

2002

Linda Haymond and Melanie A. Lloyd, for
themselves and for all others similarly situated,
Plaintiffs/Appellants vs. Bonneville Billing
Collections, Inc., a Utah corporation; Ted K.
Godfrey, David Toller; and John Does 1 through
10, Defendants/Appellees : Brief of Appellee

Utah Supreme Court

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Lester A. Perry; Hoole & King, L.C.; Andrew M. Morse; Snow Christensen & Martineau attorneys for appellants.

Rebecca L. Hill; Christensen & Jensen PC; attorneys for appellee.

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STATE OF UTAH

Appeal No. 20020531

IN THE UTAH SUPREME COURT

STATE OF UTAH

LINDA HAYMOND and MELANIE A.)	
LLOYD, for themselves and for)	
all others similarly situated,)	
)	
Plaintiffs/Appellants)	
)	
vs.)	Appeal No. 20020531
)	
BONNEVILLE BILLING &)	
COLLECTIONS, INC., a Utah)	
corporation; TED K. GODFREY,)	
DAVID TOLLER; and JOHN DOES)	
1 THROUGH 10,)	
)	
Defendants/Appellees.)	
)	

BRIEF OF APPELLEES

**APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, THE HONORABLE J. DENNIS FREDERICK**

Lester A. Perry
Hoole & King, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124
Attorneys for Appellants

Andrew M. Morse
Snow Christensen & Martineau
P.O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Appellee Ted K. Godfrey

Rebecca L. Hill, #6246
Christensen & Jensen, P.C.
50 South Main, Suite 1500
Salt Lake City, Utah 84144
Attorneys for Appellees Bonneville
Billing & Collections, Inc. and
David Toller

COMPLETE LIST OF ALL PARTIES IN DISTRICT COURT

All parties in the district court are listed on the caption of this case

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STATEMENT OF APPELLATE JURISDICTION

The Court has appellate jurisdiction over this matter based on the Order of Dismissal, dated June 18, 2002, and under Utah Code Ann. § 78-2-2(3) (1996).

STATEMENT OF ISSUES AND APPELLATE REVIEW

I. STATEMENT OF ISSUES

A. Did the District Court err in granting Motions to Dismiss in favor of Defendants Bonneville Billing & Collections, Inc., David Toller and Ted K. Godfrey finding that Plaintiffs Linda Haymond and Melinda Lloyd have no standing or basis under Utah law for a right of action against the Defendants for alleged illegal attorney fee splitting practices.

B. Did the District Court err in granting Motions to Dismiss in favor of Defendants Ted Godfrey, Bonneville Billing & Collections, Inc. and David Toller finding that Plaintiff Linda Haymond has no standing or basis under Utah law for a right of action against the Defendants for alleged collection and retention of treble damages pursuant to Utah Code Ann. §§ 7-15-1.

II. APPELLATE REVIEW

The issue of standing is primarily a legal question which appellate courts review for correctness. Kearns-Tribunes Corp. v. Wilkinson, 946 P.2d 372, 373 (Utah 1997) American Interstate Mortgage v. Edwards, 2002 UT App 16, ¶ 11 (Utah Ct. App. 2002).

III. LAWS OF CENTRAL IMPORTANCE

The following statutory law and administrative law is of central importance to the appeal:

Utah Code Ann. § 7-15-1 (pre and post 1999 versions); and

Utah Rules of Judicial Administration 4-505 and 4-505.01.

These laws are appended as part of the Addendum to Brief of the Appellants.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The above-captioned lawsuit involves the efforts and practices of Defendants Bonneville Billing & Collections, Inc. and David Toller (collectively referred to as "Bonneville") and their attorney Ted K. Godfrey ("Mr. Godfrey") in collecting debts, pursuant to Utah's Dishonored Instrument Act, Utah Code Ann. §§ 7-15-1 *et seq.* (1953 as amended) ("Dishonored Instrument Act" or "Act"). The dishonored instruments which are the subject of this suit are checks issued by Plaintiffs Linda Haymond ("Ms. Haymond") and Melinda Lloyd ("Ms. Lloyd").

In the Winter of 2001, Ms. Haymond issued and "bounced" a check made payable to the Flower Patch. On behalf of the Flower Patch, Bonneville and its attorney Mr. Godfrey sought collection of the dishonored check by sending letters to Ms. Haymond, and by eventually filing suit in June 2001 seeking recovery of the value of the check, collection costs, attorney fees, and damages, as permitted under the Dishonored

Instrument Act. However, in October 2001, the suit against Ms. Haymond was voluntarily dismissed by Bonneville and Mr. Godfrey, resulting in Ms. Haymond not paying any attorney fees or collection damages to Mr. Godfrey or Bonneville.

In the Spring of 1999, Ms. Lloyd issued and "bounced" a check made payable to Conoco. On behalf of Conoco, Bonneville and Mr. Godfrey sought collection of that dishonored check by sending letters to Ms. Lloyd and preparing suit pleadings as permitted under the Dishonored Instrument Act. In June of 1999, after being served with initial pleadings prepared by Mr. Godfrey, Ms. Lloyd paid \$40.20 to Mr. Godfrey representing the amount of the bounced check and a service charge, and also paid \$160.00 to Mr. Godfrey representing the costs of service of the pleadings and attorney fees.

In this suit, Ms. Haymond and Ms. Lloyd claim that after seeking and collecting (with respect to Ms. Lloyd) attorney fees as permitted under the Dishonored Instrument Act as stated above, Mr. Godfrey and Bonneville engaged in an illegal attorney fee splitting scheme. They allege that the attorney fee splitting scheme consists of payments which Mr. Godfrey makes to Bonneville for lease of office space, maintenance of a group health insurance plan for Mr. Godfrey's employees and use of Bonneville's CUBS computer system. Ms. Haymond and Ms. Lloyd claim that such payments amount to and are, in actuality, one-half of the attorney fees collected, and are an end run around Utah's rule prohibiting sharing of attorney fees.

Ms. Haymond also claims that Bonneville and Mr. Godfrey violated the Dishonored Instrument Act in seeking treble collection damages from Ms. Haymond. Ms. Haymond asserts that Bonneville and Mr. Godfrey retain the damages, in violation of Section 7-15-1(6)(b) and (7)(d) of the Act, rather than passing on the damages to the original payees of the dishonored instrument as required by the Act.

II. COURSE OF PROCEEDINGS AND DISPOSITION AT THE DISTRICT COURT LEVEL

On or about December 17, 2001, Ms. Lloyd and Ms. Haymond filed the above-captioned lawsuit against Bonneville and Ted K. Godfrey alleging twenty two separate causes of action which concern the aforementioned two claims of alleged illegal attorney fee splitting practices and alleged wrongful collection and retention of treble damages. In their Complaint, Ms. Haymond and Ms. Lloyd seek certification of this suit as a class action for all Utah individuals who are debtors from which Bonneville and Mr. Godfrey attempted to and/or collected attorneys' fees that were allegedly illegally split, and allegedly attempted to and/or collected and retained treble damages.

Bonneville and Mr. Godfrey were served and filed Answers to the Complaint. Shortly thereafter, Bonneville and Mr. Godfrey filed separate Motions to Dismiss asserting that Ms. Haymond and Ms. Lloyd lack standing to sue them for alleged attorney fee splitting practices and wrongful collection and retention of treble damages. Bonneville and Mr. Godfrey asserted that even assuming the truth of the alleged wrongful conduct, which they vehemently deny, the Complaint allegations show that neither

Plaintiff suffer any distinct and palpable injury because Mr. Godfrey and Bonneville were authorized under the Dishonored Instrument Act to rightfully seek and collect attorney fees (collection only from Ms. Lloyd) and to rightfully seek treble damages from Ms. Haymond. Accordingly, neither Plaintiff could be injured from what allegedly happens to such funds after Mr. Godfrey and Bonneville rightfully sought and partially collected them.

On June 3, 2002, Judge J. Dennis Frederick heard oral argument on the Motions to Dismiss and thereafter granted both Motions. Judge Frederick ruled that "Plaintiffs have no standing or basis under Utah law for a right of action against Defendants [for attorney fee splitting practices or collection of treble damages] as they allege in their Complaint." Order of Dismissal at 2; Brief of Appellant, Addendum; Record Index at p. 472.

STATEMENT OF FACTS

A. Undisputed Facts Concerning Plaintiffs' Dishonored Checks.

Plaintiff Linda Haymond

1. On February 24, 2001, Plaintiff Linda Haymond wrote a check to the Flower Patch for \$7.42, which was subsequently dishonored for insufficient funds. See Complaint at ¶¶ 9-10 and Exhibit "A"; Record Index at p. 3, 33.

2. Ms. Haymond's dishonored check was referred to Bonneville Billing & Collection, Inc. for collection on behalf of the Flower Patch, and Bonneville retained

attorney Defendant Ted K. Godfrey to collect the check. See Complaint at ¶¶ 11-12; Record Index at 3.

3. On April 13, 2001, Mr. Godfrey sent a notice to Ms. Haymond regarding collection of the dishonored check. See Complaint at ¶ 13 and Exhibit "B" of the Complaint; Record Index at pp. 3 and 34.

4. On June 13, 2001, Mr. Godfrey had Ms. Haymond served with a Summons and Complaint suing Ms. Haymond for collection of the dishonored check and other costs, fees and damages pursuant to the Utah Dishonored Instruments Act. See Complaint. at ¶ 14 and Exhibit "C"; Record Index at pp. 3 and 35.

5. Ms. Haymond retained Plaintiffs' counsel, Lester Perry ("Mr. Perry"), to defend her. Mr. Perry's defense included seeking discovery of information and documents regarding Mr. Godfrey's collection of attorney fees, alleged splitting of fees between Mr. Godfrey and Bonneville and collection of damages. See Complaint at ¶¶ 16-22; Record Index at pp. 3-5.

6. On October 3, 2001, Bonneville voluntarily filed a Motion to Dismiss the suit against Ms. Haymond with prejudice. See Complaint. at ¶ 25 and Exhibit "I"; Record Index at pp. 5 and 49.

7. Ms. Haymond opposed Bonneville's Motion to Dismiss and filed a Motion to Amend Answer proposing to amend her Answer to alleged wrongdoing by Bonneville

in collection of the dishonored check. See Complaint at Exhibit "J"; Record Index at pp. 52-53.

8. After consideration of the parties' motions, the trial court granted Bonneville's Motion to Dismiss and denied Ms. Haymond's Motion to Amend Answer as moot, stating "there is nothing to defend against. It [] seems axiomatic that plaintiff cannot be made to prosecute a matter it does not wish to pursue." Complaint at Exhibit "J"; Record Index at p. 53.

9. In relation to the collection of the dishonored check, Ms. Haymond sent a cashier's check in the amount of \$28.00 to the Flower Patch, the original payee. Ms. Haymond never made any payment of damages, costs or attorney fees to Mr. Godfrey or Bonneville.

Plaintiff Melanie Lloyd

10. On April 16, 1999, Plaintiff Melanie Lloyd wrote a check to Conoco, Inc. in the amount of 19.90, which was subsequently dishonored for insufficient funds. See Complaint at ¶¶ 27-28; Record Index at p. 6.

11. Ms. Lloyd's dishonored check was referred to Bonneville for collection and Bonneville sent Ms. Lloyd two notices in April and May of 1999 demanding payment of the dishonored check and service charges. It appears Ms. Lloyd did not respond to those notices. See Complaint at ¶¶ 29-30, and Exhibits "K" and "L" to the Complaint; Record Index at pp. 6 and 55-57.

12. Thereafter in June 1999, Bonneville retained Mr. Godfrey to continue efforts in collection of the dishonored check from Ms. Lloyd. Mr. Godfrey prepared a Complaint and Summons for collection of the dishonored check seeking recovery of the check amount, service charge, costs and attorney fees. The Complaint and Summons were served on Ms. Lloyd on June 13, 1999. See Complaint at ¶ 31 and Exhibit "M"; Record Index at pp. 6 and 58-60.

13. On June 14, 1999, Ms. Lloyd responded to service of the Complaint and Summons by having a cashiers check issued to Ted Godfrey in the amount of \$40.20, representing the amount of the dishonored check and service charge (plus interest). See id. at ¶ 32 and Exhibit "N"; Record Index at pp. 6 and 61.

14. On June 25, 1999, Ms. Lloyd also issued a check to Ted Godfrey in the amount of \$160.00, representing payment of attorney's fees of \$150.00, and cost of service of the Summons and Complaint of \$10.00. See Complaint at ¶¶ 33 and 34 and Exhibit "O"; see also Answer of Ted K. Godfrey at ¶ 11; Record Index at pp. 6, 61a¹ and 84.

15. Ms. Lloyd made no other payment for damages, costs or fees for discontinuance of Bonneville's suit against her for the dishonored check.

¹ Exhibit "O" of the Complaint did not receive a number within the Record Index. It is located between Record Index page 61 and 62. For clarification, Bonneville refers to Exhibit "O" as Record Index page 61a.

B. Facts Concerning This Suit

16. On or about December 17, 2001, Ms. Haymond and Ms. Lloyd filed the above-captioned lawsuit against Defendants Bonneville and Mr. Godfrey. See Complaint; Record Index pp. 1-63.

17. In their Complaint, Ms. Haymond and Ms. Lloyd generally allege that in relation to the efforts of collecting dishonored checks, Defendants engaged in two wrongful and/or illegal practices: 1) the splitting of attorney fees between Mr. Godfrey and Bonneville; and 2) the retention of treble damage monies which monies should only be collected for and passed onto the original payees of the dishonored checks. See Complaint at ¶¶ 35-51; Record Index at pp. 6-10.

18. Ms. Haymond and Ms. Lloyd filed their Complaint seeking certification of this lawsuit as a class action for all Utah individuals who are debtors from which Bonneville and Mr. Godfrey attempted to and/or collected monies for dishonored checks under Utah's Dishonored Instrument Act. See Complaint at ¶¶ 52-62; Record Index at pp. 10-13.

1. Splitting of Attorney's Fees Claim

19. In their Complaint, Ms. Haymond and Ms. Lloyd allege that prior to 1994, all attorney fees received by Defendants from collection actions were split equally between Bonneville and its attorneys. In 1994, the Utah State Bar Association issued an opinion to collection attorneys stating that splitting attorney fees between attorneys and

collection agencies is a breach of the attorney rules of ethics and professional conduct.

See Complaint at ¶¶ 36-37; Record Index at pp. 6-7.

20. Ms. Haymond and Ms. Lloyd acknowledge in their Complaint that after 1994, attorneys representing Bonneville retained 100% of the attorney fees collected from debtors. See Complaint at ¶ 38; Record Index at p. 7.

21. Ms. Haymond and Ms. Lloyd assert that after 1994 Mr. Godfrey and other attorneys representing Bonneville began paying Bonneville fees for rent, maintenance of a group health insurance plan, and use of Bonneville's computer system (CUBS system) for collection matters. See Complaint at ¶ 38; Record Index at p. 7.

22. Ms. Haymond and Ms. Lloyd claim that the payments for rent, health insurance and use of the computer system are an amount equal to 50% of the attorney fees collected by Bonneville's attorneys and is an end run around Utah law prohibiting the splitting of attorney fees. See Complaint at ¶¶ 38 - 44; Record Index at p. 7-8.

23. Ms. Haymond and Ms. Lloyd assert that the attorney fees splitting scheme violates Utah's Dishonored Instrument Act permitting collection of "reasonable attorney fees", and violates Rules 4-505 and 4-505.01 of the Utah Rules of Judicial Administration. See Utah Code Ann. § 7-15-1 [1999 & Post 1999] and Utah R. Jud. Admin. 4-505 & 4-505.01 found at Brief of Appellants; Appendum ; see also Complaint at ¶¶ 63-82; Record Index at pp. 13-18.

24. Ms. Haymond and Ms. Lloyd assert causes of action for the claim of illegal attorney fees splitting based on the foregoing statutory and administrative law, as well as causes of action of: Restitution - Mistake of Fact, Restitution - Mistake of Law, Restitution - Tortious Payment of Money, Unjust Enrichment, Wrongful Collection, Liability for Intended Consequences, Fraud, Fraudulent Non-Disclosure, Negligent Misrepresentation and Civil Conspiracy. See Complaint at ¶¶ 63-118; Record Index at pp. 13-23.

2. Collection Damages Claim

25. Ms. Haymond also alleges in the Complaint that Bonneville and Mr. Godfrey engaged in the practice of wrongfully attempting to and collecting treble damages from Utah check writers, and then retaining such collection damage monies rather than passing it onto the original payee of the check. See Complaint at ¶¶ 46-48; 119-165; Record Index at pp. 23-30.

26. Subsection (7)(b) of Section 7-15-1 provides that the issuer of a check is liable to the holder for damages equal to the greater of "(I) \$100.00 or (II) triple the check amount." Utah Code Ann. § 7-15-1(7)(b)(iv) (Supp. 2001). Subsection (7)(d) of 7-15-1 then expressly restricts the retention of those collection damages solely to the original payee of the check:

(d) (i) Notwithstanding Subsection (7)(b), all amounts charged or collected under Subsection (7)(b)(iv) shall be paid to and be the property of the original payee of the check.

(ii) A person who is not the original payee may not retain any amounts charged or collected under Subsection (7)(b)(iv).

(iii) The original payee of the check may not contract for a person to retain any amounts charged or collected under Subsection (7)(b)(iv).

Utah Code Ann. § 7-15-1(7)(d) (Supp. 2001); see Complaint at ¶¶ 46, 54, 119.

27. Plaintiff Haymond alleges in the Complaint the following claim of wrongful conduct:

47. Based upon best information and belief, Bonneville and its attorneys were not hired by the merchant to whom Ms. Haymond wrote her check, The Flower Patch, to collect such damages. Notwithstanding this fact, Bonneville and Mr. Godfrey attempted to collect such damages with the intent of keeping these damages for themselves. Ms. Haymond did not pay these damages because she hired an attorney to protect her from the attempts of Bonneville and Mr. Godfrey to collect these damages.

Complaint at ¶¶ 47; Record Index at p. 9.

28. Ms. Haymond asserts causes of action for the alleged wrongful retention of collection damages based on Section 7-15-1 of the Dishonored Instrument Act, as well as Mistake of Fact, Restitution - Mistake of Law, Restitution - Tortious Payment of Money, Unjust Enrichment, Wrongful Collection, Liability for Intended Consequences, Fraud, Fraudulent Non-Disclosure, Negligent Misrepresentation and Civil Conspiracy. See id. at ¶¶ 119-165; Record Index at pp. 23-30.

C. Prior Review And Determination Of Alleged Attorney Fee Splitting Practice By Mr. Godfrey and Bonneville.

29. In 2000, prior to filing the above-captioned suit, Plaintiffs' attorney, Mr. Perry, filed an informal complaint with the Utah State Bar Office of Professional Misconduct alleging that Defendants Mr. Godfrey and Bonneville engaged in attorneys' fee splitting practices in violation of the Utah Rules of Professional Conduct. See Letter from Lester A. Perry to Utah State Bar, July 6, 2000; Exhibit "6" to Bonneville's Memorandum in Support of Motion to Dismiss . . .; Record Index at pp. 190-220.

30. The Office of Professional Conduct reviewed and investigated Mr. Perry's complaint. On May 18, 2001, counsel from the Office of Professional Conduct issued a determination dismissing Mr. Perry's Complaint. The determination provides:

You have alleged that Mr. Godfrey and Bonneville have a fee splitting arrangement by Mr. Godfrey making excessive payments for the use of the CUBS system when the attorneys were not previously billed for the use of this system.

Mr. Godfrey states that he does (sic) [not] engage in any fee splitting with Bonneville and that Bonneville is paid for the lease, equipment, insurance and use of the CUBS system.

The evidence is insufficient to establish by a preponderance of the evidence that Mr. Godfrey has violated the Rules of Professional Conduct. You have not established that Mr. Godfrey is fee splitting because of the large payments to Bonneville for the use of the CUBS system. Bonneville is not prohibited from charging its attorneys more than its cost for the use of the system.

Accordingly, this matter must be dismissed. We nevertheless thank you for bringing this matter to our attention. Your concerns aid the OPC in monitoring the professional conduct of attorneys in Utah.

Letter from Renee Spooner to Lester Perry, dated May 18, 2001; Exhibit "7" to Bonneville's Memorandum in Support of Motion to Dismiss . . .; Record Index at pp. 211-12.

31. Mr. Perry attempted to appeal the Office of Professional Conduct's decision to the Utah State Bar Association's Ethics and Discipline Committee, however the appeal was dismissed as being untimely. See Ruling, dated June 21, 2001; Exhibit "8" to Bonneville's Memorandum in Support of Motion to Dismiss . . .; Record Index at pp. 213-15.²

² In addition to have having filed a Complaint with the Office of Professional Conduct, Plaintiffs' counsel has filed within the past six years two other suits against Bonneville in the United States District Court for the District of Utah on behalf of plaintiff/debtors who alleged the same claims as Ms. Lloyd and Ms. Haymond of illegal attorney fee splitting practices. See Pickering et al. v. Bonneville Billing and Collections et al, Civil No. 1-95-CV-125-B ("Pickering"); Twila Heard v. Bonneville Billing And Collections, Inc. Civil No. 2:97-CV-445C ("Heard"). In those prior cases, the district court judges addressed standing of the plaintiffs to sue for alleged illegal attorney fee splitting practices, and Judges Benson and Campbell found that plaintiffs lacked standing if attorneys performed work of collecting the debt. Mr. Perry appealed the Heard case and the United States Court of Appeals for the Tenth Circuit affirmed Judge Campbell's ruling. The Tenth Circuit Court of Appeals found:

As the district court noted, Ms. Heard did not allege in her complaint the attorneys' fees were too high or unconscionable or that the attorney did not do any work to justify the statutory award. Indeed, Ms. Heard paid the amount demanded before any judgment was entered on Bonneville's stated complaint. **What Bonneville's attorney did with the statutory fees may violate state ethical rules. How that injures this plaintiff, however eludes us. It is the fundamental deficiency of Ms. Heard's *stake* in the**

SUMMARY OF ARGUMENT

To prove standing under Utah law, a plaintiff must show that he/she has suffered "a distinct and palpable injury giving rise to a personal stake in the outcome of the dispute." Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983). In rare instances, however, Utah courts find standing without injury if a plaintiff is the most appropriate plaintiff to bring the claims, and/or a plaintiff raises issues of such public importance that they ought to be decided to further public interest. See State of Utah v. L.A.W., 2000 UT 79; 12 P.3d 80 (Utah 2000) (*citing* Kennecott Corp. v. Salt Lake County, 702 P.2d 451, 454 (Utah 1985)).

Ms. Haymond and Ms. Lloyd allege that Bonneville and Mr. Godfrey have violated the Dishonored Instrument Act and Rules 4-505 and 4-505.01 of the Utah Rules of Judicial Administration by engaging in illegal attorney fee splitting practices and wrongful collection and retention of treble damages. While Ms. Haymond and Ms. Lloyd assert the foregoing claims, neither of them have suffered any distinct and palpable injury from or caused by the alleged wrongful conduct to meet the traditional test for standing to file suit.

outcome of the fee-splitting issue which defeats her standing. We therefore cannot conclude that the district court erred in dismissing her second claim of unlawful and unethical fee-splitting on the ground she lacked standing.

Heard v. Bonneville, 216 F.3d 1087 (Table), 2000 WL 825721 **5 (10th Cir. 2000) (emphasis added); Record Index at pp. 188-89.

Ms. Haymond and Ms. Lloyd admit in their Complaint allegations that as a result of their own conduct of issuing bad checks, Mr. Godfrey, as an attorney, and Bonneville, as a collection agency, were entitled under the Dishonored Instrument Act to seek and collect reasonable attorney fees for Mr. Godfrey's work and treble damages to be retained by the original payee of the checks. Ms. Haymond's and Ms. Lloyd's only claims of wrongdoing are in what happens to the attorney fees and damages after they are paid to Mr. Godfrey and Bonneville (payment actually being only made by Ms. Lloyd). How those fees and damages are later used and by whom is none of Ms. Haymond's and Ms. Lloyd's business and does not injure them.

Moreover, neither the Dishonored Instrument Act, the Utah Rules of Judicial Administration nor any other law, rule or regulation provide a legal basis for Ms. Haymond and Ms. Lloyd to sue over funds properly sought and collected from them under the Dishonored Instrument Act. Therefore, Ms. Haymond and Ms. Lloyd have not sustained injury and do not meet the first and traditional test for standing to sue.

Lastly, there are no facts or law which provide a basis for the Court to invoke Utah's other two tests to grant standing. The claims of illegal attorney fees splitting practice and wrongful retention of collection damages do not involve issues of great public importance and there are other potential plaintiffs who have a more direct and greater interest than Ms. Haymond and Ms. Lloyd in the outcome of the case.

Accordingly, the Court should affirm Judge Frederick's ruling dismissing this suit in its entirety for lack standing to sue.

ARGUMENT

I.

MS. HAYMOND AND MS. LLOYD LACK STANDING TO SUE BONNEVILLE AND MR. GODFREY.

As a general proposition under Utah law, "the right to commence a legal proceeding depends on the plaintiffs suffering an injury to a legally protected right for which the law provides a remedy. Absent such a showing, there is no right to complain in the courts." Stromquist v. Cokayne, 646 P.2d 746, 747 (Utah 1982). In legal parlance, the foregoing concept is known as standing to sue. Standing "operates as a gatekeeper to the courthouse, allowing only those cases that are fit for judicial resolution." Aldrich, Nelson, Weight & Esplin v. D.E.S., 878 P.2d 1191, 1194 (Utah Ct. App. 1994).

Utah courts have developed a three-step test for determining whether a plaintiff has standing to sue:

A party has standing if any one of the three criteria is met: (1) the interests of the parties are adverse, and the party seeking relief has a legally protectible interest in the controversy; (2) no one has a greater interest than that party and the issue is unlikely to be raised at all if standing is denied; or (3) the issues raised by the party are of great public importance and ought to be judicially resolved.

State of Utah v. L.A.W., 2000 UT 79, 12 P.3d 80 (Utah 2000) (*citing* Kennecott Corp. v. Salt Lake County, 702 P.2d 451, 454 (Utah 1985)) (*citing* Jenkins v. Swan, 675 P.2d

1145, 1150-51 (Utah 1983)). The first step of the test acknowledges and conforms to the traditional standing criteria of showing the plaintiff's "real and personal interest in the dispute", and the second and third steps recognize the court's power in exceptional circumstances to "grant standing where matters of great public interest and societal impact are concerned." Jenkins, 675 P.2d at 1150. As the following analysis demonstrates, Ms. Haymond and Ms. Lloyd do not and cannot meet any of the three steps of the standing test for either of their claims against Bonneville and Mr. Godfrey and the Court should affirm the trial court's dismissal of their case for lack of standing.

II.

MS. HAYMOND'S AND MS. LLOYD'S CLAIMS FAIL UTAH'S THREE-PART TEST FOR STANDING.

A. First Step: Traditional Test For Standing.

Under the first step of the standing test, a plaintiff must "show that he suffered some distinct and palpable injury that gives him a personal stake in the outcome of the legal dispute." Jenkins, 675 P.2d at 1148. A mere allegation of an adverse impact is not sufficient. There must be a causal relationship between the injury to plaintiff, the alleged illegal activity of the defendant and the relief requested. See id. at 1150; see also York v. Unqualified Washington County Elected Officials, 714 P.2d 679, 680 (Utah 1986). The courts, therefore, must make a determination "whether proof of such a causal relationship is difficult or impossible and whether the relief requested is substantially likely to redress the injury claimed." Jenkins, 675 P.2d at 1150.

In this case, Ms. Haymond and Ms. Lloyd complain that in collecting dishonored checks Bonneville and Mr. Godfrey have allegedly engaged in illegal attorney fee splitting practices and wrongful collection and retention of treble damages in violation of the Utah Dishonored Instruments Act and Utah Rules of Judicial Administration . Ms. Haymond and Ms. Lloyd can neither show that they have sustained any injury causally related to Defendants' wrongful conduct, even assuming that such conduct occurred, nor can they show that they have a personal stake in the outcome of the suit.

1. Claims of Illegal Splitting of Attorney Fees

First, Ms. Haymond and Ms. Lloyd have not been injured by alleged attorney fees splitting practices. The Utah Dishonored Instruments Act expressly provides for recovery of "reasonable attorneys fees" in collecting dishonored checks. Utah Code Ann. § 7-15-1(7) (Supp. 2001). Ms. Haymond and Ms. Lloyd admit that Mr. Godfrey performed work (preparing correspondence and pleadings) in pursuing collection of their dishonored checks, therefore entitling him to seek attorney fees under the Dishonored Instrument Act. See Statement of Facts at ¶¶ 3-4, 12. Ms. Haymond and Ms. Lloyd further acknowledge that the \$150.00 amount of attorney fees collected from Ms. Lloyd comports with and is an amount expressly allowed as attorney fees for default judgments of \$700.00 or less under Rule 4-505.01 of the Rules of Judicial Administration. See id. at ¶ 23, 25. Therefore, the fee collected by Mr. Godfrey from Ms. Lloyd was a reasonable

attorney fee amount. Lastly, Ms. Lloyd admits that she paid the attorney fees to Mr. Godfrey and he retained them. See id. at ¶ 14, 20.³

Based on the foregoing admitted facts, how can Ms. Haymond and Ms. Lloyd have suffered injury and have a personal stake in the issue when the fees and amount collected from Ms. Lloyd are consistent with the law permitting such collection.⁴ Furthermore, how can they obtain relief and/or redress for subsequent illegal distribution of fees which were properly collected from them. They owed the funds and have no right or business in complaining about how the funds are later used. Ms. Haymond's and Ms. Lloyd's situation is no different than if a defendant, who pays attorney fees as part of a judgment in a civil rights case, later sues the plaintiff's attorney for the manner in which he/she used or distributed the attorney fees. Such civil rights defendant, like Ms. Haymond and Ms. Lloyd, has no personal stake in the outcome of how or when those fees are used. Ms. Haymond or Ms. Lloyd have not suffered harm which is causally related to Bonneville's and Mr. Godfrey's alleged splitting of attorney fees.

2. Claim of Wrongful Collection and Retention of Treble Damages.

³ Ms. Haymond never paid any attorney fees to Mr. Godfrey and therefore has even less basis for claim of injury and standing than Ms. Lloyd.

⁴ That was the question asked by the Tenth Circuit Court of Appeals in the Heard v. Bonneville case and it found that the plaintiffs did not have a stake in the outcome of the fee splitting issue. See Statement of Undisputed Material Facts at ¶ 31 n.2. This Court should consider this thoughtful reasoning of the federal bench and likewise find that Ms. Haymond and Ms. Lloyd have no stake in the alleged attorney fee splitting practices and lack standing to sue.

In addition to claiming illegal attorney fee splitting practices, Plaintiff Linda Haymond asserts a claim that Bonneville and Mr. Godfrey have engaged in wrongful collection and retention of treble damages in violation of the Dishonored Instrument Act. Bonneville and Mr. Godfrey deny these claims, but even assuming they are true, she has not been injured by such acts.

The Dishonored Instrument Act provides that issuers of checks can be held liable for damages if their checks are dishonored, and the damages can be equal to the greater of \$50.00 (presuit) \$100.00 (post-suit) or "triple the check amount." Utah Code Ann. §§ 7-15-1(6)(a)(iii); and (7)(b)(iv); Brief of Appellants, Addendum (Post 1999 Version). The Act, however, restricts the retention of those damage monies to the original payee of the dishonored check. See Utah Code Ann. §§ 7-15-1(6)(b) and (7)(d); Brief of Appellants, Addendum (Post 1999 Version).⁵

While Ms. Haymond asserts her claim for wrongful collection and retention of treble damages against Bonneville and Mr. Godfrey, she admits and acknowledges that she never paid collection damages or any monies to either defendant as a result of their

⁵ Section 7-15-1(7)(d) provides:

(d) (i) Notwithstanding Subsection (7)(b), all amounts charged or collected under Subsection (7)(b)(iv) shall be paid to and be the property of the original payee of the check.

(ii) A person who is not the original payee may not retain any amounts charged or collected under Subsection (7)(b)(iv).

(iii) The original payee of the check may not contract for a person to retain any amounts charged or collected under Subsection (7)(b)(iv).

Utah Code Ann. § 7-15-1(7)(d) (Supp. 2001).

efforts of collecting the dishonored check she issued to the Flower Patch. Bonneville voluntarily dismissed the suit it brought against Ms. Haymond under the Dishonored Instrument Act prior to obtaining any order or judgment for payment of damages. See Statement of Material Facts at ¶¶ 6-9. Since Plaintiff Haymond paid no damages to Defendants and no damages were ever retained by Bonneville or Mr. Godfrey, Ms. Haymond could not have and did not suffer any injury whatsoever and has no personal stake in the outcome of the legal dispute.

Even if Ms. Haymond had paid collection damages under Section 7-15-1, she still would not suffer any harm or injury from Bonneville or Mr. Godfrey's alleged wrongful retention of damages. The claim is no different than the circumstance of Plaintiffs' claim of illegal attorney fees splitting practice. Ms. Haymond acknowledges that Section 7-15-1 of Utah's Dishonored Instrument Act provides that issuers of dishonored checks are subject to liability for damages of \$100.00 or treble the amount of the dishonored check. See Statement of Material Facts at ¶¶ 27-29. Plaintiff Haymond was subject to liability for treble damages in issuing a dishonored check. However, how those treble damages are later distributed or retained is of no injury to or business of Ms. Haymond. Like the alleged splitting of attorney fees, Ms. Haymond would have no "concrete, particularized injury" from having paid damage monies under Section 7-15-1 which Defendants thereafter allegedly retained for themselves.

The foregoing analysis demonstrates that neither Ms. Haymond nor Ms. Lloyd can show that they sustained injury from illegal attorney fee splitting practices or wrongful retention of treble damages allegedly committed by Bonneville or Mr. Godfrey; and that neither of them have a personal stake in the outcome in a legal dispute regarding such wrongful conduct. Therefore, Ms. Haymond and Ms. Lloyd fail to meet the requirements of the first and traditional test for standing to sue.

B. Second Step: No Other Entity With Standing And Greater Interest In Outcome Of The Case.

If a plaintiff does not have standing under the first step of the standing test, Utah courts will analyze the second step of the standing test, which is whether there are potential plaintiffs with a more direct interest in the issues who can more adequately litigate the issues. If there are no such potential plaintiffs with a more direct interest and "the issue is unlikely to be raised at all if the plaintiff is denied standing", the courts will grant standing. Jenkins v. Swan, 675 P.2d 1145, 1150 (Utah 1983). In the present case, there are potential plaintiffs with a more direct interest in the issues of illegal attorney fees splitting practices and wrongful retention of collection damages than Ms. Haymond and Ms. Lloyd, such that the second standing test is not met.

1. Claim of Illegal Attorney Fee Splitting Practice.

While Ms. Haymond and Ms. Lloyd cast their attorney fee splitting practice claim as violations the Utah Dishonored Instrument Act and Rules 4-505.01 of the Utah Judicial Administration Act, they acknowledge in their Complaint that their claims are in

actuality claims governed by Rule 5.4 of the Utah Rules of Professional Conduct which prohibits sharing of legal fees. See Complaint at ¶ 75B; Record Index at 16. Rule 5.4 of the Utah Rules of Professional Conduct states that "[a] lawyer or law firm shall not share legal fees with a nonlawyer." Utah R. Prof. Cond. 5.4. The Utah Supreme Court has held that the Utah Rules of Professional Conduct do not create a basis for civil liability or give rise to a private cause of action against those violating the rules. See Archuleta v. Hughes, 969 P.2d 409, 413-414 (Utah 1998). Rather, the Rules of Professional Conduct are to be administered and overseen by the Utah State Bar in reviewing conduct of attorneys. Given that the Rules of Professional Conduct are not a basis for private civil liability, Ms. Haymond and Ms. Lloyd have no right of action and have no standing to sue Mr. Godfrey and Bonneville for violation of Rule 5.4 for alleged attorneys' fees splitting practices.

However, there is an entity which is a potential plaintiff and does have standing to bring a cause of action for alleged attorney fee splitting practices under the Rules of Professional Conduct. That entity is the Utah State Bar Association Office of Professional Conduct. Violations of the Rules of Professional Conduct are prosecuted by the Utah State Bar through the Office of Professional Conduct. See Pendleton v. Utah State Bar, 2000 UT 96 ¶ 9; 16 P.3d 1230, 1232 (Utah 2000). Under the Utah Rules of Lawyer Discipline and Disability, the Office of Professional Conduct reviews complaints of attorney misconduct, and if meritorious files suit against attorneys prosecuting them

for violations of the Rules, including Rule 5.4 regarding splitting of attorney fees. Therefore, the Office of Professional Conduct is a party which has standing to sue for attorney fee splitting practice claims and is a party with "a more direct interest in the issues who can more adequately litigate the issues." Jenkins, 675 P.2d at 1150.

Indeed, in 2000, Plaintiffs' counsel, Lester Perry, used the foregoing procedures and forum of the Office of Professional Conduct to bring an informal complaint against Mr. Godfrey and Bonneville for the exact claim of attorney fee splitting practice now before the Court. See Statement of Material Facts at ¶¶ 29-31. The Office of Professional Conduct investigated the complaint of alleged attorney fee splitting practice against Mr. Godfrey and Bonneville and concluded that the complaint was unmeritorious. See id. at ¶ 40. Mr. Perry attempted to appeal the Office's decision to the Ethics and Discipline Committee of the Utah State Bar Association, but his appeal was untimely.

Unhappy with the foregoing result, this suit was filed in hope that the parties and the Court would ignore Ms. Haymond's and Ms. Lloyd's lack of standing to sue, and permit an end-run around the interest and right of the Office of Professional Conduct to investigate and prosecute claims of attorney misconduct. Accordingly, the Office of Professional Conduct is an entity which has a greater interest than Ms. Haymond and Ms. Lloyd in the outcome of claims for alleged attorney fees splitting practices, and therefore Ms. Haymond and Ms. Lloyd do not meet the second step of the standing test.

2. Claim of Wrongful Collection and Retention of Treble Damages

For the claim of wrongful collection and retention of treble damages, there are several potential plaintiffs with a more direct and greater interest in the issue than Ms. Haymond. First, the original payees to the dishonored checks which are entitled to the collection damages under the Dishonored Instrument Act are potential plaintiffs with a more direct interest in seeking relief from Bonneville and Mr. Godfrey than Ms. Haymond. See Utah Code Ann. § 7-15-1(7)(d). The original payees are those entities which are allegedly deprived of the collection damage monies and, unlike Ms. Haymond who was never be entitled to such damage monies, they may be entitled to request and seek relief for the alleged wrongful conduct.

Second, the Utah State Division of Corporations and Commerce is a potential plaintiff with a more direct interest than Ms. Haymond in the issue of whether Bonneville and Mr. Godfrey are allegedly retaining the collection damage awards in violation of Section 7-15-1(6) and (7). The Division of Corporations and Commerce governs the registration and bonding of collection agencies under Title 12 of the Utah Code. In having such authority over collection agencies, the Division could seek declaratory or injunctive relief against Bonneville and Mr. Godfrey for conducting collection efforts in violation of the Dishonored Instrument Act. See Utah Code Ann. § 12-1-1 *et seq.* (2001).

Third, although Bonneville and Mr. Godfrey dispute the standing of any check writers to seek relief for wrongful retention of collection damages, as shown above, those check writers who actually paid collection damages to Bonneville and Mr. Godfrey

through settlement or judgment have a more direct and greater interest in the outcome of the case than Ms. Haymond. Those check writers at least paid damages to Bonneville and Mr. Godfrey unlike Ms. Haymond. Ms. Haymond may not assert the alleged jeopardy or injury of those check writers who paid collection damages in order to confer standing on her own claim. York v. Unqualified Washington County Elected Officials, 714 P.2d 679, 680 (Utah 1986) ("Plaintiff may not allege jeopardy or injury to others in order to confer standing upon his own claims.").⁶ Since there are several potential plaintiffs with a more direct and greater interest in the outcome of the case than Plaintiff Haymond, the second step of the standing test is not met.

C. Third Step: Issue of Great Public Importance.

Lastly, if a plaintiff does not have standing under the first or second steps of the standing test, Utah courts will grant standing if "the issues raised by the party are of great public importance and ought to be judicially resolved." State of Utah v. L.A.W., 2000 UT 79 ¶ 12, 12 P.3d 80, 83 (Utah 2000) (finding that State of Utah had standing to raise issue of parental presumption in divorce custody proceeding over non-parent in which

⁶ Additionally, courts, who have addressed the standing of representational plaintiffs in class action suits, find that representational plaintiffs who lack individual standing when suit is filed cannot maintain a class action suit for those class member who might have standing to sue. See Policastro v. Stelk, 780 So.2d 989 (Fla. Ct. App. 5th Dist. 2001) ("It is clear that no class action may proceed until there is a named plaintiff with standing to represent the class."); Pyles v. Johnson, 758 N.E.2d 1182, 1191 (Ohio Ct. App. 4th Dist 2001) ("The class membership prerequisite requires only that the 'the representative have proper standing."); The M.D. Anderson Cancer Center v. Novak, 52 S.W.3d 704 (Texas

parent/father had previously lost custody in an adjudication of neglect case); see also State of Utah v. Mace, 921 P.2d 1372, 1379 (Utah 1996) (finding that convicted felon lacked standing to challenge constitutionality of statutory scheme codifying insanity defense as defendant did not raise an issue that "is so important that that we [the court] must decide it in the absence of a more appropriate litigant."). The issue of great public importance is determined on a case-by-case basis examining several factors: 1) whether the issue is of sufficient weight to be judicially resolved; 2) whether the issue is not more properly addressed by the other branches of government; and 3) whether there are potential plaintiffs with a more direct interest in the particular issue. See Jenkins, 675 P.2d at 1150-51.

In Jenkins, this Court examined the standing of a taxpayer to challenge the issue of constitutionality of educators serving in the Utah Legislature, where the plaintiff taxpayer did not live in a school district which employed an educator who was also in the Legislature. The taxpayer claimed standing based on the great public importance of the challenged issue. The Court denied standing making the following finding:

Jenkins further requests that we grant him standing under the rationale that he raises questions of great public interest and societal impact. We need not address that issue. Since Jenkins' claim for standing on this issue is predicated solely on the grounds of its public importance, we will not grant him standing when the pleadings reveal other potential plaintiffs with a more direct interest in this particular questions.

2001) ("[I]f the named plaintiff lacks individual standing, the court should dismiss the entire suit for want of jurisdiction.").

Jenkins' interest as a resident of the state of Utah is certainly less direct than the interest of the residents of the school districts which employs these individuals or the legislative districts from which they are elected. We need not and do not decide here whether residents of those areas would have standing to bring this complaint. We do find, however, that Jenkins' interest is less direct than the interest of those living in the relevant school districts or legislative districts. Therefore, we will not invoke the standing doctrine of "great public interest and societal impact" to consider his request for standing.

Id. at 1151.

Applying the foregoing rationale of the Jenkins case to the present case demonstrates that this Court should not invoke the standing doctrine of great public importance to grant Ms. Haymond and Ms. Lloyd standing to pursue claims of illegal attorney fee splitting practice and wrongful retention and collection of treble damages against Bonneville and Mr. Godfrey. Like the facts in Jenkins and Mace, and as previously shown, Ms. Haymond and Ms. Lloyd have a less direct interest in the issue of attorney fee splitting practices than the interest of a potential plaintiff of the Utah State Bar Association Office of Professional Conduct. Ms. Haymond also has a less direct interest in the issue of collection and retention of treble damages than the original payees of the dishonored check and the Utah State Division of Corporations and Commerce.

Furthermore, the claims of fee splitting and wrongful retention of treble damages are not so important of issues that the Court should decide these issues in the absence of the more appropriate litigants. Attorney fee splitting and retention of treble collection

damages are not issues which have great public interest or societal impact. Rather the claims at issue in this case have a limited impact and effect on society, concerning the ethical and business conduct of attorneys and collection agencies.

Consequently, Ms. Haymond and Ms. Lloyd do not meet the third step or any other step of the standing test. Accordingly, the Court should affirm the lower court's dismissal of Ms. Haymond's and Ms. Lloyd's claims against Bonneville and Ms. Godfrey for lack of standing.

II.

MS. HAYMOND AND MS. LLOYD HAVE NO REMEDY UNDER UTAH LAW FOR BONNEVILLE'S AND MR. GODFREY'S ALLEGED ATTORNEY FEE SPLITTING PRACTICES AND WRONGFUL RETENTION OF TREBLE DAMAGES

In addition to the fact that Ms. Haymond and Ms. Lloyd cannot show injury or meet Utah's three-step standing test, they also cannot show that Utah law provides a remedy to them for Bonneville's and Mr. Godfrey's alleged attorney's fee splitting scheme and alleged wrongful retention of treble damages. In their Appellate Brief, rather than analyzing the standing issue, Ms. Haymond and Ms. Lloyd primarily concentrate their efforts on arguing that Bonneville and Mr. Godfrey have violated Section 7-15-1 of the Dishonored Instrument Act and Rule 4-505.01 of the Rules of Judicial Administration in splitting attorney fees and retaining treble damages.⁷ See Appellate Brief at 21-27.

⁷ In their argument attempting to show that Bonneville and Mr. Godfrey violated the Dishonored Instrument Act by allegedly splitting attorney fees, Ms. Haymond and Ms.

However, in making that argument, Ms. Haymond and Ms. Lloyd completely ignore the fact that neither Section 7-15-1 nor Rules 4-505.01 provide any basis for civil liability or a private cause of action to enforce their provisions.

Utah courts do not generally recognize or grant "a private right of action based upon state law, absent some specific direction from the Legislature." Broadbent v. Board of Education of Cache County School Dist., 910 P.2d 1274, 1278 (Utah Ct. of App. 1996) (teacher did not have private right of action to enforce provisions of Educator Evaluation Act). The statute or other administrative law must provide or indicate in some way that the Legislature intended to create a private remedy for the courts to recognize such a civil remedy. Id. at 1278-1280 see also Archuleta v. Hughes, 969 P.2d 409, 414 (Utah 1998) ("Utah Rules of Professional Conduct are not designed to create a basis for civil liability."); Millner v. Elmer Fox And Co., 529 P.2d 806, 808 (Utah 1974) (stating that where criminal statute did not provide a private right of action, such matter and

Lloyd claim that the Act does not allow a collection agency to collect collection costs, other than a service fee. See Appellate Brief at pp. 19, 22. Just recently, this Court found that such interpretation of the Dishonored Instrument Act is wrong. In Checkrite Recovery Serv. v. King, 2002 UT 76 (Utah July 30, 2002), the Utah Supreme Court interpreted the Dishonored Instrument Act finding that the Act's phrase "all costs of collection including all court costs and reasonable attorneys' fees" must include costs of collection which are no longer limited to \$20. Id. at ¶ 6. This Court stated: "It would be anomalous to construed the statutory scheme to allow recovery of collection costs early in the collection process, but deny recovery of them when a civil action is necessitated with its attendant increase in time devoted to the collection effort." Id. Accordingly, while unrelated to the standing issue, the Checkrite case demonstrates that Ms. Haymond's and Ms. Lloyd's analysis of the Dishonored Instrument Act is faulty.

remedy is "best left to the legislature."). If there is no provision or indication that the Legislature intended to create a private remedy, Utah courts will not and cannot invent a remedy.

Neither the Dishonored Instrument Act nor Rules 4-505 and 4-505.01 of the Utah Rules of Judicial Administration provide a basis for a private right of action against Bonneville and/or Mr. Godfrey. The Dishonored Instrument Act establishes the procedures and rights of check holder to seek recovery from issuers of dishonored checks, like Ms. Haymond and Ms. Lloyd. The Act is completely silent as to permitting a cause of action for debtors against collection agencies and/or attorneys who allegedly violate its provisions. Likewise, Rules 4-505 and 4-505.01 simply establish general procedures for determining the amount of attorney fee awards and say nothing about violation of and remedy for violation of their provisions. Since neither the Dishonored Instrument Act nor Rules 4-505 and 4-505.01 provide a private right of action, Ms. Haymond and Ms. Lloyd have no right to seek remedy for Bonneville's and Mr. Godfrey's alleged attorney fees splitting scheme and alleged wrongful collection of triple damages.

The lack of a private cause of action under the Dishonored Instrument Act and Rule 4.505.01 demonstrates why the Hawaii case of Fuller v. Pacific Medical Collections, Inc., 891 P.2d 300 (Haw. Ct. App. 1995), which Ms. Haymond and Ms. Lloyd rely on in their Appellate Brief, is distinguishable from this case. See Appellate

Brief at p. 28-30. In Fuller, the plaintiffs/debtors challenged the retention of attorney's fees by debt collection agencies claiming that such conduct violated Hawaii's Revised Statutes ("HRS") Chapter 443B which govern collection agencies. The debt collection agencies filed a motion to dismiss claiming that plaintiffs had no standing because violations of Chapter 443B can only be enforced by Hawaii's Director of Commerce and Consumer Affairs. The trial court granted the debt collections agencies motion and the plaintiffs appealed. Fuller, 891 P.2d at 303-304

The Intermediate Court of Appeals of Hawaii reversed the trial court's determination finding that the plaintiffs had standing to sue based on a specific provision of statute. The court found that HRS § 480-13(b) expressly grants a consumer the right to sue for damages "who is injured by any unfair or deceptive act or practice forbidden or declared unlawful by Section 480-2". Id. at 305.

This case is in stark contrast to the facts and circumstances of the Fuller case. In the present case, neither the Dishonored Instrument Act nor Rules 4-505 and 4-505.01 provide for a private cause of action to Ms. Haymond and Ms. Lloyd. Accordingly, the Fuller case is distinguishable and shows that in this case Ms. Haymond and Ms. Lloyd do not have standing because they have not suffered an injury to a legally protected right for which Utah law provides a remedy.⁸

⁸ Ms. Haymond and Ms. Lloyd claim number common law causes of action against Bonneville and Mr. Godfrey (e.g. mistake of fact, unjust enrichment). While some of the causes of action are recognized under Utah's common law as a general proposition, when

III.

MS. HAYMOND AND MS. LLOYD ARE NOT DENIED THEIR CONSTITUTIONAL RIGHT TO A DAY IN COURT BY DISMISSING THEIR CASE FOR LACK OF STANDING.

Finally, Ms. Haymond and Ms. Lloyd assert that by granting dismissal of their case against Bonneville and Mr. Godfrey, the trial court denied them their right to a day in court, and violated Article I Sections 7 and 11 of the Utah Constitution, which provide due process and open courts guarantees. Ms. Haymond's and Ms. Lloyd's constitutional argument fails for two reasons.

First, Ms. Haymond's and Ms. Lloyd's constitutional arguments are raised for the first time on appeal. Ms. Haymond and Ms. Lloyd did not argue in their memoranda opposing Defendants' Motions to Dismiss that dismissal of their claim violates their due process rights and/or the open courts rule, nor were such arguments raised by their counsel at oral argument. See Memorandum in Opposition to the Motion to Dismiss of

applied to the claims made by Ms. Haymond and Ms. Lloyd, they still do not state a claim for relief and demonstrate their lack of standing to sue Bonneville and Mr. Godfrey. While Ms. Haymond and Ms. Lloyd complain that Bonneville and Mr. Godfrey wrongfully split attorney fees and wrongfully retained treble damages, they acknowledge that Bonneville and Mr. Godfrey were entitled to seek attorney fees and treble damages under Section 7-15-1 and Rule 4-505.01 and complied with those laws in obtaining the attorneys fees from Ms. Lloyd. Utah's common law does not recognize a right of action in a person from which attorneys fees and damages were rightfully sought and collected to seek redress for the way in which those fees and damages are later used and/or disbursed. Accordingly, as with their claims under the Dishonored Instrument Act and Rules of Judicial Administration, Plaintiffs have no remedy under Utah's common law for their claims against Defendants.

Bonneville Billing & Collections and David Toller; Memorandum in Opposition to Motion to Dismiss Ted K. Godfrey; see also Transcript of Hearing Occurring June 3, 2002; Record Index at 480 (pp. 1-14). Issues, claims and defenses “not raised by parties at trial cannot be argued for the first time on appeal.” Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996) (court declined to address arguments involving constitutional protections as the arguments were not raised before the lower court); see also Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983) (“It is axiomatic that defenses and claims not raised by the parties in the trial cannot be considered for the first time on appeal.”). Since Ms. Haymond and Ms. Lloyd did not make their constitutional arguments before the lower court, claiming violation of their due process rights and the open courts rule, the Court should not consider those arguments now.

Second, even if the Court considers Ms. Haymond's and Ms. Lloyd's argument that the dismissal violates their constitutional rights to due process and open courts, that argument fails on the merits. Article I, Section 7 of the Utah Constitution guarantees Utahns their due process rights providing that "No person shall be deprived of life, liberty or property, without due process of law." Utah Const. Art. I, § 7. Article I, Section 11 guarantees and provides the right of open courts:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in

this State, by himself or counsel any civil cause to which he is a party.

Utah Const. Art. I, § 11. This Court has recently stated that the due process and open courts clauses of Article I of the Utah Constitution both guarantee that "litigants will have [their] day in court." Miller v. USAA Cas. Ins. Co., 2002 UT 6 ¶ 38, 44 P.3d 663, 675 (Utah 2002). The "constitutional right to a day in court is the 'right and opportunity, in a judicial tribunal, to litigate a claim, seek relief, or defend one's rights.'" Id. citing Black's Law Dictionary 402 (7th ed. 1999).

Implicit in the due process and open courts guarantees, however, is the limitation or requirement that the individual have a viable claim and that there is a justiciable controversy between litigants:

[T]he open courts provision guarantees litigants access to the courts i.e., a day in court, affording them the opportunity to litigate any justiciable controversy. However, that right is limited to those individuals who actually have a viable claim because the right is inextricably connected with that claim.

Applied Medical Technologies v. Eames, 2002 UT 18 ¶ 16, 44 P.3d 699, 702 (Utah 2002). Further, requiring a viable claim necessarily requires that the individuals will have sustained some injury and have standing to sue. See Utah Const. Art. I, § 11 ("All courts shall be open to, and every person, "for **an injury** done to him in his person, property or reputation, shall have remedy by due course of law"). "[S]tanding is implicit in the open courts provision' because it 'contemplates access to the courts only for those litigants suffering an injury.'" Met-Rx USA, Inc. v. Shipman, 62 S.W.3d 807,

809 (Tex. Ct. App. 2001) (*quoting* Texas Ass'n. of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 444 (Tex. 1993)). Accordingly, standing to sue is a necessary prerequisite for the protections afforded by the due process and open courts provisions of the Utah Constitution.

As shown above, Ms. Haymond and Ms. Lloyd do not have standing to sue Bonneville and Mr. Godfrey for alleged illegal attorney fee splitting practice and wrongful retention of treble damages. Ms. Haymond and Ms. Lloyd have not sustained any injury from conduct of Bonneville and Mr. Godfrey, assuming Plaintiffs' allegations are true. Since Ms. Haymond and Ms. Lloyd do not have standing, their rights of due process and open courts, protected by the Utah Constitution, are not violated by dismissal of their claims. Consequently, the Court should affirm the lower court's dismissal of Ms. Haymond's and Ms. Lloyd's action.

CONCLUSION

The foregoing analysis demonstrates that neither Plaintiff Linda Haymond nor Plaintiff Melinda Lloyd have suffered any injury that gives them a personal stake in the outcome of the legal dispute they pursue, namely: whether Bonneville and Mr. Godfrey allegedly engaged in illegal splitting of attorney fees and wrongful retention of collection of treble damages in relation to collecting dishonored checks. Nor can Ms. Haymond and Ms. Lloyd demonstrate that they have standing under the second and third steps of Utah's standing test to permit this case to be heard and heard as a class action suit against

Bonneville and Mr. Godfrey. Accordingly, the Court should affirm the lower court's dismissal of Ms. Haymond's and Ms. Lloyd's suit in its entirety as Ms. Haymond and Ms. Lloyd lack standing to bring claims against Bonneville and Mr. Godfrey.

DATED this 5 day of December, 2002.

CHRISTENSEN & JENSEN, P.C.

By Rebecca L. Hill

Rebecca L. Hill

Attorneys for Defendants Bonneville

Billing & Collections, Inc. and David Toller

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing, postage prepaid, thereon, this 5th

day of December, 2002, to the following:

Lester A. Perry
Hoole & King, L.C.
4276 South Highland Drive
Salt Lake City, UT 84124-2634
Facsimile No.: 272-7557
Counsel for Plaintiffs

Andrew M. Morse
Snow Christensen & Martineau
P.O. Box 45000
Salt Lake City, Utah 84145
Facsimile No.: 363-0400
Counsel for Defendant Ted K. Godfrey

A handwritten signature in cursive script, reading "Rebecca L. Hill", is written over a horizontal line.