

LIFE & HEALTH
MONTANA

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I. REGULATORY LIMITS ON CLAIMS HANDLING

A. Timing for Responses and Determinations

Montana's claim handling practices are governed by the Montana Unfair Trade Practices Act (UTPA). Mont. Code Ann. § 33-18-101 through -1006 (2003). The UTPA requires insurers to pay or deny a claim within 30 days after receipt of a proof of loss unless the insurer makes a reasonable request for additional information in order to evaluate the claim. Mont. Code Ann. § 33-18-232 (2003). If the insurer requests additional documentation, then it must pay or deny the claim within 60 days of receiving the proof of loss or advise the insured of its reasons for not issuing payment. Mont. Code Ann. §33-18-232 (2003). Insurers must acknowledge and act promptly upon communications with respect to claims. Mont. Code Ann. § 33-18-201(2) (2003).

B. Standards for Determination and Settlements

The UTPA requires insurers, in good faith, to effectuate prompt, fair and equitable settlements of claims where liability is "reasonably clear." Mont. Code Ann. § 33-18-201(6). It was held in an automobile claim that this means that liability the accident must be reasonably clear and it is reasonably clear that the medical expenses are causally related to the accident. Etter v. Safeco Ins.Co. of Illinois, (2002) 192 F.Supp 2nd 1071. Insurers are prohibited from refusing to pay claims without conducting a reasonable investigation. The UTPA provides that an insurer may not compel an insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered if suit is filed. Mont. Code Ann. § 33-18-201.

To determine if liability is reasonably clear, you must decide whether a reasonable person, with knowledge of the relevant facts and law, would have concluded for good reason that one party is liable to another. Peterson v. St. Paul Fire & Marine Ins. Co., 239 P.3d 904, 915 (Mont. 2010). In doing so, you should take into account that, under Montana law, if the defendant was 50% or more negligent, then the plaintiff would be entitled to recover damages from the defendant, even if the plaintiff was partially negligent. Id.

C. Privacy Protection (In addition to Federal Gramm-Leach-Bliley Act)

The Insurance Information and Privacy Protection Act (Mont. Code Ann. §33-19-201 through -409 (2003) establishes standards for the collection use, and disclosure of information gathered in connection with insurance transactions by insurance institutions. This act was passed in 1981 and is based on the model Act drafted by the National Association of Insurance Commissioners. The Act was amended in 2001 to provide privacy protection consistent with federal law.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) added requirements concerning individual's rights to privacy of their confidential health information. Pub. Law 104-191, August 21, 1996 §§ 261-264. To some extent, this act may affect insurance companies' ability to obtain and/or use private information. MCA § 33-19-105 exempts those licensees who are covered entities under HIPAA from the obligations imposed under Montana statutes.

Montana also has a Uniform Health Care Information Act, which is intended to protect personal and sensitive information, and limits access to health care information. See Mont. Code Ann. § 50-16-501 et. Seq.

II. PRINCIPLES OF CONTRACT INTERPRETATION

In Montana, the interpretation of an insurance contract is a question of law. When a court reviews an insurance policy, it is bound to interpret its terms according to their usual, common sense meaning as viewed from the perspective of a reasonable consumer of insurance products. Counterpoint, Inc. v. Essex Ins. Co., 1998 MT 251, P 13, 291 Mont. 189, 967 P.2d 393. Exclusions from coverage are to be narrowly and strictly construed because they are contrary to the fundamental protective purpose of an insurance policy. Swank Enters., Inc. v. All Purpose Servs., Ltd., 2007 MT 57, P 27, 336 Mont. 197, 154 P.3d 52.

When an insurance policy is ambiguous, it is to be interpreted most strongly in favor of the insured and any doubts as to coverage are to be resolved in favor of extending coverage for the insured. Mitchell v. State Farm Ins. Co., 2003 MT 102, P 26, 315 Mont. 281, 68 P.3d 703. An ambiguity exists where the insurance contract, taken as a whole, is reasonably subject to two different interpretations. Park Place Apts., L.L.C. v. Farmers Union Mut. Ins. Co., 247 P.3d 236 (Mont. 2010).

III. CHOICE OF LAW

Montana Supreme Court claims that, when faced with a choice-of-law conflict in contract disputes, they follow the "most significant relationship" approach contained in the Restatement (Second) of Conflict of Laws to determine the applicable state law, but in fact the Court has refused on a number of occasions to follow those rules where application of the law of the state chosen in the policy would be contrary to Montana public policy—especially when an insurer has attempted to make a subrogation claim. Youngblood v. American States Ins., 262 Mont. 391 (1993); Keystone v. Triad Systems, Inc. 971 P.2d 1240 (Mont. 1998); Swanson v. Hartford Ins. Co. 46 P.3d 584 (Mont. 2002). The Court in acknowledged the inconsistency in Moodro v. Nationwide Mut. Fire Ins. Co., 191 P.3d 389 (Mont. 2008) and attempted to clarify their position by stating that it will not apply the law of the state

chosen by the parties if three factors are met: (1) if, but for the choice-of-law provision, Montana law would apply under § 188 of the Restatement; (2) if Montana has a materially greater interest in the particular issue than the state chosen by the parties; and (3) if applying the state law chosen by the parties would contravene a fundamental policy of Montana.

The plaintiff must timely be put on notice that defendant intends to assert a choice of law defense, but where the issue should be inferred from the choice of law provision in the contract, it is not considered an affirmative defense for purposes of pleading. Masters Grp. Int'l, Inc. v. Comerica Bank, 352 P.3d 1101 (Mont. 2015).

IV. EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

A. Bad Faith

1. First Party

Mont. Code Ann. § 33-18-242(3) actually prohibits an insured from suing their insurer for common law "bad faith" over the handling of an insurance claim. (2003). An insured who has suffered damage as a result of the handling of an insured claim, however, is permitted under the statute to bring an action against an insurer for a number of improper practices including: breach of contract, fraud; misrepresentation of pertinent facts or policy provisions; refusal to pay claims without conducting a reasonable investigation based upon all reasonable information; failure to affirm or deny coverage within a reasonable time after proof of loss statements have been provided; and a failure to attempt in good faith to effectuate prompt, fair, and equitable settlements when liability is reasonably clear, if an insurer attempts to settle claims on the basis of an application which was altered without notice to or consent of the insured; failure to promptly settle claims if liability has become reasonably clear under one portion of an insurance policy in order to influence settlements under other portions of the policy. Mont. Code Ann. § 33-18-242 (read in conjunction with Mont. Code Ann. § 33-18-201(1), (4), (5), (6), (9), (13).

It is not necessary for an insured to prove that the violations were of such frequency as to indicate a general business practice. Mont. Code Ann. § 33-18-242(2). An unfair trade practices claim, however, is considered a cause of action which is independent from the underlying claim. As a result, a defense verdict in an underlying negligence claim against the insured does not in itself preclude an action against the insurer for violation of the UTPA. Graf v. Cont. W. Insur. Co. 89 P.3d 65 (2004).

An insurer may not be held liable for unfair trade practices if the insurer had a reasonable basis in law or fact for contesting the amount of the claim, whichever is at issue. Bartlett v. Allstate Ins. Co., 929 P.2d 227 (Mont. 1996).

A claim of misrepresentation under the Fair Trade Practices Act is determined by an objective analysis of the substance of the representation at issue, without regard to whether it resulted from an intentional effort to mislead, carelessness, incompetence or anything else. Lorang v. Fortis Insurance, 192 P.3d 186 (Mont. 2008).

2. Third Party

A third party has the same causes of action as stated above, absent the breach of contract claim. Moreover, a third party is not limited to the exclusivity of the above remedies and, in addition to the above causes of action, can bring common law bad faith actions against an insurer over the handling of a claim. Brewington v. Employers Fire Ins. Co., 992 P.2d 237 (Mont. 1999). A party may allege and recover damages in a common law cause of action upon proof of a common law claim, but a party is not entitled to obtain private enforcement of a regulatory UTPA statute that is not specifically intended by the legislature to be enforceable by private parties. Mark Ibsen, Inc. v. Caring for Montanans, Inc., 371 P.3d 446 (Mont. 2016) (holding plaintiff had UTPA claim for violation of §§ 33-18-208 or 33-18-212, MCA).

Third party bad faith actions against an insurer may not be brought until liability of the insured has been established in the underlying action. Safeco Ins. Co. of Ill. V. Mont. Eighth Jud. Dist. Ct. Cascade County, 2 P.3d 834 (Mont. 2000).

An insurer is obligated to pay, in advance of a settlement and without release, all reasonable and quantifiable expenses, such as medical bills and lost wages, that are incurred as a result of the accident. Dubray v. Farmers Ins. Exchange, 36 P.3d 897 ¶ 14-15 (Mont. 2001). Failure to pay these expenses, or predicating a payment on the claimant signing a release are grounds for bad faith. Shilhanek, 70 P.3d at 725. Further, nothing in the UTPA requires a general release of the insured or insurer as a condition of settlement. Shilhanek, 70 P.3d at 727.

It is not bad faith for an insurer to send an adjuster to represent the insured in a mediation instead of an attorney. Farmers Ins. Exchange v. Johnson, 224 P.3d. 613 (Mont. 2009).

3. Damages

In addition to recovering compensatory damages proximately caused by the insurer's conduct and punitive damages, an insured can also recover attorney's fees "when the insurer forces the insured to assume the burden of legal action to obtain the full benefit of the insurance contract. Mt. W. Farm Bureau Mut. Ins. Co. v. Brewer, 69 P.3d 652 (Mont. 2003). Generally, compensatory damages are a prerequisite to recovery of punitive damages for bad faith insurance practices. Estate of Gleason v. Cent. United Life Ins. Co., 350 P.3d 349 (Mont. 2015).

However, when an insurer is found to have violated the UTPA, breach of contract damages can constitute compensatory damages for purposes of determining eligibility for punitive damage relief. Rather, we hold that HN26 where an insurer has been found to have violated the UTPA due to delay or refusal to pay benefits in breach of the insurance contract, damages resulting from that violation may be considered compensatory damages under the UTPA for purposes of pursuing punitive damages. Id.

B. Fraud

Montana permits an action for actual or constructive fraud. The Montana Supreme Court has described the following elements for a claim of actual fraud: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance upon its truth; (8) the right of the hearer to rely upon it; and (9) the hearer's consequent and proximate injury or damage." May v. ERA Landmark Real Est. of Bozeman, 15 P.3d 1179 (Mont. 2000)

Constructive fraud is defined by statute as follows:

28-2-406. What constitutes constructive fraud.
Constructive fraud consists of:
(1) any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under him by misleading another to his prejudice or to the prejudice of anyone claiming under him;
or
(2) any such act or omission as the law especially declares to be fraudulent, without respect to actual fraud.

While actual fraud requires knowledge and intent on the part of the defendant, constructive fraud only requires knowledge. Durbin, 916 P.2d at 762, Moschelle v. Hulse, 622 P.2d 155, 158 (Mont. 1980). Constructive fraud allows the court to hold a defendant liable and prevent him from being unjustly enriched where a false statement is made unknowingly or relevant facts are withheld from the other party. Durbin, 916 P.2d at 762.

C. Intentional or Negligent Infliction of Emotional Distress

An independent cause of action for negligent or intentional infliction of emotional distress arises under circumstances where "(1) serious or severe consequence of (3) the defendant's negligent or intentional act or omission." Wages v. First Nat. Ins. Co. of Am. 2003 MT 308. ¶ 11, 318 Mont. 232, 11, 79 P.3d 1095, 11 (quoting Sacco, 896 P.2d at 426, 428). Montana has abolished the by-stander requirement. Sacco v. High Country Indep. Press, Inc. (1995), 271 Mont. 209, 239, 896 P.2d 411, 429.

Whether foreseeability exists is a function of such factors as "the closeness of the relationship between the plaintiff and victim, the age of the victim, and the severity of the injury of the victim, and any other factors bearing on the question. Moreover, the court may consider whether the plaintiff was a bystander to the accident. It may not, however, rely exclusively on the fact that a plaintiff was not a bystander to conclude that such a plaintiff is an unforeseeable plaintiff." Wages, 25.

D. State Consumer Protection Laws, Rules and Regulations

Montana's Unfair Trade Practices and Consumer Protection Act makes it unlawful to engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Mont. Code Ann § 30-14-103 (2003). Both state and private actions can be brought under the

Act. See Mont. Code Ann. §§ 30-14-111 and -133 (2003). One may recover actual damages and treble damages and the prevailing party may also recover attorney's fees. Mont. Code Ann. § 30-14-133. Insured's are not allowed to bring an action under this act against an insurer for the handling of a claim. See generally Mont. Code Ann. § 33-18-242(3).

E. State Class Actions

To certify a class action, the Plaintiff must prove the existence of all of the following six elements.

1. The class must be so numerous that joinder of all members is impractical;
2. There must be questions of fact or law common to the class;
3. The claims or defenses of the representative class parties must be typical of the claims or defenses of the proposed class;
4. The representative parties must fairly and adequately protect the interests of the proposed class;
5. The questions of law or fact common to the members of the class must predominate over questions of the individual members; and
6. The class action must be superior to other methods of adjudicating the controversy.

McDonald v. Washington, 862 P.2d 1150 (Mont. 1993); Mont. R. Civ. P. 23(a)-(b)(3). In determining whether these elements are met, the court must perform a rigorous analysis based on sufficient information to for a reasonable judgment as to each element. Burton v. Mt. W. Farm Bureau Mut. Ins. Co., 214 F.R.D. 598, 608 (D. Mont. 2003) (citations omitted). The court must accept as true the substantive allegations of the class claim, and cannot examine the merits of the claim. Burton, 214 F.R.D. at 608 (citations omitted). Prudence and caution must be used in authorizing a class action. Murer v. Mont. State Compt. Mut. Ins. Fund (1993), 257 Mont. 434, 849 P.2d 1036, 1038 (citing to the Advisory Committee's notes on Rule 23). A predominance of common questions over individual ones, however, is not required. Ferguson v. Safeco Ins. Co. of America, 342 Mont. 380, 180 P.2d 1164 (2008).

V. DEFENSES IN ACTIONS AGAINST INSURERS

A. Misrepresentations/Omissions: During Underwriting or During Claim

Misrepresentations, omissions, concealment of facts and incorrect statements made by an insured can prevent recovery if they were fraudulent, material to the acceptance of the risk or hazard assumed by the insurer, if the insurer in good faith would either not have issued the policy or issued it at a different rate or limit, or if the true the particularly type of hazard that caused the loss. Mont. Code Ann § 33-15-403. If a misrepresentation is made it must have been material to justify avoidance of coverage. Williams v. Union Fid. Life Ins. Co., 123 P.3d 213, 220 (Mont. 2005).

Though misrepresentation may prevent coverage, an insurer, health service corporation, or health maintenance organization may not place an

elimination rider on or rescind coverage provided by a disability policy, certificate, or subscriber contract after a policy, certificate, or contract has been issued unless the insured has made a *material misrepresentation or fraudulent misstatement* on the application or has failed to pay the premium when due. Id. (citing Mont. Code Ann. §33-18-215)

B. Pre-existing Illness or Disease Clauses

Mont. Code Ann. § 33-22-246 provides as follows:

(1) Except as provided in subsection (2), a health insurance issuer offering individual health insurance coverage may not exclude coverage for a preexisting condition unless:

(a) Medical advice, diagnosis, care, or treatment was recommended to or received by the participant or beneficiary within the 3 years preceding the effective date of coverage; and

(b) Coverage for the condition is excluded for not more than 12 months.

(2) A health insurance issuer offering health insurance coverage may not impose a pre-existing condition exclusion on a federally defined eligible individual because of a preexisting condition.

Montana also has a guaranteed renewability of individual health insurance coverage statute. It provides health insurance coverage to an individual shall be renewable or continue the coverage in force at the option of the individual. Mont. Code Ann. § 33-22-247. Nonrenewable or discontinuance of health insurance is allowable only if the individual failed to pay premiums or committed fraud. Mont. Code Ann. § 33-22-247.

Montana follows the general rule of insurance contract interpretation when applying these clauses. "If the terms of an insurance policy are ambiguous, obscure or open to different constructions, the constructions most favorable to the insured or other Beneficiary must prevail, particularly if an ambiguous provision in the policy attempts to exclude the liability of an insurer." *Head v. Central Reserve Life of North America Ins. Co.* (1993), 256 Mont. 188, 200, 845 P.2d 735, 745 (citation omitted).

C. Statutes of Limitation

Written contract: 8 years - Mont. Code Ann. § 27-2-202 (1) (2003)

Oral contract: 5 years - Mont. Code Ann. § 27-2-202 (2) (2003)

Unfair Claims Practices

Action by Insured

against Insurer: 1 year - Mont. Code Ann. § 33-18-242 (2003)

Common law bad faith: 3 years - Mont. Code Ann. § 27-2-202 (3)(2003)

Brewington v. Employers Fire Ins. Co. 1999 Mt 312, 24, 297 Mont. 243, 24, 992 P.2d at 236, 24

Fraud:

2 years - Mont Code Ann. § 27-2-203 (2003)

VI. BENEFICIARY ISSUES

A contract of insurance is not subject to the Statute of Frauds. See MCA § 28-2-903. As a result, there are no formal requisites for a change of beneficiary except as specified by the policy. The law provides, however, that "unless the insured makes an irrevocable designation of beneficiary, the right to change a beneficiary is reserved to insured." MCA § 33-22-215. Where the husband does not change the beneficiary of his policy after having been divorced, the divorced wife is entitled to the proceeds of the policy upon the death of the insured. If a property settlement agreement contemplates a disposition of all property rights and other matters and specifically describes a life policy in which the wife is beneficiary and states that the husband is to receive the policies free and clear of any claims of the wife thereto, the wife waives and relinquishes all right to the insurance proceeds of the policy in which she is beneficiary notwithstanding that at the time of the insured's death the wife is still the designated beneficiary. Eschler v. Eschler 257 Mont. 360 (1993).

VII. INTERPLEADER ACTIONS

A. Availability of Fee Recovery

In Montana state court, a stakeholder, disinterested in the result, who interpleads money or property so that a court may decide the true owner is entitled to costs and reasonable attorney fees for the interpleader action. Mutual of Omaha Insurance Company v. Walsh (Mont. 1975), 395 F.Supp. 1219. Such fees and costs may be charged against the stake to be distributed. Rocky Mountain Elevator Co. v. Bammel (1938), 106 Mont. 407, 81 P.2d 673. Whether the stake should be replenished by the losing party to the extent of the awarded fees and costs is a matter for the discretion of the District Court, depending upon the equities of the case. Generally, where a bona fide conflict exists between parties as to which is entitled to the stake, no absolute duty devolves upon the losing party to bear the interpleader's fees and costs as awarded. The District Court has discretion under MCA § 25-8-10 to order the deposited money to be delivered "upon such conditions as may be just". Soha v. West (1981) 196 Mont. 95.

The Montana Supreme Court declined to adopt an equitable rule generally providing for attorneys' fees in interpleader matters. Nat'l Cas. Co. v. Am. Bankers Ins. Co., 2001 MT 28, ¶¶ 29-32, 304 Mont. 163, 169-70, 19 P.3d 223, 227-28. Where the party's claim for insurance proceeds was neither frivolous nor malicious denial of interpleader fees is appropriate. Id.

B. Differences in State vs. Federal Court

Montana's interpleader rule as set forth in M. R. Civ. P. 22(a) is identical to Fed. R. Civ. P. 22. Montana's rule interpleader is an equitable remedial device that exists in order to avoid the unfairness that may result to some claimants who have competing claims to the interpleader res, but who lose the "race to judgment." Associated Dermatology & Skin Cancer Clinic v. Fitte, 388 P.3d 632, 636-38 (Mont. 2016).

Under 28 U.S.C. § 1335, an insurance company is permitted to file in the U.S. District Court a "civil action of interpleader" where it has issued

an insurance policy or other instrument of value or amount of \$500 or more, but only if the following apply: (1) there are two or more claimants of diverse citizenship, as defined by subsection (a) and (d) of 28 U.S.C. § 1332, who are claiming or may claim to be entitled to money or benefits arising under a policy and (2) the Plaintiff had deposited such money or paid the value of the instrument into the registry of the court or given sufficient bond to secure a future judgment rendered by the court with respect to the amounts owed.

There is no interpleader statute in Montana comparable to 28 U.S.C. § 1335. Interpleader can be pursued under MCA § 25-20-Rule 22, which allows persons with claims that may expose a party to double or multiple liability to be joined as defendants through an interpleader, even though the claims of the several claimants may lack a common origin or are adverse and independent rather than identical. A Plaintiff may initiate an interpleader by naming the interested parties as defendants. Defendants may seek interpleader through a cross-claim or counterclaim except that a defendant in a contract or property action may substitute as the defendant a person who is not a party and who demands the same debt or property at issue in the action. An interpleader by a defendant must be done before an answer is filed, with due notice to the person not a party and to the plaintiff, and with an affidavit that the person not a party makes against the defendant a demand for the same debt or property, and is not colluding with the defendant. Once this occurs, the court has the discretion to order a defendant substituted under Rule 22 to either deposit into the court the amount of the debt at issue or deliver the property at issue or its value to such person as the court may direct. A defendant's deposit of debt or delivery of property under this rule discharges the defendant's liability to either the plaintiff or the substitute defendant. With respect to smaller amounts, MCA §25-31-119 and MCA §25-35-508 provide that an interpleader action can be maintained to determine the rights of rival claimants to a fund held by a disinterested party.