

2013

Jacobsen v. Allstate Ins. Co., 2013 MT 244

Samir Faerevik Aarab
University of Montana School of Law, sfaarab@gmail.com

Follow this and additional works at: <http://scholarship.law.umt.edu/mlr>



Part of the [Insurance Law Commons](#)

Recommended Citation

Samir Faerevik Aarab, *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, 0 Mont. L. Rev. (2013).
Available at: <http://scholarship.law.umt.edu/mlr/vol0/iss2/4>

This Civil Case is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized administrator of The Scholarly Forum @ Montana Law.

Jacobsen v. Allstate Ins. Co., 2013 MT 244, 371 Mont. 393, --- P.3d ---.

The Rule 23(b)(2) class certification standard requires that a class be sufficiently cohesive so that injunctive and declaratory relief may apply to the class as a whole. Punitive damages are inappropriate for a 23(b)(2) class. Class certification proceedings do not require evidence to be in a form that would be admissible at trial.

In 1995 Allstate developed a Claim Core Process Redesign (“CCPR”) for quick resolution of claims in an effort to limit legal settlement sums. In 2001, Robert Jacobsen suffered personal injury and property damage in a car accident caused by Allstate's insured. To qualify for the quick resolution of a claim, a claimant must be unrepresented by counsel. Jacobsen was unrepresented. He met with Allstate’s adjuster and accepted Allstate's settlement offer under the CCPR. Shortly after the payment of \$3500, Jacobsen experienced additional physical symptoms and retained counsel to pursue further compensation from Allstate. After filing suit and alleging Allstate's violation of Montana’s Unfair Trade Practices Act (UTPA), among other claims, Jacobsen settled with Allstate for \$200,000 in 2002. Later, Jacobsen retained new counsel and filed a second complaint against Allstate seeking compensatory damages for, among other things, violations of the UTPA. The jury returned a verdict awarding \$68,000 compensatory and \$350,000 punitive damages to Jacobsen in 2006. Both Allstate and Jacobsen appealed. Jacobsen had been barred by the trial court from discovering documents pertaining to Allstate's development of its CCPR (“The McKinsey documents”). Even though he won below, Jacobsen argued on appeal that the CCPR documents were discoverable and that it was error for the trial court not to have ordered their production.

The Montana Supreme Court remanded the case for a new trial and held that Allstate's documents pertaining to the development of the CPPR were discoverable. On remand, fortified by the production of the McKinsey documents, Jacobsen filed his fourth amended complaint with class action claims and a motion seeking class certification. Jacobsen argued that Allstate had violated UTPA codified at Mont. Code Ann. § 33–8–201. Jacobsen further argued Allstate “intentionally misrepresent[ed] that unrepresented claimants generally received more compensation than represented

claimants.” Jacobsen alleged that “settling unrepresented claims via an inadequate ‘fast track’ component of the CCPR . . . resulted in unfair settlements.” Jacobsen advanced these claims on behalf of all unrepresented individuals who had third party or first party claims against Allstate and whose claims were adjusted using the CCPR. Jacobsen filed for class certification in May 2010, and the district court certified the class under Rule 23(b)(2) in June 2012. In granting certification, the district court followed the United States Supreme Court’s standard in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011).¹ The court construed the class claim to argue that Allstate's CCPR practice constituted a common pattern and practice in violation of the UTPA, “thereby resulting in indivisible harm to the class as a whole.” The trial court also certified the class to determine whether Allstate acted with actual malice, thus allowing for the possibility of punitive damages. Allstate appealed the class action certification and argued that the court's admission of certain evidence in the certification proceedings was error because the documents would not be admissible at trial.

The Montana Supreme Court analyzed the class certification based on the four requirements in Rule 23(a): numerosity, commonality, typicality and adequacy. Commonality was the requirement most at issue on appeal. Commonality requires a party seeking class certification to have a common question of law or fact within the class. The Montana Supreme Court has previously recognized that the *Wal-Mart* commonality standard was a “more stringent” standard than Montana's but has yet to address whether the Montana standard will continue to apply post *Wal-Mart*. The Court again declined to address whether the *Wal-Mart* standard should apply in Montana because Jacobsen met the *Wal-Mart* standard and the issue was not raised on appeal. Therefore, as the dissent suggests, district courts in Montana will likely continue to use the commonality standard articulated in *Wal-Mart*.

¹ The U.S. Supreme Court held in *Wal-Mart* that a “proper ‘rigorous’ Rule 23(a) analysis specifically requires that the district court determine each requirement of Rule 23(a) has been actually met and allows, but does not require, the district court to probe beyond the pleadings and touch aspects of the merits to make this determination.”

Although the Court upheld the district court's class certification, it modified the certification request, and it reversed the trial court to the extent that the trial court permitted class certification respecting punitive damages at this stage in the litigation. The Court held that punitive damages are not appropriate for Rule 23(b)(2) class certification. If the CCPR is found to have violated the UTPA, subsequent individual trials will not have re-litigate that claim. However, after class members are given notice and an opportunity to opt in or opt out of the class, individual trials would have to be held to determine the extent of the individual member's actual harm. The nature and extent of that harm would then be the basis for a potential punitive damage claim. Whether and to what extent a plaintiff suffered actual injury as a result of the violation of the UTPA must be determined on a case-by-case basis.

Finally, the Court upheld the district court's admission of evidence that is not in "trial admissible form" for the purposes of class certification proceedings. The Court held that class certification proceedings are "tentative, preliminary, and limited to a determination of only whether the litigation may be conducted on a class basis," and they are "not a conclusive judgment on the merits of the case."

The Court's remand in *Jacobsen* requires the following:

1. A class trial to determine the legality of the CCPR under the UTPA.
2. Following that determination, the trial court is to determine whether it should enter an order requiring Allstate to notify former settled claimants of their right to reopen and readjust their claim.
3. The jury in this class action trial must also determine whether Allstate's CCPR involved actual fraud or actual malice, which might later justify punitive damages following a finding of actual damages in the individual trials.
4. If the district court determines that Allstate did not engage in either actual fraud or actual malice, "individual class members who have chosen to re-open their claims would be entitled to compensatory damages to the extent they can prove them in their individual cases."

5. Following the class trial, the trial court needs to determine whether a common fund recovery should be established for the payment of attorneys' fees and costs.

The Montana Supreme Court's recent decision in *Jacobsen* does not develop or clarify Montana's common law respecting class certification following the U.S. Supreme Court's opinion in *Wal-Mart*. However, as part of its holding, the Court confirmed that attorney's fees and emotional distress damages alone are sufficient for claims under the UTPA. Furthermore, district courts in Montana likely will continue to analyze commonality for class certification under the federal *Wal-Mart* standard. Although the Montana Supreme Court did not address the standard for Montana, *Jacobsen* is the second case (*Mattson III* was the first) where the Court has declined to address that standard. For now, the federal standard under *Wal-Mart* may be the de facto standard for Montana.

The District Court, Cascade County, Dirk M. Sandefur, Presiding Judge, granted motion. Insurer appealed.

For Appellant:

Robert H. King, Jr. (argued), SNR Denton US LLP, Chicago, Illinois; Dennis Tighe; Paul R. Haffeman; Davis, Hatley, Haffeman & Tighe, P.C., Great Falls, Montana

For Appellee:

Lawrence A. Anderson (argued), Attorney at Law, P.C., Great Falls, Montana | Daniel P. Buckley, Buckley Law Office, P.C., Bozeman, Montana | David J. Berardinelli, Berardinelli Law Firm, Santa Fe, New Mexico

Samir Aarab