STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Docket No. BCD-WB-CV-10-53

NICOLE RICHMAN, JULIE HOWARD, JOHN THIBODEAU, and MARYANN CARROLL
On behalf of themselves and others similarly situated,

Plaintiffs

v.

POSSIBILITIES COUNSELING SERVICES, INC., WENDY L. BERGERON, AFFILIATE FUNDING, INC., EMILE L. CLAVET, KEVIN DEAN, and FOSTER CARE BILLING, LLC d/b/a PROVIDER FINANCIAL

Defendants

ORDER ON AFFILIATE DEFENDANTS' MOTION TO DISMISS COUNT XII AND PLAINTIFFS' MOTION TO AMEND COMPLAINT

Before the court are two motions: a Motion to Dismiss Count XII, pursuant to M.R. Civ. P. 12(b)(6), filed by Affiliate Funding, Inc. (AFI), Emile L. Clavet, Kevin Dean, and Foster Care Billing, LLC (collectively, the "Affiliate Defendants"); and a Motion to Amend the Consolidated Complaint filed by the Plaintiffs to add a count for violations of the Unfair Trade Practices Act (UTPA), 5 M.R.S. §§ 206-214 (2010). The court heard oral argument on these motions on April 26, 2011.

Background

Possibilities Counseling Services, Inc. (PCS) is a mental health agency licensed by the State of Maine to provide therapy services. AFI is a corporation located in Auburn; Defendants

Dean and Clavet are AFI's principals or owners. Defendant Dean is also involved with Foster Care Billing, LLC, which does business as Provider Financial.

Plaintiffs are four social workers who entered into identical reimbursement contracts with PCS. PCS handled Plaintiffs' claims for reimbursement of fees from MaineCare or other private insurers for therapy services that Plaintiffs and other similarly situated clinicians rendered. Pursuant to those contracts, PCS was obligated to make payment to Plaintiffs for each MaineCare occasion of service within two weeks of the week when the services were performed, regardless of whether or not PCS in fact had been compensated for those services by MaineCare. In exchange, Plaintiffs agreed to a reduced amount of reimbursement than they would otherwise be entitled to had they submitted the claims to MaineCare themselves.

In order to pay the claims in a timely fashion, PCS entered into a contract with AFI's predecessor in 2006, whereby PCS sold its account receivables to AFI for 75% of the face value and AFI advanced funds to PCS. Plaintiffs were not parties to this contract, but allege that they were intended third-party beneficiaries to the contract between PCS and AFI. At the end of 2009 and throughout the summer of 2010, PCS made incomplete and untimely payments to Plaintiffs and other clinicians. AFI ceased advancing funds to PCS, and in September of 2010, AFI sued PCS for breach of contract. Plaintiffs allege that because AFI stopped advancing funds to PCS, Plaintiffs were not paid the amounts owed to them pursuant to their individual contracts with PCS. PCS ceased doing business on October 31, 2010.

Plaintiffs commenced suit individually and later consolidated their suits into a class action complaint filed in November of 2010. The Consolidated Complaint alleged 12 counts, but the only count relevant to the pending motions is Count XII. In Count XII, Plaintiffs allege that PCS and AFI entered into a factoring agreement that violates both state and federal law and

Plaintiffs' contract with PCS, because the latter agreement prohibits PCS from assigning any of its rights or responsibilities enumerated in the contract. As relief, Plaintiffs request a declaratory judgment that the factoring contract is illegal and that the assignment of contractual rights by PCS to AFI violates Plaintiffs' contract with PCS. The Affiliate Defendants moved to dismiss Count XII on December 6, 2010.

Plaintiffs moved to amend their complaint on February 11, 2011, to add a count for UTPA violations (Count XIII) by Defendants AFI, Clavet, Dean, Provider Financial, PCS, and Bergeron,[1] alleging that: 1) Defendants committed unfair methods of competition or unfair or deceptive acts or practices; and 2) Plaintiffs utilized services from Defendants primarily for personal purposes, and as a result of Defendant's deceptive practices, Plaintiffs have suffered ascertainable loss. PCS, Bergeron, and the Affiliate Defendants oppose the amendment.

In the interim, the court appointed a referee to aid the court in adjudicating the issues regarding the processing and payment of claims raised by the named Plaintiffs for themselves and on behalf of the proposed class of clinicians. The referee established a bank account into which the State has deposited funds for MaineCare services rendered by Plaintiffs and other former PCS clinicians.

Discussion

Motion to Dismiss Count XII

The Affiliate Defendants allege that because Plaintiffs were not parties to the contract between AFI and PCSI, they do not have standing to ask the court to declare the contract illegal

[1] Plaintiffs assert in their motion that their amendment only adds a claim for UTPA violations, and make no mention of adding party defendants. However, a comparison of the Consolidated Complaint and the Second Amended Complaint reveals that Plaintiffs have added a Defendant, Agency Billing Services, LLC (ABS). ABS is a Maine limited liability company managed by Jane Clavet, Defendant Clavet's wife; Plaintiffs assert that AFI, Clavet, Dean, and Provider Financial acted in concert with ABS with respect to their dealings with PCS and its providers. ABS has been added as a defendant to Count VII (negligence), Count VIII (money had and received), Count IX (unjust enrichment), Count X (conversion), and Count XI (constructive trust). The court considers Plaintiffs' motion to amend as presented: to add a UTPA claim.

and unenforceable.[2] A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, the material allegations of the complaint must be taken as admitted." *Shaw v. S. Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quotation marks omitted). When reviewing a motion to dismiss, the court examines "the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.*

Standing to sue in Maine is prudential, rather than of constitutional dimension, and a "court may limit access to the courts to those best suited to assert a particular claim." *Lindemann v. Comm'n on Govtl. Ethics and Election Practices*, 2008 ME 187, ¶ 8, 961 A.2d 538, 541-42 (quotation marks omitted); *Roop v. City of Belfast*, 2007 ME 32, ¶ 7, 915 A.2d 966, 968. At a minimum, "[s]tanding to sue means that the party, at the commencement of the litigation, has sufficient personal stake in the controversy to obtain judicial resolution of that controversy." *Halfway House v. City of Portland*, 670 A.2d 1377, 1379 (Me. 1996) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972)). Typically, a party's personal stake in the litigation is evidenced by a particularized injury to the party's property, pecuniary, or personal rights. *See, e.g., Mortg. Elec. Registration Sys. v. Saunders*, 2010 ME 79, ¶ 7, 2 A.3d 289, 294; *Great Hill Fill & Gravel v. Bd. of Envt'l Prot.*, 641 A.2d 184, 184 (Me. 1996). The standing requirement is equally applicable to actions pursuant to the Declaratory Judgment Act, 14 M.R.S. §§ 5951-63 (2010). *See McCafferty v. Gartley*, 377 A.2d 1367, 1370 (Me. 1977).

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[2] The Affiliate Defendants also assert that the contract between AFI and PCSI is not illegal, but whether in fact the contract is illegal is not properly before the court on a motion to dismiss.

In their opposition to the motion to dismiss, Plaintiffs argue that they are third party beneficiaries of the PCS-AFI contract and therefore have standing to enforce that contract.[3] *See Perkins v. Blake*, 2004 ME 86, ¶ 8, 853 A.2d 752, 754-55; *accord* Restatement (Second) of Contracts § 302 (1981). An intended third party beneficiary may enforce the contract, but an incidental beneficiary to a contract has no standing to enforce third party beneficiary rights. *See F.O. Bailey Co. v. Ledgewood, Inc.*, 603 A.2d 466, 468 (Me. 1992). Whether a party is an intended third-party beneficiary to a contract "is gathered from the language of the written instruments and the circumstances under which they were executed." *Id.*

Plaintiffs assert that they are intended third party beneficiaries because the payments that AFI was to advance to PCS were for the Plaintiffs' benefit. Viewing the facts set out in the complaint in the light most favorable to the Plaintiffs, this statement would be enough to survive a motion to dismiss for a claim based on enforcing the contract. Plaintiffs, however, are not in fact seeking to enforce the duties and obligations on the PCS-AFI contract. Plaintiffs are seeking to challenge the contract's legality and render it unenforceable. The question before the court is thus whether an intended third party beneficiary to a contract has standing to challenge the contract's legality and ultimately, nullify the contract.

The court concludes that Plaintiffs do not have standing, for several reasons. First, the court agrees with the reasoning in *DFS Secured Healthcare Receivables Trust v. Caregivers Great Lakes, Inc.*, 384 F.3d 338 (7th Cir. 2004), which explained that illegality of contract only has applicability between the contracting parties. This reasoning comports with illegality in Maine being a *defense* to the enforcement of a contract that can be asserted by the parties to the

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[3] In their opposition, Plaintiffs cite *Luce Co. v. Hoefler*, 464 A.2d 213, 221 (Me. 1983), for the proposition that "when contracting parties manifest an intent to benefit a third-party, the third-party is in privity of contract and has standing to enforce the rights and obligations set forth in the contract." Plaintiffs neglect to note that their citation is to the dissent of A.R.J. Dufresne. 464 A.2d at 221-22. Further, this case and others cited by Plaintiffs only discuss the right to enforce; they do not address a third-party beneficiary's alleged right to invalidate the agreement.

contract. *See* M.R. Civ. P. 8(c); *State Farm Mut. Auto. Ins. Co. v. Koshy*, 2010 ME 44, ¶ 41, 995 A.2d 651, 665 ("We will not enforce a contract if it is illegal, contrary to public policy, or contravenes the positive legislation of the state.") In addition, an illegal and unenforceable contract creates no rights in the purported third-party beneficiary. Restatement (Second) of Contracts § 309(1) & illus. 1.

Finally, Plaintiffs have not been able to articulate what harm or injury they suffer from the existence of the AFI-PCS contract, other than the fact that they allege it constitutes a breach of their agreement with PCS. To the extent that Count XII is a breach of contract claim against PCS, Count I of the Consolidated Complaint covers any breach of contract between the Plaintiffs and PCS that resulted from the PCS-AFI contract. Because Plaintiffs are not parties to the contract, and are not attempting to enforce the contract, they have no standing to challenge its legality.

Motion to Amend Consolidated Complaint

The Affiliate Defendants, Bergeron, and PCS oppose the addition of Count XIII and argue, among other theories, that UTPA is a consumer protection statute that has no applicability to commercial relationships and the court should deny the motion to amend the complaint. After a responsive pleading is served, a plaintiff may amend its complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." M.R. Civ. P. 15(a); *accord Efstathiou v. Aspinquid, Inc.*, 2008 ME 145, ¶ 21, 956 A.2d 110, 118. "Whether to allow a pleading amendment rests with the court's sound discretion." *Holden v. Weinschenk*, 1998 ME 185, ¶ 6, 715 A.2d 915, 917 (quoting *Diversified Foods, Inc. v. First Nat'l Bank of Boston*, 605 A.2d 609, 616 (Me. 1992)). Courts should freely allow an amendment to a complaint except for bad faith, dilatory tactics, or undue delay resulting in prejudice to the

opponent. *See Longley v. Knapp*, 1998 ME 142, ¶ 19, 713 A.2d 939, 945; 1 Field, McKusick & Wroth, *Maine Civil Practice* § 15.4 at 303-04 (2d ed. 1970). However, where "a proposed amended complaint would be subject to a motion to dismiss, the court is well within its discretion in denying leave to amend." *Glynn v. City of S. Portland*, 640 A.2d 1065, 1067 (Me. 1994).

Maine's UTPA declares that "[u]nfair methods and unfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful, 5 M.R.S. § 207, and provides a cause of action for "[a]ny person who purchases or leases goods, services or property, real or personal, primarily for *personal, family or household purposes* and thereby suffers any loss of money or property, real or personal" as a result of unfair methods, acts, or practices, 5 M.R.S. § 213(1) (emphasis added). Plaintiffs argue that because they have alleged that they used the services of AFI and PCS for personal purposes, the court must accept that allegation as true at this procedural stage and allow them to amend their complaint. *See Shaw*, 683 A.2d at 503.

The Law Court has not defined the scope of "personal, family or household purposes," but consistently has referred to the UTPA as a consumer protection statute. *See State v. Weinschenk*, 2005 ME 28, ¶ 11, 868 A.2d 200, 205 ("Maine's UTPA provides protection for *consumers* against unfair and deceptive trade practices." (emphasis added) (citation omitted)); *Jolovitz v. Alfa Romeo Distribs. of N. Am.*, 2000 ME 174, ¶ 9 n.1, 760 A.2d 625, 629 (stating that the UTPA "provides a private remedy to *consumers* of personal, family or household goods, services or property" (emphasis added)); *Bangor Publ'g Co. v. Union St. Mkt.*, 1998 ME 37, ¶ 7, 706 A.2d 595, 597 (explaining that unlawful practices under UTPA "must not be outweighed by any countervailing benefits to *consumers* or competition that the practice produces; and it must be an injury that *consumers* themselves could not reasonably have avoided" (emphasis added));

accord 5 M.R.S. § 214 ("Any waiver by a *consumer* of the provisions of this chapter . . . shall be void." (emphasis added)); *cf. Roach v. Mead*, 722 P.2d 1229, 1234 (Ore. 1986) (explaining that the scope of Oregon's UTPA to be whether the good or service in question is customarily bought by a substantial number of purchasers and for what purpose the good or service is designed to serve). Indeed, the types of transactions that support a private cause of action under UTPA mirror general definitions of consumer transactions. *See* Black's Law Dictionary 335 (8th ed. 2004) (defining a consumer transaction as a "bargain or deal in which a party acquires property or services primarily for a *personal, family, or household purpose*" (emphasis added)).

Based on the allegations in the complaint, it is clear that the relationship between PCS and Plaintiffs is not a consumer transaction and does not fall under UTPA. Plaintiffs allege that PCS is a mental health agency that contracted with Plaintiffs to provide billing services for the mental health services Plaintiffs provided to patients and Plaintiffs are independent contractor affiliates of PCS. *Cf. State v. DeCoster*, 653 A.2d 891, 896 (Me. 1995) (holding that UTPA does not apply to an employer-employee relationship). The arrangement is clearly a business or commercial transaction between a sole proprietor and a corporation and not meant to fall under a consumer protection statute; Plaintiffs' allegation that they purchased services from PCS for personal purposes is simply inaccurate.

Even if the statute were to apply to this relationship,[4] the court agrees that, without a direct relationship with AFI or the other Affiliate Defendants, Plaintiffs cannot assert a UTPA violation claim against them. Plaintiffs' arguments regarding a "joint enterprise" theory are unavailing. Parties are engaged in a joint enterprise when there exists "a community of interest in and the joint prosecution of a common purpose under such circumstances that each participant

[4] Were the UTPA to apply to the transaction between the Plaintiffs and PCS in the first instance, in the alternative, the court would conclude that it is excepted from the statute by virtue of 5 M.R.S. § 208.

has authority to act for all in directing and controlling the means of agency employed." *Morey v. Stratton*, 2000 ME 147, ¶ 7, 756 A.2d 496, 499 (quoting *Illingworth v. Madden*, 135 Me. 159, 164, 192 A. 273, 276 (1937)). The doctrine of joint enterprise imputes the *negligence* of one member of the enterprise to the other enterprise members. *See Welch v. Jordan*, 159 Me. 436, 444, 194 A.2d 841, 845 (1963). While Plaintiffs contend they will show AFI and PCS were engaged in a joint enterprise in their pursuit of the UTPA claim, the Law Court has never applied the doctrine of joint enterprise outside of a negligence claim. *See Morey*, 2000 ME 147, ¶ 7, 756 A.2d at 499.; *Welch*, 159 Me. at 444, 194 A.2d at 845; *Illingworth*, 135 Me. at 164, 192 A. at 276; *Bonefant v. Chapdelaine*, 131 Me. 45, 52, 158 A. 857, 860 (1932); *Trumpfeller v. Crandall*, 130 Me. 279, 286-87, 155 A. 646, 650 (1931); *Skillin v. Skillin*, 130 Me. 223, 224, 154 A. 570, 570 (1931); *Cullinan v. Tetrault*, 123 Me. 302, 306, 122 A. 770, 772 (1923). Whether the Law Court would expand the doctrine to the UTPA seems doubtful, especially under these circumstances when the gravamen of the charge would seem to be an attempt to completely disregard their separate corporate identities.

Based on the foregoing analysis, the court concludes and orders:

1. Defendants' Motion to Dismiss Count XII is GRANTED as to all named Defendants.

2. Plaintiffs' Motion to Amend their Complaint is DENIED in full.

Pursuant to M.R. Civ. P. 79(a), the clerk is hereby directed to incorporate this Order by reference in the docket.

Dated: May 2, 2011

A. M. Horton
Justice, Superior Court