

No. DA 19-0357

IN THE

Supreme Court of the State of Montana

CHERYL BRATTON, individually and on behalf of
a class of similarly situated Montanans,

Appellant,

V.

SISTERS OF CHARITY OF LEAVENWORTH HEALTH SYSTEM, INC.
D/B/A SCL HEALTH

Appellee,

ON APPEAL FROM THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY, HON. GREGORY R. TODD, PRESIDING
CASE No. DV 18-1609

APPELLANT'S REPLY BRIEF

JOHN HEENAN
JOE COOK
HEENAN & COOK
1631 Zimmerman Trail
Suite 1
Billings, MT 59102
(406) 839-9091
john@lawmontana.com
joe@lawmontana.com

MICHAEL P. MANNING
RITCHIE MANNING KAUTZ PLLP
175 North 27th Street
Suite 1206
Billings, MT 59101
(406) 601-1400
mmanning@rmkfirm.com

Counsel for Appellant

Additional Counsel Information on Following Page

ROBERT C. LUKES
GARLINGTON, LOHN & ROBINSON,
PLLP
350 Ryman Street
P.O. Box 7909
Missoula, MT 59807-7909
(406) 523-2500
rclukes@garlington.com

KATHRYN ANN REILLY
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street
Suite 4500
Denver, CO 80202
(303) 244-1983
reilly@wtotrial.com

Counsel for Appellee

KENNETH K. LAY
CROWLEY FLECK, PLLP
900 N. Last Chance Gulch
Helena, MT 59601
(406) 457-2037
klay@crowleyfleck.com

*Counsel for Amicus Curiae Montana
Bankers Association, American
Bankers Association, and Consumer
Bankers Association*

DAVID K.W. WILSON, JR.
MORRISON, SHERWOOD, WILSON & DEOLA,
PLLP
401 N. Last Chance Gulch
Helena, MT 59601
(406) 442-3261
kwilson@mswdlaw.com

MARK ELLIOT BUDNITZ (*PRO HAC VICE*)
GEORGIA STATE UNIVERSITY
COLLEGE OF LAW
1765 Morris Landers Drive
Atlanta, GA 30345
mbudnitz@gsu.edu

*Counsel for Amicus Curiae Montana Legal
Services, National Consumer Law Center
and National Association of Consumer
Advocates*



TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
ARGUMENT	3
I. Either Bratton Is Entitled to Summary Judgment on Her Declaratory Judgment Claim or It Should Be Remanded for Trial.....	3
A. SCL Health’s Waiver Argument Is Meritless.....	3
B. SCL Health’s Delegation Argument Ignores Unfavorable Evidence.	5
1. Bank of America’s performance is not the equivalent of the performance owed by SCL Health.....	6
2. Patients must deal with Bank of America to obtain their refunds.	10
C. Patient Refund Cards Do Not Satisfy SCL Health’s Unqualified Refund Obligation.....	13
II. Fact Issues Preclude Summary Judgment on Bratton’s Unjust Enrichment and Constructive Trust Claims.....	18
III. Fact Issues Also Preclude Summary Judgment on Bratton’s Consumer Protection Act Claim.	20
A. SCL Health Cannot Ignore Evidence It Does Not Like.....	20
B. Bratton Suffered an Ascertainable Loss.....	22
IV. Bratton, Not SCL Health, Is Entitled to Summary Judgment on Her Money Had and Received Claim.	24

CONCLUSION25
CERTIFICATE OF COMPLIANCE.....27

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Advanced Indus. Prods., S.C.S. v. Alcoa Global Fasteners, Inc.</i> , 2006 WL 8433939 (C.D. Cal. Feb. 6, 2006)	11
<i>AICCO, Inc. v. Ins. Co. of N. Am.</i> , 90 Cal. App. 4th 579 (Cal. Ct. App. 2001)	11, 13
<i>Ajaxo Inc. v. E*Trade Financial Corp.</i> , 187 Cal. App. 4th 1295 (Cal. Ct. App. 2010)	20
<i>Anaconda Pub. Schs. v. Whealon</i> , 2012 MT 13, 363 Mont. 344, 268 P.3d 1258	5
<i>Jacobson v. Bayview Loan Serv., LLC</i> , 2016 MT 101, 383 Mont. 257, 271 P.3d 397	23, 24
<i>Johnston v. Centennial Log Homes & Furnishings, Inc.</i> , 2013 MT 179, 370 Mont. 529, 305 P.3d 781	9
<i>Kinter v. Harr</i> , 146 Mont. 461, 408 P.2d 487 (1965)	11
<i>Northern Cheyenne Tribe v. Roman Catholic Church ex rel. Dioceses of Great Falls/Billings</i> , 2013 MT 24, 368 Mont. 330, 296 P.3d 450	19, 20
<i>Puerta v. United States</i> , 121 F.3d 1338 (9th Cir. 1997)	5
<i>Puryer v. HSBC Bank USA</i> , 2018 MT 124, 391 Mont. 361, 419 P.3d 105	23, 24
<i>Sugarlines Co. v. Am. Crystal Sugar Co.</i> , 594 F.2d 687, 691 (8th Cir. 1979)	6, 8

<i>Siciliano v. Mueller</i> , 149 A.3d 863 (Pa. Super. Ct. 2016)	16
---	----

Statutes

42 U.S.C. § 1320d-8	15
Cal. Civil Code § 1457	13
Health Insurance Portability and Accountability Act of 1996 Pub. L. No. 104-191, 110 Stat. 1936 (1996).....	15
Mont. Code Ann. § 28-1-1002.....	<i>passim</i>
Mont. Code Ann. § 30-14-133(1).....	22
Mont. Code Ann. § 39-3-204(2).....	17
Montana Consumer Protection Act (MCPA) Mont. Code Ann. § 30-14-101 <i>et seq.</i>	3, 20, 21, 22, 23, 24

Rules

Mont. R. App. P. 11(4)	27
------------------------------	----

Other Authorities

4A Corbin, Contracts § 884 (1951)	6
https://dphhs.mt.gov/CSED/payment	17
https://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/electronic-wage-payment-faq	17

INTRODUCTION

SCL Health's defense of its participation in Bank of America's Patient Refund Card Program (the Program) has a consistent theme. It repeatedly asserts that Bank of America's issuance of unactivated prepaid debit cards (Patient Refund Cards) drawn on a Bank of America account constitutes payment by SCL Health itself, and that Cheryl Bratton's claims fall like dominoes as a result. All the while, SCL Health ignores evidence it does not like and views disputed facts in its own favor.

SCL Health does not even acknowledge the restrictive terms in Bank of America's Commercial Prepaid Card Account Agreement (the Card Agreement), dismissing the Card Agreement as irrelevant even though patients cannot use their Patient Refund Cards without stipulating to it. Likewise, SCL Health brushes aside any discussion of the fact that it relinquishes all control over patient refunds to Bank of America after 14 days, while simultaneously arguing that it did not violate Montana Code Annotated section 28-1-1002 because it remains liable for the refunds.

Properly considered, the evidence supports Bratton in all respects. SCL Health cannot plausibly deny that it delegates its obligation to pay

patient refunds where it transfers the refund amounts to Bank of America and then cedes all responsibility for making payment. It is also beyond dispute that Bank of America's proffered payment is materially different than the unqualified refund obligation SCL Health owes. Namely, Bank of America forces patients to stipulate to a contract of adhesion to obtain their money. Indeed, even under SCL Health's view of the facts, it is the patients' responsibility, not SCL Health's, to procure their refunds in a form that does not require assent to the Card Agreement. And SCL Health admits that it does not obtain patients' consent for any of this.

SCL Health's primary position—that the Program reflects a commonly accepted payment method that satisfies SCL Health's refund obligation—is utterly lacking. SCL Health conflates the voluntary use of an already-activated prepaid debit card with presenting the payee with an unsolicited, unactivated card. SCL Health does not, and cannot, cite a single instance in the normal flow of commerce where the payee—not the payor—is forced to stipulate to a contract of adhesion to accept payment. If a payee does so, it is only because he or she has voluntarily consented.

The bottom line is that SCL Health's use of the Program violates Montana law. As such, Bratton is entitled to declaratory judgment. Her other claims are equally meritorious. SCL Health is unjustly enriched at patients' expense by using the Program; its use of the Program violates the Montana Consumer Protection Act (MCPA); and its payment of patients' money to Bank of America rather than to the patients gives rise to a money had and received claim.

ARGUMENT

I. Either Bratton Is Entitled to Summary Judgment on Her Declaratory Judgment Claim or It Should Be Remanded for Trial.

A. SCL Health's Waiver Argument Is Meritless.

SCL Health begins by asserting that Bratton waived any argument that the Program violates section 28-1-1002. To get there, SCL Health takes an extremely narrow view of Bratton's position while simultaneously failing to disclose that Bratton invoked section 28-1-1002 below.

As SCL Health admits, Bratton sought broad declaratory relief in the district court, including that SCL Health: (1) should be enjoined from continuing to use the Program without patients' consent; (2) may not transfer patients' money to Bank of America without their consent;

(3) is legally obligated to refund Bratton’s money; and (4) cannot force Bratton to contract with Bank of America or “otherwise deal with Bank of America in order to receive her refund.” *See* Resp. Br., 14. What SCL Health fails to mention is that, in support of those requests, Bratton argued in multiple places in her summary judgment briefing that SCL Health’s use of the Program violates section 28-1-1002. *See* Dkt. 35, at 2, 9.¹

Nevertheless, SCL Health posits that Bratton’s declaratory judgment requests are “substantively different” than asking for a declaration that the Program violates a specific statute. *See* Resp. Br., 14. But SCL Health is conflating the relief Bratton is seeking and the specific legal theories warranting that relief.

On appeal, Bratton is advocating for the same fundamental declaratory judgment she sought below—that, absent patients’ consent, SCL Health’s use of the Program violates Montana law. Although her opening brief admittedly expanded her analysis of section 28-1-1002, “an argument is typically elaborated more articulately, with more extensive authorities, on appeal than in the less focused and frequently

¹ Citations to Dkt. refer to the “Doc. Seq.” number in the district court’s Case Register Report.

more time pressured environment of the trial court, and there is nothing wrong with that.” *Puerta v. United States*, 121 F.3d 1338, 1341-42 (9th Cir. 1997).

SCL Health’s emphasis on Bratton’s abandonment of her conversion argument, Resp. Br., 14, is inapposite. Bratton was perfectly entitled to argue alternative justifications for her requested relief in the district court, *see Anaconda Pub. Schs. v. Whealon*, 2012 MT 13, ¶ 17, 363 Mont. 344, 268 P.3d 1258, just as she was free to narrow her focus on appeal in favor of including a more detailed discussion of a single theory, *see Puerta*, 121 F.3d at 1341-42. Simply put, where Bratton argued below that SCL Health’s use of the Program violates section 28-1-1002, she did not waive that theory on appeal merely by elaborating on it.

B. SCL Health’s Delegation Argument Ignores Unfavorable Evidence.

Next, SCL Health asserts that even if it delegated performance to Bank of America without patients’ consent, doing so was permissible because SCL Health remained secondarily liable. *See* Resp. Br., 21-24. From there, SCL Health contends that the entire premise of Bratton’s argument—that she is entitled to direct performance from SCL Health—is baseless. *Id.* at 23.

But SCL Health is wrong that the “only injury Bratton claims” is the *fact* of delegation. *See id.* Bratton’s argument is: (1) regardless of whether SCL Health could theoretically delegate its performance obligation to a third party, Bank of America’s proffered performance is conditional; (2) because patients cannot obtain unconditional performance from Bank of America, they are entitled to direct performance from SCL Health; and (3) SCL Health has admitted it retains no control over patient refunds after 14 days, casting extreme doubt on its representation that it remains ultimately liable for the refunds.

1. Bank of America’s performance is not the equivalent of the performance owed by SCL Health.

In arguing that contractual duties are freely delegable if the original obligor remains liable, SCL Health ignores an important limitation. That is, “[a]n assignment of a contractual obligation is necessarily circumscribed by the contemplated performance of the original parties.” *Sugarlines Co. v. Am. Crystal Sugar Co.*, 594 F.2d 687, 691 (8th Cir. 1979). In other words, a delegee cannot “materially change the extent and character” of the performance owed by the delegating obligor. *Id.* (citing 4A Corbin, Contracts § 884 (1951)).

Thus, the analysis is not as truncated as SCL Health suggests. The question is not solely whether SCL Health delegated to Bank of America its obligation to pay patient refunds; it is whether Bank of America's performance materially differed from the performance owed by SCL Health. The answer is yes.

SCL Health's original obligation is as basic as it gets; it has a straightforward duty to refund patients' money. There is nothing in the record reflecting—and SCL Health has not argued—that the obligation is somehow qualified or that it can impose conditions on the refunds.

Bank of America's proffered performance, however, does not come close to reflecting SCL Health's unconditional obligation. Rather, the Program requires patients to agree to a host of unilaterally imposed conditions to receive their money. *See* App. 61-62. SCL Health would certainly have no basis to tell Bratton, "we owe you \$27.75, but you can receive your money only if you agree that (1) the payment mechanism remains our property which we can revoke at any time, (2) we may impose fees at our discretion, (3) North Carolina law governs any dispute, and (4) we can change the terms governing your refund whenever we like." Consequently, SCL Health's delegee, Bank of

America, cannot not impose those restrictions either. *Sugarlines*, 594 F.2d at 691.

SCL Health makes no real effort to justify Bank of America's forced imposition of the Card Agreement. *See* Resp. Br., 20. Indeed, it doesn't even acknowledge the Agreement's restrictive terms, much less discuss them. Instead, it insists that the Agreement is irrelevant because patients can receive their refunds by requesting a check.

On that point, SCL Health is, at best, viewing disputed evidence in the light most favorable to itself. The record contains an affidavit and supporting audio recording from a patient who received a Patient Refund Card, attempted to contact Bank of America to request a check, and could not reach a live person through Bank of America's automated system unless she activated her card. App. 19-20; 63-64. It is telling enough that the toll-free number through which patients can purportedly request a check takes callers directly to a card activation system. *See id.* But there is also evidence that Bank of America told patients for a period of time that there was a \$5 fee for receiving a check and initially instructed its customer service team that it would issue a check only for patients "who are very upset or adamant that

they will not utilize the patient refund card.” App. 43-44, 62:18-63:1, 66:5-14.

Applying the correct standard of review, that evidence reflects that Bank of America required patients to consent to the Card Agreement and actively discouraged them from obtaining checks, which is far from paying an unqualified refund. To reach the opposite conclusion—that patients can unequivocally obtain a refund without consenting to the Card Agreement—the Court would have to inappropriately credit SCL Health’s supporting evidence over Bratton’s. *See, e.g., Johnston v. Centennial Log Homes & Furnishings, Inc.*, 2013 MT 179, ¶ 32, 370 Mont. 529, 305 P.3d 781.

Moreover, even if the Court assumes that patients can obtain checks without first activating Patient Refund Cards, Bank of America’s performance is still materially different than the obligation owed by SCL Health. Importantly, Bank of America does not offer patients a choice up front. It sends a Patient Refund Card and then imposes a duty on patients to take affirmative action to obtain a check if they want one. Whether that action is navigating Bank of America’s customer service system or engaging in litigation, the result is the same—the onus is on the patient to obtain the performance she is owed

from SCL Health in the first place. Forcing patients to bear the burden of obtaining their refund via a method that does not require them to enter into a contract of adhesion is not even arguably equivalent to receiving an unconditional refund.²

2. Patients must deal with Bank of America to obtain their refunds.

Because Bank of America's performance materially differs from SCL Health's obligation, the analysis circles back to secondary liability. SCL Health's argument appears to be that neither the Card Agreement nor any other specific facts matter because they "do not alter the relationship between SCL Health and its patients." *See Resp. Br.*, 20. In SCL Health's view, the Court should simply accept its representation that it would remain liable to pay a patient's refund if, hypothetically, a Patient Refund Card was defective and could not be used to access the patient's money. *See id.* There are multiple problems with that position.

First, SCL Health is arguing that its secondary liability depends on some sort of default by Bank of America. That is simply incorrect.

² To be clear, Bratton does not concede it is possible for patients to obtain a check without first activating the Patient Refund Card. This argument is made in the alternative.

The California cases discussed in Bratton’s opening brief reflect the same rule for which SCL Health cites *Kinter v. Harr*, 146 Mont. 461, 408 P.2d 487 (1965)—that while section 28-1-1002 allows a third party to assume the burden of a contract, the original obligor is not relieved of liability without consent. The California cases, however, address an issue that Montana courts have not. They make clear that the initial obligor’s continued liability is not premised on a default by the third party delegee. *See Advanced Indus. Prods., S.C.S. v. Alcoa Global Fasteners, Inc.*, 2006 WL 8433939, at *5 (C.D. Cal. Feb. 6, 2006); *AICCO, Inc. v. Ins. Co. of N. Am.*, 90 Cal. App. 4th 579, 588 (Cal. Ct. App. 2001). Thus, the Court should reject any suggestion that SCL Health can comply with section 28-1-1002 solely by stating it will remain liable if Bank of America’s Patient Refund Cards are somehow defective.

More importantly, SCL Health glosses over the heart of the inquiry. Secondary liability is an issue because Bank of America’s performance is not equivalent to SCL Health’s obligation to pay patients unqualified refunds. Thus, the Court must ask whether patients can obtain the performance to which they are entitled from the

original obligor (SCL Health) since they cannot do so from the delegee (Bank of America).

To answer that question, the Court need look no further than undisputed evidence from SCL Health's Vice President/Treasurer, Mark Wilkinson. He concedes that after 14 days following Bank of America's issuance, SCL Health "does not have any control of or access to funds associated with Patient Refund Cards." App. 56, ¶ 6; App. 40, 46:14-47:1. The consequence, according to Wilkinson, is that patients *must* accept performance from Bank of America:

. . . and then they also have up to 14 days to request a check through SCL, at which point after that time period we no longer have the ability to pull those funds back, *so then Bank of America has to issue the check.*

App. 40, 46:22-47:1 (emphasis added). On top of that, SCL Health cannot even assist patients who want to request a check from Bank of America:

Q. Did Mr. Wills on behalf of Bank of America tell you and others at SCL that, quote, SCL cannot request checks on behalf of patients due to consumer regulations, end quote?

A. Yes.

App. 53, 115:8-13.

Those facts reflect precisely the concern that precluded dismissal in *AICCO*, where the complaint alleged that one insurance company transferred the burden of its policies to another company without policyholders' consent and then disclaimed any further responsibility. 90 Cal. App. 4th at 591. SCL Health does precisely the same thing here. It transfers its refund obligation to Bank of America and then, after a 14-day period, disclaims any obligation to perform, forcing patients to accept inferior performance from its third-party delegee. Accordingly, just as the insurance company's actions in *AICCO* supported a claim for violation of California Civil Code section 1457, Bratton has a valid claim that SCL Health violated section 28-1-1002.

C. Patient Refund Cards Do Not Satisfy SCL Health's Unqualified Refund Obligation.

SCL Health tries to avoid all the analysis above by maintaining that it never actually delegated its performance duty to Bank of America. Consistent with the district court's reasoning, SCL Health urges that Patient Refund Cards are a perfectly acceptable payment method that do not implicate the transfer of any obligation. *See Resp. Br.*, 16-19.

To start, SCL Health is playing semantics. Section 28-1-1002 speaks to transferring the "burden" of an obligation, not the obligation

itself. Here, the obligation is refunding patients' money and the burden of that obligation is the act of repayment. Where SCL Health transmits a patient's refund to Bank of America rather than to the patient and then relies solely on Bank of America to contact the patient and proffer payment, SCL Health can hardly contend that it does not transfer the burden of paying refunds.

The Court should also reject the notion that Patient Refund Cards are a widely accepted payment method that do not implicate section 28-1-1002 any more than would issuing a check. There are several glaring differences. For instance, if SCL Health issued a refund check, it would not transfer the patient's money to its bank up front. Nor would it transmit any information about the patient to its bank, and the bank would have no idea what the payment is for. The patient could also negotiate the check without stipulating to any contract. Only once the patient did so would there be a routine transfer of money between banks on the back end.

Contrast that with the Program where Bank of America knows that the money is for patient refunds related to healthcare services and SCL Health transmits patients' names, addresses, and refund amounts

to Bank of America without their consent.³ App. 46, 78:2-79:5, App. 56, ¶ 5. Bank of America also receives funds earmarked for a specific patient and holds them in a Bank of America, not SCL Health, account. Then, Bank of America sends the patient a prepaid debit card that may be used only if the patient consents to the Card Agreement. See App. 81:1-83:3.

None of that is to say that Bratton denies the widespread use of debit cards. But the discussion in the banking associations' amicus brief about the rising popularity of prepaid debit cards is beside the point. There is a significant difference between *voluntarily* obtaining and using a prepaid debit card as a form of payment and paying a bank to send an unsolicited, unactivated card as payment. See Open. Br., 33-34.

The key issue is consent. It is not surprising that SCL Health accepts *already-activated* Patient Refund Cards as payment because

³ For the same reason, SCL Health's HIPAA argument is flawed. SCL Health could certainly operate within the confines of HIPAA by issuing refunds without divulging individually identifiable health information, but it does not. And 42 U.S.C. § 1320d-8 applies only to entities "engaged in the activities of a financial institution," so it does not excuse SCL Health's transmission of protected information to Bank of America either.

SCL Health does not have to agree to anything to get its money. It simply negotiates the card as the functional equivalent of cash or a check. On the other hand, SCL Health would never accept an unactivated card because SCL Health, not the patient, would be forced to consent to a card agreement to receive its money. Neither SCL Health nor its amici can demonstrate that *unactivated* prepaid debit cards are a commonly accepted payment method because they are not. And the reason is that paying via that method would require payees, not payors, to consent to restrictive terms to accept the money they are owed. *See Siciliano v. Mueller*, 149 A.3d 863, 865-66 (Pa. Super. Ct. 2016) (unactivated prepaid debit cards used to pay wages are not the “functional equivalent” of a check or lawful money).

SCL Health’s specific examples actually undermine its position. *First*, the website SCL Health cites to support its assertion that state governments disburse government benefits through prepaid debit cards describes that recipients may *choose* whether to receive payments via direct deposit or a prepaid debit card, with a full disclosure about the

debit card.⁴ See <https://dphhs.mt.gov/CSED/payment>. Thus, notwithstanding that government benefit programs are almost always opt-in to begin with, SCL Health has proven only that program participants must consent to receive payments via prepaid debit cards.

Second, although SCL Health contends that *other* jurisdictions allow prepaid debit cards to pay wages, Resp. Br., 42, Montana does so only under very specific circumstances. They include, among others, the employee's consent and the ability to access the entire amount of wages in cash without incurring any fee. See <https://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/electronic-wage-payment-faq>; see also Mont. Code Ann. § 39-3-204(2).

Finally, using prepaid debit cards for disbursing class-action settlement funds inherently involves consent. If a court approves their use, it's only because the parties agreed among themselves before seeking court approval.

In short, when unactivated cards are used as a means of payment, there is a common thread in every situation—the payee consents *before*

⁴ Simply pointing out that federal and state governments disbursed \$144 billion via prepaid debit cards in 2017, Resp. Br., 42, adds nothing to the discussion without more information.

accepting the card. That makes sense and is precisely the type of conduct to which section 28-1-1002 is directed. Otherwise, someone owing a payment obligation could force the beneficiary to accept performance from a third party who, in turn, forces the beneficiary to agree to a contract of adhesion to obtain payment.

* * *

In sum, SCL Health's arguments to avoid application of section 28-1-1002 fail. Even viewing the facts in the light most favorable to SCL Health: (1) Bank of America's performance was not equivalent to the obligation SCL Health owed; (2) SCL Health has admitted that patients must accept performance from Bank of America after 14 days; and (3) SCL Health did not simply pay patients in the normal course of commerce by having Bank of America send unactivated Patient Refund Cards. Alternatively, viewing the facts in the light most favorable to Bratton, a reasonable jury could find for Bratton on each of those issues. Either way, this Court should reverse.

II. Fact Issues Preclude Summary Judgment on Bratton's Unjust Enrichment and Constructive Trust Claims.

SCL Health contends that it was not unjustly enriched because Bratton received her \$27.75 refund in the form of Patient Refund

Cards.⁵ *See* Resp. Br., 26-28. But like the district court, SCL Health mistakenly assumes that the Program is perfectly legitimate. Because it is not, the pertinent question is whether, via their forced and nonconsensual participation in the Program, Bratton and SCL Health's other patients confer a benefit that SCL Health inequitably retains.

See N. Cheyenne Tribe v. Roman Catholic Church ex rel. Dioceses of Great Falls/Billings, 2013 MT 24, ¶ 36, 368 Mont. 330, 296 P.3d 450.

As explained in Bratton's opening brief, each time SCL Health processes a refund through the Program in violation of Montana law, it benefits financially. *See* Open. Br., 42. SCL Health dismisses that theory, characterizing the benefits as mere business-related cost savings not conferred by Bratton or the other patients. But that position ignores both fact and law.

Factually, SCL Health's patients plainly confer the benefit. It is patients who unwillingly forego unqualified payment of a refund so SCL Health can save money by having Bank of America send them a Patient Refund Card in violation of section 28-1-1002. SCL Health cannot escape that its financial gain comes at the expense of its

⁵ Bratton agrees that a constructive trust is a remedy for unjust enrichment. *See* Open. Br., 41.

patients' rights simply by labeling the Program as an improvement of business practices. *See* Resp. Br., 27.

Legally, unjust enrichment is a flexible doctrine designed to remedy inequities, *see Northern Cheyenne Tribe*, ¶ 36, and does not have any artificial restrictions on the types of wrongly retained benefits a defendant must disgorge. For example, in the trade secrets context, courts routinely recognize that “[a] defendant’s unjust enrichment might be calculated based upon cost savings or increased productivity resulting from use of the secret,” particularly where a plaintiff’s loss does not correlate directly with the defendant’s benefit. *See, e.g., Ajaxo Inc. v. E*Trade Financial Corp.*, 187 Cal. App. 4th 1295, 1304 (Cal. Ct. App. 2010). The same reasoning makes sense here. Even if patients do not necessarily lose precisely the same amount SCL Health gains, the cost savings SCL Health realizes are a direct result of its violation of the law to the detriment of patients owed refunds.

III. Fact Issues Also Preclude Summary Judgment on Bratton’s Consumer Protection Act Claim.

A. SCL Health Cannot Ignore Evidence It Does Not Like.

Without mentioning any adverse evidence, SCL Health assumes the Program complies with section 28-1-1002 and then faults Bratton for not affirmatively taking action to obtain a check when she received

Patient Refund Cards in the mail. *See* Resp. Br, 29-31. But the facts that SCL Health is refusing to address matter.

Under the correct standard of review, a reasonable jury could easily conclude that the Program is unfair or deceptive. Just some of the supporting evidence includes: (1) SCL Health fails to obtain patient consent to the Program; (2) patients are not informed of Bank of America's involvement until they receive a form letter with the Patient Refund Card and the Card Agreement to which they become bound by accessing their money; (3) the form letter does not always inform patients of the amount of the refund and some patients have received a card without any letter at all; (4) Bank of America actively discouraged patients from obtaining checks; and (5) SCL requires patients to accept performance from Bank of America and will not help them obtain checks.

The Court should not sanction SCL Health's attempt to avoid liability by rewriting the facts during litigation. Specifically, SCL Health emphasizes that it "arranged to have Bank of America issue Bratton a check" for the balance of a Patient Refund Card "through normal business channels once she requested one." Resp. Br., 30-31. But not only must SCL Health concede that Bratton's "request"

occurred when she testified in her deposition that she would prefer a check, *see* Resp. Br., 9, its “arrangement” for Bank of America to issue a check directly contradicts Wilkinson’s deposition testimony SCL Health cannot request checks on behalf of patients for regulatory reasons, *see* App. 53, 115:8-13.

Simply put, Bratton had to file litigation and sit through a deposition to receive the unqualified payment SCL Health owed her all along, and even then SCL Health procured it through a means that is not otherwise available to patients. Unwitting participation in a refund program that requires consent to a contract of adhesion is precisely the type of conduct the MCPA is designed to avoid. It is no defense that SCL Health tried to remedy its conduct after Bratton filed suit.

B. Bratton Suffered an Ascertainable Loss.

SCL Health insists that Bratton has suffered no ascertainable loss of money or property under Montana Code Annotated section 30-14-133(1). Basically, SCL Health believes that even if the Program is unfair or deceptive, Bratton’s ability to access her money by consenting to the restrictive terms imposed by Bank of America’s Card Agreement forecloses her MCPA claim. *See* Resp. Br., 31-34.

This Court does not take nearly such a restrictive a view of the MCPA. In *Jacobson v. Bayview Loan Servicing, LLC*, for example, the plaintiffs had a viable MCPA claim where a loan servicer instructed them not to pay on their loan and then instituted foreclosure proceedings. 2016 MT 101, ¶¶ 56-57, 383 Mont. 257, 271 P.3d 397. The Court rejected the loan servicer’s argument that the borrowers had no actual damages because no foreclosure sale ever occurred, reasoning that if that were the case, “a loan servicer could undertake any sort of action to collect debt so long as the loan does not actually foreclose.” *Id.*, ¶ 56. Because the MCPA was “enacted to stop unfair practices including false representations,” the Court held that the financial injury supporting a MCPA claim was a wrongful increase of loan liability, even though the borrowers never actually lost any money as a result.⁶ *Id.*, ¶ 57.

⁶ Under similar factual circumstances, *Puryer v. HSBC Bank USA* held that being forced to execute a legal proceeding—and alleging damages of costs and fees—to stop a lender’s improper foreclosure satisfies the MCPA’s ascertainable loss requirement even where the borrowers do not ultimately lose money because the foreclosure is called off. 2018 MT 124, ¶ 36, 391 Mont. 361, 419 P.3d 105.

The same result follows here. Bratton’s loss is her inability to obtain her \$27.75 from SCL Health short of litigation. *See* Open. Br., 46-47. Concluding that Bratton can obtain her money via the Program would be akin to the idea rejected in *Jacobsen*—it would effectively mean that SCL Health can act illegally in refunding patient money so long as patients eventually obtain their refunds in some form at the end of the day. Just as the borrowers in *Jacobsen* were injured even though their home was not actually foreclosed, Bratton was injured even though Bank of America proffered her money in a form she was not obligated to accept. Bratton had a legal entitlement to an unqualified payment of \$27.75 from SCL Health. She has not received it and has been forced to initiate litigation to obtain it. Accordingly, she has suffered an ascertainable loss of money sufficient to maintain her MCPA claim. *Jacobsen*, ¶ 56-57; *Puryer*, ¶ 36.

IV. Bratton, Not SCL Health, Is Entitled to Summary Judgment on Her Money Had and Received Claim.

The analysis of Bratton’s money had and received claim is nearly identical. SCL Health admits it owed Bratton a refund. It also admits that, rather than paying Bratton, it transferred the amount of her refund to Bank of America and that the money stays “with Bank of America” unless Bratton either consents to the Card Agreement or

jumps through Bank of America's hoops to obtain a check. *See App. 47, 82:8-83:2.*

SCL Health's lone response is that Bratton can obtain her money via Patient Refund Cards and that those cards constitute payment of SCL Health's debt. *See Resp. Br., 35.* And that response is deficient for all the reasons discussed above—Patient Refund Cards are not the equivalent of an unqualified payment and SCL Health cannot avoid liability by suggesting that Bratton can mitigate her damages by consenting to a contract adherence she has no duty to accept.

CONCLUSION

For the foregoing reasons, Bratton respectfully requests that the Court reverse the district court's grant of summary judgment in SCL Health's favor on every claim except conversion and reverse the district court's denial of summary judgment in Bratton's favor on her claims for declaratory judgment and money had and received.

Dated: January 7, 2019.

Respectfully submitted,

/s/ Michael P. Manning _____

Michael P. Manning
RITCHIE MANNING KAUTZ PLLP
175 N. 27th St.
Suite 1206
Billings, Montana 59101

John Heenan
Joe Cook
HEENAN & COOK
1631 Zimmerman Trail
Suite 1
Billings, MT 59102

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Mont. R. App. P. 11(4), this response brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,982 words, as determined by the undersigned's word processing program.

/s/ Michael P. Manning _____

Michael P. Manning
RITCHIE MANNING KAUTZ PLLP
175 N. 27th St.
Suite 1206
Billings, Montana 59101

Counsel for Appellant

CERTIFICATE OF SERVICE

I, Michael Manning, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 01-07-2020:

John C. Heenan (Attorney)
1631 Zimmerman Trail, Suite 1
Billings MT 59102
Representing: Cheryl Bratton
Service Method: eService

Robert C. Lukes (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: Sisters of Charity of Leavenworth Health Systems,
Service Method: eService

David Kim Wilson (Attorney)
401 North Last Chance Gulch
Helena MT 59601
Representing: National Consumer Law Center, National Association of Consumer Advocates,
Montana Legal Services Association
Service Method: eService

Kenneth K. Lay (Attorney)
900 North Last Chance Gulch, Suite 200
P.O. Box 797
Helena MT 59624
Representing: Montana Bankers Association, American Bankers Association, Consumer Bankers
Association
Service Method: eService

Kathryn Ann Reilly (Attorney)
370 Seventeenth Street, Ste 4500
Denver CO 80202-5647
Representing: Sisters of Charity of Leavenworth Health Systems,
Service Method: Conventional

Joseph Patrick Cook (Attorney)
1631 Zimmerman Trail, Suite 1

Billings MT 59102
Representing: Cheryl Bratton
Service Method: E-mail Delivery

Mark E. Budnitz (Attorney)
1765 Morris Landers Dr.
Alanta GA 30345
Representing: Mark E. Budnitz
Service Method: E-mail Delivery

Electronically Signed By: Michael Manning
Dated: 01-07-2020