

INSURANCE CONSUMER COUNSEL'S COLUMN

THE CONSTITUTIONAL ATTACK ON MONTANA'S ANTI-STACKING STATUTE

BY PROFESSOR GREG MUNRO

Without doubt, the most significant and frustrating obstruction to securing adequate insurance compensation for consumers right now is the statutory prohibition against "stacking" of auto insurance coverages. Legislative amendments to MCA Section 33-23-203 in 1997 were intended to absolutely block any stacking of insurance benefits in motor vehicle liability policies. Because the amendments so severely cut potential limits of recovery for auto accident victims, plaintiffs' counsel have been pressing arguments in state district courts seeking to avoid the anti-stacking statute's effect or to attack the statute itself. In at least two instances, stacking cases were settled after decision by district judges and before appeal.

In the Summer 1999 issue of *Trial Trends*, I wrote an article entitled, "**Stacking in Montana in 1999**," that traced the history of the stacking issue in Montana and discussed the legal import of the 1997 amendments. In the Spring 2002 issue, in a column entitled, "**The Case Against Montana's Anti-Stacking Statute**," I collected and featured a number of arguments that were being pressed around the state in favor of stacking and challenging the anti-stacking statute.

Fortuitously, the stacking issue has now arrived at the Montana Supreme Court in the case of *Hardy v. Progressive Specialty Insurance Company*. MTLA member Kent Duckworth of Ronan represents Ned Hardy who suffered a broken neck in auto accident on December 26, 2000. Hardy was a passenger in a car driven by his wife, which was struck by a vehicle negligently driven by Gary Marr. Hardy settled with Marr's liability

carrier for its \$50,000 liability limit and then pressed claims against his own insurer, Progressive, for the \$50,000 limits of Underinsured Motorist coverage on each of his three vehicles under the policy and for the separate Medical Pay coverage limits on each. Hardy had paid separate premiums for each vehicle and for each coverage.

Progressive refused to stack the coverages for the three vehicles and also asserted that no UIM coverage was available based on its restrictive definition of an "underinsured motorist" and on an offset provision that, together with the definition, entirely defeated Hardy's UIM coverage. Progressive asserted that anti-stacking provisions of Progressive's policy and the Montana anti-stacking statute, MCA Section 33-23-203, prohibited the stacking of the coverages. With regard to the UIM coverage, Progressive's policy restrictively requires that an "underinsured motorist" have limits of liability less than the limits of the insured's UIM coverage (as opposed to less than the limits of the UIM insured's damages). Finally, the policy provided that any liability limits recovered be subtracted from any UIM coverage available thereby making it certain that the insured could never recover the limits of UIM shown on the declarations page.

Kent Duckworth sued Progressive in the Federal District Court in Missoula and secured Judge Molloy's certification of the following three questions to the Montana Supreme Court:

- 1) Is the offset provision in Progressive's policy void in Montana as against public policy?
- 2) Given that the Montana Supreme Court has determined that underinsurance coverage is personal and portable, is it against public policy in Montana to charge separate premiums for underinsurance for separate vehicles on the same policy if insureds can only collect once on that policy?
- 3) Are insurance policies such as the one in question here against public policy in Montana when they include provisions that defeat coverage for which the insurer has received valuable consideration?

Kent Duckworth invited MTLA to join in the effort and, because of the importance of the questions involved, the MTLA Amicus Committee successfully petitioned the court to enter the case. Kent wrote a fine brief arguing the fallacy in allowing a statute controlling stacking of motor vehicle coverages to apply to personal and portable coverages like UIM and Med Pay. He also attacked the "illusory" coverage caused by the UIM definition and offset provisions.

MTLA member Randy Bishop and I endeavored to add arguments different from Kent's in the amicus brief. Hence, Randy researched and wrote the argument on stacking that challenges the validity of the anti-stacking statute under four provisions of the Montana Constitution, and I wrote the arguments on the UIM definition and offset arguments. We edited each other's work and honed the arguments until we convinced ourselves of their impeccable logic and righteousness. Because of the importance of Randy's constitutional stacking arguments, they are reprinted

here in full. In next quarter's column, I will discuss the issue of the validity of Progressive's restrictive definition of UIM and its offset, which result in "illusory" coverage. Here then are the arguments submitted by amicus MTLA challenging the constitutionality of the anti-stacking statute:

Introduction

Section 33-23-203 MCA violates separation of powers, denies equal protection, and arbitrarily infringes upon inalienable rights.

For 30 years, this court has consistently articulated Montana's public policy prohibiting insurers from placing provisions in insurance policies that defeat coverage for which the insurer has received valuable consideration. *Ruckdaschel v. State Farm Mutual Automobile Insurance Co.* (1997), 285 Mont. 395, 398, 948 P.2d 700, 702. *In Dakota Fire Insurance Company v. Oie*, 1998 MT

288, ¶¶34 & 35, 291 Mont. 486, 499-500, 968 P.2d 1126 1134-35, this court labored to give effect to the 1991 version of Section 33-23-203. It was able to do so because crucial omissions were found within the statutory language. Foreshadowing the issue here, this court differentiated the 1991 statute from the one now under consideration, observing, "[u]nlike the 1997 version of the statute, the 1991 version applicable here makes no reference to the number of premiums paid." Id.

Now, this court is directly confronted with legislative action undoubtedly intended, "as a matter of public policy, to preclude stacking of uninsured [and underinsured] motorist coverages despite the insured having paid separate premiums for such coverages..." Cf. *Oie*, *supra*. The United States District Court seeks this court's opinion, upon first impression¹, of the apparent conflict

between three decades' judicial expression of public policy which requires stacking, and Section 33-23-203 (1997), which forbids it.

Amicus curiae MTLA submits that the reason this court has so consistently identified and powerfully endorsed Montana public policy is that its roots are deeply imbedded in multiple, fundamental constitutional guarantees and protections, each of which is infringed by Section 33-23-203. The office of the Attorney General has been advised of the constitutional infirmity of Section 33-23-203 and of the present proceedings. Its 'Notice of Intent Not to Participate' is attached as an Appendix to this brief.

The certified questions raise, but do not directly refer to, these statutory and constitutional issues. Whether the questions certified to this court are considered broadly as they have been phrased or reformu-

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lated as permitted by Rule 44(d), M.R.App.P., each certified question must ultimately, and unequivocally, be answered "yes." But, implicit within the certified questions is a threshold issue. Namely, is the legislature's "dictation" of a particular interpretation of the language of insurance agreements an impermissible invasion of the power of "determination," constitutionally reserved to the judiciary? MTLA respectfully submits that, once again, the unfortunate answer is "yes."

Argument of Amicus Curia MTLA

I. Section 33-23-203 MCA is Constitutionally Invalid

1. Section 33-23-203 MCA violates separation of powers.

a. Judicial Power Is Constitutionally Vested Exclusively In The Judiciary.

The independence of the judiciary is absolute. *Montana Constitution, Article III, Section 1; Article VII, Section 1 (1972)*. Stated succinctly, "the legislative branch makes the laws, the executive branch carries out the laws, and the judicial branch construes and interprets the laws." *Merlin Myers Revocable Trust v. Yellowstone County*, 2002 MT 201 ¶21, 2002 WL 31012788.

The hallmark of judicial power is the power to decide and enter judgments carrying judicial determinations into effect. *Seubert v. Seubert*, 2000 MT 241, 301 Mont. 382, 391, 13 P.3d 365, 370-71. The free exercise of discretion, reasoning, and judgment, without obedience to the authority of the executive or legislative branches of government, is the characteristic that differentiates an independent judiciary from a body that is merely ministerial. See *Carlson v. City of Bozeman*, 2001 MT 46, ¶¶27-29, 20 P.3d 792, 797. In *Coate v. Ombolt* (1983), 203 Mont.

488, 493, 662 P.2d 591, 594, this court, citing *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision (1958)*, 107 U.Pa.L.Rev. 1, 31-32, adopted the view that,

"[a]ny statute which moves so far into this realm of judicial affairs as to dictate to a judge how he shall judge or how he shall comport himself in judging or which seeks to surround the act of judging with hampering conditions clearly offends the constitutional scheme of the separation of powers and will be held invalid."

This court has consistently halted improper legislative and executive incursions into the realm of judicial power. Judicial power cannot be taken away by legislative action." State ex rel. *Bennett v. Bonner* (1950), 123 Mont. 414, 429, 214 P.2d 747, 755. The manner in which cases shall be decided is solely for the judicial branch of government. *Coate v. Ombolt* (1983), 203 Mont. 488, 492, 662 P.2d 591, 593. See also *Harlen v. City of Helena* (1984), 208 Mont. 45, 49, 676 P.2d 191, 193 and *Ingraham v. Champion International* (1990), 243 Mont. 42, 48-49, 793 P.2d 769, 772-73.

b. Judicial Power Is Unconstitutionally Abridged By Section 33-23-203.

Interpreting insurance contracts is a question of law, reserved to the court. See *Dagel v. Farmers Insurance Group of Companies* (1995), 273 Mont. 402, 405, 903 P.2d 1359, 1361. Indeed, it is the legislative branch that has declared that a court must decide the construction of "statutes and other writings." See Section 26-1-201, MCA and *Wadsworth v. State of Montana* (1996), 275 Mont. 287, 296, 911 P.2d 1165, 1170.

Despite this constitutional and statutory norm, Section 33-23-203 declares that "the limits of insurance coverage available under each part of the policy *must be determined as follows* . . ." (emphasis added). The legislature then goes on to dictate the precise manner by which coverage provisions must be interpreted and applied. See Section 33-23-203 (a) (b) and (c) MCA. In this manner, Section 33-23-203 provides a "cookbook" for insurers intent upon preventing insureds from obtaining the benefit of their UIM bargain. What is remarkable is that this enactment commands this court, and all Montana courts, to follow its "recipe" to the letter. Making matters still worse, the legislature demonstrated its willingness to grant the insurance industry power to alter the interpretive mandate, while steadfastly denying it to the courts, by authorizing insurers to "specifically provide otherwise." Section 33-23-203(1) MCA.

Section 33-23-203's directive to interpret legal instruments in a predetermined manner exceeds the powers of the legislature and violates our Constitution's mandate that, "No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others..." *Montana Constitution, Article III, Section 1 (1972)*.

2. Section 33-23-203 MCA infringes upon inalienable rights included within our Declaration of Rights, *Montana Constitution, Article II (1972)*.

a. Section 33-23-203 abridges fundamental rights to pursue life's necessities and protect property.

The individual's right to pursue life's necessities is a fundamental right encompassing all activities and opportunities necessary to the enjoy-

ment of this right. *Montana Constitution, Article II, Section 3* (1972); Wadsworth, *supra*, 275 Mont. at 299, 911 P.2d at 1172. Thus, the opportunity to pursue employment is a fundamental right because earnings and earning capacity "... provide income for the most basic of life's necessities, such as food, clothing, and shelter. . . , [and] for many, if not most, . . . their only means to secure other essentials of modern life, including health and medical insurance, retirement, and day care. *Id.* These rights are fundamental because they are of the nature that "without which other constitutionally guaranteed rights would have little meaning."

Matter of C.H. (1984), 210 Mont. 184, 201, 683 P.2d 931, 940. Inextricably linked with the right to pursue life's necessities, of course, is the inalienable right to protect property. *Montana Constitution, Article II, Section 3* (1972).

Insurance is *the method* of protecting one's property and ability to pursue life's necessities. Modern society recognizes that a lifetime's pursuit of life's necessities can be wiped out in an instant by the negligence of another and that remedies are meaningless absent the means to obtain compensation. Underinsured and uninsured motorist insurance is the sole means of protecting against the irresponsible driver who opts to carry nothing more than minimum automobile liability insurance coverage limits or none at all. Like life insurance, UIM and UM insurance is personal and portable protection.

Bennett v. State Farm Mutual Automobile Insurance Co. (1993), 261 Mont. 386, 389, 862 P.2d 1146, 1148 and **Jacobson v. Implement Dealers Mutual Insurance Co.** (1982), 196 Mont. 542, 548, 640 P.2d 908,

912, 30 A.L.R.4th 165. It is underwritten, advertised, and sold to secure life's essentials: to protect earnings and earning capacity, to access medical and institutional care, and to provide food, shelter, clothing, and retirement in the event of catastrophic injury. As if these truths had been momentarily forgotten, the 1997

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amendments to Section 33-23-203 delegated to the insurance industry the unbridled power to prevent insureds from enjoying the benefits of their personal insurance bargain.

b. Privileges and immunities.

The legislature is prohibited from making any irrevocable grant of special privileges, franchises, or immunities. *Montana Constitution, Article II, Section 31*. A 'franchise' is in the nature of a "special privilege conferred by the government on an individual which does not belong to the citizens generally." **Glodt v. City of Missoula** (1948), 121 Mont. 178, 183, 190 P.2d 545, 548. An immunity is a special exemption from "duties which the law generally requires other citizens to perform." *Black's Law Dictionary* (revised 4th ed. 1968), at p. 885.

Law requires citizens and corporations to perform their contracts. Special legislative privilege to charge money for a product with the full knowledge that it need not be delivered is not generally available to those who do business in Montana. It is precisely this sort of special privi-

lege and immunity, however, which the 1997 Legislature granted irrevocably to the insurance industry when it amended Section 33-23-203 MCA. Section 33-23-203 provides irrevocable exemption from liability for contractual obligations for which full value has been demanded, delivered, and accepted in the form of premiums. With these enactments, the legislature effectively granted insurers license to accept premiums for personal and portable underinsured motorist coverage, which it knew the industry had no intention to provide. Article II, Section 31, bars such legislation.

3. The legislature's abridgement of these inalienable rights works a denial of equal protection.

Both the Montana and United States constitutions state that, "[n]o person shall be denied the equal protection of the laws." *Montana Constitution, Article II, Section 4*. "The principal purpose of the Equal Protection Clause is to ensure that citizens are not the subject of arbitrary and discriminate state action." **Godfrey v. Montana State Fish and Game Commission** (1981), 193 Mont. 304, 306, 631 P.2d 1265, 1267; **Brewer v. Ski-Lift, Inc.** (1988), 234 Mont. 109, 762 P.2d 226. "The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government." **Butte Community Union v. Lewis** (1986), 219 Mont. 426, 430, 712 P.2d 1309, 1311. Equal protection challenges to legislation are reviewed under one of three different levels of scrutiny. **Matter of S.L.M.** (1997), 287 Mont. 23, 32, 951 P.2d 1365, 1371. Where, as here, the legislation in question infringes upon rights identified as fundamental by

express inclusion in Article II, this court employs the most stringent standard, strict scrutiny. Strict scrutiny requires the showing of a compelling state interest underlying the discriminatory action. *Wadsworth*, *supra* and *Davis v. Union Pacific Railroad Co.* (1997), 282 Mont. 233, 241, 937 P.2d 27, 31.

It would be futile to attempt to demonstrate a compelling state interest that justifies discriminatory impacts of the type mandated by Section 33-23-203. Indeed, the statute cannot even pass muster under rational basis analysis. *Cf. Davis*, *supra*. In *Davis*, this court struck down Section 25-2-122(2) MCA, which purported to restrict venue options available to victims of non-resident corporations. *Davis*, 282 Mont. at 243-45, 937 P.2d at 32-34. See also *Henry v. State Compensation Insurance Fund*, 1999 MT 126, 294 Mont. 448, 458-59, 982 P.2d 456, 464 (no rational basis for treating workers injured over one work shift differently from workers injured over two work shifts).

Reasoning identical to that applied by this court in *Davis* is *apropos*, because here, as in *Davis*, the discriminatory impact of the enactment is stunning. Paragraph (1)(a) of Section 33-23-203 requires this court to "determine" that the limits specified for the coverage available under the policy insuring the motor vehicle involved in the accident constitute the limit of available coverage. If no such policy exists, however, paragraph (1)(b) of Section 33-23-203 mandates that the courts "determine" that the "highest limits of coverage" constitute the "insurance coverages available." Thus, based solely upon whether the "vehicle involved in the accident" had coverage, an injured person or family may be stuck with the low limits of that vehicle and

unable to access the insurance protection which they purchased for themselves.

As in *Davis*, examples make the point: Assume that A and B each purchase \$300,000 of combined UM/UIM coverage. Each then suffers similar severe, totally disabling injuries while riding as a passenger in a car owned by another. The only

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difference is that the car in which A is riding carries \$25,000 UIM limits, while the car carrying B is uninsured. Pursuant to the legislative mandate of Section 33-23-203(1)(a) and (b), Montana's courts are directed to determine that A is precluded from obtaining the \$300,000 benefit of the coverage purchased, while B is not.

Moreover, pursuant to Section 33-23-203(1)(c), this court is ordered by the legislature to disregard the insured's fundamental rights discussed above and discriminate in favor of those who purchase UM/UIM coverage for one vehicle. The statute declares that this savvy consumer gets the full benefit of the bargain. One premium is paid, one coverage is obtained. The consumer who insures more than one automobile, of course, gets shortchanged. Multiple premiums are paid, but still, just one coverage is obtained.

Discrimination such as this is indistinguishable from the "one work shift" versus "two work shifts" distinction declared irrational in *Henry* and the limited venue restrictions struck down in *Davis*. And, regardless of legislative notions to the contrary, no amount of written notice

that, "coverage from one policy. . . may [not] be added to the coverage of another," lessens the discriminatory impact of Section 33-23-203 in any way. See Section 33-23-203(3) MCA. Stated bluntly, the reasoning that underlies the 1997 amendments to Section 33-23-203 is inexplicable in logic, law, or fairness.

The underlying justification for such an enactment may reside in insurance industry concerns over the cost of claims, but concerns such as this do not justify disparate treatment. This court recognizes that discrimination always results in lower costs

and has repeatedly disallowed discrimination merely for the sake of "fiscal health." *Henry*, *supra*, 294 Mont. at 459, 982 P.2d at 464; *Heisler v. Hines Motor Co.* (1997), 282 Mont. 270, 283, 937 P.2d 45, 52. Here, as in *Heisler* and *Henry*, there is no rational reason — let alone the required compelling state interest — to explain why similarly situated people should be treated differently so as to deprive one, but not the other, of either their insurance premiums or the benefits of their personal insurance coverage purchased, paid for and accepted by the insurer.

4. The legislature's abridgement of these inalienable rights violates substantive due process.

"No person shall be denied of life, liberty, or property without due process of law." *Montana Constitution, Article II, Section 17* (1972). This guarantee of due process not only imposes standards of fairness in governmental procedures, but also contains a substantive component. *Newville v. State Dept. of Family Services* (1994), 267 Mont. 237, 249, 883 P.2d 793, 800. Substantive due

process prevents the state from using its power to take unreasonable, arbitrary, or capricious action. To satisfy substantive due process concerns, "a statute enacted by the legislature must be reasonably related to a permissible legislative objective." *Plumb v.*

Fourth Judicial District (1996), 279 Mont. 363, 372, 927 P.2d 1011, 1016, citing *Newville*, 883 P.2d at 803.

At a minimum, it is difficult to isolate the "permissible legislative objective" that underlies legislation authorizing the insurance industry to sell illusory coverage. If lower insurance cost for consumers is the goal, then how can one argue that legislation that authorizes insurers to charge multiple premiums for a single coverage be seen as "reasonably related" to that end? If, instead, we assume that increased insurance industry profit is the goal, then the question becomes, is this a proper legislative objective in the first instance or is it instead a

legislative grant of special privilege?

Even assuming one finds a way to conclude that increased profit for insurers is a permissible objective, is delegation of the power to sell illusory insurance coverage reasonable or arbitrary? To ask these questions is to answer them. Suffice it to say, it is not easy to rationalize a legislative strategy that authorizes insurers to charge for coverage they do not intend to provide, particularly when one commences the inquiry with the understanding that insurance contracts have long been identified as contracts of adhesion. *Transamerica Insurance Company v. Royle* (1983), 202 Mont. 173, 181, 656 P.2d 820, 825 and *Fitzgerald v. Aetna Insurance Company* (1978), 176 Mont. 186, 191, 577 P.2d 370, 373.

Since it goes without saying that to charge premium under a contract of adhesion with no intention of providing coverage is unconscio-

nable, one is left with the stark realization that the legislative branch has granted the insurance industry carte blanc to sell a product that, in any other circumstance, would be void and wholly unenforceable. Legislative actions more arbitrary, inexplicable, and unreasonable than this are rarely seen. ♦

1. Neither public policy considerations nor the validity of Section 33-23-203 (1997) were considered in *Christensen v. Mountain West Farm Bureau Insurance Company*, 2000 MT 378, 22 P.3d 624, or could have been. There, the plaintiff sought to stack liability coverages, not personal and portable UM/UIM coverages. None of the public policy and constitutional concerns central to the present inquiry were implicated in *Christensen*. The questions certified by the Honorable Donald W. Molloy present these issues for consideration against the backdrop of Section 33-23-203 (1997), for the first time.

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