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

Brandon Shannon

I. JOHN MORRISON FOR APPELLANT IBSEN

Mr. Morrison began his oral argument by stating that CFM illegally included rebate payments in its health insurance premiums and was fined \$250,000 for this conduct by the State Auditor. He opined, under the district court's opinion, insurance customers have no remedy for this conduct. Mr. Morrison returned to this theme throughout his argument.

Mr. Morrison first argued that Montana has long recognized that insurance companies are liable for breaching the insurance code. Justice Cotter asked about the status of the plaintiff, a business who purchased insurance on behalf of its employees and is not a beneficiary to the plan. Mr. Morrison responded that Ibsen is in a contract with CFM and argued Ibsen is considered a member of the policy under Montana small group law. Justice Cotter followed up by asking where in the record the allegedly breached contract could be found. Mr. Morrison answered the policy itself is what was breached. Justice Shea followed up by asking if the breach claim could be sustained without alleging the violation of the insurance code, which Mr. Morrison responded it could, for instance under a bad faith claim. Mr. Morrison argued, however, that the insurance code should be incorporated into the contract under Montana law.

Next, Mr. Morrison argued that under the enforcement provision¹ of the UTPA, an order by the commissioner does not absolve a party of other civil liabilities. Prompted by a question from Justice McKinnon, he asserted that the section of the UTPA which specifies the actions available² is only intended to affect claim handling suits. Justice Baker next pointed out that the complaint alleges violations of both the Title 30 general UTPA and the Title 33 Insurance UTPA, and asked if Title 30 could provide a remedy. Mr. Morrison vaguely responded that Title 30 had not been part of the briefing in the case. Justice Cotter next asked whether the common law claims could stand alone without pleading violations of the UTPA. Mr. Morrison responded that they could because the conduct is a breach of fiduciary duty and unjust enrichment. Justice Cotter followed up by asking if all of the counts in this case are premised upon the violation of the UTPA, to which Mr. Morrison answered they plead breach of fiduciary duty, breach of contract and unjust enrichment in the alternative. Prompted by a follow up from Justice Shea, Mr. Morrison acknowledged that the

¹ MONT. CODE ANN. § 33-18-1004(4) (2015).

² MONT. CODE ANN. § 33-18-242(3).

count alleging a violation of the UTPA could not survive absent a private right of action for violating the UTPA. Justice Baker followed up by asking about factual differences between the Montana cases the Appellants cite and the current facts. In her question, Justice Baker suggested that violations of the UTPA were allowed in past cases as evidence to support recognized torts, but do not create an independent cause of action.

Mr. Morrison argued that at the very least, Ibsen should be allowed to move forward with its unjust enrichment claim because the unjust enrichment claim is completely independent of the UTPA. He finished by noting that the federal case of *Fossen*³ was decided incorrectly, opining that the holding stripped insurance consumers of their rights. Finally, Mr. Morrison argued that a federal court had already decided that ERISA does not preempt this action.

II. Michael McMahon for Appellee CFM and Stanley Kaleczyc for Appellee HCSC

Mr. McMahon began by telling the Court that the Plaintiffs and amici are asking the Court to judicially legislate a cause of action which the legislature has already rejected. He asked the Court to send the Plaintiffs to the legislature to make their policy changes. Mr. McMahon emphasized that federal courts and a Montana district court correctly concluded there is no private cause of action for a violation of the UTPA. Mr. McMahon asserted that Ibsen told the federal court that **its** causes of action are based solely on violations of the UTPA, likely to avoid ERISA preemption.

Justice Baker asked Mr. McMahon to address the Appellant's arguments involving previous Montana cases, and Justice McKinnon followed up with specific questions. Mr. McMahon responded that *O'Fallon*,⁴ *Thomas*,⁵ and *Williams*⁶ do not allow an independent claim based on a statutory violation, but instead allow evidence of a nonactionable breach of duty in a separate actionable claim. Justice Shea asked if this is similar to negligence per se claim, and Mr. McMahon agreed that a negligence per se claim may be appropriate here, though it was not pleaded. Mr. McMahon next argues that Ibsen is not an insured, and says the Appellant's new argument that they are an insured under Montana small group policy would support ERISA preemption.

Mr. McMahon next moved to the legislative history, and argued that the legislature purposefully restricted the causes of action under the UTPA. Justice Wheat argued that Montana has never adopted the model

³ *Fossen v. Caring for Montanans, Inc.*, 993 F. Supp. 2d 1254 (D. Mont. 2014).

⁴ *O'Fallon v. Farmers Ins. Exchange*, 859 P.2d 1008 (Mont. 1993).

⁵ *Thomas v. Northwestern National Ins. Co.*, 973 P.2d 804 (Mont. 1998).

⁶ *Williams v Union Fidelity Life Ins. Co.*, 123 P.3d 213 (Mont. 2005).

provision of the UTPA which explicitly bars causes of action based on a statutory violation. Mr. McMahon responded that this provision was only meant to clarify the intent of the original act as passed by the Montana legislature. Mr. McMahon opined that allowing every insured to sue when the Auditor conducts a market conduct exam would open the litigation floodgates and deter insurers from offering policies in Montana.

Justice Baker asked Mr. McMahon why the UTPA, which contains a private right of action clause, is not being used in this case. Mr. McMahon responded that Title 30 violations would clearly be preempted by ERISA. Mr. McMahon finished by arguing that *Fossen* is highly persuasive to the Court on the UTPA, and binding to the Court on ERISA preemption. He reminded the court that Ibsen has remedies other than creating a new cause of action under the UTPA such as ERISA. He asked the Court to dismiss the suit, either because ERISA preempts or because there is no private right of action under the UTPA.

Stanley Kaleczyc for HCSC used the last few minutes of the Appellee's time to briefly ask the court to affirm the district court. He summarized some of the arguments made by Mr. McMahon and added that HCSC should be dismissed as a party because the conduct occurred before HCSC purchased Blue Cross Blue Shield's assets.

III. REBUTTAL OF JOHN MORRISON FOR APPELLANT IBSEN, INC.

Chief Justice McGrath started off the rebuttal of Mr. Morrison by asking him which of the causes of action are independent of the UTPA violation. Despite a follow up, Mr. Morrison never clearly answer the question. He transitioned to asking the court to give the victims of the UTPA violations a remedy. Justice Rice asked Mr. Morrison Ibsen told the federal court that all of their causes of action were based on the statutory violations, as Appellee claimed. Again, Mr. Morrison tactfully avoided the question. He noted they did not file a negligence per se claim because the conduct in this case was intentional.

Mr. Morrison offered several legal options to the Court to avoid a floodgate case. First, the Court could limit cases to consumers with actual damages. Second, the Court could specify only suits from plaintiffs who are a member of the class which the statute is meant to protect. Third, the Court could take these suits on a case-by-case basis. Mr. Morrison finished by re-emphasizing that the federal courts have already decided there is not ERISA preemption. He also argued that HCSC should not be dismissed as a corporate successor.

IV. ANALYSIS

During Mr. Morrison's arguments, several members of the court—including Chief Justice McGrath, Justice Cotter, Justice Baker, and

Justice Shea—asked about potential remedies in this case without a private right of action under the UTPA. These potential remedies, which the trial court concluded were an attempt to backdoor the exclusive enforcement power of the State Auditor, include the breach of contract, breach of fiduciary duty and unjust enrichment. Further, there are other remedies under Title 30, which plaintiff was apparently avoiding because of likely ERISA preemption. The Court also has the option to decide that ERISA preempts this cause of action, though the Justices did not seem as engaged in these arguments. Mr. Morrison seemed reluctant to answer the questions regarding other remedies, possibly to force the court to decide whether there is a private cause of action under the UTPA. Because of these recurring questions, I predict the Court may decide the UTPA does not have an independent cause of action—or even avoid the question altogether—and instead remand the case for the Appellee to pursue one of the other available remedies.