DA 18-0480

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 163

LISA STRAUSER,

Petitioner and Appellant,

v.

RJC INVESTMENT, INC.

Defendant and Appellee.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV 17-1894
Honorable Michael G. Moses, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

D. Michael Eakin, Eakin, Berry & Grygiel, PLLC, Billings, Montana

For Appellee:

Christopher T. Sweeney, Peter M. Damrow, Moulton Bellingham PC, Billings, Montana

---

Submitted on Briefs: July 3, 2019

Decided: July 23, 2019

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Plaintiff Lisa Strauser appeals from an order of the Thirteenth Judicial District Court, Yellowstone County, granting a motion to dismiss in favor of Defendant RJC Investment, Inc. We affirm in part and reverse in part.

¶2 We restate the issues on appeal as follows:

1. Whether consumers have a private right of action under the 2007 version of the Montana Retail Installment Sales Act.

2. Whether the statutory provisions contained in the Montana Retail Installment Sales Act apply to a retail installment contract not enforced by the Department of Administration.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On January 15, 2009, Strauser purchased a mobile home for $50,000 from Cherry Creek Development, Inc. (Cherry Creek) in Billings, Montana. Strauser paid $2,500 down and financed the remainder through an Installment Sales Contract and Security Agreement (Agreement), which Cherry Creek later assigned to RJC Investment, Inc. (RJC Investment). The Agreement required Strauser to make monthly payments of $482 with a variable interest rate over a fifteen-year period and to pay a $50 late fee for any late payments. Between 2009 and 2016, Strauser alleges that RJC Investment assessed $3,300 in late fees against her and failed to disclose the amount of the finance charge.

¶4 Strauser filed an action in District Court seeking a declaratory judgment pursuant to the Uniform Declaratory Judgment Act (UDJA), Title 27, chapter 8, MCA, clarifying her rights and obligations under the Agreement. Strauser further asserted that provisions

of the Montana Retail Installment Sales Act (RISA), Title 31, chapter 1, part 2, MCA, (2007), barred RJC Investment from collecting fees under the Agreement because Cherry Creek and RJC Investment had violated RISA by failing to disclose the finance charge and collecting excessive late fees. RJC Investment moved to dismiss Strauser's complaint for failure to state a claim pursuant to M. R. Civ. P. 12(b)(6). On March 29, 2018, the District Court granted RJC Investment's M. R. Civ. P. 12(b)(6) motion on the basis that the 2009 version of RISA did not confer a private cause of action. Strauser appeals.

STANDARD OF REVIEW

¶5 This Court reviews a district court's grant or denial of a motion to dismiss pursuant to M. R. Civ. P. 12(b)(6) de novo. *Meagher v. Butte-Silver Bow City-Cty.*, 2007 MT 129, ¶ 13, 337 Mont. 339, 160 P.3d 552. "A district court's determination that a complaint failed to state a claim presents a conclusion of law," which this Court reviews for correctness. *Renenger v. State*, 2018 MT 228, ¶ 5, 392 Mont. 495, 426 P.3d 559. This Court views the complaint in the light most favorable to the non-moving party, and affirms a District Court's dismissal only where the "non-moving party would not be entitled to relief based on any set of facts that could be proven to support the claim." *Renenger, ¶ 5.*

DISCUSSION

¶6 *1. Whether consumers have a private right of action under the 2007 version of the Montana Retail Installment Sales Act.*

¶7 On appeal, Strauser asserts six violations of RISA including that Cherry Creek and RJC Investment: (1) failed to disclose the finance charge; (2) failed to disclose the total amount of the time balance, stated as one sum in dollars and cents; (3) prematurely assessed late fees; (4) charged excessive late fees; (5) failed to disclose the number of payments; and (6) did not contain the required notice in the Agreement. Strauser argues that she has a private cause of action pursuant to RISA, § 31-1-203(2), MCA (2007), which states: "Any person violating 31-1-231 through 31-1-243, except as the result of an isolated accidental and bona fide error of computation, shall be barred from recovery of any finance, delinquency, or collection charge on the contract." We disagree. In *Somers v. Cherry Creek Dev., Inc.*, 2019 MT 101, 395 Mont. 389, 439 P.3d 1281, this Court held that the 2009 version of RISA did not confer a private right of action. While the 2007 version of RISA controls in this case, the same analysis applies.[1]

¶8 "[A] party is not entitled to obtain private enforcement of a regulatory statute that is not intended by the legislature to be enforceable by private parties." *Mark Ibsen, Inc. v. Caring for Montanans, Inc.*, 2016 MT 111, ¶ 41, 383 Mont. 346, 371 P.3d 446. In *Wombold v. Assocs. Fin. Servs. Co. of Mont., Inc.*, 2004 MT 397, ¶ 36, 325 Mont. 290,

[1] "It is well established that laws existing at the time a contract is formed become part of the contract." *Earls v. Chase Bank of Tex., N.A.*, 2002 MT 249, ¶ 12, 312 Mont. 147, 59 P.3d 364. Strauser entered the Agreement with Cherry Creek in January 2009 under the 2007 version of RISA. The 2007 version of RISA therefore controls. At the time of sale, installment sales of mobile homes were covered by the 2007 version of RISA. *See* § 31-1-102(1)(d), MCA.

104 P.3d 1080, this Court developed a four-factor test (*Wombold* test) to determine whether a statutory scheme confers a private cause of action. *Somers*, ¶ 11. Consistent with this Court's analysis and application of the *Wombold* test in *Somers*, the Legislature did not intend the 2007 version of RISA to confer a private cause of action. *Somers*, ¶ 19. "RISA is an administrative statute authorizing the Department to enforce its provisions," not private parties. *Somers*, ¶ 15.

¶9 *2. Whether the statutory provisions contained in the Montana Retail Installment Sales Act apply to a retail installment contract not enforced by the Department of Administration.*

¶10 This Court has recently reviewed several installment contracts governing the relationship between mobile home purchasers and RJC Investment. *See Kapor v. R.J.C. Inv., Inc.*, 2019 MT 41, 394 Mont. 311, 434 P.3d 869; *Hutzenbiler v. R.J.C. Inv., Inc.*, 2019 MT 80, 395 Mont. 250, 439 P.3d 378; *Christman v. Clause*, 2019 MT 132, 396 Mont. 142; *Somers.* While each case presented nuanced issues, this Court has uniformly held that Article 9A of Montana's adopted version of the Uniform Commercial Code (U.C.C.) governs contracts involving secured transactions, including the present Agreement, subjecting "both the debtor and creditor parties to additional obligations and rights." *Christman*, ¶¶ 12-13. While the statutory provisions of the U.C.C. are not presently at issue, this Court wishes to contextualize our prior holdings in *Kapor*, *Hutzenbiler*, *Christman*, and *Somers*, with the present facts.

¶11 Title 30, chapter 9A, part 6, MCA, governs default in secured transactions, and is triggered by the debtor's default. *Kapor*, ¶ 11; *Hutzenbiler*, ¶ 14 (citing § 30-9A-601,

MCA). In the event of Strauser's default and RJC Investment's repossession and disposition of the mobile home, our holdings in *Kapor*, *Hutzenbiler*, and *Christman*, make clear that "termination of the security interest does not do away with the obligations of a creditor under Title 30, Chapter 9A," including the debtor's right to an accounting for or payment of surplus proceeds of collateral. *Christman*, ¶ 15.

¶12 However, it is unclear from the record and the briefing whether Strauser is currently in default. This Court declines to conduct an independent review of the District Court record to decide sua sponte whether Strauser is in default, triggering the statutory provisions of Title 30, chapter 9A, part 6, MCA. *See Hutzenbiler*, ¶ 14. Therefore, this Court takes the case in the procedural posture presented.

¶13 Strauser asserts she is uncertain whether RJC Investment can lawfully collect the finance charges and late fees under the Agreement and that a declaratory judgment pursuant to UDJA would relieve the parties from uncertainty. Specifically, Strauser alleges that RJC Investment has already unlawfully assessed $3,300 in late fees against her and refused to disclose the finance charge. She seeks a declaratory judgment to determine whether the Agreement lawfully requires her to continue to pay the fees in question. Strauser presents an existing and genuine dispute. Because Strauser and RJC Investment have existing rights and interests under the Agreement, and the District Court's judgment will clarify those legal rights and obligations, Strauser presents a justiciable controversy. *See Marshall v. Safeco Ins. Co.*, 2018 MT 45, ¶ 10, 390 Mont. 358, 413 P.3d 828.

¶14 In *Somers*, this Court declined to address whether the plaintiffs could seek a declaratory judgment clarifying the rights and obligations of the parties under a retail installment contract. *Somers*, ¶ 21. However, the plaintiffs in *Somers* filed a putative class action in district court seeking a declaratory judgment that RISA barred Cherry Creek and RJC Investment from recovery of any interest, finance charges, or late fees on the installment contract. While they asked for the same declaratory relief as Strauser on appeal, the issue was not properly raised in district court. *Somers*, ¶ 20. Here, Strauser sought a declaratory judgment pursuant to UDJA in District Court to clarify whether she owed illegally assessed money on the Agreement. Accordingly, this Court will now address the issue on appeal.

¶15 The purpose of UDJA is "to settle and to afford relief from uncertainty and insecurity as to rights, status, and other legal relations." Section 27-8-102, MCA; *Lee v. State*, 195 Mont. 1, 6, 635 P.2d 1282, 1284 (1981). UDJA is remedial and "is to be liberally construed and administered." Section 27-8-102, MCA; *Lee*, 195 Mont. at 6, 635 P.3d at 1284. Section 27-8-202, MCA, states:

> Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

"Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not future relief is or could be claimed." Section 27-8-201, MCA.

¶16 The courts' statutory power under UDJA to answer questions of contractual construction does not conflict with the Department of Administration's statutory power under RISA to enforce the provisions of RISA. While UDJA "is primarily intended to determine the meaning of a law or a contract and to adjudicate the rights of the parties therein," it is clear that UDJA is not intended "to determine controversial issues of fact." *Tarlton v. Kaufman*, 2008 MT 462, ¶ 33, 348 Mont 178, 199 P.3d 263 (quoting *Raynes v. Great Falls*, 215 Mont. 114, 120-21, 696 P.2d 423, 427 (1985)).

¶17 Strauser sought from the District Court a construction of the Agreement she signed with Cherry Creek and a determination whether certain of the construed provisions violate state law. Her action fits squarely within UDJA's liberally constructed purpose to settle and afford relief from uncertainty and insecurity with respect to rights and obligations under a written contract. *See United Nat'l Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 2009 MT 269, ¶ 36, 352 Mont. 105, 214 P.3d 1260.

¶18 Strauser contends she should not have to wait for RJC Investment to file an eviction proceeding against her to clarify whether RJC Investment can legally collect the finance charge and late fees it has been charging. UDJA exists to remedy such uncertainty. Whether RJC Investment can lawfully collect these fees under the Agreement is a question of contractual construction, does not involve a controverted issue of fact, and is within the purview of the District Court to decide. Without such a remedy, the purchaser under a retail installment contract would be forced to pay the assessed fees even if the assessed fees violated Montana law, or default and risk the loss

of his or her home. UDJA lawfully enables Strauser to determine whether she has a valid contractual defense for default under the Agreement "whether or not future relief is or could be claimed" at the time the action is filed. *See* § 27-8-201, MCA.

¶19 While the dissent argues that a declaratory judgment in this instance amounts to an advisory opinion because no justiciable controversy exists, the statutory language of § 27-8-201, MCA, is clear.

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

Section 27-8-201, MCA. While UDJA "does not license litigants to fish in judicial ponds for legal advice," under the narrow circumstances presented, Strauser was entitled to a declaratory judgment clarifying whether the Agreement lawfully obligates her to pay a finance charge and late fees assessed by RJC Investment. *See Mont. Dep't of Nat. Res. & Conservation v. Intake Water Co.*, 171 Mont. 416, 440, 558 P.2d 1110, 1123 (1976). The District Court erred in dismissing Strauser's motion for failure to state a claim, because Strauser properly asked the District Court for a declaratory judgment clarifying her "rights, status, or other legal relations" under the Agreement in light of the provisions of RISA. *See* § 27-8-102, MCA.

¶20 We reverse the District Court's decision to dismiss Strauser's complaint for failure to state a claim on this issue, and remand this proceeding to the District Court to clarify

Strauser's rights and legal obligations under the Agreement. Accordingly, the District Court must decide whether Strauser's Agreement with Cherry Creek is a retail installment contract pursuant to § 31-1-202(n), MCA (2007). If the Agreement meets the definition of a retail installment contract pursuant to § 31-1-202(n), MCA (2007), the provisions of §§ 31-1-501 and -502, MCA (2007), do not apply.[2] Rather, the provisions of RISA dictate the legal requirements for finance charges and late fees under a retail installment contract. *See* §§ 31-1-231, -235, -236, -241, MCA (2007). The District Court order should clarify whether the Agreement obligates Strauser to pay the finance charge and late fees assessed pursuant to the provisions of the Agreement, which Strauser may rely upon in the event of a default action filed against her.

CONCLUSION

¶21 The 2007 version of RISA controls in this case and does not confer a private cause of action. Strauser cannot privately sue to employ the enforcement provisions of RISA.

¶22 However, the District Court erred in dismissing Strauser's complaint for failure to state a claim. This Court remands this proceeding to the District Court to issue a declaratory judgment construing the legal rights and obligations of the parties under the Agreement.

¶23 Affirmed in part, reversed in part, and remanded for further proceedings consistent with this Opinion.

---

[2] Conversely, if the Agreement is not a retail installment contract, and the property subject to the Agreement meets the definition of "goods" in § 31-1-202, MCA, then §§ 31-1-501 and -502, MCA, apply.

Chief Justice

We Concur:

Justices

Justice Laurie McKinnon, dissenting.

¶24 I find the Court's reasoning contradictory and incomplete.

¶25 Strauser financed her purchase of a mobile home and failed to make timely payments on approximately 66 occasions. RJC took no legal action against Strauser pursuant to the Agreement, but Strauser nevertheless sued RJC for failure to comply with RISA. Strauser sought a declaratory judgment that RJC could not collect finance charges because RJC allegedly violated RISA; she wanted the court to determine what amount remained owing under the Agreement. Strauser's claims for relief arise solely from RISA's various administrative provisions. The Legislature set forth a remedy for alleged RISA violations in § 31-1-212(2), MCA, which provides, "A retail buyer having reason to believe that [RISA] has been violated may file with the [D]epartment a written complaint setting forth the details of the alleged violation . . . ." Strauser never filed a complaint with the Department. We clearly held in *Somers*, ¶ 19, that the Legislature did not provide a private cause of action to determine whether alleged RISA violations had occurred.

¶26 Nonetheless, following a misapplication of the UDJA and *Somers*, the Court orders the District Court to "clarify whether the Agreement obligates Strauser *to pay the finance charge and late fees* assessed pursuant to the provisions of the Agreement, which Strauser *may rely upon in the event of a default action filed against her*." Opinion, ¶ 20 (emphasis added). The Court remands this case "to the District Court to issue a declaratory judgment *construing the legal rights and obligations of the parties under the Agreement*." Opinion, ¶ 22. Not only is it the Department's legislatively delegated authority to decide whether the parties violated RISA, i.e., whether the parties adhered to their legal rights and

obligations under the Agreement, but the Court ignores the fundamental prerequisite to invoking the authority of a court: a justiciable controversy.

¶27 To begin, we recognized in *Somers* that the purpose of RISA was to establish an administrative process which authorizes "the Department to enforce its provisions." *Somers*, ¶¶ 12, 15. We explained the Department, in order to carry out RISA's provisions, may: adopt rules necessary to implement RISA provisions; perform investigations it considers necessary to ensure compliance with RISA; require licensure to engage in the business of a sales finance company; and deny, suspend, or revoke licenses for failing to comply with RISA provisions, defrauding any retail buyer to the buyer's damage, or fraudulent misrepresentation. Thus, Strauser's claim that she may utilize a declaratory judgment to determine (1) her rights under RISA in the context of the Agreement, and (2) "the validity of a contract defense" pursuant to RISA, should be seen for what it is: an attempt to bypass the Department's statutory responsibilities for enforcement of RISA and obtain an advisory opinion from this Court.[1]

¶28 Aside from the Court's flawed attempt to distinguish an action under the UDJA from a complaint resolving an alleged RISA violation, the Court commits another, perhaps more fundamental, error. Before a court may exercise jurisdiction under the UDJA, a

[1] It is also clear that Strauser has changed her theory on appeal from what she raised in District Court. In District Court, Strauser sought a determination of what amount was owing under the Agreement, thus pleading a private cause of action under RISA. On appeal, Strauser pursues a theory that she is entitled to know her rights under the contract and, accordingly, whether she has a legal defense based on RISA violations. The Court errs when it adopts Strauser's circular and misguided reasoning. Whether Strauser pursues her allegations offensively or defensively, resolution of Strauser's claims is first committed to the Department.

justiciable controversy must exist. "Courts do not function, even under the [UDJA], to determine speculative matters, to enter anticipatory judgments, to declare social status, to give advisory opinions or to give abstract opinions." *Houston Lakeshore Tract Owners Against Annexation, Inc. v. City of Whitefish*, 2017 MT 62, ¶ 28, 387 Mont. 83, 391 P.3d 86. Indeed, this Court has "refused to entertain a declaratory judgment action on the ground that no controversy is pending which the judgment would affect." *Northfield Ins. v. Mont. Ass'n of Ctys.*, 2000 MT 256, ¶ 10, 301 Mont. 472, 10 P.3d 813 (citation omitted).

¶29 The test of whether a justiciable controversy exists contains three elements:

> First, a justiciable controversy requires that parties have existing and genuine, as distinguished from theoretical, rights or interests. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion. Third, [it] must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them.

Murray v. Motl, 2015 MT 216, ¶ 13, 380 Mont. 162, 354 P.3d 197 (citation omitted). We apply the justiciable controversy test to actions for declaratory judgments to prevent courts, as here, from determining speculative or anticipatory matters and rendering abstract or advisory opinions.

¶30 In *Brisendine v. Mont. Dep't of Commerce, Bd. of Dentistry*, 253 Mont. 361, 363, 833 P.2d 1019, 1020 (1992), for example, a denturist sought a judicial declaration that he was not prohibited from entering into a professional relationship with a dentist while the issue was still pending before the Board of Dentistry. We upheld the district court's

determination that no justiciable controversy existed because the complaint lacked specificity regarding his proposed business association and because Brisendine had not exhausted his administrative remedies. *Brisendine*, 253 Mont. at 365-66, 833 P.2d at 1021-22. We determined that an action for declaratory judgment while the underlying controversy was pending before an administrative board was premature and would only serve as an impermissible advisory opinion. *Brisendine*, 253 Mont. at 365, 833 P.2d at 1021.

¶31 In *Hardy v. Krutzfeldt*, 206 Mont. 521, 523, 672 P.2d 274, 275 (1983), the plaintiffs sought a judicial declaration that several preemptive rights of first refusal pertaining to real property were unreasonable restraints of alienation. We held that no justiciable controversy existed because the record did not reflect an intent by any party to sell property outside the first refusal clause; nor was any party seeking relief from the clause. *Hardy*, 206 Mont. at 525, 672 P.2d at 276. We explained:

> No litigant before us is in immediate danger of sustaining direct injury from the preemptive clause. Therefore we do not have a justiciable controversy over which the judicial power to determine real controversies may be exercised. Broad language in the [UDJA] . . . may not be used as a platform for courts in this state to plunge into indefinite amorphous ponds of contract interpretation.

Hardy, 206 Mont. at 525, 672 P.2d at 276.

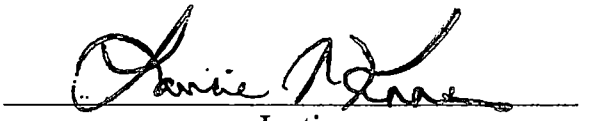
¶32 In *Northfield*, ¶ 14, this Court held there was no justiciable controversy where insurance companies sought a declaration as to their rights under a contract and whether they had a duty to indemnify. We explained that no request for indemnification had been

made and any determination of whether the contract imposed a duty to indemnify would require speculation that indemnification would eventually be sought. *Northfield*, ¶ 16.

¶33 Here, applying the test for justiciable controversies, Strauser's claim must fail. First, there is no actual dispute because RJC never sued to recover outstanding amounts owed under the Agreement. As in *Northfield*, ¶¶ 12, 14, the parties may disagree as to the obligations under the Agreement, but this does not rise to an "existing and genuine" dispute. Second, Strauser's claim is premised upon alleged violations of an administrative statute which are to be determined only by the Department. *See Somers*, ¶¶ 9-21. The Department has not made any determination that there were RISA violations and, like in *Brisendine*, 253 Mont. at 365-66, 833 P.2d at 1021-22, the administrative process has been ignored. Finally, by ordering the trial court to render an opinion on the application of various RISA provisions to the instant facts and Agreement, Opinion, ¶ 22, the Court is ordering relief inconsistent with *Somers* and instructing the trial court to issue a speculative advisory opinion. Strauser is not entitled to a court's legal opinion of how RISA affects the enforceability of her contract. Strauser is entitled to bring a complaint against RJC to the Department.

¶34 I disagree that a party may file a lawsuit to determine the validity of a potential defense to an action that has not yet been filed. I disagree that a court should issue an advisory opinion regarding a potential dispute that the Legislature committed to an administrative agency for resolution. Lastly, I disagree that the UDJA applies and with this Court's advisory opinion under the guise that Strauser's rights are uncertain under the Agreement—Strauser has a remedy under RISA with the Department.

¶35 I dissent from the Court's decision holding otherwise.



Justice

Justice Beth Baker, dissenting.

¶36 For purposes of RJC's Rule 12(b)(6) motion to dismiss, and construing the factual allegations in a light most favorable to Strauser, *Northfield*, ¶ 8, I agree that her complaint alleges a justiciable controversy. The complaint alleges that she has paid $49,751.81 in principal and interest on the $47,500 initial balance and that RJC illegally has assessed late payments of $3,300 and continues to assess such fees unlawfully. Attached to her complaint is the Promissory Note she signed, which provides:

> If default be made in the payment when due of any part or installment of interest, then the whole sum of principal and interest shall become immediately due and payable at the option of [RJC], without notice.

¶37 It also states that, in the event of default, the holder of the Note may recover necessary expenses incurred in collecting the balance, including reasonable attorney fees, "whether incurred through litigation or otherwise."[1] Without notice or an opportunity to contest the legality of the alleged assessed late fees, Strauser could risk loss of her home and exposure to added fees and costs.

¶38 Strauser does, however, have the opportunity to contest the legality of the late fees through the administrative remedy provided by RISA. Under § 31-1-212(2), MCA (2007), "[a] retail buyer having reason to believe that this part relating to his retail installment contract has been violated may file with the department a written complaint setting forth the details of the alleged violation[.]" Section 31-1-203(2), MCA (2007), bars recovery of

[1] This provision appears contrary to the default provision in the security agreement, which calls for a thirty-day cure period following the creditor's notice of default.

any finance, delinquency, or collection charge on the contract for violations of RISA prohibitions, "except as the result of an accidental and bona fide error of computation."

¶39 Construing identical provisions under the 2009 version of RISA, we held in *Somers* that "RISA is an administrative statute through which retail buyers may complain to the Department when holders of retail installment contracts violate [its] provisions." *Somers*, ¶ 17. We concluded that the statute made plain the Legislature's intent that RISA "be enforced administratively by the Department." *Somers*, ¶ 19.

¶40 The Court's Opinion does not cite or mention our long line of authority that a party must exhaust its administrative remedies before seeking declaratory relief in district court. We have applied this requirement even in cases where the underlying dispute is between private parties, as it is here. *Mt. Water Co. v. Mont. Dep't of Pub. Serv. Reg.*, 2005 MT 84, ¶ 14, 326 Mont. 416, 110 P.3d 20. The exhaustion doctrine does not apply when a party raises a bona fide constitutional issue (*Brisendine*, 253 Mont. at 366, 833 P.2d at 1022; *Mitchell v. Town of West Yellowstone*, 235 Mont. 104, 109, 765 P.2d 745, 748 (1988)); or when exhaustion would be a useless or futile act (*Mt. Water Co.*, ¶ 15 (citing *DeVoe v. Dep't of Revenue*, 263 Mont. 100, 866 P.2d 228 (1993)). But when the party "has neither attempted to exhaust its administrative remedies, nor ... alleged facts that if proven would show the futility of the available administrative remedies[,]" the party is not relieved from the exhaustion doctrine, and it may not resort to the courts before seeking administrative relief. *Mt. Water Co.*, ¶ 15. *See also In re T.W.*, 2005 MT 340, ¶ 31, 330 Mont. 84, 126 P.3d 491.

¶41 We emphasized in *Brisendine* that a party may seek a declaratory ruling from the agency under the Montana Administrative Procedure Act, which requires "[e]ach agency [to] provide for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision[.]" Section 2-4-501, MCA. Declaratory rulings under this section are subject to judicial review "in the same manner as decisions or orders in contested cases." Section 2-4-501, MCA. We noted that by following this approach, Brisendine "would not subject his license to revocation or suspension" before having his legal issue adjudicated. *Brisendine*, 253 Mont. at 366, 833 P.2d at 1021.

¶42 In the same vein, Strauser would not be faced with losing her home by pursuing an administrative remedy, which admittedly she has not done. Ignoring them altogether, the Court does not distinguish or overrule any of the cases requiring administrative exhaustion, nor does it suggest how Strauser's complaint meets any articulated exception to the requirement or why its ruling will not permit other prospective declaratory judgment litigants "to skip the administrative process." *Mt. Water Co.*, ¶ 14. Consistent with our precedent, I would hold that Strauser cannot file a declaratory judgment action until she first seeks administrative relief under RISA. If the Department refuses or fails to act on her complaint, she may file a declaratory judgment action in District Court; if the Department issues a ruling adverse to her, she may petition for judicial review. She has the ability to pursue relief without jeopardizing her home or waiting for RJC to issue a notice of default or take other action against her.

¶43 On that basis, I would affirm.

Justice

Justice Jim Rice joins in the dissenting Opinion of Justice Baker.

Justice