty, breach of contract, and unjust enrichment.⁶ The case was removed to federal court and then remanded back to state court.⁷

The district court dismissed the lawsuit, holding an insurance consumer has no cause of action for a violation of the UTPA against an insurer outside the claims handling process, because it invades the State Auditor’s exclusive power to enforce the insurance code.⁸ The district court held that the tort and contract actions were an attempt to “back door” the Auditor’s exclusivity under the UTPA.⁹ Ibsen appealed, arguing it

¹ Opening Brief of Appellant at 19, *Ibsen v. Caring for Montanan’s Inc.* (Mont. Aug. 25, 2015) (DA 15-0205).

² *Id.*

³ Commonly referred to as “Commissioner of Securities and Insurance” or “Insurance Commissioner,” though the Montana Constitution gives the name “State Auditor,” and attempts to amend the name in the Constitution have repeatedly been rejected by the people of Montana.

⁴ Opening Brief of Appellant at 9.

⁵ *Caring for Montanan’s, Inc. Answer Brief* at 7, *Ibsen v. Caring for Montanan’s Inc.* (Mont. Oct. 26, 2015) (DA 15-0205).

⁶ *Id.* at 1.

⁷ *Id.*

⁸ Opening Brief of Appellant at 20.

⁹ *Id.* at 21.

should have an action to recover funds wrongfully charged by an insurer.¹⁰ The Montana State Auditor and the Montana Trial Lawyers Association (MTLA) also filed Amicus Curie briefs.

III. SUMMARY OF ARGUMENTS

A. Appellant Ibsen

Ibsen argues the fine imposed by the Auditor did not compensate consumers injured by the scheme.¹¹ It provides three separate theories by which an insured could bring a cause of action to recover damages.

Ibsen first asserts that common law claims can be brought to redress violations of the UTPA. It contends that the district court wrongfully relied on precedent from federal court to determine there is no cause of action in the present case.¹² Instead, Ibsen asserts, the court should look to Montana case law, which holds common law claims can be brought to remedy violations of the Montana insurance statutes.¹³ Ibsen starts with *Klaudt v. Flink*,¹⁴ which held a civil action may be brought and the auditor's action is not the exclusive remedy for an unfair trade practice violation.¹⁵ After *Klaudt*, the 1987 Legislature codified the provision at issue,¹⁶ which limits the cause of action against an insurer in certain circumstances. Ibsen argues this provision was only meant to limit the causes of actions within the claims handling process and asserts there is no legislative history to suggest otherwise.¹⁷ Ibsen further argues that since the amendment, the Montana Supreme Court has decided three cases which indicate private causes of action exist. First is *O'Fallon v. Farmers Insurance Exchange*,¹⁸ where the court held that common law actions to redress violations of the UTPA are only barred under the new amendment when they deal with the claims handling process.¹⁹ Second is *Thomas v. Northwestern National Ins. Co.*,²⁰ where the Court allowed a common law claim regarding the renewal of a policy, which did not deal with the claims handling process.²¹ The court also noted that the "Legislature did not intend the Unfair Trade Practices Act to be the exclusive remedy in litigation instituted by insureds against their insurers."²² Third is *Williams*

¹⁰ *Id.* at 10.

¹¹ *Id.*

¹² *Id.* at 21.

¹³ Opening Brief of Appellant at 21.

¹⁴ *Klaudt v. Flink*, 658 P.2d 1065 (Mont. 1983).

¹⁵ *Id.* at 1066–67.

¹⁶ MONT. CODE ANN. § 33–18–242.

¹⁷ Opening Brief of Appellant at 23.

¹⁸ *O'Fallon v. Farmers Ins. Exchange*, 859 P.2d 1008 (Mont. 1993).

¹⁹ *Id.* at 1014–15.

²⁰ *Thomas v. Northwestern National Ins. Co.*, 973 P.2d 804 (Mont. 1998).

²¹ *Id.* at 809.

²² *Id.*

v. Union Fidelity Life Ins. Co.,²³ which allowed an insured to bring claims for fraud and bad faith against an insurer when the action did not deal with the handling of a claim.²⁴ Ibsen argues that *O'Fallon, Thomas and Williams* allow for a cause of action for a violation of the UTPA.

Ibsen next asserts that even if there is no cause of action for a violation of the UTPA, insureds have a cause of action for breach of contract.²⁵ Ibsen relies on *Sagan v. Prudential Ins. Co. of America*,²⁶ which held that insurance statutes are assumed to be part of an insurance contract.²⁷ Ibsen notes that Utah recognizes a breach of contract claim for the violation of an insurance statute.²⁸

Finally, Ibsen asserts that its claim for breach of fiduciary duty and unjust enrichment should not be precluded only because the conduct violated the insurance code and that these claims exist independently of the UTPA.²⁹

B. Appellee Caring for Montanans

CFM supports the district court's conclusion that there is no private right of action for a violation of the UTPA. At the outset, CFM notes that Ibsen is not an insured because Ibsen purchased coverage for its employees and is not a participant or beneficiary of a plan.³⁰

CFM argues there is no private cause of action for a violation of the UTPA. It starts with the legislative history. The 1959 Legislature enacted the UTPA based on a model act.³¹ In 1977, the Commissioner was granted greater enforcement powers by the legislature.³² In 1983, the Court decided *Klaudt*, which CFM asserts is much more narrow than Ibsen contends. CFM argues that *Klaudt* only created a cause of action for a third party claimant to sue a tortfeasor's insurer for mishandling the claims process.³³ CFM argues that *Klaudt* did not allow a private cause of action for any violation of the UTPA.³⁴ CFM asserts the 1987 amendment to the UTPA was in response to *Klaudt*, to codify limits on private causes of actions and increase the enforcement powers of the Auditor.³⁵ CFM points to legislative history which suggests the purpose of this amendment was to have potential plaintiffs complain to the Auditor instead of sue the

²³ *Williams v. Union Fidelity Life Ins. Co.*, 123 P.3d 213 (Mont. 2005).

²⁴ *Id.* at 222–23.

²⁵ Opening Brief of Appellant at 28.

²⁶ *Sagan v. Prudential Ins. Co. of America*, 857 P.2d 719 (Mont. 1993).

²⁷ *Id.* at 721.

²⁸ Opening Brief of Appellant at 29.

²⁹ *Id.* at 30.

³⁰ *Caring for Montanan's, Inc.* Answer Brief at 7.

³¹ See Robert Williams, *Montana's Comprehensive New Insurance Law*, 22 Mont. L. Rev. 1, 9 (1960).

³² *Caring for Montanan's, Inc.* Answer Brief at 8–9.

³³ *Id.* at 9–10.

³⁴ *Id.* at 10.

³⁵ *Id.*

insurer.³⁶ CFM further argues that the model act has the intent of prohibiting private causes of action, especially class action suits.³⁷ CFM asserts that California, Connecticut and Wyoming have all held there is no private cause of action under similar UTPA provisions.³⁸

CFM next addresses statutory construction. It quotes *Faust v. Util. Solutions, LLC*,³⁹ which opines there are four factors to consider when deciding if a statute creates a private right of action: (1) consistency within the statute; (2) the intent of the legislature, given the statutes plain language; (3) avoiding “absurd” results; and (4) the construction of the statutes by the agency charged with its administration.⁴⁰ CFM argues that the UTPA enforcement is left to the Auditor with the exception of the claims handling process; that the legislature rightfully intended the enforcement of the UTPA lay with the Auditor and not the courts; any reference to a common law cause of action is out of context; and the Auditor’s current interpretation is contrary to the Auditor’s position in the 1987 legislature, which wanted to avoid compensatory schemes for violations of the UTPA.⁴¹

Next, CFM tackles the case law. It first points to the federal cases of *Shupak v New York Life Ins. Co.*,⁴² and, most recently, *Fossen v. Caring for Montanans*,⁴³ affirmed in the Ninth Circuit,⁴⁴ which both held the State Auditor is the sole enforcer of the UTPA, not courts through private causes of action. CFM argues these federal courts have already made well-reasoned decisions based on the plain language of the statute, legislative history and decisions from other jurisdictions and determined there are no private actions under the UTPA.⁴⁵

CFM’s response to Ibsen’s reliance on the Montana cases of *O’Fallon*, *Thomas* and *Williams* is twofold: first, these cases deal with traditional common law tort claims when Ibsen has only pled statutory violations, and second, CFM asserts that Ibsen misinterpreted and overstated the holdings of the Montana cases, which are easily distinguished.⁴⁶ CFM argues that *O’Fallon* dealt with claims handling, a clear exception under the UTPA to exclusive enforcement by the Auditor.⁴⁷ The Court in *O’Fallon* allowed the action because it was unaddressed by the statute; Ibsen based its claims on statutory violations

³⁶ *Id.* at 11–12.

³⁷ *Id.* at 12–14

³⁸ *Id.* at 15.

³⁹ *Faust v Util. Solutions, LLC*, 173 P.3d 1183 (Mont. 2007).

⁴⁰ *Id.* at 1187.

⁴¹ *Caring for Montanan’s, Inc. Answer Brief*, at 16–27.

⁴² *Shupak v. New York Life Ins. Co.*, 780 F. Supp. 1328 (D. Mont. 1991).

⁴³ *Fossen v. Caring for Montanans, Inc.*, 993 F. Supp. 2d 1254 (D. Mont. 2014).

⁴⁴ *Fossen v. Caring for Montanans, Inc.*, 617 F. App’x 737 (9th Cir. 2015).

⁴⁵ *Caring for Montanan’s, Inc. Answer Brief* at 30.

⁴⁶ *Id.* at 32.

⁴⁷ *Id.* at 33.

which were addressed by the Auditor.⁴⁸ *Thomas* allowed an insured to file a common law action against an insurer, CFM distinguishes that Ibsen is not an insured.⁴⁹ CFM argues *Williams* allowed for a bad faith claim, and not a violation of the statute itself.⁵⁰ CFM concludes by stating that all of Ibsen’s claims are based on the statutory violations and none of them are based on a common law torts, and Ibsen’s attempt to convert them into common law torts through breach of contract is a “backdoor” method of getting around the exclusive enforcement of the Auditor.⁵¹

CFM concludes that, though the trial court dismissed the claims on other grounds and did not reach this issue, the complaint should also be dismissed entirely on Employee Retirement Income Security Act (ERISA) preemption because the claim deals with employee benefit plans.⁵² CFM also asserts that Health Care Service Corp. should be dismissed as a defendant.⁵³

C. Appellee Health Care Service Corp

The original defendant, Blue Cross Blue Shield of Montana, has since sold its private assets to Health Care Service Corp (HCSC), and its public assets were retained by CFM.⁵⁴ HCSC filed a separate brief which makes many of the same arguments as CFM. Essentially, HCSC reiterates that the district court correctly concluded no claims can be brought under the UTPA outside claims handling or settlement practices.⁵⁵ Allowing such claims would be contrary to the statute as written and the legislature’s intent that the Auditor be the sole enforcement mechanism of the UTPA.⁵⁶

D. Amicus Curiae Montana State Auditor

The State Auditor is charged with enforcement of Montana’s insurance code, including the UTPA.⁵⁷ The Auditor disagrees with the district court and takes the position that insureds, third party claimants and other parties with an interest in an insurance contract can use the prohibited practices listed in the UTPA as the basis for a common law

⁴⁸ *Id.* at 34.

⁴⁹ *Id.*

⁵⁰ *Id.* at 35.

⁵¹ *Id.* at 38.

⁵² *Id.* at 38–44.

⁵³ *Id.* at 44–45.

⁵⁴ *Id.* at 13.

⁵⁵ Appellee Health Care Service Corp’s Answering Brief at 13–15, *Ibsen v. Caring for Montanan’s Inc.* (Mont. Oct. 26, 2015) (DA 15-0205).

⁵⁶ *Id.*

⁵⁷ MONT. CODE ANN. § 33–1–101 et seq.

claim.⁵⁸ The Auditor argues that the legislature has never adopted the model amendments which make clear the UTPA does not create private actions.⁵⁹ The Auditor alleges the federal courts ignored the plain language of the statutes and Montana precedent when they decided *Fossen* and *Shupak*.⁶⁰ The Auditor also argues that the UTPA definitions should be available as support to traditional tort and contract claims, as “denying plaintiff’s access to the statutory definitions of unfair trade practices makes little sense.”⁶¹ The Auditor notes that allowing common law claims based on violations of the UTPA would not intrude upon the Auditor’s duties in enforcing the code.⁶² Finally, the Auditor argues that its enforcement powers are limited and that it cannot make a damaged party whole, leading to a need for private action for violations of the UTPA.⁶³

E. Amicus Curiae Montana Trial Lawyers Association

MTLA also disagrees with the district court. MTLA argues that there is a common law right to enforce provisions of the insurance code, and that the “private right of action” is a rule of decision for federal courts which have limited jurisdiction.⁶⁴ It argues that state courts are courts of general jurisdiction, and can provide a remedy for any unlawful act.⁶⁵ MTLA argues for a common law right of action concurrent with regulation by the State Auditor to enforce the UTPA.⁶⁶

IV. ANALYSIS

The seminal issue in this case, whether there is a private right of action for violations UTPA, is important to Montana jurisprudence because it will determine whether the State Auditor is the sole enforcer of the UTPA, or if individuals affected by a statutory violation can bring suit and recover damages against an insurer. Further, it will decide an apparent split in federal and state courts. Finally, allowing individuals to bring suit for statutory violations of the UTPA has the potential to allow a large number of cases, including class actions, against insurance companies doing business in Montana.

The Appellees appear to have the stronger argument that the statute was written to give the State Auditor the sole enforcement of the

⁵⁸ Amicus Curiae Brief of the Montana State Auditor at 2, *Ibsen v. Caring for Montanan’s Inc.* (Mont. Aug. 25, 2015) (DA 15-0205).

⁵⁹ *Id.* at 2–9.

⁶⁰ *Id.* at 9–14.

⁶¹ *Id.* at 18.

⁶² *Id.* at 18–19.

⁶³ *Id.* at 19–20.

⁶⁴ Montana Trial Lawyers Association Amicus Curiae Brief at 2, *Ibsen v. Caring for Montanan’s Inc.* (Mont. Aug. 26, 2015) (DA 15-0205).

⁶⁵ *Id.* at 6–7.

⁶⁶ *Id.* at 11.

UTPA outside of the claims process. Further, the persuasive authority of *Shupak* and *Fossen* are compelling. The Montana Supreme Court, however, has been expanding the rights of insureds little by little in *O'Fallon*, *Thomas* and *Williams* and could continue the trend in this decision. It is no surprise that MTLA supports an expansion of the available causes of action, but the State Auditor's support, which dilutes their enforcement power, is compelling. The Court has several legal theories available to allow individual causes of action for violation of the UTPA.

At oral argument, the Court will likely delve into the legislative history and the scope of the Montana cases, given the disagreement on these issues. We can likely expect to hear arguments about the weight to give the on-point federal decisions. Finally, the Court will ask questions about the statute and its construction, something that is missing analysis in all of the parties' briefs.