IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 24-0552

VICTORY INSURANCE CO.
Petitioner/Appellant.

v.

OFFICE OF THE MONTANA STATE AUDITOR,

Respondent/Appellee,

APPELLANT'S OPENING BRIEF

On Appeal from the Montana First Judicial District Court
Lewis & Clark County
District Court Cause No. BDV-25-2023-0000774-JR
Honorable Michael F. McMahon, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

Treatises

INTRODUCTION

In 2019, Victory Insurance Company sold its book of business to Clear Spring (another workers compensation insurer). Clear Spring would now be the insurer for Victory's customers, but Victory would still administer the policies.

Importantly, all coverage obligations to the insured remained the same under this transaction. Indeed, even with the change in insurer, the insureds received identical terms, paid identical premiums, and had identical renewal dates. And more importantly, Victory would remain the insureds' single point of contact and handle all policy administration.

While Victory believed it had assigned the policies to Clear Spring, the Commissioner brought a 2022 action alleging that the transaction violated Montana's anti-cancellation statutes. Perhaps most importantly to the Commissioner, Victory and Clear Spring had issued the insureds new, written policies that contained the identical terms but identified Clear Spring as the new insurer. This action, he contended, demonstrated that Victory's policies were canceled. The Commissioner reached this conclusion even though all coverage obligations continued on the same terms and despite the fact that there was no lapse in coverage.

The Hearing Examiner agreed with the Commissioner, and the District Court affirmed that decision (albeit applying the wrong standard). Victory now appeals that determination.

Because all coverage obligations to insureds remained the same, this transaction constituted an assignment. And nothing in Montana's anti-cancellation statutes suggests that it applies to assignments. To focus on the fact the new policies were issued to say "Clear Spring" elevates form (new policies being issued) over substance (all obligations and terms remained the same).

Additionally, Victory appeals the Commissioner's $250,000 fine. Victory received no due process regarding the fine amount. Specifically, it received no notice concerning the factual basis for an appropriate fine and received no opportunity to present evidence concerning what an appropriate fine would be.

Just as importantly, the Commissioner's broad authority to fine violates both due process and is unlawful delegation of legislative authority. Montana vests too much unchecked discretion in the Commissioner's ability to determine fine amounts. That is, there are no procedural guardrails (such as defined factors) in how the Commissioner determines how much to fine, and this lack of safeguards allows for arbitrary decision-making. Indeed, the Commissioner began by pursuing a $2.7 million fine, the Commissioner's attorney ultimately recommended a $1 million fine, and the Deputy Commissioner issued a $250,000. The fact the Commissioner's

employees have such disparate views about a fine amount shows how the amount is left to the whims of a single decision-maker (and who that decision maker is) rather than the product of a deliberate and fair process.

Finally, the Commissioner violated Victory's right to a jury trial. In June 2024, the United States Supreme Court effectively ruled that claims subject to civil penalties are common law claims. Accordingly, the Seventh Amendment dictates agencies seeking these penalties must use court actions rather than administrative tribunals. This Court has stated Montana's right to a jury trial is the "same" as the Seventh Amendment. So under Montana's Constitution, Victory has a right to jury adjudication.

STATEMENT OF THE ISSUES

1. Did the Hearing Examiner improperly grant summary judgment on the question of whether Victory canceled its insurance policies?
2. Did the Hearing Examiner improperly grant summary judgment on the question of whether Victory misrepresented the Clear Spring transaction?
3. Did the Commissioner violate Victory's due process rights concerning the fine?
4. Did the administrative action violate Victory's right to a jury trial?

STATEMENT OF THE CASE

The Commissioner of Insurance filed its agency action on December 27, 2022. (Doc. 41A, pp. 2630-2637). The Commissioner moved for summary judgment on March 16, 2023. (Doc. 13, pp. 46-48). Victory also moved for summary judgment. (Doc. 29, pp. 2296-2326). The Hearing Examiner granted the Commissioner's motion on summary judgment on May 23, 2023. (Doc. 41-O, pp. 5075-5114).

Notably, while the Hearing Examiner identified the maximum fine available as $25,000 per violation, the Hearing Examiner did not recommend a fine nor take evidence concerning an appropriate fine. No evidentiary hearing occurred.

On June 9, 2023, the Commissioner delegated his authority to review the Hearing Examiner's decision. (Doc. 27, p. 2600-2601). His delegate ordered that the case proceed pursuant to §2-4-621, MCA, which allowed the Commissioner to accept or modify the Examiner's "recommended penalty." (Doc. 35, p. 002596). But notably, there was no recommended penalty to review because the Hearing Examiner made no such recommendation. Nor did the statute provide authority to determine an appropriate fine without a hearing.

The Commissioner's delegate required Victory to file a brief concerning its exceptions, then allowed the Commissioner to respond. Victory had no opportunity for rebuttal. Oral argument was held on August 11, 2023. The Commissioner's delegate ultimately adopted the Hearing Examiner's Recommendation on November

3, 2023. The delegate also determined a fine of $250,000, with all but $100,000 suspended. (Doc. 45, pp. 5221-5280).

Victory then petitioned for judicial review. Oral argument was held on July 22, 2024. The District Court denied Victory any relief under this petition on August 27, 2024. This appeal followed.

FACTUAL BACKGROUND

Victory addresses the facts below in two sections: (1) the transaction with Clear Spring and (2) the administrative proceedings.

A. The Transaction

Victory Insurance Company is a domestic workers compensation insurance company headquartered in Miles City, Montana. Beginning in April 2019, Victory signed several agreements with Clear Spring Property and Casualty Company (Clear Spring), who also issued workers compensation policies.

Effective April 1, 2019, the Reinsurance Agreement established the parties' agreement that Clear Spring (as a reinsurer) accepted 100 percent responsibility for Victory's claims. (Doc. 21-B, p. 002148). The Reinsurance Agreement would continue until Victory sold its book of business to Clear Spring. The Reinsurance Agreement also provided Victory would become a Managing General Agent (MGA) for Clear Spring after the sale. (Doc. 21-B, p. 002152).

The parties also entered into a separate MGA agreement. (Doc. 21-C). In part, this agreement provided that Clear Spring would be directly financially responsible for claims. That is, Clear Spring would now be the direct insurer. But notably, as Managing General Agent, Victory would still handle all administrative aspects surrounding the policies. This included remaining the point of contact for questions and claims handling.

Accordingly, as of January 1, 2020, Victory assigned its policies to Clear Spring, and Clear Spring accepted all terms of the assigned policies, including the rate charged and the renewal dates. (Doc. 41-M, pp. 4884-4894, Doc. 32-3, p. 2373).

In sum, nothing would change for Victory's customers besides Clear Spring being the direct insurer. Victory would continue to manage all administrative aspects and would remain the insureds sole contact. (Doc. 21-C). There was also no change in policy terms, so customer policies received identical coverage. (Doc. 32-3, p. 2373). This included having the same premium and the same renewal date. And notably, per the Reinsurance Agreement, Clear Spring had already been 100 percent financially responsible for any claims.

Before the assignment became effective, Victory called each insured to discuss the transaction, and all insureds accepted the assignment (Doc. 41-M, p. 4895, Doc. 32-3, p. 2373). Although the policy terms remained identical, the parties issued paper policies that expressly identified Clear Spring as the insurer on

December 26, 2019. (Doc. 41M. pp. 004886-4894). Victory also followed up with an email on December 31, 2019, again discussing the change that would be effective the next day. (Doc. M-E-4).

Importantly, under the policies, the insureds could have canceled their coverage, selected a different carrier at any time, and received a prorated refund. (Doc. 41-M, p.004945). After Clear Spring became the direct insurer, Victory did not receive any request from the insureds to cancel. (Doc. *Id*.) Ninety-five percent of the policyholders renewed their policies when the term expired. (Doc. *Id*.) And the Commissioner confirmed that no insureds complained to the department. (Doc. 41-M, p. 00491).

B. The Administrative Proceedings

On December 27, 2022, the Commissioner issued a Notice of Proposed Agency Action ("NOPAA") concerning Victory's assignment of policies to Clear Spring. (Doc. 41-A). In short, this action alleged that Victory had illegally "canceled" the policies and that Victory had misrepresented the transaction in its December 31, 2019 correspondence. (*Id*. at p. 002634). This notice proposed a fine of up to $2.7 million and afforded Victory a right to a contested case hearing before a Hearing's Examiner.

Notably, though, the Commissioner pursued no corollary action against Clear Spring. Again, the Commissioner had alleged Victory "canceled" its policies,

meaning it ended all obligations for both insured and insurer. Yet, if the policies were canceled, Clear Spring had no contractual or legal basis to represent itself as Victory's customer's insurer or to charge these insureds premiums. Indeed, Clear Spring had no written contract with these individuals if the Victory policies were not assigned. And yet, despite the Commissioner's contentions about cancellation, his lack of action against Clear Spring suggests he felt Clear Spring did nothing wrong despite (by his logic) Clear Spring acting as an insurer without an insurance agreement.

Victory invoked its right to a hearing. Among other things, Victory sent the Commissioner a request asking him to "explain all factors you have considered and are relying on" in assessing the fine. (Doc. 31, pp. 002423-24). It also asked the Commissioner to explain why he was "considering those factors" and to "identify any evidence supporting your contentions about the various factors." (*Id.*)

The Commissioner effectively provided no response, answering that he could seek the maximum fine of $25,000 for each violation for 108 violations. As he summarized:

> Said another way:
>
> [Allowed Fine, § 33-1-317, MCA] x [number of "violat[ions] [of] a provision of this code [Title 33] or a regulation promulgated by the commissioner[,]" *id.*] = [Total Proposed Fine]

(Doc. 31. P. 002425).

Simply stated, the Commissioner provided no rationale and cited no facts for why he could seek the maximum penalty. Instead, the Commissioner indicated he had the statutory discretion to issue a maximum fine, that he would exercise that discretion, and did not need any factual basis for doing so (and certainly had no obligation to share the basis of his decision making).

The Commissioner then filed a summary judgment motion, and Victory did the same. (Doc. 41-B, J). Notably, the Commissioner argued that the Hearing Examiner only decided liability. Per the Commissioner, the Examiner could not hear evidence about an appropriate fine and did not have authority to recommend a penalty. Victory contested this notion and argued it had the right to an evidentiary hearing regarding an appropriate penalty.

Ultimately, the Hearing Examiner sided with the Commissioner. Regarding the fine, he noted, "The Commissioner proposes imposing a fine in the amount of $25,000 per violation. By the Commissioner's calculation, the total amount of the fine is $2,700,000." (Doc. 41-O, p. 005097). Notably, in seeking this amount, "The Commissioner did not provide a basis for imposing such a fine." *Id.*

Yet, the Examiner also said the Commissioner can issue the maximum fine without explanation, and Victory had no right to present evidence about an appropriate fine amount. As he concluded, "The amount of the fine the Commissioner imposes is at the discretion of the Commissioner, and the

Commissioner need not provide a basis for imposing a fine of a particular dollar amount." (Doc. 41-O, p. 005097). Per the Examiner, then, "the amount of the fine is not subject to review by the Hearing Examiner."

Put differently, the Examiner concluded that the Commissioner was not required to present evidence supporting a fine amount, and Victory had no right to respond to or present evidence regarding an appropriate fine. For example, Victory could not present evidence about whether the violation was willful or inadvertent, could not address the lack of harm to the consumer or public, and had no chance to address whether this was a first-time offense or multiple offenses for the same conduct. What is more, Victory had no opportunity to present evidence about its financial resources to establish either a proportional fine or for that matter, an ability to pay. While these all seem like relevant inquiries regarding an appropriate fine, the Hearing Examiner found (and the Commissioner argued) that the facts were irrelevant. Instead, the Commissioner could simply issue a $25,000 per violation regardless of the facts and without explanation.

After the Hearing Examiner's decision, the Commissioner delegated his authority to his staff (ultimately, his Deputy Commissioner) to render ultimate judgment. The staff member notified Victory that the matter would proceed under § 2-4-621, MCA—a statute governing procedures for adjudication when those "who are to render the final decision have not heard the case . . . ." (Doc. 35, p. 002596).

Notably, this statute assumes that a Hearing Examiner's proposed decision has made a "recommended penalty" that the agency can accept or reduce. But the Examiner made no such recommendation.

And yet, the Commissioner's staff issued an order stating they would review the recommended penalty. Notably, §2-4-621, MCA concerns reviewing the hearing record. It is not an opportunity to present evidence. Yet, Victory could not create an evidentiary record about what constituted an appropriate fine. Meaning the Commissioner's staff reviewed a record with no evidentiary record about what constituted a just fine.

The Commissioner's staff also required Victory to file an opening brief. The Commissioner's attorney was then permitted to file a response. Victory was given no written rebuttal.

For the first time, the Commissioner's brief presented a different fine request from $2.7 million to $1,000,000 with $750,000 suspended. Of course, by the time the Commissioner changed his position, Victory had no chance to respond in writing.

Ultimately, the Deputy Securities Commissioner affirmed all liability questions. He also ordered a fine of $250,000 with $100,000 suspended. (Doc. 45, pp. 5221-5280). The Deputy did not provide any reason for this fine or why the Commissioner's $1 million request was rejected. Rather, he instead noted insurance code violations had occurred with nothing more to justify his determination.

Victory filed a petition for review in Lewis and Clark District Court. Judge McMahon presided and denied Victory's petition in total. This appeal followed.

STANDARD OF REVIEW

While this case is about agency review, there is no deference here because this matter concerns granting summary judgment. *Missoula Elec. Coop. v. Jon Cruson, Inc*., 2016 MT 267, ¶ 15, 385 Mont. 200, 383 P.3d 210. Whether summary judgment was properly granted is always reviewed for correctness. Indeed, the Montana Supreme Court will review the hearing examiner and agency summary judgment decisions de novo. *Jackson v. Costco Wholesale Corp*., 2018 MT 262, ¶ 14, 393 Mont. 191, 429 P.3d 641.

Victory's petition for review additionally raised constitutional issues. The Court exercises plenary review of constitutional questions and applies de novo review to a district court's constitutional interpretations. *State v. Mercier*, 2021 MT 12, ¶ 11, 403 Mont. 34, 479 P.3d 967.

SUMMARY OF THE ARGUMENT

The Final Order against Victory (and affirmed by the District Court) was issued without regard for clear statutory standards, legal precedent, and Victory's due process rights.

The District Court's legal errors began with a failure to apply standards applicable to summary judgment motions and ended with a disregard for procedural due process standards as well as U.S. Supreme Court authority.

A. Liability

The Hearing Examiner granted summary judgment. On appeal, the District Court failed to apply the established standard of review for summary judgment decisions. Specifically, the District Court should have reviewed whether disputes of fact existed and viewed all facts in a light favorable to Victory. *Newbury v. State Farm Fire & Cas. Ins. Co*., 2008 MT 156, ¶ 14, 343 Mont. 279, 280, 184 P.3d 1021. Instead, the District Court erroneously applied the "clearly erroneous standard," which is only applicable after an evidentiary hearing. This standard only asks whether credible evidence supports the decision and in stark contrast to summary judgment, views facts more favorable to the prevailing party. *Jorgensen v. Trademark Woodworks, LLC,* 2018 MT 291, ¶ 13, 393 Mont. 381, 384, 431 P.3d 29.

Additionally, the legal distinction between an assignment and termination of an insurance contract was never properly examined. Victory assigned its policies to Clear Spring, so the Commissioner's imposition of statutes applicable to policy cancellations did not apply. This legal distinction was disregarded by the Commissioner as well as the District Court.

B. Due Process and the Fine

The fine also violates Victory's due process rights. As an initial matter, Victory was given no opportunity to know the factual basis for the Commissioner's fine, nor was Victory provided an opportunity to create an evidentiary record concerning what an appropriate fine would be.

But beyond the lack of procedural process Victory received, the statute governing fines provides the Commissioner too much discretion without any guidelines or standards about how to employ that discretion. To follow the Commissioner and the District Court's reasoning, the Commissioner can impose a maximum fine simply because a violation has occurred. Indeed, if the only reason for seeking the maximum fine is the Commissioner dislikes the insurer and its executives, that is lawful in the Commissioner's view. Without statutory factors (or at a minimum, a regulation) about how to determine an appropriate fine, the statute subjects insurers to the arbitrary whims of government employees rather than equal justice under the law.

Finally, the Commissioner's imposition of this penalty fine violates Victory's right to a jury trial. In *SEC v. Jarkesy,* 144 S. Ct. 2117, 2126 (2024), the Supreme Court held that the state seeking civil penalties constitutes a common law action. This means the right to a jury trial applies, and administrative actions that seek civil penalties violate a defendant's jury trial right.

There is no dispute that the Commissioner issued a "penalty" against Victory. And per *Jarkesy*, this implicates the right to a jury trial.

The District Court held that Montana was not bound by *Jarkesy* noting that the Seventh Amendment has not been incorporated. So it treated *Jarkesy* as irrelevant.

But the District Court ignored Montana law. Specifically, this Court has stated, "the right to trial by jury in this state is the *same* as that guaranteed by the Seventh Amendment to the United States Constitution." *Romero v. J & J Tire*, 238 Mont. 146, 151, 777 P.2d 292, 295 (1989)(emphasis added). Given that the rights are identical, the District Court erred in dismissing *Jarkesy* as irrelevant.

ARGUMENT

I. Disputes of Facts Prevented the Hearing Examiner From Granting Summary Judgment.

Victory assigned its policies; it did not cancel them. In addressing this question, the Hearing Examiner erred in granting summary judgment because disputes of fact made summary judgment inappropriate.

A. Contractual Assignment and Cancellation Are Distinct and Different Concepts.

Initially, it is important to recognize the distinction between canceling a policy and assigning a policy. Victory explains below how these are distinct concepts and how each has vastly different impact on insurers.

1. Contracts (Including Insurance Contracts) Are Generally Assignable.

"As a general rule, a party to a contract may assign all beneficial rights to another, without the consent of the other party to the contract." 3 Williston on Contracts § 411, at 13-18 (3d ed. 1960). Indeed, this Court has "long recognized the rule that rights arising from contracts between private individuals are assignable, and that non-assignability is the exception. In the absence of a non-assignment clause, either party may generally make an assignment of rights under the contract." *Watts v. HSBC Bank United States Tr.*, 2013 MT 233, ¶ 14, 371 Mont. 295, 308 P.3d 57. Generally, a party may also delegate any contractual duties. *Somont Oil Co. v. Nutter*, 228 Mont. 467, 468, 743 P.2d 1016, 1016 (1987).

Insurance policies are also assignable. *Epland v. Meade Ins. Agency Assocs*., 564 N.W.2d 203, 207 (Minn. 1997). In *Epland*, two insurers entered assumption agreements whereby one insurer assigned its policies to the other. The Minnesota Supreme Court addressed whether this assignment was lawful without the insured's consent. It began its analysis by noting that insurance policies are contracts, "and, unless there are statutory laws to the contrary, general principles of contract law apply." It noted the general rule that contracts are generally assignable. And so it concluded that, even without the insureds' consent, the assumption agreements and assignments of policies were valid.

Montana law dictates a similar conclusion. As this Court has recognized, an "insurance policy is a contract between the insurer and the insured," so "general rules of contract law apply to insurance policies." *ALPS Prop. & Cas. Ins. Co. v. Keller, Reynolds, Drake, Johnson & Gillespie, P.C.*, 2021 MT 46, ¶ 1, 403 Mont. 307, 310, 482 P.3d 638. (cleaned up). It follows, then, that insurance policies are generally assignable absent an express agreement to the contrary.

In fact, Montana statute expressly allows for assignment. It states, "A policy or group certificate issued under a policy may be assignable or not assignable, as provided by its terms." § 33-15-414, MCA.[1]

2. Cancellation is Different From Assignment As It Ends All Obligations.

[1] In addressing this statute, the District Court stated that Victory's policy was silent on assignment, and therefore, the policy did not make it assignable "as provided by its terms." So this rendered it not assignable.
This reasoning is non-sensical for two reasons. First, per the District Court's reasoning, all policies are not assignable unless expressly stated as such. That is, if the policy is silent, the default rule is it is non-assignable. This flips the common law on its head as all contracts are assignable absent an express prohibition otherwise. Nothing in the statute would suggest the Legislature intended this result.

Second, the District Court incorrectly interprets the "as provided by its terms" as "modifying" assignable. In reality, that phrase only modifies "not assignable" under the last antecedent rule. *United States v. Paulson*, 68 F.4th 528, 537 (9th Cir. 2023) "The Supreme Court has long applied this 'timeworn textual canon' to interpret statutes that include a list of terms or phrases followed by a limiting clause. *Id. "*The rule of the last antecedent provides that a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Id*. Per this canon, the limiting phrase "as provided to its terms" only applies to "not assignable" as the last phrase preceding it. This of course makes sense as it conforms to the common law standard that agreements are assignable unless expressly stated otherwise in the agreement.

Montana statute governs the cancellation of insurance policies. § 33-15-1101, MCA. But "termination of a contract and assignment of a contract are two very different concepts. Termination is defined as ending the contract by breach or other means." *Riverside Health Sys. v. Unruh*, 2003 Kan. App. Unpub. LEXIS 419, at *5-6 (Ct. App. Oct. 31, 2003) (citing 1 Farnsworth on Contracts § 8.15 n.2 (3d ed. 1999)). "On the other hand, an assignment transfers the assignor's rights in the contract to the assigned. Essentially, the assignee stands in the shoes of the assignor with respect to the contract." *Id.* Simply stated, a contractual obligation continues with an assignment; a cancellation ends all obligations.

Statutes governing cancellation of insurance policies only protects the latter. This is because anti-cancellation provisions protect against a lapse in coverage. *Couch on Insurance*, 3D, §30.6. They accomplish this by requiring notice that "allows the consumer to take protective action. It gives the insured the opportunity to guard against the peril of *noncoverage* . . . ." *Piermount Iron Works, Inc. v. Evanston Ins. Co*., 963 A.2d 818, 823 (NJ 2009) (emphasis added). Of course, there is no concern about non-coverage with assignment as coverage continues (albeit with a different insurer).

In fact, the National Association of Insurance Commissioners (NAIC) has different model legislation for assignments and cancellations. Compare NAIC's *Assumption Reinsurance Model Act, Model Law 803,* with NAIC's *Improper*

Termination Practices Model Act, Model Law 915. The reason for these different laws is that assignment and cancellation are different concepts and raise different regulatory concerns. Notably, Montana has not adopted Model Law 803 and has no law governing or restricting the assignment of insurance policies.

B. In Addressing the Assignment v. Cancellation Question, The District Court Applied The Wrong Legal Standard.

As an initial matter, the District Court applied the wrong standard of review. Specifically, the District Court improperly applied a clearly erroneous standard of review.

The Hearing Examiner granted summary judgment. Per this Court's precedent, judicial review of agencies still reviews under the traditional summary judgment standard. *Missoula Elec. Coop. v. Jon Cruson, Inc.*, 2016 MT 267, ¶ 15, 385 Mont. 200, 383 P.3d 210. That is, it reviews de novo whether a dispute of fact existed, reviewing all facts in a light most favorable to the non-moving party and resolving all doubts in favor of the non-movant.

Yet, the District Court did not follow this standard. Indeed, the words "summary judgment" never appear in his order. It never recited the well-known summary judgment standards. Nor does the phrase "no dispute of fact" ever appear. This phrase is expected in any appellate decision reviewing a summary judgment question. See, e.g., *Stonehocker v. Gulf Ins. Co.*, 2016 MT 78, ¶ 33, 383 Mont. 140, 368 P.3d 1187 (concluding that summary judgment was appropriate because there

was "no genuine dispute of material fact"); *Barrett, Inc. v. City of Red Lodge*, 2020 MT 26, ¶ 10, 398 Mont. 436, 457 P.3d 233; *Hubbell v. Gull SCUBA Ctr., LLC*, 2024 MT 247, ¶ 25, 418 Mont. 399. Indeed, that phrase must appear in some form, or there are no grounds to grant summary judgment. This is because summary judgment is "only appropriate" if no dispute of facts exists. *Kaul v. State Farm Mut. Auto. Ins. Co.*, 2021 MT 67, ¶ 12, 403 Mont. 387, 391, 482 P.3d 1196, 1199. Put differently, a finding of "no dispute of fact" is imperative to affirming or granting summary judgment.

But here, rather than finding no "dispute of fact," the District Court instead noted that "substantial credible evidence" supported the decision. It also noted that the decision had "credible evidentiary support." (District Court Order at p.6).

This terminology is only correct if reviewed under a "clearly erroneous" standard. That standard would be correct if this case had gone through an evidentiary hearing.

But no such hearing occurred. Instead, the case was decided on summary judgment. So, the de novo summary judgment standard should have been applied.

Indeed, the difference between these standards is great. With summary judgment, Judge McMahon was required to view all facts in Victory's favor and resolve any doubts in Victory's favor. *Newbury*, ¶ 14. On the clearly erroneous standard, all the reviewing Court looks for is whether evidence supports the result.

KB Enters., LLC v. Mont. Human Rights Comm'n, 2019 MT 131, ¶ 9, 396 Mont. 134, 443 P.3d 498. Moreover, this standard requires the reviewing court view all facts in a light most favorable to the Commissioner (i.e., the prevailing party). *Jorgensen*, ¶ 13. In effect, then, the District Court offered deference to the Commissioner regarding the facts when, in reality, any such deference should have been offered to Victory.

In sum, the District Court's decision contains a fatal flaw. It relied on the clearly erroneous standard rather than the de novo, summary judgment standard. And because it used the incorrect legal framework, the decision is inherently flawed and unreliable.

C. The District Court's Ruling Appears to Ignore the Actual Summary Judgment Order.

Beyond applying the wrong standard, the District Court also ignored the actual summary judgment decision. The District Court opinion concluded that the Hearing Examiner unequivocally found that a cancellation of the policies had occurred.

Not so. In fact, the Final Order correctly concluded that in January 2020, Victory assigned its policies to Clear Spring. However, it incorrectly held that Victory's assignment was subject to statutory standards applicable to termination and cancellation of policies.

Specifically, the Hearing Examiner wrote, "The transaction that occurred between Victory and Clear Spring *appears to be an assignment*; however, the Commissioner is not concerned with that transaction, but rather with the transaction between Victory and its policyholders, which is to say, the termination of Victory's policies without providing notice required by either statute or the terms of the policies." (Doc. 41-O, p. 005112), (emphasis added).

This reasoning makes no sense. If Victory canceled the policies, there would be nothing to assign. Victory obviously could not both end the obligations and assign the obligations, suggesting the Hearing Examiner labored under some confusion about what cancellation means.

And there is no doubt that the policies were not canceled because no lapse in coverage occurred. Instead, the policyholders retained identical coverage through Clear Spring, and as the MGA, Victory administered all aspects of the policies. (Doc. 41-M, p.4895, Doc. 32-3, p. 2373, Doc. 21-C). In essence, nothing changed for these insureds other than their policies were backed by a bigger insurance company (who had already been fully re-insuring their claims before the assignment occurred). (Doc. 21-B, p. 002148, Doc., Doc. 32-15, p. 2529).

The only means to reconcile the Hearing Examiner's confusing rationale is to conclude that even an assignment is subject to the cancellation statutes. But this conclusion does not pass basic statutory interpretation. It is axiomatic that the

"narrow purpose of statutory construction is to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *State v. Collins*, 2023 MT 78, ¶ 31. And the words "assignment" and "assign" are nowhere in the anti-cancellation statutes.

Nor is it correct to interpret the terms "cancellation" and "assignment" to mean the same thing. There is a "presumption that different words mean different things." *Med. Coll. of Wis. Affiliated Hosps., Inc. v. United States*, 854 F.3d 930, 933 (7th Cir. 2017). As explained above, assigning contracts and terminating contracts are distinct concepts, and accordingly, those words should be interpreted to have different meanings. Indeed, per NAIC, they are governed by different model rules because they impact insureds differently.

D. At a Minimum, Disputes of Fact Exists About Whether The Policies Were Assigned.

Reversal is warranted here because (at a minimum) disputes of fact exist regarding whether the policies were assigned. In affirming the Hearing Examiner, the District Court relied heavily on statements that the policies were canceled because Clear Springs issued new policies (albeit with identical terms).

But the District Court's reasoning is the epitome of elevating "form over substance"—a practice this Court routinely declines to engage in. *Schmitz v. Vasquez*, 1998 MT 314, ¶ 16, 292 Mont. 164, 970 P.2d 1039. In fact, Montana recognizes that, "The law respects form less than substance." § 1-3-219, MCA.

In effect, what happened with the insurance coverage speaks to an assignment, not cancellation. First and foremost, there was no lapse in coverage, which is inherent with a cancellation. Second, the policy terms with Clear Spring were identical to Victory's policies. What is more, the renewal dates for each insured remained the same, and the insurance premiums were likewise unchanged. (Doc. 41-A, pp. 005069-70).

In essence, the only argument that a cancellation occurred is because Victory and Clear Spring decided to issue new policies on Clear Spring paper. But this detail is immaterial since the terms of the Victory policies and Clear Spring policies were identical. Indeed, the Hearing Examiner emphasized new pieces of paper being sent rather than the fact that there was no change in terms, coverage, renewal period, or price. (District Court Order at p. 5, citing to Recommended Order).

The Commissioner's own actions speak directly to what occurred here. If this was not an assignment, Clear Spring has engaged in serious misconduct. That is, it misrepresented to Montanans that Clear Spring was their insurer when those Montanans had never entered into an insurance agreement. And Clear Spring began charging these Montanans premiums they had never agreed to pay.

Despite these egregious violations of Montana law, the Commissioner has taken no action against Clear Spring for this "misconduct." There is a clear and obvious explanation for the Commissioner's inaction—these policies were assigned

to Clear Spring, and Clear Spring had every right to claim they were these Montanans' insurer and every right to charge premiums pursuant to the assigned insurance agreements.

In sum, with all facts viewed in Victory's favor, disputes of fact exist about whether the policies were assigned or canceled. The Court should accordingly reverse and remand for an evidentiary hearing.

II. Disputes of Fact Prevented Summary Judgement on the Misrepresentation Claim.

Disputes of fact also prohibit summary judgment on the misrepresentation question.

A. The District Court Applied The Wrong Legal Standard.

Like with cancellation, no indication exists that the District Court applied a de novo summary judgment standard. Specifically, it made no finding that there existed no dispute of fact.

B. Disputes of Fact Exists About Misrepresentation.

The Commissioner has accused Victory of misrepresenting the transaction. Specifically, as the Hearing Examiner found, Victory's December 31, 2019 email was misleading because it "made misrepresentations by failing to clearly explain that each Victory policy was terminated and rewritten by Clear Spring, a separate entity. The Hearing Examiner further concluded that the letter made

misrepresentations by failing to clearly explain that Clear Spring had assumed Victory's policy burdens."

This argument, though, is quickly dismissed by knowing multiple communications occurred with the policyholders. On December 26, 2019, prior to the communication relied upon by the Commissioner, insureds were given the Clear Spring replacement policy. These policies included provisions identifying Clear Spring as the insurer. Specifically, the policy included portions like the following:

Clear Spring Property and Casualty Company
A Stock Insurance Company

Workers Compensation and Employers Liability Insurance Policy

Named Insured **Nevermore Inc**		Endorsement Number **0**
Policy Number **WC110-0010491-2020A**	Policy Period **1/1/2020** to **10/25/2020**	Effective Date of Endorsement **1/1/2020**
Issued by (Name of Insurance Company) **Clear Spring Property and Casualty Company**		

This endorsement changes the policy to which it is attached and is effective on the date issued unless otherwise stated

Any insured receiving this was well aware Clear Spring was the insurer.

Not only were the insureds sent a letter, but all the insureds were called by phone about Clear Spring and its role as the insurer. All insureds agreed to the transaction (Doc. 41M. p. 004895).

At a minimum, when all facts are viewed in a light most favorable to Victory, disputes of fact made summary judgment inappropriate. The context surrounding and preceding the letter to insureds at least creates a triable issue about whether misrepresentations occurred.

III. The Fine Is Unconstitutional.

Beyond liability, serious questions exist about the Commissioner's process for obtaining a fine. At least here, the Commissioner violated Victory's due process rights.

A. Victory Did Not Receive Due Process Because It Lacked Notice and Meaningful Opportunity to Address What Constituted An Appropriate Fine.

"Absent extraordinary circumstances, procedural due process requires notice and hearing before any governmental deprivation of a significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971). As this Court has recognized, "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a *meaningful* manner." S*mall v. McRae*, 200 Mont. 497, 508, 651 P.2d 982 (1982) (emphasis added).

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Trust Co*., 339 U.S. 306, 314 (1950). The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest. *Golberg v. Kelly*, 397 U.S. 254 (1070).

Here, Victory received no notice and meaningful opportunity to present evidence considering the amount of an appropriate fine.

The timeline is as follows:

> March 21, 2023: Victory asked the Commissioner to identify the factual basis for the fine he requested, and specifically, it asked the Commissioner to "explain all factors you have considered and are relying on" in assessing the fine. The Commissioner, though, offered no such factors. Instead, the Commissioner only referred back to the NOPAA, stated the number of alleged violations, and then noted the maximum fine for each violation being $25,000. Doc. 31, pp. 002423-24).
>
> May 23, 2023: Hearing Examiner issues order stating that the fine amount is beyond the Hearing Examiner's role. That is, there was no evidentiary hearing about an appropriate fine, nor did the Examiner recommend a fine.
>
> June 1, 2023: Commissioner orders Victory to file an opening brief setting forth Victory's exceptions to the Hearing Examiner's Order, still without Victory receiving evidentiary support for the basis of the Commissioner's proposed fine amount.
>
> July 7, 2023: For the first time, in response to Victory's opening brief, the Commissioner files a brief reducing the fine and makes argument supporting the fine. Victory is offered no opportunity for a rebuttal or to submit additional evidence in light of these contentions.
>
> August 11, 2023: Commissioner holds oral argument rather than an evidentiary hearing regarding the fine. Because this is a record-based review, Victory is provided no opportunity to present evidence about an appropriate fine.

Simply stated, the first time Victory had an opportunity to discuss an appropriate fine was *after* the evidentiary record closed. And Victory had to file an opening brief without knowing the factual basis for the Commissioner's proposed fine.

In fact, the Commissioner did not comply with statutory standards concerning contested cases. Per the Commissioner's own June 1, 2023 order, the "opportunity for exceptions" was held pursuant to § 2-4-261, MCA. This statute states the Commissioner could "reduce or accept" a "recommended penalty" contained in the Examiner's "proposed decision."

But inherent to a recommended penalty is that the proposed decision resulted in a penalty being "recommended." But no such recommendation about an appropriate fine occurred here. To the contrary, the Hearing Examiner's proposed decision expressly disclaimed any responsibility for the fine amount. As he stated, "the amount of the fine is not subject to review by the Hearing Examiner." (Doc. 41-O, p. 39).

But this notion is incorrect. The statute is clear: the Hearing Examiner *must* consider evidence concerning a fine and *must* make a fine recommendation. This Court's precedent supports this reading. *Munn v. Mont. Bd. of Med. Exam'rs*, 2005 MT 303, ¶ 25, 329 Mont. 401, 124 P.3d 1123. *Munn* considered the Board of Medical Examiners reviewing a hearing examiner decision pursuant to § 2-4-261, MCA. The hearing examiner heard evidence about an appropriate sanction and made a recommendation. Granted, the board had ultimate authority in determining the fine amount, but that was after an evidentiary record was created and a penalty recommendation occurred.

Indeed, the existence of a record is critical to § 2-4-261, MCA. Notably, the reviewing entity can only increase the fine if they have "reviewed the complete record." That is, the state entity can only cause further deprivation than the Hearing Examiner proposes *if* it has reviewed all evidence. The reason for this is obvious—it is the only way a fine can increase *and* comply with due process.

Simply stated, the Commissioner's cited authority for reviewing the contested case required the opportunity to present evidence about an appropriate fine, and that the examiner provide a recommended penalty. Because the Commissioner did not adhere to this procedure by not allowing an opportunity to present evidence about an appropriate fine, its actions violated Montana law and due process.

To summarize:

- Victory had no right to present evidence for an appropriate fine at a hearing;
- The Commissioner claimed to proceed under a statute that required The Examiner recommend a fine after an evidentiary hearing;
- Despite having no hearing, Victory had to file an opening brief explaining why the decision was wrong without any notice about the amount of the fine or the basis of that fine;
- Instead, the Commissioner, for the first time, presented argument (<u>not</u> evidence) about what it believed was an appropriate fine and basis for the fine after Victory had lost its opportunity to provide written evidence about an appropriate fine.

Certainly, this system cannot adhere to due process. Indeed, it does not even comply with the statutory scheme that the Commissioner proceeded under.

At a minimum, Victory should have the right to (1) have all facts, evidence, and contentions about what the Commissioners contends is an appropriate fine and (2) present evidence, argument, and rebuttal to those contentions and about an appropriate fine.

B. The Fine Is Unconstitutional Because There Are Insufficient Procedural Safeguards Surrounding the Commissioner's Discretion In Determining An Appropriate Fine.

As this Court has stated, rules must "prescribe a policy, standard or rule" to guide decision-making, and the rule "must not vest" agencies "with arbitrary and uncontrolled discretion." *Williams v. Bd. of County Comm'rs,* 2013 MT 243, ¶ 44, 371 Mont. 356, 308 P.3d 88. Rules without such standards "run afoul of the due process guarantees." *Id*., ¶ 45. This is because standardless rules allow an entity "to be held hostage by the will and whims" of a decision-maker "without reason or justification." *Id*., ¶ 50. And standardless rules "allows for unequal treatment under the law and is in clear contradiction of the protections of the due process clause of the Fourteenth Amendment." *Id*.

Indeed, it is well recognized that "procedural safeguards and fairness must accompany" administrative discretion. *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083, 1089 (Del. 1985). "Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee*

Committee v. McGrath, 341 U.S. 123, 179, (1951)). This is essential in marking the "difference between rule by law and rule by whim or caprice." *Id.*

The Delaware Supreme Court specifically recognized this concern with an Insurance Commissioner. *Butler v. Insurance Comm'r*, 686 A.2d 1017, 1022 (Del. 1997). In that case, the Commissioner had an informal (but unwritten) policy about reinstating licenses. Specifically, the Commissioner required agents seeking reinstatement to take additional courses. An agent challenged this policy as unlawful and prevailed. The Court noted that the Commissioner had "broad discretionary powers" over licensing but needed to commit the course work rule to a regulation. As it stated, "The Commissioner's discretionary powers must be accompanied by safeguards to protect against capricious or whimsical policymaking by the Department staff." *Id.*

This "capricious and whimsical policymaking" is precisely Victory's concern here. Montana law allows the Commissioner to issue fines "not to exceed $25,000 . . ." § 33-1-317, MCA. Notably, it does not require a $25,000 fine, but instead, grants discretion up to that amount. But there is no guidance or other factors about how the Commissioner must exercise his discretion in determining fine amounts, which lends itself to arbitrary decision-making about how to use that discretion.

Take an example in this case. Victory contends, and the Commissioner agrees, that no consumer was harmed, and no consumer complained, and therefore, a large fine is unwarranted. The Commissioner argues consumer harm is irrelevant.

But if that notion is true, its irrelevancy should be true in all cases. For future cases, if an insurer does harm consumers, the Commissioner should be barred from arguing that warrants a larger fine. Simply stated, the Commissioner should not be permitted to take contradictory positions case by case based on whatever best suits the Commissioner's desired fine amount. Rather, the Commissioner should be required to exercise consistent and fair standards in exercising discretion.

This is precisely why written, established factors for determining fines is important. Established standards help "reduce significantly the possibility that the decision process will be arbitrary." *Elizondo v. State, Dep't of Revenue, Motor Vehicle Div*., 570 P.2d 518, 521 (Colo. 1977). With objective, established standards, similar defendants receive similar fines (thus, treated fairly), and these standards ensure that administrative agencies' actions are based on clear, objective standards rather than any one decision-maker's arbitrary whims.

In fact, statutory schemes routinely use factors to limit and guide administrative discretion in issuing fines. As the Eighth Circuit has stated, "many statutes authorizing civil fines carefully prescribe the factors an agency must consider in imposing such penalties, and reviewing courts ensure that agencies obey

those statutory mandates." *Corder v. United States*, 107 F.3d 595, 597 (8th Cir. 1997). At a minimum, the Eighth Circuit noted that a statute without standards required considering "the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business." *Id.*

Penalty factors are also prevalent in other state insurance codes and regulations. For example, Texas law provides:

> (b) The amount of the penalty shall be based on:
>
> (1) the seriousness of the violation, including:
>
> (A) the nature, circumstances, extent, and gravity of the violation; and
>
> (B) the hazard or potential hazard created to the health, safety, or economic welfare of the public;
>
> (2) the economic harm to the public interest or public confidence caused by the violation;
>
> (3) the history of previous violations;
>
> (4) the amount necessary to deter a future violation;
>
> (5) efforts to correct the violation;
>
> (6) whether the violation was intentional; and
>
> (7) any other matter that justice may require.

Tex. Ins. Code § 84.022. Through regulation, South Dakota provides a similar list of factors:

> In determining the penalty for a violation of an insurance law by an agent, broker, or insurer, the director may consider, but is not limited to, the following factors:
>
> (1) Prior violations of the law by the agent, broker, or insurer;
>
> (2) Number of violations of a statute;
>
> (3) Number of statutes violated;
>
> (4) Penalties assessed against other agents, brokers, or insurers for the same violations;
>
> (5) Magnitude of the harm to the public and insured; and
>
> (6) Any mitigating circumstances.

California law likewise provides a list of factors for consideration, including the violation's severity, willfulness, the violation's monetary effect, and the insurer's compliance record. The California Commissioner must also consider the duration, which means "consideration will be given as to whether the violation was a single event or violations continued repeatedly over a given period of time." Cal. Code Regs. Tit. 10, § 2591.3. Florida relies on similar factors as these other states. Fla. Admin. Code Ann. R. 69O-142.011.[2]

[2] For states without factors, the statutory schemes provide the Commissioner far less authority (and less need to cabin). For example, while the Commissioner claimed he could seek a $2.7 million fine against Victory and $25,000 per violation, the Wyoming Commissioner is limited to $5,000 a violation and $50,000 in the aggregate. Wyo. Stat. Ann. § 26-1-107. In New York and Ohio, each offense is $1,000. N.Y. Ins. Law § 109; Ohio Rev. Code Ann. § 3905.77. That means Victory would face a maximum fine of approximately $100,000 (or three percent of the maximum fine here).

With such objective, established standards, similar defendants receive similar fines, and thus, are fairly treated. This in turn ensures due process guarantees because it guards against any one decision-maker's arbitrary whims.

The fear regarding arbitrary action is not hypothetical here. The Commissioner's entire structure for determining a fine lacks any meaningful safeguards.

First, there is the adjudication structure. The Commissioner both prosecutes the case and adjudicates the fine. "Due Process requires a hearing before an impartial tribunal." *Clements v. Airport Auth.*, 69 F.3d 321, 333 (9th Cir. 1995). And at a minimum, there are inherent fairness concerns when the agency that authorized the case also issues judgment. *See SEC v. Jarkesy*, 144 S. Ct. 2117, 2140 (2024) (Gorsuch, J., concurring).

Nor is there any objective system for establishing who ultimately decides the fine. No statute or regulation exists about who is appointed to adjudicate the fine. In this case, the Commissioner appointed Brett Olin—his own employee—to adjudicate a fine where (1) his employer was a party and (2) his co-workers were advocating for a specific result. In a different case, the Commissioner hired Matt Cochenour as a Hearing Examiner, who shortly after issuing a decision, became Victory's opposing counsel in this current matter.[3] Simply stated:

[3] Case No. INS 2021-313A , order dated March 19, 2024

1. Who exercises the discretion (i.e., who adjudicates) changes case to case;

2. There are no published rules for how this unelected adjudicator is selected (indeed, it appears the adjudicator is left entirely to the Commissioner's discretion about who to appoint to determine the fine he is advocating for);

3. There is no rule to ensure this adjudicator's neutrality; and

4. Most importantly, there are no guidelines for how this adjudicator should exercise their discretion.

Such randomness in adjudicating fines inherently allows for arbitrary whims rather than equal justice.

In fact, fines against other insurers show this randomness. In 2021, the Commissioner sought a $50,000 fine against Continental Life Insurance Company. (Doc. 31. pp. 002323-24). Continental had been advised in 2018 by the Commissioner that it had disapproved a plan because it misleadingly suggested it had a network. Yet, Continental issued 2,220 policies with the disapproved plan for the next three years. (Doc. *Id.*). A $25,000 fine per violation in that action would have amounted to $55,500,000.[4] Instead, the Commissioner resolved the matter for $25,0000.

The Court may take judicial notice of this fact. M. R. Evid. 201; *Burns v. Burns*, 293 Neb. 633, 641, 879 N.W.2d 375, 382 (2016)(noting the rule allows judicial notice at "any time in the proceedings", including on appeal).

[4] Had the Commissioner use the same reasoning he used in Victory's matter, the violations would double because not only had Continental issued disapproved policies, it had (per the Commissioner's own previous findings) mislead consumers about having a network.

This result is stunning compared to Victory's result. Continental had more than 20 times the violations as Victory (2,220 v. 108) and ended up with 10 percent the fine ($25,000 v. $250,000). Because there are no factors or guidelines the Commissioner must consider in determining the fine, there are no means to explain why Continental received such a reduced fine compared to Victory.

Just in this case, the Commissioners' office itself had a wide and illogical range of what it deemed an appropriate fine. For example, the Commissioner began by seeking a $2.7 million fine. Apparently having second thoughts, the Commissioner's attorney reduced that to $1 million. And then the Deputy Commissioner settled on $250,000. Such variance in what the Commissioner's employees consider an appropriate fine demonstrates how arbitrary the process is without established standards. To state the obvious, two individuals should not look at the same set of facts and have a $750,000 difference if what is fair.

This is why the District Court's Order is so troubling. Victory contended (and does contend) that no factual basis was offered into evidence for the fine amount. But the District Court said no explanation was necessary. Per the Court's decision, "The factual basis for the fine is that Victory violated, multiple times, a provision of the Montana Insurance Code for which the Legislature authorized the imposition of fines." (District Court Order, p. 10). It again stated, "The violation of a statue [sic]

for which fines are authorized constitutes the factual basis for the imposition of fines." Or., p. 18.

That is, so long as a violation is proven and the fine is within the $25,000 per violation amount, the fine is inherently legal and a lawful use of discretion. To follow the District Court's reasoning to its logical end, a Commissioner could issue a maximum fine simply because he disliked an insurer. And he could choose to not fine another insurer he did like for the exact same violation.

But such unfettered discretion and unfair treatment are the antithesis of equal justice under the law. The District Court downplays this concern by noting that the Commissioner's fining discretion is limited to $25,000. But this ignores (1) that its $25,000 *per violation* and (2) many cases concern far more than a single violation. Indeed, many cases concern one policy, decision, or act resulting in numerous violations. On this record alone, the Commissioner could have sought:

- a $2,700,000 fine against Victory;
- a $55,000,000 fine against Continental (mentioned above); and
- an $11,000,000 fine against Blue Cross Blue Shield in 2012 stemming from a market conduct exam that had 455 violations (Doc. 31. pp. 002323).

At such amounts, the Commissioner's discretion is hardly limited at all.

In sum, without a regulation or statute outlining how the Commissioner exercises his discretion in determining a fine amount, assessing fines is subject to

arbitrary whims. Without some rule establishing how that discretion is exercised, there is no guarantee of equal justice of law.

C. Even If Not Unconstitutional, The Fine Amount is Arbitrary and Capricious.

At a minimum, any fine here is arbitrary and capricious. Even if liability exists, the dispute here centers on a difference in legal interpretation. To Victory, nothing in the cancellation statute says that it applies to assignment. What is more, it is clear that policy coverage continued, insureds paid the same premiums, and had the same renewal dates. Victory contacted the policyholders, they were made aware of the assignment, approved of it, and did not complain. (Doc. 41-M, p. 4895, Doc. 32-3, p. 2373). A fine of $250,000 (amongst the most in the Commissioner's history) under these circumstances is unwarranted.

IV. Victory's Right to a Jury Trial Were Violated.

In June 2024, the United States Supreme Court decided *SEC v. Jarkesy,* 144 S. Ct. 2117, 2126 (2024). The case concerned the SEC's ability to pursue civil penalties for securities fraud through administrative proceedings. One defendant, Jarkesy, argued that the SEC's administrative proceedings were unconstitutional as violating his right to a jury trial.

The Supreme Court agreed. It noted, "The Seventh Amendment extends to a particular statutory claim if the claim is legal in nature." *Id.* at 2129. It further noted that, "Actions by the Government to recover civil penalties under statutory

provisions" have historically "been viewed as a type of action in debt requiring trial by jury." *Id.*

Key to the Court's analysis is that the SEC sought a civil penalty. As the Court held, the agency seeking this "remedy is all but dispositive" to the question of whether a case demands a right to a jury. *Id.* As the Court observed, "we have recognized that civil penalties are a type of remedy at common law that could only be enforced in courts of law." *Id.* (cleaned up).

The Court concluded, "In sum, the civil penalties in this case are designed to punish and deter, not to compensate. They are therefore a type of remedy at common law that could only be enforced in courts of law. That conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims." *Id.* at 2130.

Here, there is no question that the Commissioner is seeking a penalty. As CSI's response brief below stated, the Commissioner brought the case under Title 33's "penalty statutes," (Dkt. 22, CS Answer Br., p.1), and specifically, referred to § 33-1-317 (the action he brought the case under) as a "penalty statute." *Id.*, p. 13. He likewise concedes he sought a "financial penalty" from Victory. *Id.* p. 9. And he referred to the amount the Commissioner can fine as a "penalty range." *Id.,* p. 17.

Ultimately, the monetary penalty that CSI seeks against Victory is the "type of remedy at common law that could only be enforced in courts of law." *Jarkesy,*

144 S. Ct. at 2130. CSI of course did not pursue its fine through the court system, but rather, through an administrative action.

The District Court rejected Victory's argument by determining *Jarkesy* had no application here. It noted that the Seventh Amendment has not been incorporated, and thus, it treated *Jarkesy's* as irrelevant. Instead, it relied on existing Montana law without any reference to *Jarkesy* changing the legal landscape.

But the District Court ignored what Montana law states. Specifically, this Court has stated, "the right to trial by jury in this state is the *same* as that guaranteed by the Seventh Amendment to the United States Constitution." *Romero v. J & J Tire*, 238 Mont. 146, 151, 777 P.2d 292, 295 (1989)(emphasis added). Put differently, the Supreme Court's Seventh Amendment precedent is not simply persuasive authority; it is instead binding since the rights are identical.

It would also be a legal anomaly that Montana's Constitution would provide fewer rights despite having stronger language. As our Constitution states, the right to a jury trial is "inviolable." Typically, Montana's use of different language is a reason to provide stronger protection than the United States Constitution. *State v. Covington*, 2012 MT 31, ¶ 21, 364 Mont. 118, 123, 272 P.3d 43, 47. So providing weaker protection when the Montana right is "inviolable" is divorced from both Montana precedent and the text itself.

The District Court also ignored *Jarkesy* because this case is not a "common law" action. But *Jarkes*y held that seeking a civil penalty makes this case a common law one. As it stated, a civil penalty "is all but dispositive" and the civil penalty and the penalty alone "effectively decides" the right to a jury trial is implicated. *Jarkesy,* 144 S. Ct. at 2130.

What is more, while *Jarkesy* placed heavy emphasis on the fine, the questions at issue are also akin to common law. As the Supreme Court explained in *Tull,* America has followed the "English common law in treating the civil penalty suit as a particular type of an action in debt." *Tull v. United States*, 481 U.S. 412, 418, 107 S. Ct. 1831, 1836 (1987). That is, simply pursuing a civil penalty is itself a common law action.

Additionally, the Commissioner's claims against Victory arise under contract law and claims of misrepresentations. By definition, an insurance policy is a contract and the Commissioner's claims are based upon these contracts. The insurance code is read into these contracts, so a violation of an insurance provision is also a breach of contract (undoubtedly a common law action). *Sagan v. Prudential Ins. Co*., 259 Mont. 506, 509, 857 P.2d 719, 722 (1993). And of course, as the District Court effectively concedes, claims of misrepresentation are rooted in common law.

The District Court also seemed to miss *Jarkesy's* central points. For example, the Court stated, "There is no right to a jury where the plain language of the statute does not contemplate the role of a jury."

But this statement ignores *Jarkesy*. As the Supreme Court concluded, "When a matter from its nature, is the subject of a suit at the common law, Congress may not withdraw it from judicial cognizance." *Id.* at 2139. So too here, the Montana Legislature cannot avoid the jury trial right by assigning cases to administrative proceedings that rightfully belong in Court.

Similarly, the District Court spent great length talking about how there is no right to a jury trial under MAPA. But that is the entire point of *Jarkesy*. Victory should not have this matter adjudicated in an administrative proceeding, but rather, before Montana's judiciary. As the concurrence explained, "The Seventh Amendment guarantees the right to trial by jury. Article III entitles individuals to an independent judge who will preside over that trial. And due process promises any trial will be held in accord with time-honored principles. Taken together, all three provisions vindicate the Constitution's promise of a "fair trial in a fair tribunal." *SEC v. Jarkesy*, 144 S. Ct. 2117, 2140 (2024) (Gorsuch, J., concurring).

In sum, when facing a $2.7 million penalty, Victory's fate should have rested in a courtroom with a jury; not decided by unelected, state employees. The Court

should accordingly vacate the administrative decision as violating Victory's rights to a jury trial.

CONCLUSION

Based upon the foregoing Victory requests the Court reverse the District Court Order and remand for further proceedings.

RESPECTFULLY SUBMITTED this 27th day of November, 2024.

By: ___/s/ Linda M. Deola_____
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionally spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word 2008 for Mac is **9,913**, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

DATED this 2nd day of December, 2024.

By: ___/s/ Linda M. Deola_____
Linda M. Deola
Scott L. Peterson
MORRISON SHERWOOD WILSON DEOLA, PLLP
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APPENDIX

1. 8/27/2024 Judicial Review Petition Order

CERTIFICATE OF SERVICE

I, Linda Deola, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-02-2024:

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Electronically signed by Amy Kirscher on behalf of Linda Deola
Dated: 12-02-2024