

No.

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IN THE  
**Supreme Court of the United States**

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ALLSTATE INSURANCE COMPANY,  
*Petitioner,*

v.

ROBERT JACOBSEN, and all others similarly situated,  
*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The Supreme Court Of Montana**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

The Montana Supreme Court approved a class action in which the class representative is seeking classwide equitable relief that he cannot seek individually, the mandatory class claims establish the predicate for later individual trials on monetary damages, and the factfinder will determine whether the statutory prerequisites for individual awards of punitive damages have been satisfied on a classwide basis without regard to individual circumstances in the class trial.

The questions presented are:

1. Whether the Due Process Clause precludes state courts from certifying a class action for injunctive and declaratory relief that the class representative cannot seek in an individual capacity.
2. Whether the Due Process Clause precludes state courts from certifying a no-opt-out class action to provide the predicate for later individual awards of compensatory and punitive damages.
3. Whether the Due Process Clause precludes state courts from certifying class claims on the premise that individual defenses will be removed from consideration.

**PARTIES TO THE PROCEEDING  
AND RULE 29.6 STATEMENT**

Petitioner, who was defendant-appellant below, is Allstate Insurance Company.

Respondent, who was plaintiff-appellee below, is Robert Jacobsen. Jacobsen is the class representative and, as such, purports to represent a class consisting of “(1) all unrepresented claimants who made first-party or third-party claims to Allstate; (2) for an amount in excess of the applicable policy deductible; (3) for bodily injury or property damage related to an underlying motor vehicle incident or occurrence; and (4) whose claims were adjusted by Allstate in Montana to an unrepresented settlement since deployment in Montana of the various versions of the Casualty CCPR (*CCPR Implementation Manual (Tort States)*).” App. 8a-9a.

In addition, Charles Connors, an adjuster with Allstate Insurance Company, was a defendant in the trial court. The claims against Mr. Connors were dismissed by the trial court by stipulation of the parties. App. 122a n.11.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Allstate Insurance Company states that it is a wholly owned subsidiary of a publicly held corporation, The Allstate Corporation, and that no other publicly held corporation owns 10% or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

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Allstate Insurance Company (“Allstate”) respectfully petitions for a writ of certiorari to review the judgment of the Montana Supreme Court in this case.

### OPINIONS BELOW

The opinion of the Montana Supreme Court (App. 1a-105a) is reported at 310 P.3d 452. The order of the Montana Supreme Court denying rehearing (App. 293a-294a) is unreported. The order of the trial court (App. 106a-257a) is unreported.

### JURISDICTION

The judgment of the Montana Supreme Court was entered on August 29, 2013. The Montana Supreme Court denied Allstate’s petition for rehearing on October 8, 2013. On December 31, 2013, Justice Kennedy extended the time within which to file a petition for certiorari to and including January 30, 2014. No. 13A640. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Allstate fully preserved its due process arguments in the courts below. See pages 7-11, *infra*. This Court has jurisdiction though “there are further proceedings in the lower state courts to come.” *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975). The decision below is a final adjudication of the parties’ federal due process rights and the judgment is not supported by adequate and independent state grounds. Jurisdiction lies because “the federal issue has been finally decided in the state courts” and “reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action.” *Id.* at 482-83. The relevant cause of action here, Jacobsen’s class claim seeking declarato-

ry and injunctive relief for an alleged violation of Montana's Unfair Trade Practices Act ("UTPA"), is "distinct from" an individual action for damages under the UTPA. App. 217a. Reversal of the decision below would preclude further litigation on the class cause of action. See, e.g., *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54-55 (1989) (fourth *Cox* exception was satisfied where reversal of state-court order "would bar further prosecution on the RICO counts" although prosecution on other counts would proceed). Allowing this class action to proceed would seriously erode federal policy protecting the due process rights of litigants in Montana on whom the decision below is binding. See *Cox*, 420 U.S. at 483; see also *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir. 1995) (Rule 23(a) inquiries "constitute a multipart attempt to safeguard the due process rights of absentees").

Additionally, jurisdiction lies because the constitutional issue "will survive and require decision regardless of the outcome" below. *Cox*, 420 U.S. at 480. The decision below dictates the terms of the class certification and the trial court is not free to amend those terms on remand. Cf. Mont. R. Civ. P. 23(c)(1)(C); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 & n.11 (1978). Thus, the state-court litigation will proceed under an unconstitutional class mechanism, and either Allstate (if the class prevails below) or individual class members (if Allstate prevails) will be in a position to raise these due process objections in attacking the ultimate outcome below. Moreover, the federal due process issues presented here are separate and distinct from the merits of the underlying action, and are not "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963); accord *Hudson Distributions, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The relevant provisions of the United States Constitution, the Montana Code Annotated, M.C.A. §§ 27-1-221, 33-18-201, and 33-18-242, and Rule 23 of the Montana Rules of Civil Procedure, are reproduced at App. 295a-309a.

## **STATEMENT**

The certified class approved by the Montana Supreme Court represents a radical abridgment of the parties' due process rights. Under the Due Process Clause of the Fourteenth Amendment, a named plaintiff must present claims that are typical of the class and adequately represent the interests of absentee class members; absentees must be afforded notice and the ability to opt out of any class action predominantly for money damages; and defendants must have an opportunity to raise individualized defenses, particularly with respect to awards of punitive damages. The Montana Supreme Court's decision calls into question whether these principles will apply in all class actions, state and federal, or whether, as the majority below apparently believed, state courts are free to adopt any novel alternative form of classwide adjudication that might "drive the resolution of the litigation," App. 27a, without regard to longstanding norms of procedural fairness.

The Montana Supreme Court has approved a class action under Rule 23(b)(2) of the Montana Rules of Civil Procedure that cannot be reconciled with federal standards of due process. As certified, the class is represented by a plaintiff who is ineligible to receive, and cannot benefit from, the equitable relief he seeks on behalf of the class, because he has already received what he claims class members are



entitled to—namely, a reopening and readjustment of his claim. The class members whose interests are being represented by this atypical plaintiff will be bound by the results of a class trial, even though they have no right to opt out. Moreover, the Montana Supreme Court has announced that the class action is merely the first step in a protracted litigation, the next phase of which will be numerous individual trials to determine the amounts of specific awards of compensatory and punitive damages to individual members of the class if the class representative prevails in the class trial. And, to facilitate the award of punitive damages in these later trials, the Montana Supreme Court has certified for classwide resolution the question whether Allstate is guilty of actual fraud or actual malice—the standard for awarding punitive damages under Montana law—toward the class as a whole. Classwide resolution of this question would thus preclude Allstate from asserting individualized defenses to the statutory predicate for punitive damages.

The courts of appeals and state supreme courts are hopelessly divided over whether a mandatory class action under Rule 23(b)(2) may be certified for the purpose of determining core elements of class members' claims for monetary damages, and in a manner that deprives defendants of the ability to assert individualized defenses. The division has deepened in recent years as courts on both sides of the issues have purported to honor the due process framework set forth in *Wal-Mart*. Certiorari is warranted to resolve these conflicts and to clarify that in all class actions—state and federal—the named plaintiff must represent the interests of absentees, absent class members have a constitutional right to opt out where substantial money damages are

sought, and defendants must be afforded the opportunity to present individualized defenses.

### **I. Jacobsen's Automobile Accident And Insurance Claim**

In 2001, Respondent Robert Jacobsen was involved in a traffic accident in Montana with an Allstate insured. App. 2a, 259a. At the time, both Jacobsen and the medical professionals who initially examined and treated him reported no serious injuries. App. 318a. Allstate's claims adjuster promptly contacted Jacobsen, who stated that he did not wish to retain a lawyer but needed immediate cash for a mortgage payment, and requested that Allstate pay his lost wages. *Ibid.*; App. 152a. After some negotiation, Allstate settled Jacobsen's claim for \$3,500 with medical expenses open and payable for 45 days following settlement, in exchange for Jacobsen executing a full release. App. 153a, 259a.

Three weeks later, while mowing his lawn, Jacobsen experienced pain in his shoulder and arm. App. 154a. Jacobsen and his newly-retained lawyer contacted Allstate and demanded that Jacobsen's claim be reopened and his release rescinded. *Ibid.* Allstate agreed and later settled the reopened claim in 2002 for \$200,000 in exchange for Jacobsen executing a second release. App. 155a, 260a, 319a. Jacobsen does not claim that this settlement was inadequate or unfair. App. 319a.

### **II. Jacobsen's Individual Lawsuit And The Montana Supreme Court's 2009 Decision**

Following his second settlement, Jacobsen retained new counsel and sued Allstate in his individual capacity in the Montana Eighth Judicial District Court, Cascade County, alleging violations of Mon-

tana's UTPA, common-law bad faith, intentional and negligent infliction of emotional distress, and actual malice. App. 260a. The trial court granted Allstate summary judgment on Jacobsen's claim for compensatory damages arising from alleged emotional distress, and the remaining claims were tried to a jury. App. 260a-261a. The jury returned a verdict for Jacobsen, awarding attorney fees and costs as "compensatory damages" and \$350,000 in punitive damages. App. 261a.

Allstate appealed to the Montana Supreme Court, and Jacobsen cross-appealed the trial court's summary judgment ruling on emotional distress and a pretrial order refusing to enforce Jacobsen's request to obtain discovery of documents concerning Allstate's company-wide claims-adjustment practices. App. 259a; see also 125a. In 2009, the Montana Supreme Court affirmed in part, reversed in part, and remanded. *Jacobsen v. Allstate Ins. Co.*, 215 P.3d 649, 653 (Mont. 2009). As relevant here, the Montana Supreme Court held that: attorney fees could not be awarded as compensatory damages, App. 266a-267a; the trial court abused its discretion in refusing to enforce Jacobsen's discovery request for documents purportedly concerning Allstate's company-wide claims-adjustment practices, App. 281a; and the trial court erred in granting summary judgment for Allstate on Jacobsen's claim for damages resulting from alleged emotional distress, App. 284a-286a. Having reversed the jury's award of compensatory damages, the Montana Supreme Court also vacated the punitive damages award and remanded the case for a new trial on Jacobsen's emotional distress claim. App. 285a-286a.

### III. Jacobsen's Class Action Claim And The Montana Supreme Court's 2013 Decision

On remand, Jacobsen did not seek a retrial limited to his emotional distress claim. Instead, he radically transformed the case into a class action challenging Allstate's claims-adjustment practices during the past two decades. App. 132a-133a. With the trial court's leave, Jacobsen filed a Fourth Amended Complaint adding a putative class claim under Rule 23(b)(2) and (3) of the Montana Rules of Civil Procedure,<sup>1</sup> and seeking classwide declaratory and injunctive relief, punitive damages, and attorney fees. App. 133a-135a. He then moved to certify a class of all unrepresented individuals whose claims were adjusted by Allstate in Montana since 1995. App. 157a, 193a-194a.

Allstate opposed Jacobsen's motion for class certification on federal due process grounds. App 369a-371a (arguing, *inter alia*, that the proposed class would violate Allstate's "Due Process right to offer proof as to any or all class members to dispute [the asserted] injury"). The trial court rejected Allstate's due process arguments. App. 230a, 235a-239a, 243a-244a. Specifically, the court held that the requested injunctive relief "implicates no due process concerns" and keeps "all ordinarily attendant due process intact regarding each individual claim," App. 230a, and the requested monetary relief "comports with due process as a Rule 23(b)(2) remedy merely incidental

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<sup>1</sup> Montana Rule of Civil Procedure 23(b) is substantively identical to Federal Rule of Civil Procedure 23(b).

to the underlying declaratory and ... injunctive relief,” App. 238a-239a, 244a.<sup>2</sup>

Thus, the trial court certified Jacobsen’s class claim alleging that Allstate’s claims-adjustment practices violated the UTPA, caused “indivisible harm to the class as a whole,” and were carried out with “actual malice.” App. 255a. The trial court also certified a broad array of class remedies under Rule 23(b)(2), including a declaration that Allstate’s claims-adjustment practices are unlawful under the UTPA; a mandatory injunction requiring Allstate to reopen and readjust the claims of all class members; “class-wide punitive damages”; and classwide attorney fees upon an award of punitive damages. App. 256a-257a.

Allstate appealed as of right to the Montana Supreme Court, see Mont. R. Civ. P. 23(f), arguing, *inter alia*, that the trial court’s class certification order violated fundamental principles of federal due process. Specifically, Allstate challenged the trial court’s holding that “the requirements of Due Process under the Montana and United States Constitutions were satisfied” even though “Jacobsen is not a member of the class certified,” “proof of Jacobsen’s claim would not prove the claims of other class members,” and “Jacobsen’s claim is subject to unique defenses not applicable to other class members.” App. 311a-312a; accord App. 324a (arguing that “Due Process protects Allstate against litigation brought by a non-representative plaintiff on behalf of a non-existent ‘aggregate’ plaintiff class”), 328a (commonality,

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<sup>2</sup> The trial court rejected Jacobsen’s “cursory,” “fall-back” request for class certification under Rule 23(b)(3), App. 213a-214a n.45, a ruling from which Jacobsen did not appeal, App. 44a.

typicality, and adequacy “are mandated by Due Process”). Allstate also argued that the certified class “could deprive any future judgment of finality and clearly prejudice Allstate’s Due Process rights” because “absent Rule 23(b)(2) class members could argue that *they* are not bound by any judgment and are free to pursue identical class claims on their own because they got neither notice nor an opportunity to opt-out.” App. 343a. In addition, Allstate argued that the certified class “violates Allstate’s Due Process right to have an opportunity to present every defense to challenge individual class member[s] entitlement to the class declaratory and injunctive relief.” App. 352a.

In a fractured 4-3 decision, the Montana Supreme Court affirmed the class certification but modified the class claim and certified class relief. App. 2a. While acknowledging that the prerequisites of typicality, commonality, and adequacy “are intended to protect the due process rights of absent class members,” App. 15a (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)), the majority held that Jacobsen satisfied the requirements of commonality and typicality—withstanding that his own “requested relief and alleged bases for damages are not entirely clear,” App. 27a—because he allegedly had been subjected to a “general business practice” that, “as applied to the class members,” was “a per se violation of the UTPA” and “caused harm to the class as a whole.” App. 27a (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)), 38a. Moreover, although individual plaintiffs must show actual damages to assert an independent cause of action under the UTPA, the majority held that individual damages claims do not preclude Rule 23(b)(2) certification because they “may be determined in later in-

dividual trials after a class trial has determined the availability of the requested injunctive and declaratory relief,” App. 33a, and the Rule 23(b)(2) class action “would set the stage for later individual trials,” App. 36a.

The majority agreed with Allstate that certifying classwide punitive damages was inconsistent with due process. App. 56a-57a. In an attempt to resolve this concern, the majority *sua sponte* modified the class claim to allege “damages to the members of the class” and ordered that the amounts of compensatory damage awards would be determined in subsequent individual trials if the class prevails on its claim for declaratory and injunctive relief. App. 34a-36a. The majority also certified for classwide resolution the question whether Allstate was guilty of “actual fraud” or “actual malice”—the prerequisite for an award of punitive damages under Montana law—towards the entire class during the entire class period from 1995 to the present by virtue of implementing its challenged claims-adjustment practices developed in the 1990s. App. 46-47a, 64a. An affirmative answer to that question will serve as the basis for awards of punitive damages in later, individual trials. App. 47a.

Three justices dissented. Justice Baker, joined by Justice Rice, expressed the view that the class was improperly certified for the purpose of laying a foundation for later individualized monetary awards, and expressed doubt over whether Jacobsen meets the requirements of typicality and adequacy. See App. 66a n.2, 70a-71a (Baker, J., dissenting). Justice McKinnon separately expressed the view that the class certification deprived class members of their federal due process rights to receive notice and opt

out of a class action predominantly for money damages. App. 72a-73a, 94a-95a (McKinnon, J., dissenting).

Allstate filed a timely petition for rehearing challenging, on federal due process grounds, the Montana Supreme Court's reformation of the class claims and certified relief. App. 358a-368a. Allstate argued that Jacobsen's inability to obtain the certified equitable relief created an unconstitutional "headless' class," App. 366a, and that "leaving the class with no true representative ... violates Due Process," App. 367a-368a. Allstate also argued that absent class members "are unable to opt out" of the certified class, in violation of due process. *Ibid.* (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). In addition, Allstate argued that its "Due Process right to present all defenses applies not just to punitive damages claims, but to every claim for relief." App. 365a.

The Montana Supreme Court denied rehearing over a dissent. App. 293a-294a.

### **REASONS FOR GRANTING THE PETITION**

This case raises the fundamental question whether longstanding principles of due process that govern federal class actions have any effect in limiting the certification of class actions in state courts. In the decision below, the Montana Supreme Court repeatedly broke from settled due process precedents in a misguided effort to preserve Jacobsen's class-wide punitive damages claim. The result is a novel litigation scheme that begins with a blatantly atypical class representative, proceeds to the resolution of core elements of class members' damages claims without a right to opt out and with no consideration given to individualized defenses, and ends (if Jacob-



sen prevails in the class trial) with numerous individual trials to award compensatory and punitive damages to members of the class.

The constitutional questions raised here are vitally important both to defendants and to individuals who may find that they are members of a sprawling class like the one certified below. Do class members have a right to have their claims litigated by a plaintiff who is typical of the class and adequately represents their interests? Do class members have a right to notice and opt-out in an action predominantly for money damages? Do defendants have a right to assert the same defenses in a class action that they would be entitled to assert in an individual action? The Montana Supreme Court answered “no” to each of these questions, a view that firmly aligns Montana with an entrenched minority on these issues.

Review is warranted because the class action that the courts below have conclusively authorized conflicts with basic principles of due process long recognized in federal class actions. These due process limitations have become increasingly vital means for ensuring procedural fairness to class members and defendants in response to well-documented and growing abuses of the class action mechanism. This Court has not had a suitable opportunity to apply these principles in the context of a state class action. Despite their ubiquity, state class actions often evade this Court’s review because the specter of procedural unfairness and crippling liability typically causes defendants to settle before trial—an unfortunate reality that becomes more likely where, as here, the due process violations are especially egregious. This Court should take this opportunity to clarify that the due process principles that

safeguard the rights of defendants and class members in federal class actions apply with no less force in state class actions.

**I. The Montana Supreme Court's Decision Is An Extreme Departure From This Court's Precedents On Class Action Due Process**

The Montana Supreme Court has not only approved, but exacerbated, an extreme abuse of the class action mechanism. What was presented to that court as a deeply flawed but relatively limited class action certified under Rule 23(b)(2) of the Montana Rules of Civil Procedure has now become a sprawling, multi-phase experiment consisting of a mandatory, no-opt-out class action certified to lay the foundation for potentially thousands of individual trials to award compensatory and punitive damages. The class action dispenses entirely with the procedural safeguard of representativeness, adjudicates core elements of absent class members' damages claims, and expressly "removes the consideration" of Allstate's individualized defenses. App. 48a. This wholesale abrogation of the traditional norms of procedural fairness by the Montana Supreme Court "raises a presumption that its procedures violate the Due Process Clause." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).

**A. Due Process Requires That The Class Representative Be Typical Of The Class**

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). Binding, classwide adjudication of legal rights and obligations is per-

missible only if the “procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit.” *Hansberry v. Lee*, 311 U.S. 32 (1940). To ascertain the requirements of due process, “traditional practice provides a touchstone for constitutional analysis.” *Honda Motor*, 512 U.S. at 430; accord *Walker v. Sauvinet*, 92 U.S. 90, 93 (1876) (due process is satisfied “if the trial is had according to the settled course of judicial proceedings”); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856) (due process is determined according to “settled usages and modes of proceeding”).

Rule 23(a) of the Montana Rules of Civil Procedure, like the identically worded Rule 23(a) of the Federal Rules of Civil Procedure, sets forth several requirements “intended to protect the due process rights of absent class members.” App. 15a. The requirements of typicality and commonality, in particular, are rooted in the ancient concept of representativeness—the common law understanding that “[i]n all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.” *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1854). Courts have long honored that principle even “where the question is of general interest, and a few may sue for the benefit of the whole,” *West v. Randall*, 29 F. Cas. 718, 722 (C.C.R.I. 1820) (Story, J.); in such “cases of general right,” the question may be litigated only by those “fairly representing that right, and honestly

contesting in behalf of the whole, and therefore binding, in a sense, that right,” *id.* at 723.

The Montana Supreme Court parted with these longstanding precedents by certifying a class action in which the named plaintiff, Jacobsen, fails to satisfy the threshold requirement of representativeness. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) (“For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members ...”); *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (“a class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members”) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). That requirement is a “prerequisite” to class treatment because where it is not satisfied, as here, the resultant error infects all subsequent stages of the proceedings—skewing burdens of proof for plaintiffs, distorting procedural protections for defendants, and causing prejudice to class members whose interests are not adequately represented.

1. Montana’s UTPA provides individuals with a private right of action against an insurer for “actual damages” caused by an insurer’s violation of the statute. M.C.A. § 33-18-242(1). But, as the trial court found (without disagreement from the state supreme court), Jacobsen is advancing his class claim under a *different* cause of action that allows a class representative to bring a “UTPA-based Rule 23(b)(2) class action claim for declaratory and derivative non-compensatory injunctive relief” for alleged violations of the UTPA. App. 217a-218a. Under his *class* cause of action, Jacobsen seeks a declaration

that Allstate's claims-adjustment practices violate Montana law "as applied to the class as a whole," App. 41a-42a, 45a & n.8, and an injunction requiring Allstate to reopen and readjust the claims of all class members, App. 45a-46a.

There is no question that Jacobsen cannot maintain an individual action for the equitable relief he is seeking on behalf of the class. The release that he signed in 2001 has already been rescinded and his insurance claim has already been reopened and readjusted. Jacobsen has not maintained that he was underpaid after his claim was reopened. Because he is ineligible for the equitable relief that he purports to seek on behalf of the Rule 23(b)(2) class, he is not part of the certified class and lacks the "same interest" and "same injury" as the class members. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *Schlesinger*, 418 U.S. at 216).

2. Jacobsen also does not present a common question of law or fact. See Mont. R. Civ. P. 23(a)(2). Quite the contrary, his claim depends on individualized contentions that are incapable of classwide resolution. Whether Allstate's claims-adjustment practices can be deemed to violate Montana law rests on case-specific contentions, such as whether Allstate "misrepresent[ed] pertinent facts or insurance policy provisions relating to coverages at issue," M.C.A. § 33-18-201(1), or whether Allstate neglected to settle a particular claim "in which liability has become reasonably clear," *id.* § 33-18-201(6). The truth or falsity of these contentions cannot be determined "in one stroke," as is required for common issues of law or fact in class actions certified under Rule 23(b)(2). See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

In addition, as a predicate for punitive damages, Jacobsen seeks a declaration that Allstate acted with “actual fraud” or “actual malice” in its claims-adjustment practices between 1995 and the present. See M.C.A. § 27-1-221(1). Under Montana law, actual fraud presents “specific questions of proof best resolved in individual trials.” *Gonzales v. Mont. Power Co.*, 233 P.3d 328, 330 (Mont. 2010); see also M.C.A. § 27-1-221(4) (actual fraud limited to plaintiffs who have a “right to rely” on the representation). Similarly, actual malice is shown by proving intentional disregard of facts that create “a high probability of injury to the plaintiff.” M.C.A. § 27-1-221(2) (emphasis added). Because Montana law requires a plaintiff-specific inquiry for allegations of actual fraud and actual malice, Jacobsen again has failed to present a common question that can be determined “in one stroke.” *Wal-Mart*, 131 S. Ct. at 2551.<sup>3</sup>

3. The Montana Supreme Court held that Jacobsen is an adequate class representative because his own claim “stems from” and is “based on” his class theory that Allstate’s claims-adjustment practices constitute a “per se violation of the UTPA” that harmed “the class as a whole.” App. 39a. By approving class certification on this basis, however, the Montana Supreme Court used the class action device to vest Jacobsen with qualities that he does not individually possess. A class representative must litigate on behalf of himself, not on behalf of a “perfect plaintiff pieced together for litigation.” *Broussard v.*

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<sup>3</sup> Although Jacobsen did not seek certification of a class claim for compensatory damages, the Montana Supreme Court *sua sponte* modified the second certified claim to require a classwide determination of whether Allstate’s claims-adjustment practices “resulted in damages to the members of the class.” App. 34a.

*Meineke Disc Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998). The Montana Supreme Court has allowed Jacobsen to deploy the class action device to mask the deficiencies of his own claim in the guise of seeking relief on behalf of the class. That decision violates the due process rights of Allstate, which is entitled to litigate against actual parties and not a hypothetical “perfect plaintiff.” See *Wal-Mart*, 131 S. Ct. at 2561 (Rule 23 may not be used to enlarge or abridge substantive rights); *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) (per curiam) (due process requires that class actions not be used to diminish the substantive rights of any party to the litigation). It also violates the due process rights of absent class members, who are entitled to have their legal rights and obligations litigated by a plaintiff who truly represents their claims. See, e.g., *Rattray v. Woodbury Cnty.*, 614 F.3d 831, 835 (8th Cir. 2010); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 480 (5th Cir. 2001); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996).

Even if Allstate’s claims-adjustment practices as applied to Jacobsen were determined to violate Montana law, that determination could not benefit other class members whose claims were adjusted using different procedures. Only some of the challenged practices apply to Jacobsen’s individual claim, yet the Montana courts have allowed him to seek relief on behalf of all claimants who allegedly “suffered a violation of the same provision of law” that “can be violated in many ways.” *Wal-Mart*, 131 S. Ct. at 2551; see App. 40a. Here again, the Montana courts have used the class vehicle to vest Jacobsen with qualities he is otherwise lacking.

In *Cullen v. State Farm Mutual Automobile Insurance Co.*, 999 N.E.2d 614 (Ohio 2013), the Ohio Supreme Court reversed a virtually identical class certification order. Cullen, the putative class representative, sought to certify a Rule 23(b)(2) class seeking a declaration that State Farm’s claims practices violated state law; the declaration would have supplied the basis for individual damages awards. *Id.* at 623-24. The Ohio Supreme Court held that certification was improper where money damages were the “primary relief sought” and the predicate declaration would not have benefitted certain class members, including Cullen. As the court noted, “claimants have not demonstrated that *all class members* would benefit from the declaratory relief sought.” *Id.* at 624.

The Montana Supreme Court’s decision cannot be squared with *Cullen* and other decisions. As the Seventh Circuit has held, “[b]asic principles of due process prevent individual named plaintiffs from binding—through litigation or court-approved settlement—absent class members the plaintiffs do not legally represent.” *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 502 (7th Cir. 2012).<sup>4</sup> Permitting Ja-

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<sup>4</sup> Accord *Phillips v. Klassen*, 502 F.2d 362, 365 (D.C. Cir. 1974) (“[I]n order for a class action to be maintainable the representative party must adequately protect the interests of those he purports to represent. The concept is as old as the historic remedy of a class suit ....”); *Life of the Land v. Land Use Comm’n*, 623 P.2d 431, 444-45 (Haw. 1981) (typicality and adequacy requirements are “primarily structured to assure due process for absentees”); *Newberry Library v. Bd. of Educ.*, 55 N.E.2d 147, 153 (Ill. 1944) (in a class action, “where the substantial interests of parties present in such a suit are not necessarily or even probably the same as the interests of those they seek to represent, such parties present cannot be said to afford that protection to absent parties required by due process”); *Sw.*



cobsen to represent absentee class members in a class action to award equitable relief that Jacobsen cannot obtain himself would fundamentally alter Jacobsen's claim and violate core tenets of federal due process. Review is therefore warranted to ensure that the due process principles of typicality and commonality are respected in state as well as federal litigation.

**B. Due Process Requires That Class Members Have Notice And Opportunity To Opt Out In An Action Predominantly For Monetary Damages**

Under both the Federal and Montana Rules of Civil Procedure, Rule 23(b)(2) allows certification of a class action for “final injunctive relief or corresponding declaratory relief ... respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2); Mont. R. Civ. P. 23(b)(2). Because such limited relief “must perforce affect the entire class at once,” due process does not require that absentee class members be afforded notice or an opportunity to opt out of the class. *Wal-Mart*, 131 S. Ct. at 2558. But this Court has recognized an important constitutional limitation on Rule 23(b)(2) class actions: “In the context of a class action *predominantly for money damages* we have held that absence of notice and opt-out violates due process.” *Wal-Mart*, 131 S. Ct. at 2559 (emphasis add-

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*Bell Tel. Co. v. Mktg. on Hold, Inc.*, 308 S.W.3d 909, 919 (Tex. 2010) (Rule 23(a) “protections are not only procedural safeguards but are based in the Due Process clauses of the United States and Texas Constitutions to ensure ... that the class representative adequately represents the[] [class members'] interests.”).

ed); see also *AT&T Mobility*, 131 S. Ct. at 1751; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). That is what the court below has authorized here.

1. The Montana Supreme Court left no room for doubt that money damages are the predominant object of this litigation. Indeed, the court acknowledged that the purpose of the Rule 23(b)(2) class action is to “*set the stage* for later individual trials” to award compensatory and punitive damages. App. 36a (emphasis added); see also App. 70a-71a (Baker, J., dissenting). Moreover, to facilitate the award of punitive damages at a later stage of the litigation, the Montana Supreme Court modified Jacobsen’s class claim to allege “damages to the members of the class.” App. 34a (majority); App. 86a (McKinnon, J., dissenting). “Simply stated, this is not a Rule 23(b)(2) class.” App. 71a (Baker, J., dissenting).<sup>5</sup>

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<sup>5</sup> Jacobsen has effectively admitted that the class approved by the Montana Supreme Court violates due process. In an attempt to narrow the due process violations mandated by the judgment below, Jacobsen has proposed a trial plan that would provide absent class members with notice and an opportunity to opt out. But that relief is foreclosed by the Montana Supreme Court’s decision directing that if the class factfinder determines that Allstate violated state law, then the trial court will “determine whether [it] should enter an order requiring Allstate to provide notice to the class members of their right to re-open and re-adjust their claims.” App. 63a-64a. The trial court, on remand, “must proceed in conformity with the views expressed by the appellate court.” *Haines Pipeline Constr., Inc. v. Mont. Power Co.*, 876 P.2d 632, 637 (Mont. 1994). Even if the trial court were to disregard this aspect of the judgment below, it could not immunize the Montana Supreme Court’s decision from review by this Court because that decision continues to

In *Wal-Mart* this Court questioned whether “any forms of ‘incidental’ monetary relief” are permissible in a Rule 23(b)(2) class action. 131 S. Ct. at 2560. Even assuming, *arguendo*, that incidental monetary relief is possible in a no-opt-out class action such as this, the compensatory and punitive damages that will be litigated if Jacobsen prevails in the class trial cannot possibly be deemed “incidental” to the (b)(2) injunction.<sup>6</sup> Rather, as the Montana Supreme Court candidly admitted, the individualized monetary awards are simply the remedy to be awarded after the “specifics” of each class members’ injuries are aired following a finding of harm to the class “generally.” App. 26a; see also App. 41a (“[O]ur reformation of the requested class relief will cause the specifics of Jacobsen’s injuries to be aired in a later, individual suit for damages if the court awards the requested class injunctive and declaratory relief.”).

Members of the mandatory class will necessarily have essential elements of their damages claims litigated to a binding adjudication in a no-opt-out trial, contrary to the dictates of due process as recognized by this Court. For example, an individual plaintiff’s claim for emotional distress damages would require proof of “the nature and circumstances of the wrong,”

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authorize the very constitutional violation that even Jacobsen now admits.

<sup>6</sup> See, e.g., *Nationwide Life Ins. Co. v. Haddock*, 460 F. App’x 26, 29 (2d Cir. 2012) (holding that due process precludes certification of Rule 23(b)(2) class seeking non-incidental monetary relief); *In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012) (noting that “individualized issues begin to predominate” when “damages enter the fray”) (internal quotation marks omitted).

*Carey v. Piphus*, 435 U.S. 247, 263-64 (1978)—facts that will be determined on a classwide basis under the Montana class certification order. See App. 49a (noting that the class trial “will determine whether [Allstate’s claims-adjustment practices] will be ‘enjoined or declared unlawful only as to all of the class members or as to none of them’”) (quoting *Wal-Mart*, 131 S. Ct. at 2557). That determination would bind absent class members who have no right to opt out of the Rule 23(b)(2) class. See *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 820 (7th Cir. 2011) (noting that under Rule 23(b)(2), if “the decision on the merits, adverse to the class, is affirmed, the claims of the unnamed members, as of the named members, will be barred”).<sup>7</sup>

This due process violation cannot be cured by allowing subsequent damages juries to revisit the class jury’s factual findings. Principles of due process require that issues of fact be decided by the first empaneled jury. See *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (“Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.”). To allow a second jury to revisit the first jury’s factual findings “would amount to a denial of a

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<sup>7</sup> The Montana Supreme Court drew support from *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir.), *cert. denied*, 133 S. Ct. 338 (2012). *McReynolds*, however, did not consider or decide the due process question presented here; nor did it involve an atypical class representative, a compensatory damages claim created from whole cloth by the court to save a fatally flawed class, or any question of punitive damages.

fair trial.” *Ibid.*; see also, *e.g.*, *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 245 & n.36 (Md. 2000) (splitting between class and individual juries such interrelated issues as the determinations of liability for punitive damages and liability for actual damages would give “cause for constitutional concerns”).

2. The decision below implicates an established and deepening split among federal courts of appeals and state supreme courts. The Seventh and District of Columbia Circuits and the Supreme Court of Ohio all have held that a Rule 23(b)(2) class cannot be certified in an action predominantly for monetary damages. See *Jamie S.*, 668 F.3d at 499 (“[S]uperficially structur[ing a] case around a claim for class-wide injunctive and declaratory relief does not satisfy Rule 23(b)(2) if as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made; this kind of relief would be class-wide in name only, and it would certainly not be final.”); *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006) (“[W]hen the relief sought would simply serve as a foundation for a damages award, or when the requested injunctive or declaratory relief merely attempts to reframe a damages claim, the class may not be certified pursuant to Rule 23(b)(2).”) (citations omitted); *Cullen*, 999 N.E.2d at 624 (“[C]laims for declaratory relief that merely lay a foundation for subsequent determinations regarding liability or that facilitate an award of damages do not meet the requirement for certification as set forth in Civ.R. 23(B)(2).”). These decisions are consistent with the requirement that the injunctive relief awarded be “final.” Fed. R. Civ. P. 23(b)(2); Mont. R. Civ. P. 23(b)(2).

In contrast, the Supreme Court of New Mexico has held that even the “dominance” of claims for money damages will pose no obstacle to certifying a Rule 23(b)(2) class for injunctive relief. *Ideal v. Burlington Res. Oil & Gas Co.*, 233 P.3d 362, 364 (N.M. 2010) (“[A]s long as declaratory or injunctive relief is sought as an integral part of the relief for the class, then Rule 23(b)(2) is applicable regardless of the presence or dominance of additional prayers for damages relief for class members.”) (internal quotation marks omitted). The Montana Supreme Court has aligned itself firmly in the latter camp, approving the certification of a Rule 23(b)(2) class action that “would set the stage for later individual trials” on damages, App. 36a, even though the members of the class would receive no prior notice and have no right to opt out of the class.

The Ohio Supreme Court’s decision in *Cullen* provides an instructive contrast to the decision below. In *Cullen*, the plaintiff purported to represent a class of insureds who allegedly had been injured by State Farm’s systematic practice of dissuading claimants from replacing damaged windshields. The trial court had certified a Rule 23(b)(2) class seeking a declaration that State Farm’s practice violated state law and a declaration that “damages and remedies ... are due” to members of the class. 999 N.E.2d at 619, 623; cf. App. 34a (modifying class claim for a declaration that Allstate’s claims practice “resulted in damages to the members of the class”). The Ohio Supreme Court held that the class could not be certified, even where “[t]he effect of a declaration on members of the proposed class could establish liability, thereby allowing an individualized award of monetary damages to each class member.” 999 N.E.2d at 624. That result is compelled by federal

due process, and the Montana Supreme Court's decision is in direct conflict with *Cullen* and the other authorities cited above.

This Court's review is warranted to provide much-needed guidance on the contours of class members' due process rights in a Rule 23(b)(2) class action seeking money damages. The Court should make clear that in state class actions as well, due process forbids certifying a mandatory class for the purpose of laying a foundation for individualized damages awards.

**C. Due Process Requires That Class Actions Permit Adjudication Of Individualized Defenses**

“Due process requires that there be an opportunity to present every available defense.” *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted). This basic principle is particularly true for claims seeking punitive damages, a subject that implicates heightened due process protections. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). “[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.” *Wal-Mart*, 131 S. Ct. at 2561. The decision below contravenes this principle.

1. The decision below deprives Allstate of its due process right to present every available defense to disputed questions of liability for punitive damages. Under the scheme mandated by the court below, the class trier of fact will determine whether claims-adjustment procedures allegedly implemented in 1995 constituted “actual fraud” or “actual malice” with respect to a class of claimants spanning nearly 20 years. See M.C.A. § 27-1-221(1). But those prac-

tices changed over time and necessarily varied in individual applications. In an individual lawsuit, a plaintiff would have to show that Allstate acted with actual fraud or actual malice in processing *that individual plaintiff's* claim, which may have been submitted many years after 1995 and adjusted using different procedures than those contemplated in documentation from 1994 and 1995. Allstate is entitled to challenge each plaintiff's ability to show actual fraud or actual malice at the time each claim was submitted. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (punitive damages can be awarded only for "conduct that harmed the plaintiff"). Montana's one-size-fits-all approach to proving actual fraud or malice violates Allstate's due process rights by precluding its ability to offer individualized defenses.

Under Montana law, actual fraud requires that the plaintiff "has a right to rely upon the representation of the defendant," M.C.A. § 27-1-221(4), and "whether a party has a right to rely upon another's representation could create specific questions of proof best resolved in individual trials," *Gonzales*, 233 P.3d at 330. In the certified Rule 23(b)(2) class, however, Allstate will be denied its right to raise such individualized questions of proof.

Similarly, actual malice requires proof that the defendant intentionally disregarded "a high probability of injury *to the plaintiff*." M.C.A. § 27-1-221(2) (emphasis added). As certified, however, the question has become whether there is a "high probability that the net effect of" Allstate's business practices would cause harm "*to the class as a whole*." App. 8a (emphasis added). This Court has held that an "unforeseeable and retroactive judicial expansion of nar-



row and precise statutory language” can violate due process. *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). Here, the Montana Supreme Court has unconstitutionally used the class certification device to deprive Allstate of defenses otherwise available under the statutory standard for malice and simultaneously dispensed with the requirement that *each* member of the class must have suffered a common injury. *Wal-Mart*, 131 S. Ct. at 2551.

Allstate has a due process right to challenge the factual basis for *each* class member’s punitive-damages claim. By divorcing the classwide determination of actual fraud or actual malice from individual awards of punitive damages, however, the Montana courts have severed the required “nexus to the specific harm suffered by the *plaintiff*.” *State Farm*, 538 U.S. at 409-10 (emphasis added). This result violates due process.

2. Allstate has also been deprived of its right to present every available defense to a finding of liability for the alleged statutory violation. The Montana courts certified a class based on Jacobsen’s contention that Allstate’s claims-adjustment practices, as contemplated in documents from 1994 and 1995, constitute a per se violation of M.C.A. § 33-18-201(1) or (6). See App. 27a. But the certified class conflates two decades of claims handling, unconstitutionally depriving Allstate of individual defenses to liability that would apply to claims adjusted after 1995 using different procedures. In an individual action for damages stemming from a violation of this statute, a plaintiff would be required to prove case-specific facts—for example, that Allstate’s liability to the insured had become “reasonably clear,” M.C.A. § 33-18-201(6)—and Allstate would be permitted to raise in-

dividual defenses. Allstate must be permitted to defeat individual claims by pointing to specific examples involving specific plaintiffs for whom its claims-adjustment practices produced results that comport with Montana law. The decision below denies Allstate this right by decreeing that the lawfulness of Allstate's claims handling over two decades will be determined on a classwide basis in light of practices allegedly employed in 1995.

Montana's unorthodox procedure stands in stark contrast to the Third Circuit's recent holding that "[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013). Consolidation devices, such as the class action mechanism, cannot "change the rights of the parties" or "have the effect of merging the rights of some parties with those of others." *Garber v. Randell*, 477 F.2d 711, 715 (2d Cir. 1973) (quoting *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933)). The Montana Supreme Court's class certification decision breaks from this longstanding principle as well, necessitating this Court's review.

## **II. The Questions Presented Are Recurring And Important, And This Case Is An Ideal Vehicle To Ensure That Due Process Principles Are Respected In State Class Actions**

Issues surrounding class certification are exceptionally important to courts and civil litigants. The due process principles implicated here—representativeness, notice and opt-out, and the right to present defenses—are central to these issues and of recurring national importance, as this Court's recent deci-

sions have shown. In *Wal-Mart* this Court unanimously reaffirmed that due process is an important constraint on class certification under Federal Rule of Civil Procedure 23, and some states, including Montana, have taken steps “to bring more uniformity” between state rules on class certification and their federal counterpart. See App. 66a (Baker, J., dissenting) (noting that Montana’s Rule 23 is “identical in all substantive respects with Rule 23 of the Federal Rules”). But, as the Montana Supreme Court’s decision demonstrates, some state courts continue to resist the implications of this Court’s due process precedents in certifying class actions, particularly those seeking monetary damages.

State class actions are particularly susceptible to abuse because they are not directly governed by the Rules Enabling Act, which guarantees that Rule 23 of the Federal Rules “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b). Many state courts evade constitutional review by cloaking their decisions in state-law garb, resulting in widely disparate standards of procedural fairness for parties in state class actions. Congress acknowledged this problem in enacting the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d), which expands federal diversity jurisdiction for certain types of multistate class actions. See Pub. L. No. 109-2, § 2(a)(2), 119 Stat. 4, 4 (finding “abuses of the class action device”); see also S. Rep. No. 109-14, at 4 (2005) (finding that “most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements”). That statutory remedy,

however, affords scant protection in cases such as this, where the certified class is carefully tailored to fall primarily within state boundaries. See 28 U.S.C. § 1332(d)(4).

In recent Terms, in a variety of contexts, this Court and individual Justices have acknowledged national concern over abuse of the class action mechanism. See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 444 (2010) (Ginsburg, J., dissenting); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006); *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers). Granting this petition would afford the Court an excellent opportunity to clarify that the due process principles enunciated in its precedents are not merely “best practices” for class adjudication in the federal courts, but essential guarantees of procedural fairness in all class action litigation, state and federal.

Although several decades have passed since this Court applied federal due process principles in reviewing a state-court class action,<sup>8</sup> the issue is undoubtedly important and recurring. Indeed, on several prior occasions this Court has granted certiorari to review due process questions similar to those presented here, only to encounter case-specific vehicle problems that prevented the Court from reaching the issue and warranted dismissal. In *Ticor Title Insurance Co. v. Brown*, for example, the Court granted

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<sup>8</sup> *Phillips Petroleum*, 472 U.S. at 799; cf. *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996) (due process precludes binding state class members by res judicata effect of prior action in which they were not parties).

certiorari to consider “[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf.” 511 U.S. 117, 120-21 (1994) (per curiam) (internal quotation marks omitted). The Court ultimately was compelled to dismiss the writ after it became clear that, under the unique circumstances of that case, even the parties themselves may not have benefitted from resolution of the constitutional question. *Id.* at 122.

The Court again attempted to reach the due process issue in *Adams v. Robertson*, where certiorari was granted to review whether a state court’s approval of a mandatory settlement class for damages, “without affording all class members the right to exclude themselves from the class or the [settlement] agreement, violated the Due Process Clause of the Fourteenth Amendment.” 520 U.S. 83, 85 (1997) (per curiam). There again, however, the Court found it necessary to dismiss the writ when it became clear, after argument, that the petitioners had not met their burden of showing that the issue had been decided by or properly presented to the state’s highest court. *Id.* at 86.

In contrast to *Ticor* and *Adams*, this case presents no vehicle problems that would bar this Court’s review of the constitutional questions conclusively decided by the Montana Supreme Court. Indeed, the Montana Supreme Court’s *sua sponte* reformation of the certified class claims and class relief, and its creation of multi-phase litigation scheme consisting of a Rule 23(b)(2) class action followed by numerous individual damages trials, is the source of many of the

due process issues that Allstate promptly raised in its petition for rehearing and now presents here. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2600 n.4 (2010) (plurality) (where state supreme court decision itself constitutes a violation of federal law, issues presented in rehearing petition are properly preserved); *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 n.3 (1996) (“Because petitioners raised their due process challenge . . . in their application for rehearing to the Alabama Supreme Court, that federal issue has been preserved for our review.”). A state supreme court cannot insulate its rulings from this Court’s review by denying key procedural protections for the first time in its own pronouncements.

Montana’s constitutional offense cannot be resolved or mooted in subsequent proceedings before the state’s lower courts. The Montana Supreme Court has spoken on the due process issues presented here, and all that remains is for the trial court to carry out the litigation scheme that Montana’s highest court has directed. See App. 63a-64a. The trial court is not free to alter or amend that scheme, cf. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 & n.11 (1978), and there is no possibility that the trial court will be subjected to conflicting appellate guidance under Montana’s two-tier judiciary.

This case is therefore the ideal vehicle for this Court to provide much-needed guidance on the boundaries of federal due process in state class actions. Now in its second decade, this litigation perfectly illustrates the many types of procedural unfairness that defendants and class members often face in state class actions but that infrequently rise to this Court’s attention. The Court should seize this

valuable opportunity to clarify the due process principles that govern state class actions.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 30, 2014

## **APPENDIX**



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**APPENDIX A**

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DA 12-0130

IN THE SUPREME COURT  
OF THE STATE OF MONTANA

2013 MT 244

ROBERT JACOBSEN, and all others  
similarly situated,

Plaintiff and Appellee,

v.

ALLSTATE INSURANCE COMPANY,

Defendant and Appellant.

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APPEAL FROM: District Court of the Eighth  
Judicial District,  
In and For the County of  
Cascade, Cause No. ADV 03-  
201(D)  
Honorable Dirk M. Sandefur,  
Presiding Judge

\* \* \*

Argued: May 8, 2013

Submitted: May 15, 2013

Decided: August 29, 2013

Filed: \_\_\_\_\_  
Clerk

Justice Michael E Wheat delivered the Opinion of the Court.

¶1 Defendant Allstate Insurance Company (Allstate) appeals the order of the Eighth Judicial District Court, Cascade County, granting Plaintiff Robert Jacobsen's (Jacobsen) motion for class certification. We affirm the class certification but modify the certified class relief on remand.

### **ISSUES**

¶2 We restate the issues on appeal as follows:

¶3 1. Whether the District Court abused its discretion by finding that the proposed class met the requirements of M. R. Civ. P. 23(a)?

¶4 2. Whether the District Court abused its discretion by certifying a M. R. Civ. P. 23(b)(2) class action lawsuit?

¶5 3. Whether the District Court erred by holding that the Montana Rules of Evidence do not apply to class action proceedings?

### **FACTUAL AND PROCEDURAL BACKGROUND**

¶6 This interlocutory appeal arises from the District Court's order certifying a class in Jacobsen's class action against Allstate. Jacobsen's class action claim in turn arose out of our remand of his initial non-class third-party claim against Allstate in *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, 351 Mont. 464, 215 P.3d 649 (*Jacobsen I*). As we recounted in *Jacobsen I*, Jacobsen suffered bodily injuries and property damage in an automobile accident caused by Allstate's insured in 2001. Allstate admitted liability and negotiated a settlement with Jacobsen while he was unrepresented by counsel. Allstate's adjuster, Chuck Connors (Connors) used Allstate's

Claim Core Process Redesign (CCPR) program to process Jacobsen's claim. The CCPR is a system of claims adjusting guidelines that Allstate implemented in 1995 to fast track settlements and reduce the amount paid out on claims. Connors utilized the general outlines of the CCPR in settling Jacobsen's claim. The program facilitated a quick, unrepresented settlement six days after the accident for \$3,500 and 45 days of "open" medical payment. As part of the settlement, Jacobsen signed a release.

¶7 Roughly three weeks later, Jacobsen began experiencing significant pain. Jacobsen contacted Connors and asked him to reconsider the release and provide additional assistance. Connors refused because Jacobsen had signed a release. Jacobsen retained counsel, who successfully persuaded Allstate to rescind the release and re-open Jacobsen's claim. Due to the efforts of Jacobsen's newly-hired attorney, Allstate settled Jacobsen's claim for \$200,000 on November 27, 2002, roughly 18 months after his initial, unrepresented settlement for \$3,500.

¶8 Thereafter, Jacobsen retained new counsel and filed a complaint against Allstate seeking compensatory damages for various violations of the Montana Unfair Trade Practices Act (UTPA), common law bad faith, intentional and negligent infliction of emotional distress (IIED and NIED respectively), and also seeking punitive damages pursuant to § 27-1-221, MCA. Jacobsen ultimately sought compensatory damages based on the attorney fees he incurred in pursuing his underlying claim and punitive damages based on Allstate's alleged malicious conduct.

¶9 The jury returned a verdict in favor of Jacobsen on October 19, 2006, finding Allstate liable for common law and statutory bad faith and awarding

Jacobsen \$68,372.38 in compensatory damages. The jury specifically found that Allstate violated the UT-PA by misrepresenting pertinent facts regarding the claim and neglecting to attempt in good faith to promptly, fairly, and equitably settle a claim in which liability was reasonably clear. The jury also awarded Jacobsen \$350,000 in punitive damages based on its finding that Allstate acted with actual malice.

¶10 Following the verdict, both Jacobsen and Allstate appealed various rulings by the District Court. Our resolution of these appeals comprises *Jacobsen I*. One issue under consideration in *Jacobsen I* concerned the discovery of what were termed the “McKinsey documents.” The McKinsey documents consist of around 12,500 PowerPoint slides produced by McKinsey & Company (McKinsey), a management consulting firm, for Allstate. The CCPR program is a distillation of the studies and recommendations contained in the McKinsey documents, and they consequently provide a more complete understanding of the program. However, Jacobsen was unaware of the existence of the McKinsey documents at the time of his initial discovery request or motion to compel production of the CCPR. When he became aware of them, Jacobsen sought leave of the court to assert new individual and class action claims against Allstate and to pursue additional discovery. The District Court denied these requests, finding that they would “cause substantial prejudice and undue delay, burden, and expense[.]” *Jacobsen I*, ¶ 55.

¶11 In his pre-remand appeal, Jacobsen argued that the District Court erred by denying his request for further discovery. We found that because “the issue before the District Court was not whether to re-

open discovery, but whether to compel Allstate to produce documents that were within Jacobsen’s original discovery request,” it was “unnecessary to determine whether Jacobsen demonstrated due diligence or excusable neglect[.]” *Jacobsen I*, ¶ 57. We concluded “[t]he McKinsey documents were indeed critical to Jacobsen’s theory that Allstate’s policies regarding unrepresented claimants constituted bad faith” and reversed the District Court’s decision. *Jacobsen I*, ¶ 58.

¶12 We ultimately remanded the case for a new trial, finding that the jury’s award of compensatory damages could not be based solely on Jacobsen’s incurred attorney costs and fees and that there could be no punitive damages following this reversal of the compensatory damages award. We also ordered the court to allow the jury to consider Jacobsen’s emotional distress damages and directed the District Court to compel the production of the McKinsey documents. *Jacobsen I*, ¶ 67.

¶13 On remand, bolstered by the production of the McKinsey documents, Jacobsen filed a motion for leave to file a Fourth Amended Complaint that added class action claims concerning Allstate’s CCPR program. Count Four of Jacobsen’s Fourth Amended Complaint, filed May 6, 2010, contained the newly-added class action claims. Jacobsen based the class claims on his prior individual theories asserting violations of the UTPA<sup>1</sup> and common law bad faith.

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<sup>1</sup> Jacobsen specifically alleged Allstate’s CCPR violated §§ 33-18-201(1) & (6), MCA. Section 33-18-201(1), MCA, prohibits misrepresenting “pertinent facts or insurance policy provisions relating to coverages at issue.” Section 33-18-201(6) prohibits neglecting “to attempt in good faith to effectuate prompt, fair,

Specifically, Count Four alleged that Allstate's CCPR program violated the UTPA "and/or common law bad faith laws" by intentionally misrepresenting that unrepresented claimants generally received more compensation than represented claimants and by settling unrepresented claims via an inadequate "fast track" component of the CCPR that resulted in unfair settlements. Count Four asserted these claims on behalf of "all unrepresented individuals who had either third party claims or first party claims against Allstate whose claims were adjusted by Allstate in Montana using its CCPR program."

¶14 Count Five presented a claim for a common fund recovery of attorney fees incurred in pursuing the class action, and Count Six presented a claim for attorney fees as a "Private Attorney General" by asserting that the State of Montana had failed to enforce §§ 33-18-201(1) and (6), MCA. Regarding class relief, Jacobsen requested class certification, injunctive relief prohibiting Allstate from using the CCPR program in Montana, an injunction requiring Allstate to "re-open all claims in which liability was reasonable [sic] clear in which the Defendant applied the CCPR paradigm in settling such cases," an injunction requiring Allstate to disgorge unlawful profits, the award of punitive damages, and attorney fees.

¶15 Jacobsen filed a motion for class certification on May 7, 2010, proposing a class definition encompassing "all unrepresented individuals who had either third-party claims or first-party claims against

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and equitable settlements of claims in which liability has become reasonably clear."

Allstate whose claims were adjusted by Allstate in Montana using its CCPR program.”

¶16 The District Court certified a Rule 23(b)(2) class in its methodical June 30, 2012 Order. In the course of its analysis, the Court noted the United States Supreme Court’s admonition in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011), to conduct a “rigorous” Rule 23 analysis. The Court also construed the substantive essence of Plaintiff’s asserted class claim to be, irrespective of individual outcomes, that the CCPR’s settlement practices “constitute a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class as a whole, thereby resulting in indivisible harm to the class as a whole . . . .” The court accordingly certified the following class claim:

(A) the Casualty CCPR’s unrepresented segment adjusting practices are a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class of unrepresented claimants as a whole;

(B) Allstate’s common, systematic use of this pattern and practice in Montana caused indivisible harm to the class as a whole by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of unrepresented claimants as a whole; and

(C) Allstate acted with “actual malice,” as defined by § 27-1-221(2), MCA, by intentionally, deliberately, and consciously creating and

disregarding a high probability that the net effect of its Casualty CCPR's unrepresented segment practices would result in net settlement payouts to the class as a whole less than the net amount previously sufficient to fully and fairly settle unrepresented claims under Montana law[.]

As support, the Court found that Jacobsen had proffered "substantial credible evidence" that Allstate systematically adjusted unrepresented first and third-party claims involving bodily injury or property damage "in the same general manner" under the CCPR program. The Court thus rejected Allstate's claim that Jacobsen could not establish that all unrepresented claimant's settlements were unfair by reasoning that Jacobsen's claims concerned the "preliminary manner, means, and course of adjustment systematically applied to the class as a whole in the context of the insurer's duties under §§ 33-18-201(1) and (6), MCA," and not the "ultimate outcomes" of individual claims.

¶17 The Court restructured Jacobsen's class definition as follows:

- (1) all unrepresented claimants who made first-party or third-party claims to Allstate;
- (2) for an amount in excess of the applicable policy deductible;
- (3) for bodily injury or property damage related to an underlying motor vehicle incident or occurrence; and
- (4) whose claims were adjusted by Allstate in Montana to an unrepresented settlement since deployment in Montana of the various



versions of the Casualty CCPR (*CCPR Implementation Manual (Tort States)*).

The Court considered this reformed definition to be “sufficiently precise and homogenous for purposes of Rule 23.” Using this reformed class definition the Court determined that Jacobsen’s class claim satisfied Rule 23(a)’s four prerequisites—numerosity, commonality, typicality, and adequacy. The Court certified Jacobsen’s claim as a Rule 23(b)(2) class action and certified the following class action remedies as available upon proof of the certified class claim:

(A) [a] declaratory judgment adjudicating the constituent assertions of the certified class claim [which we have recounted in ¶ 16];

(B) [a] mandatory injunction requiring Allstate to:

(1) give all class members court-appointed notice of the right and opportunity to obtain re-opening and re-adjustment of their individual claims by timely returning a proof of claim form; and

(2) re-open and re-adjust each individual claim upon receipt of a timely filed proof of claim;

(C) class-wide punitive damages pursuant to §§ 27-1-220 and 27-1-221(2), MCA (actual malice), predicated on the above-referenced class-wide conduct; and

(D) common fund recovery of class action attorney fees and costs upon a class-wide punitive damages award[.]

Allstate appeals the court's certification of Jacobsen's class claims pursuant to Rule 23<sup>2</sup> as well as the court's consideration of what Allstate argues was inadmissible evidence during the certification proceedings.

***Allstate's CCPR Program and the McKinsey Documents.***

¶18 Due to Jacobsen's contention that Allstate's application of the CCPR program to unrepresented claimants amounts to statutory and common law bad faith, a brief summary of the program, and the related McKinsey documents, is in order.

¶19 Allstate hired McKinsey in the early 1990's to help redesign its claims process. This redesign was prompted by Allstate's recognition that while claims expenses were low, total payouts were increasing at a pace above the industry average. The McKinsey documents outlined a claim settlement process, like the CCPR program, to lower claims payouts by increasing claimant contact and reducing attorney involvement. McKinsey essentially advocated "increasing the number of early unrepresented settlements" while "holding the line" on represented claims. This focus flowed from research showing that represented claims settled for 2-3 times more than unrepresented claims, that Allstate claims adjusters were not effectively initiating early contact or

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<sup>2</sup> A more thorough analysis of the District Court's application of Rule 23(a) and (b) will be provided in the course of our legal discussion.

communicating with claimants, and that this failure to promptly and effectively communicate with claimants made claimants more likely to hire lawyers. The McKinsey documents ultimately styled claims adjusting as a “zero sum” economic game where if Allstate gains by reducing settlements, others—including “medical providers, plaintiff attorneys, and claimants”—“must lose.”

¶20 Allstate’s CCPR program consequently strives to reduce overall claims payouts by establishing a more centralized, regimented claims adjusting process focused on quick claimant contact, building rapport, reducing claimant representation rates, and shuttling certain claims into a “fast track” system. Allstate applies the CCPR to both third and first-party claimants.

¶21 Here, Allstate’s adjuster, Conners, utilized the CCPR program to obtain a fast track, unrepresented, reduced payment settlement of Jacobsen’s claim. Jacobsen alleges that the CCPR program systematically violates the rights of unrepresented claimants as provided to them by the UTPA. Jacobsen specifically takes issue with the application of the CCRP’s “fast track” system, “9-step process,” and “attorney economics script” to his claim.

¶22 First, the “fast track” system seeks to promote settlement with claimants within 12 days of the accident. Jacobsen alleges that the system promotes quick settlements at the expense of fair settlements. A “Fast Track Evaluation Worksheet” controls whether a claim is amenable to “fast track” processing and requires: the claimant is unrepresented, there are no coverage questions, there are only soft tissue injuries and a good prognosis, no residuals, no aggravation of preexisting conditions, and treatment

for less than 60 days. In this case, after Jacobsen accepted the initial \$3,500 settlement, Conners processed Jacobsen's claim under the CCPR's "fast track" guidelines for unrepresented claims.

¶23 Second, Conners generally utilized the "9-step process" for unrepresented claimant contact. The CCPR's Initial Claimant Contact Outline for unrepresented claimants directs adjusters to: (1) establish empathy and gather injury facts; (2) confirm Allstate's customer service pledge; (3) gather loss facts; (4) confirm Allstate's liability decision; (5) discuss payment of medical bills and lost wages; (6) assist with car repairs; (7) assist with alternate transportation; (8) explain the bodily injury settlement process and discuss attorney economics; and (9) close the claim and follow-up. Jacobsen alleges the 9-step process increases Allstate's profits at the expense of good faith settlements.

¶24 Third, in accordance with the CCPR, Conners discussed attorney economics with Jacobsen. The CCPR process explicitly seeks to reduce the number of represented claims to reduce claims payouts. This goal was motivated by Allstate's determination that represented claimants typically settled for 2-3 times (and perhaps up to 5 times) the amount unrepresented claimants received. To reduce attorney involvement, the CCPR aims to build rapport with claimants through quick, empathetic contact, and directs adjusters to utilize an "attorney economics script." The script states:

[q]uite often our customers ask if an attorney is necessary to settle a claim. Some people choose to hire an attorney, but we would really like the opportunity to work directly with you to settle the claim.

Attorneys commonly take between 25-40% of the total settlement you receive . . . plus expenses incurred. If you settle directly with Allstate, however, the total amount of the settlement is yours.

At any time in the process you may choose to hire an attorney. I would, however, like to make an offer to you first. This way, should you go to an attorney, you would be able to negotiate with the attorney so his/her fees would only apply to amounts over my offer to you.

The script's instructions counsel against improperly dissuading claimants from seeking representation and instruct adjusters to remind claimants that they are free to hire an attorney at any time and discuss the relevant statute of limitations. However, the script does not contain information advising that Allstate found that represented claimants generally received higher settlements. Jacobsen alleges Allstate's portrayal of "attorney economics" induced him into believing unrepresented claimants generally received more compensation for injuries and resulted in an initially unfair settlement.

#### **STANDARD OF REVIEW**

¶25 We afford trial courts the broadest discretion when reviewing a decision on class certification. *Sieglock v. Burlington Northern & Santa Fe Ry. Co.*, 2003 MT 355, ¶ 8, 319 Mont. 8, 81 P.3d 495. This is because the trial court "is in the best position to consider the most fair and efficient procedure for conducting any given litigation." *Chipman v. Northwest Healthcare Corp.*, 2012 MT 242, ¶ 17, 366 Mont. 450, 288 P.3d 193. We will therefore not upset the Dis-

trict Court’s decision without finding an abuse of discretion. In conducting this review we do not ask whether we would have reached the same decision, but instead ask whether the district court acted arbitrarily without conscientious judgment or exceeded the bounds of reason. *Newman v. Lichfield*, 2012 MT 47, ¶ 22, 364 Mont. 243, 272 P.3d 625. However, “[t]o the extent that the ruling on a Rule 23 requirement is supported by a finding of fact, that finding, like any other finding of fact, is reviewed under the ‘clearly erroneous’ standard. And to the extent that the ruling involves an issue of law, review is *de novo*.” *Mattson v. Mont. Power Co.*, 2012 MT 318, ¶ 17, 368 Mont. 1, 291 P.3d 1209 (*Mattson III*) (quoting *Miles v. Merrill Lynch & Co.*, 471 F.3d 24, 40-41 (2d Cir. 2006)).

## **DISCUSSION**

¶26 1. *Whether the District Court abused its discretion by finding that the proposed class met the requirements of M. R. Civ. P. 23(a)?*

### **A. Rule 23(a)**

¶27 Initially, a class action claim is “ ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’ ” *Mattson III*, ¶ 18 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S. Ct. 2545 (1979)). Departure from the usual rule is justified if the class representative is part of the class and possesses the same interest and suffers the same injury as the class members. *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891 (1977). In this way, class action suits save the resources of courts and parties “ ‘by permitting an issue potentially affecting every [class member] to be litigated in an

economical fashion under Rule 23.” *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 155, 102 S. Ct. 2364 (1982) (quoting *Califano*, 442 U.S. at 701).

¶28 Rule 23 of the Montana Rules of Civil Procedure governs certification of a class action and ensures that the named plaintiffs are appropriate representatives of the class. Because the Montana version of Rule 23 is identical to the corresponding federal rule, federal authority is instructive, but Montana courts are not required to march lockstep with federal interpretations of Fed. R. Civ. P. 23. *Chipman*, ¶ 43. The four requirements found in Rule 23(a) provide the threshold inquiry courts engage in when considering a putative class. Specifically, Rule 23(a) requires that:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

These prerequisites are intended to protect the due process rights of absent class members, *Hansberry v. Lee*, 311 U.S. 32, 42-43, 61 S. Ct. 115 (1940), and failure to establish any element of Rule 23(a) is fatal to class certification. *Chipman*, ¶ 43.

¶29 Moreover, we have recently adopted the following guidelines in an attempt to provide further clarification of Rule 23’s proper standard of review:

(1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.

*Mattson v. Mont. Power Co.*, 2009 MT 286, ¶ 67, 352 Mont. 212, 215 P.3d 675 (*Matson II*). Our application of these guidelines to the District Court's certification order in this case leads us to the conclusion that the District Court did not abuse its discretion by certifying Jacobsen's proposed class. The District Court based its class certification on a meticulous review of the evidence behind the pleadings. As class certification requires that the plaintiff satisfy all four requirements of Rule 23(a), we will address each requirement in turn.



**i. Numerosity—Rule 23(a)(1)**

¶30 As noted, Rule 23(a)(1) requires that the proposed class be “so numerous that joinder of all members is impracticable.” Here, the Court found that Jacobsen, using the deposition of Allstate Agent Conners, “reasonably estimated the size of the first proposed class [in *Jacobsen I*] at around 600 members.” Because Jacobsen had enlarged the class post-remand by adding first-party claimants and automobile-related property damage claims, the Court concluded that the post-remand class met Rule 23(a)(1)’s numerosity requirement. Allstate does not challenge this conclusion on appeal.

**ii. Commonality—Rule 23(a)(2)**

¶31 Allstate does contest the Court’s finding that the proposed class satisfied the commonality requirement of Rule 23(a)(2). Rule 23(a)(2) requires “questions of law or fact common to the class.” Because the requirements of the rule are disjunctive, a party seeking class certification must have either common questions of law or fact, and total commonality is not required. *Sieglock*, ¶ 11. The commonality requirement has therefore generally been seen as a relatively low burden for plaintiffs. *See Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, ¶ 32, 363 Mont. 151, 267 P.3d 756 (quoting *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 667-68 (S.D.Ala. 2005)) (commonality requirement is met when a single issue is common to all class members); *Ferguson v. Safeco Ins. Co. of Am.*, 2009 MT 109, ¶ 26, 342 Mont. 380, 180 P.3d 1164 (citing *LaBauve*, 231 F.R.D. at 668) (commonality “is not a stringent threshold and does not impose an unwieldy burden on plaintiffs.”); *McDonald v. Washington*, 261 Mont. 392, 401, 862

P.2d 1150 (quoting *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1320 (9th Cir. 1982)).

¶32 As these cases indicate, we have a “long history of relying on federal jurisprudence when interpreting the class certification requirements of Rule 23.” *Chipman*, ¶ 52. Federal Rule 23(a)(2) jurisprudence was further developed in 2011 by the U.S. Supreme Court in *Wal-Mart v. Dukes*. The *Wal-Mart* decision has raised the dual questions of whether it plots a new course for “commonality” analysis and if this course materially differs from our own. We first considered *Wal-Mart*’s treatment of Rule 23(a)(2) in *Chipman*. There, we recognized that the *Wal-Mart* decision had departed from our heretofore “minimal standard” and had “significantly tightened the commonality requirement.” *Chipman*, ¶¶ 47-48. We then applied the *Wal-Mart* decision’s “reasoning” concerning Rule 23(a)(2) and upheld the class certification order. *Chipman*, ¶¶ 47, 52. We next considered Rule 23(a)(2) and *Wal-Mart* two months later in our *Mattson III* decision. There, we again referenced the Supreme Court’s apparent tightening of Federal Rule 23(a)(2)’s requirements and noted “a recent divergence between the federal approach and Montana’s approach to the commonality requirement.” *Mattson III*, ¶ 35. However, despite our application of *Wal-Mart*’s “reasoning” in *Chipman*, the *Mattson III* decision portrayed our decision to follow *Wal-Mart*’s interpretation of Rule 23(a)(2) as an open question best left for some “future case.” *Mattson III*, ¶ 37. Despite disclaiming our adoption of *Wal-Mart*’s commonality reasoning, *Mattson III* still analyzed, and upheld, the District Court’s class certification pursuant to the supposedly “more stringent” federal standard. *Mattson III*, ¶ 37.

¶33 As Justice Baker observed in her dissenting opinion in *Mattson III*, our varying embrace of *Wal-Mart* in *Chipman* and *Mattson III* perhaps “introduce[d] confusion into our class certification standards . . . .” *Mattson III*, ¶ 45 (J. Baker, dissenting). Our opinion in *Mattson III* recognized this, and we determined that “[i]t may be necessary in a future case— where the issue is properly briefed and argued, and the choice of one standard over the other is dispositive of the commonality inquiry—to decide whether Montana will retain its more permissive approach or instead adopt the *Wal-Mart* majority’s approach.” *Mattson III*, ¶ 37. This, however, is not that future case. Neither Jacobsen’s nor Allstate’s arguments hinge on the potential differences between *Wal-Mart*’s and Montana’s approaches to commonality. Moreover, the District Court applied *Wal-Mart* in its order certifying the class. Because we affirm the District Court’s certification of the class decision under *Wal-Mart*, the choice of one standard over the other is not dispositive. We therefore need not decide whether Montana will retain its approach to commonality or how these approaches differ, and we will proceed with a discussion of Jacobsen’s proposed class in the context of *Wal-Mart*.

**a. *Wal-Mart* and F. R. Civ. P. 23(a)**

¶34 In *Wal-Mart*, the U.S. Supreme Court considered a proposed class of 1.5 million current and former female *Wal-Mart* employees “who [alleged] that the company discriminated against them on the basis of their sex by denying them equal pay or promotions . . . .” *Wal-Mart*, 131 S. Ct. at 2547.<sup>3</sup> There,

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<sup>3</sup> We must note that the unusual size of the *Wal-Mart* class presented unique challenges that may make the case inapposite

as here, the Court dealt with the requirements of the identical Federal Rule 23(a)(2). To satisfy the commonality requirement, the plaintiffs had proffered statistical evidence about pay and promotion disparities between genders, anecdotal reports of discrimination from female employees, and the expert testimony of a sociologist. The District Court reviewed this evidence and certified the proposed class. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 145, 2004 U.S. Dist. LEXIS 11297 (N.D. Cal. 2004). In the course of its Rule 23(a) analysis, the District Court noted that “the party seeking certification must provide certain facts sufficient to satisfy Rule 23(a),” that “the court’s analysis [of Rule 23] must be rigorous,” and that “the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” *Dukes*, 222 F.R.D. at 143-44. Wal-Mart opposed the commonality finding largely by advancing the unique nature of individual stores and its practice of giving local managers substantial discretion in pay and promotion decisions. *Dukes*, 222 F.R.D. at 151.

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to the classes generally proposed in Montana. See *Mattson III*, ¶ 20 (at least 3,000 class members); *Pallister v. Blue Cross & Blue Shield of Mont., Inc.*, 2012 MT 198, ¶ 7, 366 Mont. 175, 285 P.3d 562 (3,000 class members); *Chipman*, ¶ 46 (1,254 class members); *Diaz*, ¶ 31 (“hundreds” of class members); *Gonzales v. Mont. Power Co.*, 2010 MT 117, ¶ 6, 356 Mont. 351, 233 P.3d 328 (117 class members); *Ferguson*, ¶ 39 (“at least” 239 class members); *McDonald*, 261 Mont. at 400, 863 P.2d at 1155 (35,360 individual class members). The unique need in *Wal-Mart* to find some sort of common contention that would bind 1.5 million disparate individuals prompted a level of skepticism towards class certification that would likely never arise in Montana.

¶35 Wal-Mart appealed the class certification, contesting, *inter alia*, the District Court’s conclusion that the class met the commonality requirement. The Ninth Circuit affirmed after granting a rehearing en banc. *See Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). Wal-Mart again appealed and the U.S. Supreme Court granted certiorari, issuing its opinion in 2011. The majority considered the decision on commonality to be the “crux” of the case and engaged in an analysis of Federal Rule 23(a)(2)’s requirements. The Court attempted to clarify the application of Rule 23(a)(2)’s language and establish the proper standard of Rule 23(a)(2) adjudication. For our purposes, this clarification produced two important holdings, the first concerning the sufficiency of a plaintiff’s common contentions and the second regarding the proper, “rigorous” level of Rule 23(a) analysis. We will examine these clarifications in turn.

¶36 First, the majority cautioned that the language of the commonality rule is “easy to misread, since ‘[a]ny competently crafted class complaint literally raises common ‘questions.’” *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted). Thus, the majority sought to clarify *what sort* of common questions of law or fact satisfy Rule 23(a)(2). The majority emphasized that plaintiffs may not merely raise droves of superficial common questions (providing “Do all of us plaintiffs indeed work for Wal-Mart?” as an example). Instead, the plaintiffs’ common legal or factual contentions must “demonstrate that the class members ‘have suffered the same injury’” by asserting a common contention “of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the

claims in one stroke.” *Wal-Mart*, 131 S. Ct. at 2551.<sup>4</sup> This emphasis logically flows from the Court’s prior justification of the class-action device’s departure from the usual rule of individual litigation: “permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.” *Falcon*, 457 U.S. at 155 (quoting *Califano*, 442 U.S. at 700-01).

¶37 Second, the Supreme Court sought to clarify what it saw as an inconsistent, and inadequate, level of Rule 23(a) review in the lower federal courts. In doing so, the *Wal-Mart* decision embraced what has been termed a “rigorous” form of Rule 23(a) analysis. A “rigorous” level of Rule 23(a) analysis was previously adopted by a majority of the federal Circuit Courts, and the “more rigorous” approach adopted by the Second, Fourth, Fifth, Seventh, and Ninth Circuits requires district courts to make specific findings that each requirement of Rule 23(a) has *actually*, not presumably, been met. *Dukes*, 603 F.3d at 583. The *Wal-Mart* decision adopted the “more rigorous” approach, as district courts may certify a class “only if” they are satisfied that the prerequisites of Rule 23(a) have actually been satisfied. *Wal-Mart*, 131 S. Ct. at 2551. Further, in the course of making the required determination that Rule 23(a) has actually been satisfied, “sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.” *Wal-Mart*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 160). Thus, to the *Wal-Mart* majority, a proper “rig-

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<sup>4</sup> It should be noted that the majority retained the permissive recognition that “for purposes of Rule 23(a)(2) ‘[e]ven a single [common] question’ will do.” *Wal-Mart*, 131 S. Ct. at 2556.

orous” Rule 23(a) analysis specifically requires that the district court determine each requirement of Rule 23(a) has been actually met and allows, *but does not require*, the district court to probe beyond the pleadings and touch aspects of the merits to make this determination. *See Wal-Mart*, 131 S. Ct. at 2551.

¶38 The *Wal-Mart* majority’s application of the clarified commonality requirement provides some further insight into its Rule 23(a)(2) analysis. Because the plaintiffs’ class action alleged a company-wide policy of gender discrimination in violation of Title VII, the Supreme Court recognized that “proof of commonality necessarily overlaps with respondents’ merits contentions that Wal-Mart engages in a *pattern or practice* of discrimination.” *Wal-Mart*, 131 S. Ct. at 2552. The majority viewed the size of the class and disparate nature of Wal-Mart’s employment decisions as particular problems, and determined that “[w]ithout some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial questions *why was I disfavored*.” *Wal-Mart*, 131 S. Ct. at 2552. To provide this glue, the majority required the plaintiffs to *prove* that a company-wide policy existed. The majority accordingly reviewed the plaintiffs’ proffered evidence and concluded that it could not prove that a company-wide policy existed. *Wal-Mart*, 131 S. Ct. at 2553-57. Thus, the Supreme Court probed beyond the pleadings to determine a merits issue—whether Wal-Mart even *had* a company-wide pay or promotion policy—to determine if the plaintiffs could present a common contention amenable to classwide resolution. Unlike the present case, because the

plaintiffs could not prove a uniform plan or policy, they could not present the question of whether they, and the proposed class members, had suffered a common injury as a result.<sup>5</sup>

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<sup>5</sup> Moreover, the U.S. Supreme Court recently rejected the propriety of a merits inquiry at the class certification stage for a Rule 23(b)(3) class. The case, *Amgen Inc., et al. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013), involved a securities fraud Rule 23(b)(3) class action. To prove securities fraud and recover damages under § 10(b) of the Securities Exchange Act of 1934, a plaintiff must prove, *inter alia*, a material misrepresentation or omission by the defendant. *Matrixx Initiatives, Inc. v. Siracusano*, 568 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1309, 1317 (2011). Materiality is key in a § 10(b) class action suit because it is an essential predicate for the fraud-on-the-market theory that supports the presumption of “classwide reliance on those misrepresentations and omissions through the information-processing mechanism of the market price.” *Amgen*, 568 U.S. at \_\_\_, 133 S. Ct. at 1194. Without this presumption, the plaintiffs could not prove that the class as a whole relied on the misrepresentation and present a common question suitable for Rule 23(b)(3). However, the Supreme Court held that proof that a defendant’s misrepresentations or omissions materially affected their stock price was not required at the Rule 23(b)(3) class certification stage. *Amgen*, 563 U.S. at \_\_\_, 2013 LEXIS at 8. While *Wal-Mart* recognized that courts may intrude on merits issues, like materiality, to certify a class, the *Amgen* majority held that Rule 23(b)(3) “requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.” *Amgen*, 568 U.S. at \_\_\_, 2013 LEXIS at 8. As the *Amgen* decision emphasized, “the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the ‘metho[d]’ best suited to adjudication of the controversy ‘fairly and efficiently.’” *Amgen*, 568 U.S. at \_\_\_, 133 S. Ct. at 1191. *Amgen* accordingly supports our recognition that the focus of the class action device is the fair and efficient adjudication of common claims. Further, both *Amgen* and *Wal-Mart* dealt with questions concerning what sort of merits in-



**b. Jacobsen’s Proposed Class and  
the District Court’s Rule 23(a)(2)  
Decision**

¶39 Here, the District Court applied the *Wal-Mart* decision’s reasoning that the asserted class claim must depend upon a common contention that will resolve an issue that is central to the validity of each member’s claim. In applying this standard, the District Court looked beyond the allegations of Jacobsen’s pleadings to find: (1) that Jacobsen had produced “significant proof” that Allstate intentionally and systematically failed to disclose that represented claimants received settlements 2-3 times larger than unrepresented claimants; (2) that Allstate developed the CCPR with the intent that it would reduce the net sum of unrepresented settlements; (3) that Allstate hid this profit motive by developing the facially neutral CCPR; (4) that Allstate consciously disregarded a high probability that the net effect of the CCPR would result in less than a full and fair settlement; and (5) that the CCPR program had resulted in “a substantial, objectively measurable reduction in the total amount of compensation paid to the class of unrepresented claimants as a whole . . . .” The Court concluded that these factual showings united Jacobsen and the class member’s claims and supported the following common questions of law and fact, asking whether:

- (1) the Casualty CCPR’s unrepresented segment adjusting practices are a common

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quiry was appropriate. The *Amgen* decision limited merits inquiries in the context of a Rule 23(b)(3) securities fraud claim, supporting the view that *Wal-Mart*’s more-skeptical level of Rule 23 analysis is not universally applicable.

pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class of unrepresented claimants as a whole;

(2) Allstate's common, systematic use of this pattern and practice in Montana caused indivisible harm to the class as a whole by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of [sic] as a whole; and<sup>6</sup>

(3) Allstate has consciously disregarded a high probability that the net effect of its Casualty CCPR's unrepresented segment practices would result in net settlement payouts to the class as a whole less than the net amount previously sufficient to fully and fair[ly] settle unrepresented claims under Montana law.

Despite potential factual disputes, the Court determined that Jacobsen's proposed class action would provide the sort of "common answers" concerning the CCPR program that *Wal-Mart* encouraged. *See Wal-Mart*, 131 S. Ct. at 2551. Indeed, because the presence of a common pattern and practice is undisputed, Jacobsen's common contentions do not suffer from the same defect as did the plaintiffs' contentions in *Wal-Mart*.

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<sup>6</sup> As discussed below, however, we believe it is necessary to revise the second certified class claim in light of our holding reversing the certification of a class-wide punitive damages award.

¶40 On appeal, Allstate first argues that because Jacobsen’s claim is not predicated upon an assertion that his third-party bodily injury or property damage claims were ultimately settled unfairly or underpaid, there is no commonality between his claim and the alleged class claims. However, this argument misses the thrust of Jacobsen’s class claim on remand. While Jacobsen’s requested relief and alleged bases for damages are not entirely clear, the District Court determined that his claim asserts, in part, that Allstate’s application of the CCPR to unrepresented claims is a per se violation of the UTPA and results in actual harm in the form of an alleged zero-sum economic plan systematically reducing claims payments to increase profits. This contention does not merely allege that the proposed class members suffered a violation of the same provision of law “in many ways.” *See Wal-Mart*, 131 S. Ct. at 2551. Here, the presence of a “general business practice,” the CCPR, is undisputed. Whether this general practice, as applied to unrepresented claimants, violates §§ 33-18-201(1) or (6), MCA, is just the sort of question that may efficiently drive the resolution of the litigation. *See Wal-Mart*, 131 S. Ct. at 2551 (commonality requires the plaintiff to demonstrate that the class members “have suffered the same injury.”). This determination would not turn on the countless discretionary decisions that troubled the *Wal-Mart* majority, and would not be hampered by a variety of unique defenses and circumstances. Jacobsen’s assertion that the CCPR, as applied to the class members, represents a per se violation of the UTPA would resolve a necessary, central question applicable to all class members.

¶41 Judge Richard Posner’s treatment of the Rule 23(b)(2) class certification at issue in *McReynolds v.*

*Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) supports this conclusion. There, plaintiffs filed a class action suit alleging that Merrill Lynch engaged in a system of racial discrimination by utilizing a company policy that allowed brokers to form teams and that then rewarded team performance with increased broker account distributions. *McReynolds*, 672 F.3d at 483, 489-90.<sup>7</sup> The plaintiffs asked that the class be certified to determine whether the defendant had engaged in discriminatory practices and to provide injunctive relief. The plaintiffs also wanted compensatory and punitive damages. *McReynolds*, 672 F.3d at 483. The district court denied class certification and the plaintiffs appealed. On appeal, Judge Posner considered the denied certification in the context of *Wal-Mart*. *McReynolds*, 672 F.3d at 488. Judge Posner found that, unlike the *Wal-Mart* plaintiffs, Merrill Lynch's policies were an employment decision by the top management that was appropriate for a class-wide determination as to whether the challenged policies

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<sup>7</sup> Essentially, the plaintiffs contended that the teams were "little fraternities" that, intentionally or not, chose members largely from similar racial groups. *McReynolds*, 672 F.3d at 489. Brokers did not have to join teams, but being accepted by a successful team generally increased performance. Account distributions were made when a broker left Merrill Lynch to distribute his clients' accounts and they were based on the past success of the brokers. Thus, if a broker wasn't selected by a successful team, he may miss out on future account distributions, which would cause him to not be selected by the successful teams, and a vicious cycle could ensue. The plaintiffs argued that minority brokers at Merrill Lynch found it hard to join good teams "and as a result don't generate as much revenue or attract and retain as many clients as white brokers do." *McReynolds*, 672 F.3d at 490.

had a disparate racial impact. *McReynolds*, 672 F.3d at 489.

¶42 Judge Posner reversed the district court's denial of class certification despite his recognition that a final resolution of the class's claims would require hundreds of separate trials to determine compensatory and punitive damages. As Judge Posner noted,

[o]bviously a single proceeding, while it might result in an injunction, could not resolve class members' claims. Each class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much. So should the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices and if so what loss he sustained—and remember that the class has 700 members. *But at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful.*

*McReynolds*, 672 F.3d at 490-91 (emphasis added). To Judge Posner, “[t]he kicker is whether ‘the accuracy of the resolution’ would be ‘unlikely to be enhanced by repeated proceedings.’” *McReynolds*, 672 F.3d at 491. As the Seventh Circuit previously said in *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910 (7th Cir. 2003),

If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of

which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.

*Mejdrech*, 319 F.3d at 911. A single class trial for injunctive relief that determines the legality of a commonly applied procedure or policy is not only economical and attractive, but, in the alternative, “[t]here isn’t any feasible method . . . for withholding injunctive relief until a series of separate injunctive actions has yielded a consensus for or against the plaintiffs.” *McReynolds*, 672 F.3d at 491; *see also Wal-Mart*, 131 S.Ct at 2557 (“[T]he key to the (b)(2) class is the, indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them,”).

¶43 Regarding the class’s requested monetary relief, Judge Posner recognized “there may be no common issues,” and determined “in that event the next stage of the litigation, should the class-wide issue be resolved in favor of the plaintiffs, will be hundreds of separate suits for backpay (or conceivably for compensatory damages and even punitive damages as well . . . .)” *McReynolds*, 672 F.3d at 492. The Court approved of this bifurcated approach, determining declaratory and injunctive relief in a class trial and individual monetary relief in later individual trials, because “the lawsuits will be more complex if, until issue or claim preclusion sets in, the question whether Merrill Lynch has violated the antidiscrimination statutes must be determined anew in each case.”

*McReynolds*, 672 F.3d at 492. As the D.C. Circuit recently noted, “[t]he putative [sic] class in *McReynolds* was appropriate post-*Wal-Mart* because the economic harm alleged by each class member was the result of the same corporate-wide policies and if the policies were held unlawful then a question central to the validity of each class member’s claim would be resolved in one stroke.” *DL v. District of Columbia*, 713 F.3d 120, \_\_\_, 2013 U.S. App. LEXIS 7375, 22 (D.C. Cir. 2013). This recognition aligns with the *Wal-Mart* majority’s interest in certifying classes that will drive the resolution of litigation and it supports affirming the certification of Jacobsen’s class to determine the certified declaratory and injunctive relief. See *Ferguson*, ¶ 28 (finding a common fact issue existed concerning whether Safeco programmatically breached insured’s made whole rights); *McDonald*, 261 Mont. at 401 (concluding that commonality was satisfied, despite class members living in different areas with different water sources, because the common theory was that the defendant breached a duty owed to all class members); M. R. Civ. P. 23(c)(4) (“When appropriate, an action may be brought or maintained as a class action with respect to particular issues.”); see also *Williams v. Mohawk Indus.*, 568 F.3d 1350, 1360 (11th Cir. 2009) (“ ‘Since in theory there should be no hard requirement that (b)(2) be mutually exclusive, and since subpart (c)(4)(A) allows an action to be maintained ‘with respect to particular issues,’ the fact that damages are sought as well as an injunction or declaratory relief should not be fatal to a request for a (b)(2) suit, as long as the resulting hybrid case can be fairly and effectively managed.’ ”).

¶44 Indeed, federal courts applying *Wal-Mart*’s commonality analysis have focused on the presence

of just this sort of common contention alleging that a defendant's programmatic conduct violates the law. *See DL*, 713 F.3d at 127 (vacating class certification after *Wal-Mart* because "the district court identified no single or uniform policy or practices that bridges all [the putative class members'] claims."); *Wang v. Chinese Daily News*, 709 F.3d 829, 834 (9th Cir. 2013) (vacating and remanding class certification following *Wal-Mart* and requiring that the plaintiff show "significant proof that [the defendant] operated under a general policy of [violating California labor laws]" to satisfy commonality); *Forte v. Wal-Mart Stores, Inc.*, 2012 Dist. LEXIS 97435 5-6 (S.D. Tex.) (noting that if the lease agreement provision plaintiffs were contesting was a per se violation of the Texas Optometry Act, "commonality would be met."); *Khaliel v. Norton Health Care, Inc.*, 287 F.R.D. 511, 517 (W.D. Ky. 2012) (affirming class certification post-*Wal-Mart* where "it is the appropriateness of that [employment benefit calculation] methodology that will be determined when the court reaches the merits of the case, and such a question is indeed 'capable of classwide resolution'. . . and does not turn on the validity of countless individual discretionary decisions."); *Kingsbury v. U.S. Greenfiber, LLC*, 2012 U.S. Dist. LEXIS 94854, 18-19 (C.D. Ca.) (concluding *Wal-Mart* did not alter the Court's decision to certify a class based on common questions including whether a standard purchase agreement was deceptive under California's Unfair Competition Law); *Creely v. HCR ManorCare, Inc.*, 2011 U.S. Dist. LEXIS 77170, 4-5 (N.D. Ohio) (reconsidering class certification in light of *Wal-Mart* and concluding the concerns raised in *Wal-Mart* "simply do not exist here" because "the crux of this case is whether the company-wide poli-



cies, as implemented, violated Plaintiffs' statutory rights.").

¶45 Allstate also asserts that the common questions identified by the District Court do not demonstrate that the proposed class members have all "suffered the same injury." See *Wal-Mart*, 131 S. Ct. at 2551. Allstate specifically argues that the first proposed common question—whether the CCPR as applied to unrepresented claimants violates the UTPA—is precisely the type of generalized question that *Wal-Mart* identified as insufficient." However, as discussed above, the determination of whether Allstate's common application of the CCPR to the proposed class violated the UTPA is the sort of "common scheme of deceptive conduct" that necessarily presents common questions of law and/or fact. See *Ferguson*, ¶ 28; *McReynolds*, 672 F.3d at 491.

¶46 Allstate further contends that this question cannot be answered as a class question because an independent cause of action for a UTPA violation or common law bad faith requires a showing of actual damages. Because Allstate argues a showing of actual damages would require case-specific, individual inquiries, it asserts that the first common question cannot be answered for the class as a whole. However, as discussed above, individualized damage inquiries generally do not preclude class certification. See *Mattson III*, ¶ 38 (citing *McDonald*, 261 Mont. at 403-04). Damages claims may be determined in later individual trials after a class trial has determined the availability of the requested injunctive and declaratory relief. *McReynolds*, 672 F.3d at 491.

¶47 Allstate argues the second proposed common question is deficient because whether Allstate's profit increased while total compensation paid to the class

decreased does not provide a common answer demonstrating a violation of §§ 33-18-201(1) or (6), MCA. Jacobsen responds that the second common question would answer whether the CCPR caused indivisible “legal injury” to the class as a whole “through the use of a dishonest system, whether or not the monetary value of each settlement ultimately was unfair.” We agree that the second certified class claim question is deficient, but only insofar as it conflicts with our conclusion that the Court’s certification of a class-wide punitive damages award was improper. As framed by the District Court, the second class claim asks the class jury to determine whether Allstate’s systematic use of the CCPR caused indivisible harm to the class as a whole by operation of a zero-sum economic theory and an inversely proportional relationship between Allstate profits and compensation paid to unrepresented claimants. The Court formulated this claim so as to justify the entry of a class-wide punitive damages award. We believe that the second certified class claim must be revised in light of our conclusion that punitive damages must be determined on an individualized basis, to be awarded only if the claimant can demonstrate compensatory loss. We consequently modify the second certified claim as follows:

(B) Allstate’s common, systematic use of this pattern and practice in Montana resulted in damages to the members of the class by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of unrepresented claimants as a whole; and [ . . . ]

See Section 3-2-204, MCA (entitling us to “affirm, reverse, or modify any judgment or order appealed from[.]”). The District Court considered the second common contention as proposing whether the CCPR’s alleged pursuit of profits at the expense of unrepresented claimants harmed the class by potentially violating the unrepresented claimants’ rights to good faith adjusting of their claims under the UTPA. Answering this question, as revised, would presumably help determine whether the CCPR was an intentional, programmatic effort to produce unfair settlements in violation of the UTPA. While an increase in profits concurrent with a decrease in total payments to the class as a whole may not prove a violation of the UTPA by itself, the District Court did determine that significant proof existed that Allstate developed the CCPR program “with the knowledge and intent” that its implementation would reduce the net sum of unrepresented settlements. This revised inquiry would help advance the determination of the legality of the CCPR while avoiding our concerns with a class-wide award of punitive damages, as discussed below.

¶48 The third common contention asks whether Allstate consciously disregarded a high probability that the net effect of the CCPR would result in decreased settlements to the class as whole. Thus, an affirmative answer to the second question, determining that the CCPR was an intentional effort to engage in unfair settlement practices to increase profits, would likely advance the resolution of the third question and could support a finding of actual malice pursuant to § 27-1-221(2), MCA. However, Allstate claims that the third common question is deficient because Jacobsen does not assert his claim was underpaid. Jacobsen responds that the harm at issue is

insufficient class-wide settlement payouts due to the CCPR's zero-sum economic focus. Because Jacobsen argues that Allstate implemented the CCPR with the intention of implementing a zero-sum economic game to systematically produce unfair settlements and increase profits, this contention would resolve an issue central to each class member's claim: whether Allstate acted maliciously by applying the CCPR with the intent of lowering payouts to increase profits.

¶49 It is important to note that district courts have "broad power and discretion vested in them by" Rule 23 "with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345, 99 S. Ct. 2326 (1979); accord *Siegelock*, ¶ 8 ("Trial courts have the broadest discretion when deciding whether to certify a class."). Here, class-wide resolution of the proposed common contentions "will drive the resolution of the litigation." *Chipman*, ¶ 52. Such potentially illuminating questions are the focus of Rule 23(a)(2) and, as discussed above, resolving whether the CCPR violates the UT-PA would set the stage for later individual trials. Moreover, as we require, the District Court examined the evidence behind the pleadings to determine that the proposed class *actually* satisfied the commonality prerequisite. We therefore conclude that the District Court did not abuse its discretion by determining that Jacobsen's common contentions, as construed by this Court, satisfy the commonality requirements of Rule 23(a)(2).

¶50 Again, both Jacobsen and Allstate have claimed that *Wal-Mart* presents a heightened commonality standard when compared with our previous conception of the rule, and both applied *Wal-Mart* to

the case on appeal. Because of this, and because we affirm the District Court’s class certification (also based on *Wal-Mart*), we need not address whether *Wal-Mart* presents a different standard and if we intend to adopt it. *Mattson III*, ¶ 37. Instead, as we did in *Chipman* and *Mattson III*, we simply conclude that Jacobsen satisfies the *Wal-Mart* commonality standard because the certified class claims depend upon a common contention concerning a programmatic course of conduct that is “of such a nature that it is capable of classwide resolution,” i.e., that “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*, 131 S. Ct. at 2551.

### **iii. Typicality—Rule 23(a)(3)**

¶51 Regarding typicality, we have previously explained that this requirement “is designed to ensure that the interests of the named representative are aligned with the interests of the class members, the rationale being that a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class.” *Mattson III*, ¶ 21 (citing *Chipman*, ¶ 53). Thus, “[t]he premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class.” *Arlington Video Prods. v. Fifth Third Bancorp*, 2013 U.S. App. LEXIS 3355, 42 (6th Cir. 2013). The commonality and typicality requirements “tends to merge,” *Falcon*, 457 U.S. 147, at 158 n. 13, and typicality generally “prevents plaintiffs from bringing a class action against defendants with whom they have not had any dealings.” *Diaz*, ¶ 35. Typicality is not a demanding requirement, and it “is met if the named plaintiff’s claim ‘stems from the same event, practice, or course of conduct that forms the

basis of the class claims and is based upon the same legal or remedial theory.” *Diaz*, ¶ 35 (quoting *McDonald*, 261 Mont. at 402). The underlying event, practice, or course of conduct “need not be identical.” *Diaz*, ¶ 35. In addition, because *Wal-Mart’s* discussion of Rule 23(a) hinged on an analysis of commonality, the opinion did not consider the requirements of typicality and did not purport to establish a heightened level of review.

¶52 The District Court found that the nature of Jacobsen’s claim was typical of those of the proposed class because “significant proof [exists] that Allstate subjected the class as a whole, including but not limited to Plaintiff, to the same systematic violation of §§ 33-18-201(1) and (6), MCA, through the pattern and practice of the Casualty CCPR’s unrepresented segment adjusting practices.” Specifically, the Court found that: Jacobsen and each proposed class member are members of the above-defined class; Jacobsen and each class member were at a minimum subjected to the same allegedly unlawful conduct generally; and the allegedly unlawful conduct caused harm to the class as a whole by operation of the CCPR and its alleged zero-sum economic theory. Thus, as required by our opinion in *Mattson II*, the District Court probed behind the pleadings to actually determine whether Jacobsen met the typicality prerequisite.

¶53 On appeal, Allstate argues that the District Court erred because “Jacobsen is not even a member of the class.” Allstate supports this contention by claiming that Jacobsen lacks individual standing because his initial release, obtained after his claim was adjusted to an unrepresented settlement pursuant to the CCPR, was rescinded, citing *Hop v. Safeco Ins. Co.*, 2011 MT 215, 361 Mont. 510, 261 P.3d 981. All-

state further attempts to distinguish Jacobsen's claim from those of the class members by arguing that he does not contend his property damage claim was improperly handled and that he only seeks damages due to alleged emotional distress. Jacobsen in turn claims that the application of the CCPR is a *per se* violation of the UTPA, that the application of the CCPR to the class as a whole resulted in systemic economic injury, and that both he and the class suffered emotional distress from the application of the CCPR to their claims. Jacobsen essentially asserts that typicality isn't destroyed if class members display some uniqueness in the character of their individual injuries.

¶54 First, our opinion in *Hop* can be distinguished. There, we declined to find typicality based on the named representative's lack of individual standing for failing to meet the procedural requirements of § 33-18-242(6), MCA. *Hop*, ¶ 20. The named representative did not lack individual standing because of any factual differences in the substantive details of his claim, but for bringing a claim under § 33-18-201, MCA, despite the absence of any judgment in, or settlement of, his underlying claim as required by § 33-18-242(6), MCA. This holding is therefore inapplicable to Allstate's argument that Jacobsen's claim is not typical because of the specific facts of the application of the CCPR to his unrepresented claim.

¶55 Second, Allstate's arguments miss the aim of the typicality requirement by raising issues with the specific facts of Jacobsen's claim and the specific relief he seeks. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (1992) ("Typicality refers to the nature of the claim or defense of the class representative,

and not to the specific facts from which it arose or the relief sought.”). Jacobsen is a member of the class as defined by the District Court. He was an unrepresented third-party claimant bringing claims for property damage and bodily injury following a motor vehicle accident with an Allstate insured. Allstate applied the CCPR to Jacobsen while he was unrepresented, and, at base, Jacobsen’s class claim alleges that Allstate systematically applies the CCPR to violate the rights of unrepresented claimants under the UTPA. Jacobsen’s claim stems from the same course of conduct, the application of the CCPR to unrepresented claimants, as the proposed class members’ claims and both Jacobsen’s and the class members’ claims are based on the same legal theory, that this application of the CCPR violates the UTPA. The injuries that allegedly resulted among class members, whether economic or emotional, are not sufficiently dissimilar to render Jacobsen’s claim atypical of those of the class regarding this core allegation.

¶56 Indeed, we have previously determined that the common application of an insurance practice to a proposed class constitutes an event, practice, or course of conduct sufficient to satisfy the typicality requirement. *See Diaz*, ¶ 36; *Ferguson*, ¶¶ 26-28 (finding the related commonality requirement satisfied by an allegedly programmatic breach of a duty). In *Chipman*, we considered claims that the named plaintiffs’ claims were atypical from those of the class in the context of a suit over the discontinuation of a sick leave buy-back program. *Chipman*, ¶ 54. The defendant employers argued that the named plaintiffs’ claims were atypical because they worked for the employers for a longer period and may or may not have attended a meeting with management. *Chipman*, ¶ 54. The plaintiff employees argued that



the class members' disputes were typical because they were triggered by the same underlying cancellation of the buy-back program. *Chipman*, ¶ 54. We determined that because the claims of the named plaintiffs and class members all arose from the same event, the plaintiffs were able to establish "the necessary nexus between the injuries alleged by named Plaintiffs and class members." *Chipman*, ¶ 56. We based this decision on an analysis of *Cates v. Cooper Tire & Rubber Co.*, 253 F.R.D. 422 (N.D. Ohio 2008). There, the named plaintiffs sought class certification in a suit against their employer over the imposition of a cap on post-retirement health benefits. *Cates*, 253 F.R.D. at 424. The district court determined that typicality was satisfied despite the fact that the benefit plans of the named plaintiffs varied from those of the class members because all of the claims arose from the same event or practice and the class members relied on the same legal theory. *Cates*, 253 F.R.D. at 429. Jacobsen's and the class's claims arise from the CCPR and all are proceeding under the legal theory that the CCPR was implemented to lower claims payments to the class by violating the rights afforded claimants under the UTPA.

¶57 In addition, as we discuss below, our reformation of the requested class relief will cause the specifics of Jacobsen's injuries to be aired in a later, individual suit for damages if the court awards the requested class injunctive and declaratory relief. Jacobsen's injunctive and declaratory claims arise from the same course of conduct as those of the putative class members, the application of the CCPR to his unrepresented claim for bodily injury and property damage following a motor vehicle incident. A class trial may efficiently, and appropriately, determine the legality of this program as applied to the class as

a whole. *See McReynolds*, 672 F.3d at 490-91. Allstate's concerns over Jacobsen's typicality, centered on the details of his injury and the availability of certain defenses, will be obviated if the specifics of Jacobsen's injuries will not be addressed in a class trial that considers only the proposed injunctive and declaratory relief. Thus, despite Allstate's contentions, the specifics of Jacobsen's alleged injuries do not render him atypical of the class because his claim "stems from the same *event, practice, or course of conduct* that forms the basis of the class claims and is based upon the same legal or remedial theory," *McDonald*, 261 Mont. at 402 (quoting *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1321 (9th Cir. 1982) (emphasis in original)). This satisfies the typicality requirement and we affirm the District Court's decision.

#### **iv. Adequacy—Rule 23(a)(4)**

¶58 The fourth prerequisite of Rule 23(a) allows certification only where the representative parties will fairly and adequately protect the interests of the class. M. R. Civ. P. 23(a)(4). "This requires that the named representative's attorney be qualified, experienced, and generally capable to conduct the litigation, and that the named representative's interests not be antagonistic to the interests of the class." *McDonald*, 261 Mont. at 403, 862 P.2d at 1156 (quoting *Jordan*, 669 F.2d at 1323). Adequacy is therefore closely related to commonality and typicality. Regarding potential antagonistic interests, the District Court determined that because Jacobsen's asserted class claims satisfied the commonality and typicality requirements, Allstate had failed to show a compelling reason why Jacobsen's individual interests would conflict with the common interests of the class.

The court also took notice that Jacobsen’s class counsel are competent and experienced in complex class action litigation.

¶59 Allstate argues that Jacobsen’s claims will be subject to unique defenses that are likely to become the focus of any trial. However, “perfect symmetry of interest is not required and not every discrepancy among the interests of class members renders a putative class action untenable.” *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012). When we apply this recognition to the adequacy requirement of Rule 23(a)(4), it is clear that “[o]nly conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement.” *Matamoros*, 699 F.3d at 138 (quoting 1 William B. Rubenstein, *Newberg on Class Actions* § 3:58 (5th ed. 2012)). The potential intra-class conflicts that Allstate cites—which include Jacobsen’s desire for an early settlement, that he may have initially decided to not hire an attorney, and the cause of his emotional distress—are not “so substantial as to overbalance the common interests of the class members as a whole.” *Matamoros*, 699 F.3d at 138. As a third party claimant contesting the legality of the CCPR, Jacobsen has incentive to vigorously pursue the requested injunctive and declaratory relief. In view of this, the limited scope of the class trial on remand, and the District Court’s considerable discretion in class certification decisions, we conclude that the District Court did not abuse its discretion by concluding that Jacobsen’s interests are not antagonistic to those of the proposed class.

¶60 2. *Whether the District Court abused its discretion by certifying a M. R. Civ. P. 23(b)(2) class action lawsuit?*

¶61 Once the Rule 23(a) prerequisites are satisfied, the analysis shifts to Rule 23(b). *Mattson III*, ¶ 18. To be certified, a class must fit within one of the three types described in Rule 23(b). *Wal-Mart*, 131 S. Ct. at 2548-49. At the District Court, Jacobsen argued that his proposed class qualified under Rule 23(b)(2), or alternatively, as a “hybrid-type class” combining elements of Rule 23(b)(2) and Rule 23(b)(3). Rule 23(b)(2) allows a class action to be maintained if, having met the requirements of Rule 23(a), “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]” M. R. Civ. P. 23(b)(2). As the *Wal-Mart* decision noted, “[t]he key to the [Rule 23](b)(2) class is, the indivisible nature of the injunctive or declaratory remedy warranted--the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them,” *Wal-Mart*, 131 S. Ct. at 2557 (internal citation omitted).

¶62 Rule 23(b)(3) allows a class action if the court finds that the common questions of law or fact predominate over individual questions. The District Court declined to address Jacobsen’s alternative claim for Rule 23(b)(3) relief because of the “cursory” briefing and “logical inconsistency” of a hybrid Rule 23(b)(2) and (b)(3) class. Jacobsen does not challenge this decision on appeal.

¶63 The District Court specifically found that “significant proof” existed that Allstate, the party

opposing the class, had acted on grounds that generally applied to the class through its use of the CCPR program.<sup>8</sup> Following this determination, the Court examined whether Jacobsen sought appropriate forms of injunctive and declaratory relief and whether Jacobsen's requested monetary relief was permissible under Rule 23(b)(2).

After denying Jacobsen's claims for equitable disgorgement and a vague prohibitive injunction,<sup>9</sup> the Court certified the following class action remedies under Rule 23(b)(2):

(A) declaratory judgment adjudicating the constituent assertions of the certified class claim [quoted at ¶ 16];

(B) mandatory injunction requiring Allstate to:

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<sup>8</sup> The District Court based this finding on its construction of Jacobsen's class claim, which is quoted at ¶ 16, *supra*. The Court essentially determined that Jacobsen claimed that the CCPR was a common practice in violation of §§ 33-18-201(1) and (6), MCA, as applied to the class as a whole, that the CCPR caused economic harm to the class as a whole, and that Allstate consciously disregarded the high probability that the CCPR would result in insufficient net settlement payouts.

<sup>9</sup> The Court found that that a mandatory injunction compelling disgorgement of unlawful profits was not appropriate in addition to punitive damages and denied its availability as a Rule 23(b)(2) remedy. The Court also found that Jacobsen's requested prohibitive injunction enjoining Allstate from engaging in unlawful conduct as found by the jury was fatally vague because it failed to articulate a specific prohibition that would provide relief to the class as a whole. Jacobsen does not appeal either decision.

- (1) give all class members court-approved notice of the right and opportunity to obtain re-opening and re-adjustment of their individual claims by timely returning a proof of claim form;
  - (2) re-open and re-adjust each individual claim upon receipt of a timely filed proof of claim;
- (C) class-wide punitive damages pursuant to §§ 27-1-220 and 27-1-221(2), MCA (actual malice), predicated on the above-referenced class-wide conduct; and
- (D) common fund recovery of class action attorney fees and costs upon a class-wide punitive damages award[.]<sup>10</sup>

Allstate generally contests the appropriateness of the certified class remedies as applied to both the class and Allstate, and further asserts various violations of both its, and the class members', right to due process.

¶64 As we explain below, we affirm the Court's certification of a Rule 23(b)(2) class asserting the above class declaratory ("(A)") and injunctive ("(B)") relief, but we reverse the certification of a potential class-wide punitive damages award ("(C)"). We accordingly remand with direction to determine the availability of the above declaratory and injunctive relief in a class trial. Further, instead of considering class-wide punitive damages, the class trial will determine whether Allstate's implementation of the CCPR involved either actual fraud or actual malice

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<sup>10</sup> Allstate does not challenge the certification of common fund attorney fees on appeal.

pursuant to § 27-1-221, MCA. See § 33-18-242(4), MCA; *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 91, 345 Mont. 12, 192 P.3d 186. Thus, the class trial will initially determine if the CCPR violates the UPTA according to the certified declaratory relief. If so, the Court will issue a mandatory injunction requiring Allstate to give all class members notice of the right to re-open and re-adjust their individual claims. Last, the class trial will determine if Allstate engaged in actual fraud or actual malice in implementing the CCPR. If so, the trier of fact in the later individual cases may determine the amount of individual punitive damages to be awarded if individual actual damages are also established. We will discuss the certified class remedies in turn.

**A. The Declaratory and Injunctive Relief**  
**i. Class Cohesiveness**

¶65 Allstate first argues that a Rule 23(b)(2) class is inappropriate because the class lacks cohesiveness. This is essentially a restatement of Allstate's arguments against commonality and typicality. However, because a Rule 23(b)(2) class action is considered "mandatory," see *Wal-Mart*, 131 S. Ct. at 2558,<sup>11</sup> a class that lacks homogeneity could unjustly bind absent class members to a negative decision. See *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998). Because the relief sought must be able to affect the entire class at once, we will examine the cohesiveness of the class in the context of a mandatory Rule 23(b)(2) class.

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<sup>11</sup> Rule 23(b)(2) classes are considered "mandatory" because the rule does not provide an opportunity for class members to opt out and does not require a district court to afford them notice. *Wal-Mart*, 131 S. Ct. at 2558.

¶66 Allstate claims the proposed class is inappropriate as a Rule 23(b)(2) class because it “would necessarily include many individuals who suffered no injury and thus could have no UTPA claim . . . .” Allstate claims both that these dissimilar class members would be unjustly bound by the action and that the lack of homogeneity would involve the adjudication of significant individual issues. However, these arguments are premised on a misunderstanding of the nature of Jacobsen’s asserted class claims and are precluded by the scope of the class trial on remand. The individual context of any one settlement is not relevant to the adjudication of the certified declaratory and injunctive relief and our reformation of the punitive damages portion of the certified relief removes the consideration of individual circumstances in the class trial. Thus, Allstate’s claim that not all class members have suffered actual harm or an unfair adjustment misses the point. The certified class claims on remand are not intended to resolve individual cases of unfair settlement or payment. Instead, they are aimed at adjudicating the initial legality of the CCPR as applied to the class. The later individual trials would allow Allstate to present evidence that individual class members suffered no injury. But, the initial legality of the CCPR would not need to be re-litigated in each subsequent individual trial. *See DL*, 2013 U.S. App. at 22; *McReynolds*, 672 F.3d at 491; *Mejdrech*, 319 F.3d at 911.

¶67 As the District Court noted, our decision in *Ferguson* supports certifying Jacobsen’s requested declaratory and injunctive relief as part of a Rule 23(b)(2) class. There, as part of a Rule 23(b)(2) class, the plaintiff sought a declaration that the insurer, Safeco, had breached its adjustment duties through a “programmatic assertion of subrogation without first



investigating and determining whether insureds had received their ‘made-whole’ rights.” *Ferguson*, ¶ 33. Facing a similar claim that the requested declaratory relief would require the adjudication of individual “made-whole” entitlements, we determined that the plaintiff’s claim did not raise issues with Safeco’s application of the “made-whole” rule to any one insured. *Ferguson*, ¶¶ 34, 39. Instead, we concluded that the plaintiff’s claim contested “the procedures of a program of subrogation which systematically deprives all class members of any consideration of their ‘made-whole’ rights.” *Ferguson*, ¶ 34. Thus, like Jacobsen, the plaintiff in *Ferguson* sought a declaration requiring Safeco to follow a statutory duty prior to any consideration of the actual harm the violation of this standard caused to any individual class member. These “class claims do not seek a determination of entitlements for each class member and the payment of damages; rather [both] class claims seek a declaratory ruling that will be enforced to compel [the insurer] to follow the legal standard . . . .” *Ferguson*, ¶ 34; *see also Diaz*, ¶ 47.

¶68 Here, as in *Ferguson*, the plaintiff seeks “an order compelling [the insurer] to properly perform its statutory adjustment duties.” *Ferguson*, ¶ 36. Because Jacobsen presents a common question alleging a common injury, an answer will determine whether the CCPR will be “enjoined or declared unlawful only as to all of the class members or as to none of them.” *See Wal-Mart*, 131 S. Ct. at 2557. The potential later individualized determinations of underpayment are not necessary to answer Jacobsen’s class claims and do not render the class overbroad.

## **ii. Class Injunctive and Declaratory Relief is “Final”**

¶69 Allstate contends that Rule 23(b)(2) requires “final” relief, and contends the certified relief is not final because “it only serves as a basis to present damage claims later.” Allstate largely cites federal precedent as support for this proposition. However, we have never construed M. R. Civ. P. 23(b)(2)’s use of “final” to impose a substantive obligation on plaintiffs, and it is not clear that Allstate’s citations to authority recommend that we do so. *See Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006) (“Subsection (b)(2) was not intended to ‘extend to cases in which the appropriate final relief relates exclusively or predominantly to monetary damages.’”). Moreover, Allstate’s preferred citations are distinguishable from the present case. *See Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883 (7th Cir. 2011) (contesting the failure to implement a uniform program); *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012) (finding proof of an illegal policy was “entirely absent here.”). We have not recognized a substantive “finality” requirement in Rule 23(b)(2) and we address Allstate’s complaints concerning monetary relief below.

## **iii. Injunctive and Declaratory Relief is not Amorphous**

¶70 As noted, Jacobsen seeks declaratory relief declaring the application of the CCPR to the class to be a violation of the UTPA and a mandatory injunction requiring Allstate to re-open and re-adjust claims. Allstate complains that this relief “is so amorphous and vague that it cannot support class certification,” citing *Shook v. Bd. of County Comm’rs*, 543 F.3d 597, 605 (10th Cir. 2008) and *Kartman*.

¶71 Allstate specifically argues that the requested declaratory relief would provide an inappropriately abstract or advisory opinion that failed to provide further direction on the process to be used if claims are to be re-adjusted. However, our rule against issuing advisory opinions is based in the concept of justiciability. *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶¶ 8-9, 355 Mont. 142, 226 P.3d 567. The various doctrines of justiciability seek to ensure that courts provide specific relief in concrete, actual controversies instead of opinions advising what the law or rule *would be* based upon a hypothetical set of facts or abstract proposition. *Plan Helena, Inc.*, ¶ 9. This prohibition does not mean that the Court's potential determination that the CCPR violates the law also needs to be accompanied by a judicial proposal for a legal claims adjusting program. Our statutory requirement that an order granting an injunction be specific in its terms, § 27-19-105(2), MCA, does not require this level of specificity either. *See Guthrie v. Hardy*, 2001 MT 122, ¶¶ 61-62, 305 Mont. 367, 28 P.3d 467 (faulting an injunction which failed to indicate which named party carried the obligation of maintaining a road). Insurance adjusting is squarely within Allstate's area of expertise, not the judicial branch's, and where we have previously faulted injunctions for a lack of specificity, we have not required the level of detail Allstate now requests.

¶72 Allstate's citations to authority do not support enlisting the judiciary to draft claims adjusting policies either. For example, in *Shook*, plaintiffs sought to certify a class containing all present and future mentally ill inmates in a Colorado jail. *Shook*, 543 F.3d at 600. The plaintiffs sought a Rule 23(b)(2) class with declaratory and injunctive relief

addressing jail conditions. However, the plaintiffs suffered from a wide variety of mental illnesses and were subjected to a correspondingly wide range of treatments by the jail staff. *Shook*, 543 F.3d at 601. The plaintiffs sought a broad injunction “establishing standards across a wide range of areas affecting mentally ill inmates,” touching upon staffing, training, inmate housing, safety, psychiatric care, and the proper use of force. *Shook*, 543 F.3d at 602. The district court denied Rule 23(b)(2) certification because plaintiffs could not show that the defendants acted on grounds generally applicable to the whole class and because the variety within the class precluded class-wide injunctive relief. *Shook*, 543 F.3d at 603. The Court of Appeals affirmed the decision, noting that “the relief plaintiffs seek would require the district court to craft an injunction that distinguishes—based on individual characteristics and circumstances—*between* how prison officials may treat class members[.]” *Shook*, 543 F.3d at 605 (emphasis in original). Moreover, an injunction that took the opposite tack and merely required “adequate” services would fail to describe just what, in light of the variety of the inmates’ needs, must be done. *Shook*, 543 F.3d at 606. *Shook* therefore does not stand for the proposition that Rule 23(b)(2) requires a certain specificity of injunctive relief, but for the general recognition that Rule 23(b)(2) classes must be sufficiently cohesive so that the injunctive relief applies to the class as a whole.

¶73 In *Kartman*, plaintiffs brought a class claim alleging, in part, that State Farm’s failure to use a uniform, objective criteria while assessing their hail-damaged roofs amounted to breach of contract, bad faith, and unjust enrichment. *Kartman*, 634 F.3d at 887. As relief, plaintiffs requested compensatory and

punitive damages and an injunction requiring State Farm to reinspect all class members' roofs pursuant to a uniform and objective standard. The district court judge certified a Rule 23(b)(2) class to adjudicate the request for an injunction and to assess State Farm's liability. *Kartman*, 634 F.3d at 888. The appellate court reversed, finding that plaintiffs' only cognizable injury was for underpayment of their claims and that the requested injunctive relief was not the proper remedy. *Kartman*, 634 F.3d at 889-90. This finding was largely based on the court's conclusion that State Farm had no duty to use an objective, uniform standard to determine hail-damage. *Kartman*, 634 F.3d at 890. Thus, the plaintiffs' failing was that the court determined State Farm had *no* duty to use a particular method to evaluate hail-damage claims, let alone a duty to use the method the plaintiffs sought to impose with an injunction. *Kartman*, 634 F.3d at 890. This situation is distinct from the present case, where Jacobsen seeks a declaration that Allstate's CCPR violates the UTPA and an injunction requiring notice to the class of the right to reopen their claims. Jacobsen, unlike the plaintiffs in *Kartman*, is not contesting the lack of a program or seeking to outline the contours of a legal program to be imposed on Allstate.

¶74 Unlike *Shook* and *Kartman*, the certified class at issue has been subjected to a common practice and has allegedly suffered a common injury to statutorily conferred rights. This common contention, as discussed, is amenable to class-wide relief. This does not mean, however, that the court must go beyond an injunction addressing tortious conduct to affirmatively dictate proper adjusting practices. See *Rodriguez v. Countrywide Home Loans, Inc. (In re Rodriguez)*, 695 F.3d 360, 368-69 (5th Cir. 2012)

(holding that injunctions are problematic when they order a defendant to obey the law *and* do not indicate what law the defendant needs to obey).

**B. Punitive Damages in a Rule 23(b)(2) Claim**

¶75 The District Court certified the availability of class-wide punitive damages pursuant to § 27-1-220 and § 27-1-221(2), MCA. The District Court determined that monetary relief is available in a Rule 23(b)(2) class under *Wal-Mart* if it is incidental to the declaratory and injunctive relief, affords indivisible, non-individualized relief in a single stroke, and comports with due process by not prejudicing the rights of the class members and defendant to contest specific cases. The Court also noted that punitive damages are generally not available without a predicate award of compensatory damages, but reasoned that an award of punitive damages based on actual malice does not require an award of compensatory damages if the evidence shows that the predicate tort caused actual harm or damage. The Court then determined that Jacobsen’s claim was capable of showing that Allstate’s alleged zero-sum economic theory visited a form of indivisible, actual economic harm upon the entire class, which it reasoned “would constitute a sufficient predicate for a class-wide punitive damages award in this case.” The Court further concluded that a class-wide punitive damages award did not implicate the due process concerns addressed in *Wal-Mart* because it was not an individualized monetary remedy and did not litigate any claim-specific issues.

¶76 Allstate initially contests the basic appropriateness of monetary damages under Rule 23(b)(2), claiming that “one possible reading” of Rule 23(b)(2) is that it does not authorize certification of monetary

claims at all. The majority opinion in *Wal-Mart* did not go so far as to foreclose the availability of monetary relief in Rule 23(b)(2) classes, however, and it left open the possibility that incidental monetary claims could be certified under Rule 23(b)(2). *Wal-Mart*, 131 S. Ct. at 2557. However, we need not decide the matter in this case, because we reverse the District Court’s certification of a class-wide punitive damages award based on our concerns over the award’s potential effect on the due process rights of Allstate.

**i. The Class-Wide Punitive Damages and Due Process**

¶77 Allstate also claims that the District Court’s certification of class-wide punitive damages violates Allstate’s right to due process because Allstate would be precluded from raising case-specific defenses to an individual class member’s entitlement to punitive damages (e.g. that individual class member’s claims were handled appropriately or paid fairly). Conversely, Allstate argues that the potential class trial would “inappropriately devolve into a series of mini-trials “if the Court were to allow Allstate to present defenses to class member’s entitlement to punitive damages. Jacobsen counters that our decision in *Gonzales* established that punitive damages class claims can be maintained for systematic wrongdoing without individualized proof of harm. Jacobsen also asserts that Allstate’s proffered federal precedent does not apply in the class action context.

¶78 Given the nature of the requested relief as part of a Rule 23(b)(2) class, we agree that Allstate should be able to establish defenses to individual claims to ensure that punitive damages are not awarded to claimants that were not actually dam-

aged by the adjustment of their claims under the CCPR. *See Philip Morris USA v. Williams*, 549 U.S. 346, 353, 127 S. Ct. 1057 (2007) (“[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with ‘an opportunity to present every available defense.’”); *Seltzer v. Morton*, 2007 MT 62, ¶ 145, 336 Mont. 225, 154 P.3d 561. It is true that our *Gonzales* opinion considered the constitutionality of a class-wide punitive damages award. However, *Gonzales* did not consider a class-wide punitive damages award in the context of a Rule 23(b)(2) class and we did not consider the defendant’s right to present a defense to each class member’s entitlement to a punitive damages award. *Gonzales*, ¶ 15. *Gonzales* instead approved class-wide punitive damages in a combination Rule 23(b)(1) and (3) class suit where the district court certified a Rule 23(b)(3) compensatory damages class. *Gonzales*, ¶¶ 17-19. Thus, the *Gonzales* class members’ entitlement to compensatory damages would be established during the class trial and would support an award of punitive damages. Here, adjudicating the requested injunctive and declaratory relief would not involve a similar determination of compensatory damages. Potentially granting class-wide punitive damages *before* determining whether individual class members suffered actual damages, as Jacobsen suggests, raises serious concerns about fairness. *See Jacobsen I*, ¶ 67; *Stipe v. First Interstate Bank-Polson*, 2008 MT 239, ¶ 23, 344 Mont. 435, 188 P.3d 1063. “Due process requires that there be an opportunity to present every available defense.” *Lindsey v. Normet*, 405 U.S. 56, 66, 92 S. Ct. 862 (1972). Permitting a class-wide recovery of punitive damages before sending notice to the class and determining the extent of the class members’ actual



harm would allow the punitive award to be potentially based on non-injured parties. Allstate should be allowed to contest class members' entitlement to punitive damages. *Philip Morris USA*, 549 U.S. at 353-54. We accordingly conclude that the District Court abused its discretion by certifying the requested class-wide punitive monetary relief.

**ii. The Second Certified Class Claim**

¶79 Again, our conclusion that the Court abused its discretion by certifying a class-wide punitive damages award requires us to revise the second certified class claim. Our reformation of the second claim is discussed in paragraph 47, *supra*.

¶80 3. *Whether the District Court erred by holding that the Montana Rules of Evidence do not apply to class action proceedings?*

¶81 Last, Allstate entered several objections before the District Court concerning the Court's consideration of what Allstate argued was inadmissible evidence during the certification proceedings. In a footnote, the Court determined that the evidence Jacobsen presented in the Rule 23 certification proceedings did not need to be "in a trial-admissible form," and denied Allstate's objections to "the ultimate trial-admissible evidentiary sufficiency of Plaintiff's preliminary Rule 23 factual showings in this case."

¶82 On appeal, Allstate maintains that the District Court erroneously based its class certification order on evidence that "was clearly inadmissible under the Rules of Evidence." Allstate argues this allegedly inadmissible evidence included opinions and statements in an expert report, an article written by the Consumer Federation of America, an affidavit by one of Jacobsen's attorneys, a power point presenta-

tion referred to as the “Liddy slides,” an incentive compensation plan, and affidavits and testimony from a New Mexico case that considered the CCPR. Jacobsen counters that his case “was grounded on dozens of McKinsey documents” that Allstate produced on remand and that all other evidence was properly considered. However, because the Court did not make a ruling on the admissibility of *any* of the evidence in question, the specific admissibility of a particular piece of evidence is not presented to this Court on appeal. Rather, we must consider the Court’s contention that evidence need not be in a “trial admissible form” for the purposes of class certification proceedings.

¶83 Allstate specifically contends that the District Court’s determination that “a rigorous Rule 23 analysis” does not necessarily require a preliminary factual showing in “a trial-admissible form” was error in light of our decision in *Mattson II* and the Montana Rules of Evidence. In *Mattson II*, the District Court refrained from engaging in an analysis of the merits of the plaintiffs’ claims and stated it was required to take the plaintiffs’ allegations in support of the class action as true. *Mattson II*, ¶ 61. The District Court thereafter certified the class. On appeal, the defendant argued that the court erred in its Rule 23 analysis by taking the plaintiffs’ allegations as true and asserted that the court should have made its determination “based upon the evidence.” *Mattson II*, ¶ 62. We held that the court erred by determining it must take the plaintiffs’ allegations as true and noted a district court “certainly may look past the pleadings” when determining if Rule 23’s requirements have been met. *Mattson II*, ¶ 65. Quoting the Supreme Court’s decision in *Falcon*, we held “sometimes it may be necessary for the court to

probe behind the pleadings before coming to rest on the certification question” to determine actual conformance with Rule 23(a). *Mattson II*, ¶ 65 (quoting *Falcon*, 457 U.S. at 160, 102 S. Ct. at 2372). Therefore, while this “probe behind the pleadings” may necessitate allowing discovery and hearing evidence, *Mattson II* also determined “there is no absolute requirement that a hearing be held” if “the paper record before the court” is adequate. *Mattson II*, ¶ 66. The applicability of the Montana Rules of Evidence was not addressed by this Court and was not a basis of our decision. Thus, despite Allstate’s argument to the contrary, *Mattson II* does not stand for the proposition that courts *must* apply the Rules of Evidence in Rule 23 proceedings.

¶84 Allstate also argues that the Montana Rules of Evidence require their application to Rule 23 proceedings. In support, Allstate cites M. R. Evid. 101(a) and 104(a). Rule 101(a) states that “[t]hese rules govern all proceedings in all courts in the state of Montana with the exceptions stated in this rule.” Rule 101(c) lists the situations in which the rules do not apply, including preliminary questions of fact, grand juries, miscellaneous proceedings like those for extradition or the issuance of warrants for arrest, “summary” proceedings, and other miscellaneous proceedings like *ex parte* matters. Allstate contends that because the exceptions listed under Rule 101(c) do not include class certification proceedings, the rules must apply. Rule 104 governs “[p]reliminary questions of admissibility” and Rule 104(a) specifically covers “[q]uestions of admissibility generally.” While Rule 104(a) notes further situations where the rules of evidence do not apply, it is not relevant to this case.

¶85 In response, Jacobsen cites federal authority stating that courts in Rule 23 proceedings “may consider evidence that may not be admissible at trial.” *Alonzo v. Maximus, Inc.*, 275 F.R.D. 513, 519 (C.D. Cal. 2011); see also *Fisher v. Ciba Specialty Chemicals Corp*, 238 F.R.D. 273, 279 n. 7 (S.D. Ala. 2006) (“The Federal Rules of Evidence are not stringently applied at the class certification stage because of the preliminary nature of such proceedings.”). Indeed, federal courts do not generally require the application of the rules of evidence in class certification proceedings. See *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 603 n. 22 (9th Cir. 2010) (“We are not convinced by the dissent’s argument that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial.”) (reversed on other grounds by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (2011)); *Ellis v. Costco Wholesale Corp*, 240 F.R.D. 627, 635 (N.D. Cal. 2007) (“At this early stage, robust gatekeeping of expert evidence is not required; rather, the court should ask only if expert evidence is ‘useful in evaluating whether class certification requirements have been met.’”); *Kelly v. Montgomery Lynch & Assocs.*, 2007 U.S. Dist. LEXIS 93656, 3-4 (N.D. Ohio 2007) (“The Court declines to grant the Plaintiff’s motion to strike, however, because the Federal Rules of Evidence do not strictly apply in evaluating a Rule 23 motion for class certification.”); *Bell v. Addus Healthcare, Inc.*, 2007 U.S. Dist. LEXIS 78950, 5-6 (W.D. Wash. 2007) (Thus, “Fed. R. Civ. Pro. 23 does not require admissible evidence in support of a motion for class certification and the Court will not create that standard.”).

¶86 Importantly, the federal cases that hold that the Federal Rules of Evidence do not necessarily ap-

ply to class certification proceedings do not base their decisions on an application of F. R. Evid. 1101, which, like M. R. Evid. 101(c), enumerates the exceptions to the general applicability of the rules of evidence.<sup>12</sup> Instead, these federal courts based their conclusions on the requirements of the identical F. R. Civ. P. 23, and, as noted, we consider such federal precedent to be instructive. Specifically, these courts have determined that Rule 23 does not require specific proceedings or trial admissible evidence because of the preliminary nature of class certification and trial courts' broad discretion in certification decisions. *See e.g., Rhodes v. E.I. Dupont De Nemours & Co.*, 2008 U.S. Dist. LEXIS 46159, 37 (S.D. W. Va. 2008) (Rule 23 “does not specifically provide for, require, or prohibit specific proceedings,” including those that apply the Federal Rules of Evidence). Indeed, “class certification is not a dispositive motion [like Fed. R. Civ. P. 56] that requires [a] Plaintiff to submit admissible evidence” in support of their arguments for certification, and federal courts have been reluctant to create that requirement. *Bell*, 2007 U.S. Dist. at 5-6.

¶87 Because of the preliminary, discretionary nature of class certification questions, every federal cir-

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<sup>12</sup> Like Montana Rule 101, Federal Rule 1101 specifically enumerates the situations in which the evidentiary rules do not apply. These situations are: preliminary questions of fact regarding admissibility under Rule 104(a), grand-jury proceedings, and miscellaneous proceedings like extradition or rendition, issuing a warrant or summons, sentencing, granting or revoking probation, or bail. Thus, just like the Montana Rules, the Federal Rules neither address their applicability in class certification proceedings nor except the proceedings from their application.

cuit but the Seventh<sup>13</sup> has declined to require that a district court must conclusively decide what evidence may be ultimately admissible at trial during the class certification stage. *See Cox v. Zurn Pex, Inc.*, 644 F.3d 604, 611 (8th Cir. 2011). “A court’s rulings on class certification issues may evolve” through the course of discovery. *Cox*, 644 F. 3d at 613. The “inherently tentative” nature of these decisions may make final evidentiary decisions unnecessary or inappropriate. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11, 98 S. Ct. 2454 (1978).

¶88 Importantly, the *Wal-Mart* decision did not dispose of the federal courts’ varying application of the Federal Rules of Evidence to class certification proceedings. The *Wal-Mart* Court considered the plaintiffs’ production of the testimony of Dr. William Bielby, a sociological expert, as the only proffered evidence of Wal-Mart’s alleged “general policy of [gender] discrimination.” *Wal-Mart*, 131 S. Ct. at 2553-54. The expert testified that Wal-Mart’s corporate culture was “vulnerable” to gender bias, but he could not specifically determine how regularly gender stereotypes played a meaningful role in employment decisions. *Wal-Mart*, 131 S. Ct. at 2553. The parties disputed whether this testimony met the standards for the admission of expert testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), and the District Court concluded *Daubert* didn’t apply to class certification proceedings. The

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<sup>13</sup> The Seventh Circuit only requires a conclusive ruling on any challenge to an expert’s qualifications or submissions when the expert’s report or testimony is “critical to class certification.” *See e.g., Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812 (7th Cir. 2012).

Supreme Court's opinion did not squarely address this contention, merely offering "We doubt" that "*Daubert* did not apply to expert testimony at the certification stage" in dicta while concluding "even if properly considered, Bielby's testimony does nothing to advance respondent's case." *Wal-Mart*, 131 S. Ct. at 2554. Thus, the *Wal-Mart* majority failed to address the application of the Rules of Evidence to class action certification proceedings and the Court's doubt was aimed only at the application of *Daubert*, a question not presented here.

¶89 Because the District Court's inquiry into a motion for class certification is tentative, preliminary, and limited to a determination of only whether the litigation may be conducted on a class basis, "the court's analysis is necessarily prospective and subject to change . . . and there is bound to be some evidentiary uncertainty." *Cox*, 644 F.3d at 613. A decision on a motion to certify a class is not a conclusive judgment on the merits of the case, and is "not accompanied by the traditional rules and procedure applicable to civil trials." *Eisen*, 417 U.S. at 178, 94 S. Ct. at 2153. We therefore conclude that the District Court did not err by determining that evidence considered for the purposes of class certification need not be in trial admissible form.

### **CONCLUSION**

¶90 We accordingly conclude that the District Court did not abuse its discretion by certifying a Rule 23(b)(2) class action. We do, however, conclude that the certification of class-wide punitive damages was inappropriate in the context of a Rule 23(b)(2) class. According to our reformation of the requested relief, we remand for a class trial to determine whether the application of the CCPR to the class vio-

lated the UTPA, and, if so, to determine whether the District Court should enter an order requiring Allstate to provide notice to the class members of their right to re-open and re-adjust their claims. The trier of fact in the class trial will also make a determination as to whether Allstate's implementation of the CCPR program involved actual fraud or actual malice, such as could justify the entry of punitive damages following a finding of actual damages in the ensuing individual cases. If the trier of fact determines that Allstate did not engage in either actual fraud or actual malice, the class members would be entitled to only the compensatory damages they can prove in the individual cases. Following the class trial, the Court shall determine whether there should be a common fund recovery of class-action attorney fees and costs.

¶91 We also conclude that the District Court did not err in its determination that class certification proceedings do not require evidence to be in "trial admissible" form.

¶92 We affirm the class certification, but modify the class claim and the certified class relief as herein set forth.

S/ MICHAEL E WHEAT

We concur:

S/ MIKE McGRATH  
S/ PATRICIA COTTER  
S/ BRIAN MORRIS



Justice Beth Baker, dissenting.

¶93 I agree that the District Court erred in certifying class-wide punitive damages relief under M. R. Civ. P. 23(b)(2). The Court’s attempt to preserve the class certification order is flawed, however, because it still leaves in place a class claim that cannot meet the requirements of Rule 23(b)(2).

¶94 As a preliminary matter, regarding Rule 23(a), I disagree with the Court’s statement that *Wal-Mart* has raised “dual questions” that require some future case for our clarification. Opinion, ¶¶ 32-33. First, no party in this case has disputed that *Wal-Mart*’s analysis of the commonality element of Rule 23(a)(2) imposed a heightened threshold for class certification. Second, counsel for both parties agreed during oral argument that *Wal-Mart*’s commonality analysis established a different standard from that used in our prior cases. We already have recognized explicitly these points. *Chipman*, ¶ 47. Further, we did not state in *Chipman*, as the Court implies (Opinion, ¶ 28 (citing *Chipman*, ¶ 43)), that Montana courts “are not required to march lockstep with federal interpretations of Fed. R. Civ. P. 23.” While that statement in the Court’s Opinion today is not untrue, we invoked in *Chipman* “this Court’s long history of relying on federal jurisprudence when interpreting the class certification requirements” and did not consider the standards we had applied “prior to *Wal-Mart*.” *Mattson III*, ¶ 53 (Baker, J., dissenting) (quoting *Chipman*, ¶¶ 47, 52). By perpetuating confusion over whether *Wal-Mart* changed the law—a point I do not believe is reasonably open to dispute—the Court disserves prospective class plaintiffs and defendants, as well as the district courts that

seem to be called upon with increasing frequency to decide class certification issues.

¶95 Our October 2011 adoption of comprehensive amendments to the Rules of Civil Procedure, in fact, came in response to the recommendation of the Court's Advisory Commission on the Rules of Civil and Appellate Procedure to bring more uniformity between the Montana and Federal Rules of Civil Procedure. Rule 23 of the Montana Rules is now identical in all substantive respects with Rule 23 of the Federal Rules, with two exceptions not applicable here.<sup>1</sup> No party has argued that there is a legitimate basis in this case for this Court to part company with its federal counterparts on the standard for commonality. The Court should refrain from interjecting speculation that it may someday choose to do so if the right case comes along. Since the Court in any event applies the *Wal-Mart* commonality standard (Opinion, ¶ 50), its discussion on this point is not necessary.

¶96 Even assuming that all four factors of Rule 23(a) are met in this case, there is nonetheless a serious flaw in the Court's analysis of Rule 23(b)(2).<sup>2</sup>

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<sup>1</sup> Montana's Rule 23, unlike its federal counterpart, allows appeal of right from an order granting or denying class action certification or an order finally and definitively rejecting a proposed class settlement. Compare M. R. Civ. P. 23(f) and Fed. R. Civ. P. 23(f). The federal rule also contains a provision specific to referral of certain matters to a United States Magistrate Judge. Fed. R. Civ. P. 23(h)(4).

<sup>2</sup> I harbor reservations about whether Jacobsen meets the requirements of Rule 23(a)(3) and (a)(4), since he already has obtained the relief he seeks for the class—reopening and readjustment of an unrepresented claim. See *Gary Plastic Packaging Corp. v. Merrill Lynch*, 903 F.2d 176, 180 (2d Cir. 1990)

“Failure to establish each requisite element of Rule 23 is fatal to class certification.” *Chipman*, ¶ 43. The Court’s dismissal of Rule 23(b)(2)’s “finality” requirement not only departs from our consistent reliance on federal authorities regarding class certification, but fails to apply the language of our own rule. M. R. Civ. P. 23(b)(2), identical to its federal counterpart, provides that if Rule 23(a) is satisfied, a class action may be maintained if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, ***so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole*** [.]” (Emphasis added.) The Court summarily rejects Allstate’s arguments about the “final injunctive relief” language by declaring that we “have not recognized a substantive ‘finality’ requirement in Rule 23(b)(2)” and suggesting that the federal cases on which Allstate relies are “not clear” that we should do so. Opinion, ¶ 69.

¶97 While this Court has not had occasion to consider the question, the history of the rule and the federal cases interpreting it leave little room for doubt as to the meaning of the “finality” requirement

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(unique defenses may preclude both 23(a)(3) typicality and 23(a)(4) adequacy of representation) (citing 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1764 at 259-60 (2d ed. 1986) and 3B J. Moore & J. Kennedy, *Moore’s Federal Practice* para. 23.07[1] at 23-192 (2d ed. 1987)). My concern is heightened by the Court’s determination that Jacobsen’s claims satisfy typicality because “the specifics of [his] injuries [will] be aired in a later, individual suit for damages if the court awards the requested class injunctive and declaratory relief.” Opinion, ¶ 57. Since that concern relates primarily to the requirements of Rule 23(b)(2), I do not further discuss typicality here.

in Rule 23(b)(2). The Advisory Committee notes to subsection (b)(2) state that it was intended to reach situations where “final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate.” This subsection of the rule does not, however, “extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.” Fed. R. Civ. P. 23 Advisory Committee Notes to 1966 Amendment.<sup>3</sup> The “corresponding declaratory relief,” likewise,

should be equivalent to an injunction. . . . A request for a declaration that a . . . statute is unconstitutional[, for example,] would qualify as “corresponding declaratory relief” because the resulting judicial directive would have the effect of “enjoining” the enforcement of the . . . statute. . . . On the other hand, an action seeking a declaration concerning defendant’s conduct that ***appears designed simply to lay the basis for a damage award rather than injunctive relief would not qualify under Rule 23(b)(2)***. . . . Monetary relief that may be deemed equitable in nature or ancillary to the declaratory relief may be allowed, however.

7AA C. Wright, A. Miller, M. Kane, *Federal Practice and Procedure*, § 1775 at 58-60 (3d ed. 2005) (empha-

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<sup>3</sup> The *Wal-Mart* Court questioned whether “even a ‘predominating request’” for injunctive relief would support Rule 23(b)(2) certification if accompanied by a claim for damages, but left open the possibility that some incidental monetary relief might still be allowed in such an action. 131 S. Ct. at 2559-60.

sis added; footnotes and citations omitted); *see also* Rubenstein, *Newberg on Class Actions* § 4:31, 112-13 (“In short, declaratory relief under (b)(2) cannot simply turn a (b)(3) damages action into an action under (b)(2).”).

¶98 Actions for money damages are the province of Rule 23(b)(3), which imposes additional requirements for notice and opt-out rights for the class members and requires findings that a class action would be superior to individual litigation and that common questions predominate over individual ones. *See Mattson III*, ¶ 19. “If recovery of damages is at the heart of the complaint, individual class members must have a chance to opt out of the class and go it alone – or not at all – without being bound by the class judgment.” *Richards*, 453 F.3d at 530. “Thus, when the relief sought would simply serve as a foundation for a damages award, . . . or when the requested injunctive or declaratory relief merely attempts to reframe a damages claim, . . . the class may not be certified pursuant to Rule 23(b)(2).” *Richards*, 453 F.3d at 530 (citations omitted); *see also Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 499 (7th Cir. 2012) (Rule 23(b)(2) certification improper when remedial order merely establishes a system for eventually providing individualized relief); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 979 (5th Cir. 2000) (declaratory relief must, as a practical matter, serve to afford injunctive relief or serve as a basis for later injunctive relief; certification under Rule 23(b)(2) improper where, “for most of the class, damages will be the only meaningful relief obtained”); *DWFII Corp. v. St. Farm Mut. Auto. Ins. Co.*, 271 F.R.D. 676, 685 (S.D. Fla. 2010) (declining to certify Rule 23(b)(2) class where alleged damages for State Farm’s underpayment or nonpayment of reim-

bursments for health care services of its insureds based on State Farm’s application of the Centers for Medicare and Medicaid Services’ National Correct Coding Initiative was “not a group injury requiring a group remedy” but “would require individual resolution of [factual] questions relevant to each claim for reimbursement”); *Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534, 561 (C.D. Cal. 2012) (denying Rule 23(b)(2) class certification where injunctive relief to create a reimbursement program “would merely ‘initiate a process’ through which individual class members could receive a monetary award” rather than grant classwide relief in the form of an injunction); *Mogel v. UNUM Life Ins. Co. of Am.*, 646 F. Supp. 2d 177, 184 (D. Mass. 2009) (despite satisfying all requirements of Rule 23(a), class certification denied under Rule 23(b) because “[a]ny harm suffered as a result” of insurer’s alleged ERISA violations “has already occurred” and class members’ primary objective was to obtain monetary relief).

¶99 The Court’s brief attempt to distinguish this authority (Opinion, ¶ 69) falls short. The first certified class claim requires the District Court to declare whether the CCPR violates Montana’s unfair claims settlement practices laws. Opinion, ¶ 64. If the answer is “yes,” the District Court is to “issue a mandatory injunction requiring Allstate to give all class members notice of the right to re-open and re-adjust their individual claims.” Then, if the class trial determines that Allstate engaged in fraudulent or malicious conduct, “the trier of fact in the *later individual cases* may determine the amount of individual punitive damages to be awarded *if individual actual damages are also established.*” Opinion, ¶ 64 (emphases added). The Court expressly acknowledges, as a basis for its commonality holding, that “resolv-

ing whether the CCPR violates the UTPA would set the stage for later individual trials.” Opinion, ¶ 49. Thus, the decision today makes clear that the class trial is to occur for the purpose of establishing a foundation for individualized damage awards. Simply stated, this is not a Rule 23(b)(2) class.

¶100 The difficulty here is that the District Court already considered and denied, as part of a comprehensive, sixty-page order prior to Jacobsen’s first appeal, his motion to certify a class under M. R. Civ. P. 23(b)(3). Jacobsen did not appeal that ruling following its issuance in 2005 and would be barred from now challenging the District Court’s determination. *Bragg v. McLaughlin*, 1999 MT 320, ¶ 21, 297 Mont. 282, 993 P.2d 662 (overruled on other grounds, *Essex Ins. Co. v. Moose’s Saloon, Inc.*, 2007 MT 202, ¶ 16, 338 Mont. 423, 166 P.3d 451). Nor did Jacobsen cross-appeal the District Court’s refusal, in its January 30, 2012, class certification order, to address his “fall-back Rule 23(b)(3) theory” because of the “cursorry nature of Plaintiff’s briefing and logical inconsistency of this theory with his primary Rule 23(b)(2) theory.” He similarly fails on appeal to develop his arguments or to address the separate Rule 23(b)(3) requirements of predominance and superiority. ¶101 In conclusion, because Jacobsen cannot establish all of the requirements of the rule, I dissent from the Court’s decision to uphold Rule 23(b)(2) class certification.

S/ BETH BAKER

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

S/ JIM RICE

Justice Laurie McKinnon, dissenting.

¶102 I dissent from the Court's decision. As explained below, the case the Court decides today is not the case that was presented to us. This class action, as argued by Jacobsen and certified by the District Court, is one for declaratory relief under the Uniform Declaratory Judgments Act (Title 27, chapter 8, MCA). The class remedies are a declaratory judgment, an injunction, punitive damages, and attorney's fees. The injunction gives class members the option of returning to the position they were in when they initially filed their claims, i.e., before Allstate applied the CCPR to them. This is *not* a class action to determine liability for damages under the Unfair Trade Practices Act (UTPA; Title 33, chapter 18, MCA). Jacobsen did not frame the class claim pursuant to Rule 23(b)(2) as one that would lead to compensatory damages; to the contrary, he conceded from the outset that some of the putative class members may have suffered no individual harm from Allstate's use of the CCPR. All he requested was an injunction "to prohibit Allstate from using its CCPR program, to re-open improperly settled claims, and for disgorgement of illicit profits from the unlawful program." The District Court, correspondingly, did not certify any claims or remedies under the UTPA.

¶103 This Court, however, proceeds to repackage this case as a UTPA action. One facet of Allstate's liability is to be decided in a class trial, after which further liability determinations and assessments of damages are to be made in ensuing individual trials. I disagree with this *sua sponte* reworking of the case. Aside from being improper appellate practice, the scheme the Court has devised here distorts the rules



for certifying a class under Rule 23(b)(2) and infringes class members' due process rights.

¶104 The ensuing discussion relates primarily to my disagreement with the Court's remaking of the case and the Court's approach to Rule 23(b)(2) certification. However, like Justice Baker, I also harbor reservations about whether the threshold requirements of Rule 23(a) have been met. I address those concerns at the end of this Dissent.

### **I. The District Court's Construction of the Class Claim and Remedies**

¶105 Jacobsen's Fourth Amended Complaint is far from a model of clarity. In fact, the District Court noted in its class-certification Order that there is "considerable pleading imprecision on [the] face" of the complaint. This Court, likewise, acknowledges that "Jacobsen's requested relief and alleged bases for damages are not entirely clear." Opinion, ¶ 40.

¶106 Faced with this pleading imprecision, the District Court liberally "construed" Jacobsen's Fourth Amended Complaint and his arguments supporting class certification so as to arrive at class claims and remedies that could "minimally" satisfy the criteria of Rule 23. Jacobsen certainly benefitted from the District Court's efforts in this regard, and it must be noted that, just as he has not contested other aspects of the District Court's decision (*see e.g.* Opinion, ¶ 62, ¶ 63 n. 9), Jacobsen also has not cross-appealed from the District Court's ultimate determination of the class claim and the class remedies.

¶107 The District Court perceived both individual and class claims in the Fourth Amended Complaint.

In identifying the class claim, the District Court found as follows:

Separate and apart from the individual claims asserted in this case, the court construes the substantive essence of Plaintiff's asserted class claim to be that, irrespective of individual outcomes, the unrepresented segment adjustment practices specified in Allstate's *CCPR Implementation Manual (Tort States)* (hereinafter Casualty CCPR) constitute a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class as a whole, thereby resulting in indivisible harm to the class as a whole by operation of Allstate's own zero-sum economic theory and the resulting inversely proportional relationship between Allstate's profit increases and corresponding decreases in the total amount of compensation paid to the class of unrepresented claimants as a whole.

A critical term in this construction of the class claim is "indivisible harm to the class as a whole." This language is important because, as explained below, it reflects the limited claim and remedies that the District Court had in mind, and because this Court's revision of the District Court's language dramatically alters the nature of this case.

¶108 Jacobsen requested class certification pursuant to Rule 23(b)(2). "The key to the [Rule 23](b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Diaz v. Blue Cross & Blue Shield of*

*Mont.*, 2011 MT 322, ¶ 42, 363 Mont. 151, 267 P.3d 756 (brackets in original) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. \_\_\_, 131 S. Ct. 2541, 2557 (2011)). As the Supreme Court further explained:

In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

*Wal-Mart*, 131 S. Ct. at 2557 (emphasis in original).

¶109 The District Court construed Jacobsen’s substantive arguments mindful of these principles, correctly recognizing that Rule 23(b)(2) requires an indivisible remedy and does not permit class certification for purposes of individualized awards of monetary damages. The court construed Jacobsen’s requested class relief under Rule 23(b)(2) to consist of “a claim for class-wide declaratory, injunctive, and incidental monetary relief (equitable disgorgement and punitive damages).” The District Court declined to certify the equitable disgorgement remedy on the ground that it was cumulative to the injunctive relief, but the court otherwise certified the class relief Jacobsen sought. Specifically, the District Court certified the following claim and remedies:

(2) Class Action Claim. The certified class claim is that:

(A) the Casualty CCPR's unrepresented segment adjusting practices are a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class of unrepresented claimants as a whole;

(B) Allstate's common, systematic use of this pattern and practice in Montana caused indivisible harm to the class as a whole by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of unrepresented claimants as a whole; and

(C) Allstate acted with "actual malice," as defined by § 27-1-221(2), MCA, by intentionally, deliberately, and consciously creating and disregarding a high probability that the net effect of its Casualty CCPR's unrepresented segment practices would result in net settlement payouts to the class as a whole less than the net amount previously sufficient to fully and fair[ly] settle unrepresented claims under Montana law;

(3) Class Action Remedies. The certified class remedies available as a matter of law on proof of the certified class claim are:

(A) declaratory judgment adjudicating the constituent assertions of the certified class claim;

(B) mandatory injunction requiring Allstate to:

(1) give all class members court-approved notice of the right and opportunity to obtain re-opening and re-adjustment of their individual claims by timely returning a proof of claim form; and

(2) re-open and re-adjust each individual claim upon receipt of a timely filed proof of claim;

(C) class-wide punitive damages pursuant to §§ 27-1-220 and 27-1-221(2), MCA (actual malice), predicated on the above-referenced class-wide conduct; and

(D) common fund recovery of class action attorney fees and costs upon a class-wide punitive damages award[.]

¶110 With respect to establishing the “indivisible harm” asserted in the Class Action Claim, the District Court explained that

the occurrence and extent of the actual harm common to the class as a whole is ascertainable and at least generally measurable on an indivisible class-wide basis without consideration of individual outcomes by comparative analysis of relevant industry performance data and internal Allstate performance data.

Jacobsen’s theory is that if Allstate outperformed industry norms (in terms of profits and reduced pay-

outs) due to the CCPR, then the class members were indivisibly harmed.<sup>1</sup>

¶111 Accordingly, setting aside the punitive damages and the common fund recovery,<sup>2</sup> the District Court certified only two class remedies. The first remedy is a declaration that the CCPR constitutes a per se prohibited claim settlement practice under § 33-18-201(1) and (6), MCA.<sup>3</sup> The class trial must determine, therefore, that applying the CCPR was unlawful as to all class members or, conversely, to no class members. In a sense, this is analogous to deciding a facial challenge to a statute: to prevail on such a challenge, the plaintiff must show that “no set of circumstances exists under which the [statute] would be valid, *i.e.*, that the law is unconstitutional in all of its applications.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190 (2008) (internal quotation marks omitted); *see also Caldwell v. MACo Workers’ Comp. Trust*, 2011

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<sup>1</sup> Jacobsen proffered several studies of Allstate’s performance. One such study—a 2007 report from the Consumer Federation of America—asserts that Allstate has been able “to outperform the industry by 20 percent” due to the CCPR.

<sup>2</sup> I agree with the Court that the certification of classwide punitive damages was inappropriate. Not only would such an award implicate due process, Opinion, ¶¶ 77-78, but the District Court did not certify compensatory damages as a class remedy and, thus, there can be no award of classwide punitive damages, *see Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 67, 351 Mont. 464, 215 P.3d 649.

<sup>3</sup> “A person may not . . . (1) misrepresent pertinent facts or insurance policy provisions relating to coverages at issue; . . . [or] (6) neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear; . . .” Section 33-18-201, MCA.

MT 162, ¶ 69, 361 Mont. 140, 256 P.3d 923 (Baker & Rice, JJ., dissenting). That is, in essence, what the certified class claim asserts regarding the CCPR: that no set of circumstances exists under which the CCPR would be valid. The CCPR is unlawful in all of its applications—as the theory goes—because the “attorney economics script” misrepresents facts and because the “fast track” system and the “9-step process” are inherently incompatible with good-faith effectuation of fair and equitable settlements. If the class prevails on this claim, then the second remedy the District Court certified is an injunction requiring Allstate to allow each class member to return to square one, i.e., go back to the point when his or her claim was first filed, before Allstate applied the CCPR.

¶112 Importantly, the District Court did not certify any class claim or remedies under the UTPA itself. The UTPA recognizes “an independent cause of action [by an insured or a third-party claimant] against an insurer for actual damages caused by the insurer’s violation of subsection (1), (4), (5), (6), (9), or (13) of 33-18-201.” Section 33-18-242(1), MCA. In such action, “the court or jury may award such damages as were proximately caused by the violation of subsection (1), (4), (5), (6), (9), or (13) of 33-18-201,” as well as “[e]xemplary damages.” Section 33-18-242(4), MCA. That is not the nature of the class action certified by the District Court here. The parties’ arguments in the District Court, and the District Court’s ensuing analysis in its Order, confirm this conclusion. They also provide insight into the precise nature of the class claim, as follows.

¶113 First, in his briefs supporting class certification, Jacobsen asserted that this case is “squarely

governed” by *Ferguson v. Safeco Ins. Co. of Am.*, 2008 MT 109, 342 Mont. 380, 180 P.3d 1164. Of relevance, he quoted the following passage from that decision:

The challenge here is not to an error in Safeco’s application of the “made-whole” rule to any given insured. Rather, this case challenges the procedures of a program of subrogation which systematically deprives all class members of any consideration of their “made-whole” rights. Thus, as Ferguson points out in her brief on appeal, her class claims do not seek a determination of entitlements for each class member and the payment of damages; rather, her class claims seek a declaratory ruling that will be enforced to compel Safeco to follow the legal standard in its subrogation program.

*Ferguson*, ¶ 34. Jacobsen indicated that he was seeking the same sort of relief: a declaratory ruling that will be enforced to compel Allstate to stop using the CCPR. He further asserted that the “vehicle for class relief” under his Rule 23(b)(2) theory is an injunction requiring Allstate either to re-open and re-adjust the claims, or to disgorge the profits it made as a result of the CCPR. (As noted, the District Court chose the former.) Jacobsen did not assert any entitlement to compensatory damages for class members.

¶114 Second, in its brief seeking dismissal of the class claim, Allstate argued that Jacobsen had compromised the interests of class members by not seeking compensatory damages on their behalf. In response, Jacobsen argued that he was not required to assert claims for compensatory damages. He cited *Lebrilla v. Farmers Group, Inc.*, 16 Cal. Rptr. 3d 25 (Cal. App. 4th Dist. 2004), for the proposition that



there is no rule requiring a class representative to seek certification of all causes of action available to every member of the class. *See Lebrilla*, 16 Cal. Rptr. 3d at 40 (“Farmers is essentially asking us to hold a class cannot be certified anytime the class representative fails to seek certification of fewer than all causes of action. Of course there is currently no such rule.”).

¶115 Third, in its Order, the District Court recognized that there are “case-specific issues peculiar to individual claims” here. The court noted, for example, that whether liability for a given claim had become “reasonably clear,” *see* § 33-18-201(6), MCA, is “a highly individualized, case-specific criteri[on].”<sup>4</sup> The court noted the same thing with regard to “whether and to what extent individual class members ultimately received fair settlements.” The existence of such factual variations among claimants subjected to the CCPR would preclude classwide adjudication of Allstate’s liability for damages under § 33-18-242(1), MCA. But the District Court did not construe this case as such an action. The court instead construed Jacobsen’s class claim to be that Allstate’s use of the CCPR violated § 33-18-201(1) and (6), MCA, “irrespective of outcomes in individual cases.” The court observed that “the class-wide matter at issue is the indivisible net effect of the Casualty CCPR unrepresented segment practices on the class

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<sup>4</sup> Again, § 33-18-201(6), MCA, prohibits an insurer from “neglect[ing] to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become Again, § 33-18-201(6), MCA, prohibits an insurer from “neglect[ing] to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become “reasonably clear.”

as a whole, irrespective of individual outcomes.” Accordingly, setting aside the statute’s case-specific criteria, the District Court reasoned that “§§ 33-18-201(1) and (6), MCA, essentially require Allstate to promptly, accurately, truthfully, fairly, and in good faith adjust bodily injury and property damage claims.” The court construed the class claim to be that Allstate’s use of the CCPR violates these general principles of § 33-18-201(1) and (6), MCA.

¶116 Fourth, the District Court recognized that Rule 23(b)(2) does not authorize class certification when each class member would be entitled to an individualized award of monetary damages. The court thus framed “the dispositive Rule 23(b)(2) issues” as “(1) whether the asserted class claim seeks permissible forms of injunctive relief that will benefit the class as a whole and (2) whether as a matter of law the requested forms of monetary relief, however characterized, are permissible forms of Rule 23(b)(2) relief incidental to the predicate declaratory and injunctive relief from which they flow.” I discuss the meaning of “incidental” monetary relief below. *See* ¶ 134, *infra*. For present purposes, it suffices to note that it does not include individual claims for compensatory damages. The District Court expressly rejected Allstate’s contention that the class action here would “serve only to facilitate the award of damages.”

¶117 Finally, consistent with the foregoing points, the District Court cited Title 27, chapter 8, MCA (the Uniform Declaratory Judgments Act), as authority for the first certified class remedy and Title 27, chapter 19, MCA (authorizing injunctions), as authority for the second certified class remedy. The court did not rely on § 33-18-242, MCA, as authority for the

class claim or the class remedy. In fact, the District Court rejected the proposition that Jacobsen’s class action is one that seeks “damages” under the UTPA:

Here, as construed by the court, Plaintiff’s asserted UTPA-based class claim neither constitutes nor is tantamount to a claim for compensatory damages – it merely encompasses first and third-party . . . claims for declaratory relief and related equitable and punitive relief predicated on asserted class-wide violations of §§ 33-18-201(1) and (6), MCA.

Allstate had pointed out in its brief opposing class certification that § 33-18-242, MCA, specifically authorizes *damages*—compensatory and punitive—for an insurer’s violation of the UTPA, not the *equitable remedies* that Jacobsen sought. *See* § 33-18-242(4), MCA. Allstate argued, therefore, that injunctive relief was not available to remedy the asserted class-wide violations of § 33-18-201(1) and (6), MCA. The District Court, however, interpreted our decision in *Ferguson* as approving a class action “distinct from an independent UTPA claim for damages under §§ 33-18-242(1) and (3), MCA.” The court concluded that this case was such an action, i.e., “a UTPA-based Rule 23(b)(2) class action claim for declaratory and derivative non-compensatory injunctive relief.”

¶118 In sum, the District Court attempted to construe Jacobsen’s filings to assert a class claim and class remedies that “minimally” satisfy the criteria of Rule 23(b)(2). The court recognized that Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class, and that Rule 23(b)(2) does not authorize class certification when each class member would be entitled to an individualized award of monetary damag-

es. *Diaz*, ¶ 42; *Wal-Mart*, 131 S. Ct. at 2557. Construing Jacobsen’s filings, the District Court found that his “asserted UTPA-based class claim neither constitutes nor is tantamount to a claim for compensatory damages”; rather, what Jacobsen was asserting was “a UTPA-based Rule 23(b)(2) class action claim for declaratory and derivative non-compensatory injunctive relief.” The District Court observed that this claim is “distinct from an independent UTPA claim for damages under §§ 33-18-242(1) and (3), MCA.”

¶119 The class claim asserts what is in essence a facial challenge to the CCPR, alleging that the CCPR is per se unlawful as to all unrepresented claimants and that Allstate’s use of the CCPR caused “indivisible harm to the class as a whole” as shown “by comparative analysis of relevant industry performance data and internal Allstate performance data.” Jacobsen explained in the District Court that the claim “challenges Allstate’s systematic attempt to settle claims below fair value.” In his view, “Allstate systematically promoted bad-faith adjusting and sought to undervalue claims.” Whether class members’ claims were, in fact, undervalued or settled unfairly is not the issue; the challenge is to Allstate’s alleged “systematic attempt” to settle claims below fair value. As Jacobsen further explains this theory in his brief on appeal, Allstate used “settlement guidelines below the level needed to fairly compensate claimants” which caused class members “indivisible legal injury”; i.e., “[a]ll members suffered legal injury through the use of a dishonest system, whether or not the monetary value of each settlement ultimately was unfair.”

¶120 Jacobsen and the District Court employ § 33-18-201(1) and (6), MCA, as the legal standard for judging the CCPR's validity, but without consideration of the case-specific criteria contained in the statute (such as whether liability in a particular class member's claim was "reasonably clear"). Under this approach, the issues to be determined at the class trial are: whether the "attorney economics script" misrepresents facts; whether the "fast track" system and the "9-step process" are inherently incompatible with good-faith effectuation of prompt, fair, and equitable settlements; and whether use of these programs caused indivisible harm to the class as a whole. If using the CCPR enabled Allstate to outperform the industry, and if the CCPR is facially unlawful, then class members suffered an indivisible legal injury. The proper remedy for this injury, the District Court determined, is injunctive relief "restoring interested class members and Allstate to the pre-settlement status quo." This is the class action that the District Court certified and that Allstate appealed to this Court.

## **II. This Court's Remaking of the Class Claim and Remedies**

¶121 The Court, on its own initiative, fundamentally revises this framework. The Court begins with the erroneous premise that the District Court formulated the class claim using the "indivisible harm to the class as a whole" language "so as to justify the entry of a class-wide punitive damages award." Opinion, ¶ 47. That is simply incorrect. The District Court used this language because indivisibility is what is needed to certify a class under Rule 23(b)(2), *Diaz*, ¶ 42; *Wal-Mart*, 131 S. Ct. at 2557, and be-

cause that is what Jacobsen had asserted in his pleadings and arguments.

¶122 Nevertheless, based on its mistaken assumption about the District Court's intent, the Court proceeds to revise the class claim as follows (underlining added):

**As originally certified:** "(B) Allstate's common, systematic use of this pattern and practice in Montana caused indivisible harm to the class as a whole by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of unrepresented claimants as a whole."

**As revised by the Court:** "(B) Allstate's common, systematic use of this pattern and practice in Montana resulted in damages to the members of the class by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of unrepresented claimants as a whole." Opinion, ¶ 47.

The Court then, on its own initiative, augments the relief available to the class members. In addition to the declaratory and injunctive remedies certified by the District Court, the Court announces that the class trial will "set the stage" for "individual monetary relief" in "later individual trials." Opinion, ¶¶ 43, 46, 49, 90. The Court explains that the class trial will determine Allstate's liability for a UTPA

violation, and the later individual trials will determine class members' "compensatory damages." Opinion, ¶¶ 49, 57, 66, 90. The Court also announces that class members may seek relief for both "economic" and "emotional" injury, Opinion, ¶ 55—something that Jacobsen never asserted, and that the District Court never certified, in the Rule 23(b)(2) class claim and remedies.

¶123 This gratuitous reworking of the case is in direct contradiction to the District Court's certification of this case as a class action "distinct from an independent UTPA claim for damages under §§ 33-18-242(1) and (3), MCA." It also contradicts the District Court's statement that, "as construed by the court, Plaintiff's asserted UTPA-based class claim neither constitutes nor is tantamount to a claim for compensatory damages." In fact, the only monetary relief that Jacobsen discussed in his argument supporting class certification was "disgorgement of illicit profits from the unlawful [CCPR] program." Acknowledging the limitations of Rule 23(b)(2) certification, Jacobsen did not propose that the class action would result in monetary damages under § 33-18-242, MCA. His theory, rather, was unjust enrichment—that Allstate had unjustly enriched itself at the expense of class members by using patently unlawful claim settlement practices, as evidenced by Allstate's ability to outperform the industry. The District Court accepted this theory, but found that an injunction allowing class members to return to square one, rather than an injunction requiring Allstate to "disgorge illicit profits," would be the proper remedy. The Court thus errs in reframing Jacobsen's class claim as a springboard for future individual trials on damages. The class claim, as construed and certified by the District Court, does not deter-

mine whether Allstate is liable for actual damages under the UTPA. The District Court did not certify a class action under § 33-18-242, MCA; it certified a class action under Title 27, chapters 8 and 19, MCA.

¶124 “[A]ppellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.” *NASA v. Nelson*, 562 U.S. \_\_\_, 131 S. Ct. 746, 756 n. 10 (2011) (internal quotation marks omitted). The Court’s choice to remake this class action disregards this fundamental premise of our adversarial system. The Court’s citation to § 3-2-204(1), MCA—see Opinion, ¶ 47— is clearly misplaced. That provision simply grants this Court authority to “affirm, reverse, or modify any judgment or order appealed from.” Section 3-2-204(1), MCA. It does not give this Court authority to fundamentally remake the case to state claims and remedies that the appellee neither asserted in the district court nor raised in a cross-appeal before this Court. Ironically, the Court uses the arguments of the *appellant* (Allstate) opposing class certification as justification to revise the class claim and remedies in a way that exposes the appellant to significantly greater liability.

### **III. Flaws in the Court’s Remade Class Claim and Remedies**

¶125 Besides the questionable procedural aspect of the Court’s action, the remade class claim and class remedies are flawed for additional reasons.

¶126 First, as an initial matter, the Court’s Opinion is internally inconsistent. Pursuant to the District Court’s Order, the class is seeking a declaratory judgment as to three issues: (A) that the CCPR vio-



lates § 33-18-201(1) and (6), MCA, as applied to the class of unrepresented claimants as a whole; (B) that Allstate’s systematic use of the CCPR “caused indivisible harm to the class as a whole”; and (C) that Allstate acted with actual malice. *See* ¶ 109, *supra*. Now, under the Court’s rewording of issue (B), the class is seeking a declaratory judgment that Allstate’s systematic use of the CCPR “resulted in damages to the members of the class.” Opinion, ¶ 47. At the same time, however, the Court states repeatedly that whether class members suffered damages is to be determined in later individual trials. *See* Opinion, ¶ 46 (“Damages claims may be determined in later individual trials after [the] class trial . . . .”), ¶ 57 (the specifics of a class member’s injuries will “be aired in a later, individual suit for damages”), ¶ 66 (“The later individual trials would allow Allstate to present evidence that individual class members suffered no injury.”), ¶ 78 (“Here, adjudicating the requested injunctive and declaratory relief would not involve a . . . determination of compensatory damages.”), ¶ 90 (“the class members would be entitled to only the compensatory damages they can prove in the individual cases”). Our Opinion leaves the District Court and the parties guessing as to how the fact-finder in the class trial is to determine whether Allstate’s use of the CCPR “resulted in damages to the members of the class” when, under this Court’s decision, damages to the members of the class are to be determined in “later individual trials” at which Allstate may “present evidence that individual class members suffered no injury.” The Court offers no explanation for this incongruity—an incongruity that arose out of the Court’s decision to insert “damages” into the class claim.

¶127 Second, the question whether Allstate's use of the CCPR "resulted in damages to the members of the class" cannot be answered on a classwide basis in any event. A claimant is not damaged under § 33-18-201(6), MCA, unless the insurer's liability for the claim was "reasonably clear." A claimant is not damaged under § 33-18-201(1), MCA, unless the misrepresented facts were "pertinent" to coverages "at issue." A claimant is not entitled to damages under the UTPA unless the alleged damages were "proximately caused" by the UTPA violation. Section 33-18-242(4), MCA. A claimant is not entitled to damages under the UTPA "if the insurer had a reasonable basis in law or in fact for contesting the claim or the amount of the claim." Section 33-18-242(5), MCA. These are all highly individualized, case-specific criteria.

¶128 Third, under the legal authority discussed above and in Justice Baker's Dissent, class certification under Rule 23(b)(2) is improper where the requested injunctive or declaratory relief would simply serve as a basis for eventually providing monetary relief. Dissent, ¶¶ 97-99; *Wal-Mart*, 131 S. Ct. at 2557 ("[Rule 23(b)(2)] does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."). I agree with Justice Baker's analysis and conclusion that the Rule 23(b)(2) class trial which the Court conceives in today's Opinion is for the purpose of laying a foundation for individualized awards of monetary damages. Dissent, ¶ 99. This approach is whol-

ly inconsistent with Rule 23(b)(2)'s history and purpose.<sup>5</sup> As the Supreme Court explained:

Because Rule 23 “stems from equity practice” that predated its codification, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997), in determining its meaning we have previously looked to the historical models on which the Rule was based, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841-845 (1999).

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<sup>5</sup> Prior to 1962, a form of class action was permitted in Montana under § 93-2821, RCM (1947). This statute, originally enacted by the first territorial Legislature in 1864 as part of the Bannack Statutes, simply provided that “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.” In 1961, the Legislature repealed § 93-2821, RCM, and various other statutes and replaced them with the Montana Rules of Civil Procedure, which took effect on January 1, 1962. *See* Laws of Montana, 1961, ch. 13. Montana’s Rule 23 was identical in all material respects to then-existing Rule 23 of the Federal Rules of Civil Procedure. In 1966, several of the federal rules were amended, including Rule 23. *See* 39 F.R.D. 69, 94-98 (1966). Correspondingly, this Court issued an order in 1967 adopting amendments to the Montana Rules of Civil Procedure. *In re Montana Rules of Civil Procedure*, No. 10750-7 (Sep. 29, 1967, filed Oct. 10, 1967). As noted in our order, the amendments to the Montana Rules were “patterned after either the 1963 or the 1966 amendments to the Federal Rules,” the rationale being that it “would be desirable to maintain uniformity with the Federal Rules insofar as they are suitable to Montana practice.” In this regard, we adopted Federal Rule 23 in its entirety. In light of this background, the history of Federal Rule 23 is directly applicable and relevant to Montana Rule 23. *See also* *Sieglock v. Burlington N. Santa Fe Ry. Co.*, 2003 MT 355, ¶ 10, 319 Mont. 8, 81 P.3d 495 (because Montana Rule 23 is identical to federal Rule 23, “federal authority is instructive on the issue of class certification”).

As we observed in *Amchem*, “[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples” of what (b)(2) is meant to capture. 521 U.S., at 614. In particular, the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order. In none of the cases cited by the Advisory Committee as examples of (b)(2)’s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction.

*Wal-Mart*, 131 S. Ct. at 2557-58 (brackets in original).

¶129 Fourth, using class certification under Rule 23(b)(2) to “set the stage” for later individual trials on compensatory damages, Opinion, ¶¶ 46, 49, 90, presents due process problems. Classes certified under Rule 23(b)(1) and (b)(2) are “mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action.” *Wal-Mart*, 131 S. Ct. at 2558; *see also* M. R. Civ. P. 23(c)(2). Rule 23(b)(3), on the other hand,

allows class certification in a much wider set of circumstances but with greater procedural protections. Its only prerequisites are that “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Rule 23(b)(3). And unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to

receive “the best notice that is practicable under the circumstances” and to withdraw from the class at their option. See Rule 23(c)(2)(B).

*Wal-Mart*, 131 S. Ct. at 2558; see also M. R. Civ. P. 23(b)(3), (c)(2)(B).

¶130 The absence of such procedural protections in a class action predominantly for monetary damages violates due process. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 987 (9th Cir. 2011) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)).<sup>6</sup> According to the Supreme Court,

[t]he procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member’s individualized

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<sup>6</sup> *Phillips Petroleum* held that an absent plaintiff is entitled to procedural due process protection before he may be bound concerning a claim for money damages or similar relief at law. The plaintiff must be given “notice,” “an opportunity to be heard and participate in the litigation,” and “an opportunity to remove himself from the class by executing and returning an ‘opt out’ or ‘request for exclusion’ form to the court.” 472 U.S. at 811-12, 105 S. Ct. at 2974.

claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class. Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.

*Wal-Mart*, 131 S. Ct. at 2558-59 (emphasis in original).

¶131 That is precisely the problem the Court has created by transforming this case into a class action under § 33-18-242, MCA. Apparently, Allstate’s liability to class members under § 33-18-242(1), MCA, will be determined in a class trial, which will “set the stage” for later individual trials on damages under § 33-18-242(4), MCA. Opinion, ¶¶ 49, 90. Because this class action is certified under Rule 23(b)(2), the class is mandatory and the predominance, superiority, notice, and opt-out protections of Rule 23(b)(3) do not apply. If Jacobsen loses on the merits, then the class members’ individual claims for damages will be seriously compromised, if not totally barred. See

*Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 820 (7th Cir. 2011). This approach of “depriving people of their right to sue” by approving a mandatory class absent notice and opt-out rights violates the Due Process Clause. *Wal-Mart*, 131 S. Ct. at 2559.

¶132 The fact that the class trial may also result in injunctive relief (in addition to the compensatory damages the Court envisions in later individualized trials), Opinion, ¶ 90, does not alter this conclusion. Even if injunctive relief is the “predominant” remedy,

[t]he mere “predominance” of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)’s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a “predominating request”—for an injunction.

*Wal-Mart*, 131 S. Ct. at 2559 (emphases in original); *see also Ellis*, 657 F.3d at 986-87.

¶133 For all of the foregoing reasons, the Court errs in remaking this class action into one that determines liability for damages under § 33-18-242, MCA. Before concluding this discussion, it is necessary to address *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012), upon which the Court relies heavily. *See* Opinion, ¶¶ 41, 42, 43, 45, 46, 57, 66. The plaintiffs in that case sought certification, under Rule 23(b)(2), to determine whether Merrill Lynch was engaged in prac-

tices that had a disparate impact on members of the class in violation of federal antidiscrimination law, and to provide corresponding injunctive relief. *McReynolds*, 672 F.3d at 483. The plaintiffs also sought certification, under Rule 23(b)(3), for compensatory and punitive damages; however, such certification was not at issue on appeal. *McReynolds*, 672 F.3d at 483. The issues were whether the plaintiffs could obtain interlocutory review of the district court's certification decision and whether, under *Wal-Mart*, Merrill Lynch's delegation of decision-making authority to local managers precluded certification of a classwide claim for injunctive relief. *McReynolds*, 672 F.3d at 484-91. The Court of Appeals (speaking through Judge Posner) noted that "the only issue of relief at present is whether to allow the plaintiffs to seek class-wide injunctive relief" under Rule 23(b)(2). *McReynolds*, 672 F.3d at 491. He concluded that certification for this purpose was appropriate. *McReynolds*, 672 F.3d at 491-92. Then, near the end of the opinion, Judge Posner opined that if the classwide issue were ultimately resolved in the plaintiffs' favor (i.e., with a finding that Merrill Lynch's policies cause racial discrimination and are not justified by business necessity), then there could be hundreds of separate suits for back pay. *McReynolds*, 672 F.3d at 492. He did not hold, however, as the Court implies, that Rule 23(b)(2) may be used as an integral component of a larger damages action. Indeed, such a holding would have been inconsistent with Seventh Circuit precedent.

¶134 In *Randall*, the Court of Appeals (again speaking through Judge Posner) rejected the plaintiffs' attempt to cloak a damages action in a Rule 23(b)(2) certification. Judge Posner observed that "[c]lass action lawyers like to sue under [Rule



23(b)(2)] because it is less demanding, in a variety of ways, than Rule 23(b)(3) suits, which usually are the only available alternative. Of particular significance, plaintiffs may attempt to shoehorn damages actions into the Rule 23(b)(2) framework, depriving class members of notice and opt-out protections.” *Randall*, 637 F.3d at 825 (citations and internal quotation marks omitted). Judge Posner noted that it may be permissible in a Rule 23(b)(2) action to grant monetary relief that is *incidental* to the injunctive or declaratory relief, but he cautioned that “incidental” here means “requiring only a mechanical computation,” *Randall*, 637 F.3d at 825; in other words, “the calculation of monetary relief will be mechanical, formulaic, a task not for a trier of fact but for a computer program,” *Johnson v. Meriter Health Servs. Employee Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012).<sup>7</sup> See also *Lemon v. Intl. Union*, 216 F.3d 577, 581 (7th Cir. 2000) (incidental damages do not depend in any significant way on the intangible, subjective differences of each class member’s circumstances and do not require additional hearings to resolve the disparate merits of each individual’s case). Judge Posner explained in *Randall* that the plaintiffs’ monetary claims for back pay were not “incidental” under this definition because

calculating the amount of back pay to which the members of the class would be entitled if the plaintiffs prevailed would require 500 separate hearings. The monetary tail would

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<sup>7</sup> Judge Posner, writing for the court in *Johnson*, 702 F.3d at 372, opined that *Wal-Mart* “left intact the authority to provide purely incidental monetary relief in a (b)(2) class action,” but he acknowledged that the Ninth Circuit has expressed doubt about this in *Ellis*, 657 F.3d at 986.

be wagging the injunction dog. An injunction thus “would not provide ‘final’ relief as required by Rule 23(b)(2). An injunction is not a final remedy if it would merely lay an evidentiary foundation for subsequent determinations of liability.”

637 F.3d at 826 (quoting *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 893 (7th Cir. 2011)).

¶135 *Kartman* likewise undercuts this Court’s reliance on *McReynolds*. In the remade class action devised by the Court, the class trial is to determine whether Allstate violated the UTPA, and if a violation is found, then “compensatory damages” for “economic” and “emotional” injuries and “underpayment” of benefits is to be adjudicated in later individual trials. Opinion, ¶¶ 49, 55, 68, 90. In the later individual trials, Allstate may present evidence that individual class members suffered no injury. Opinion, ¶ 66. Thus, it may turn out that Allstate is liable in damages to some class members and not others. Under this scheme, “[Allstate’s] liability cannot be determined on a class-wide basis, but instead requires individualized factual inquiries into the merits of each [class member’s] claim.” *Kartman*, 634 F.3d at 893. That is not a proper use of Rule 23(b)(2). Reviewing a similar scheme, the *Kartman* court observed:

The [district court] judge said he would use the Rule 23(b)(2) proceeding to assess State Farm’s “liability” on the damages claims. Perhaps by this the judge meant that he intended to use the Rule 23(b)(2) class proceeding to adjudicate only those common issues pertaining to State Farm’s liability for breach

of contract and bad faith, while reserving the more claimant-specific issues—such as the calculation of damages—for subsequent individual adjudication. However, as we have explained, Rule 23(b)(2) governs class claims for final injunctive or declaratory relief and is not appropriately invoked for adjudicating common issues in an action for *damages*. A damages class may be certified under Rule 23(b)(3) and particular issues identified for resolution on a class-wide basis pursuant to Rule 23(c)(4). Or, in an appropriate case, a Rule 23(b)(2) class *and* a Rule 23(b)(3) class may be certified where there is a real basis for both damages and an equitable remedy. As we have explained, that is not the case here; neither Rule 23(b)(3) nor Rule 23(c)(4) is implicated.

*Kartman*, 634 F.3d at 895 (emphases in original, citations omitted); *see also e.g. Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 499 (7th Cir. 2012) (“a claim for class-wide injunctive and declaratory relief does not satisfy Rule 23(b)(2) if as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made”). *McReynolds* did not overrule these precedents, and this Court misreads the *McReynolds* opinion in suggesting otherwise.

¶136 For the reasons noted by the Court and Justice Baker, Rule 23(b)(3) is unavailable to Jacobsen as a basis for certifying a class action. Opinion, ¶ 62; Dissent, ¶ 100. His class claim is valid, if at all, under Rule 23(b)(2) only. In this regard, setting aside my concerns about commonality, typicality, and ade-

quacy (discussed below), the District Court construed Jacobsen’s filings to assert a plausible Rule 23(b)(2) class action—one that determines whether the program at issue (the CCPR) is per se invalid as to all class members, and that provides a single injunction allowing all class members (in the event the CCPR is found unlawful) to have their claims re-opened and re-adjusted. Jacobsen’s class claim, the District Court found, is “a UTPA-based Rule 23(b)(2) class action claim for declaratory and derivative non-compensatory injunctive relief”; it “neither constitutes nor is tantamount to a claim for compensatory damages.” Seventh Circuit precedent, including *McReynolds*, does not support our converting this Rule 23(b)(2) action for narrow injunctive relief into a broad Rule 23(b)(3) action for compensatory damages—particularly without the procedural protections that attend a Rule 23(b)(3) certification. If anything, the cases cited above repudiate this approach.

¶137 In sum, the Court’s remade class claim and class remedies are, in my view: contrary to the District Court’s construction of Jacobsen’s claim; internally inconsistent; incapable of being determined on a classwide basis; not proper for certification under Rule 23(b)(2); and violative of class members’ due process rights. For all of these reasons, I cannot join the Court’s Opinion.

#### **IV. Rule 23(a) Requirements**

¶138 As a final matter, I briefly discuss my concerns relating to the requirements of Rule 23(a).

¶139 First, I believe the Court should definitively state what standard is to be applied when assessing commonality under Rule 23(a)(2). Opinion, ¶¶ 33, 50 (declining to resolve this question). The Court, and

Justice Baker in her Dissent, acknowledge confusion in our caselaw regarding this issue. Despite “this Court’s long history of relying on federal jurisprudence when interpreting the class certification requirements of Rule 23,” *Chipman v. N.W. Healthcare Corp.*, 2012 MT 242, ¶ 52, 366 Mont. 450, 288 P.3d 193, we stated in *Mattson v. Mont. Power Co.* (*Mattson III*), 2012 MT 318, ¶ 37, 368 Mont. 1, 291 P.3d 1209, that “[t]he question arises as to whether Montana . . . should abandon its ‘permissive’ approach to Rule 23(a)(2)’s commonality requirement in favor of the *Wal-Mart* majority’s more stringent standard.” We have not yet answered that question. We have avoided the issue here, as we did in *Mattson III*, by indicating that the more stringent *Wal-Mart* standard was satisfied in any event. Opinion, ¶¶ 33, 50; *Mattson III*, ¶ 37. Yet, evaluating the propriety of the District Court’s decision pursuant to *Wal-Mart*, and conducting our own exhaustive analysis under the *Wal-Mart* standard, without definitively setting forth our standard of review, emphasizes the need for us to provide direction in this area of law. Without guidance, this issue will likely be raised repeatedly in the district courts. And, absent our directive to the contrary, it is likely that district courts will continue to assess commonality under the more stringent *Wal-Mart* standard, as fewer issues are left to be raised on appeal. The District Court here analyzed the facts and law pursuant to *Wal-Mart*. The Court today has similarly conducted its analysis pursuant to *Wal-Mart*. The question still remains, however, as to whether the *Wal-Mart* standard is the controlling standard in Montana. While I understand the necessity for robust adversarial argument and briefing, as well as an appropriate factual scenario, I think litigants and the trial courts need a de-

finitive statement from this Court as to what standard is to be used. I believe the Court does the bench and bar a disservice in neglecting to address the appropriate standard to apply.

¶140 Second, I do not believe that the class claim here—neither the one certified by the District Court nor the one remade by this Court—satisfies the commonality requirement of Rule 23(a)(2). In my view, there are no questions of law or fact common to the class. Jacobsen’s class claim is that the CCPR is per se invalid under subsections (1) and (6) of § 33-18-201, MCA. These two subsections, however, demand consideration of highly individualized, case-specific criteria. The District Court recognized this, but concluded that a common question of law or fact could be formulated for the class by essentially setting aside the case-specific criteria of subsections (1) and (6) and evaluating the CCPR’s validity based on the general principles embodied in these two provisions. As discussed, the District Court reasoned that “§§ 33-18-201(1) and (6), MCA, essentially require Allstate to promptly, accurately, truthfully, fairly, and in good faith adjust bodily injury and property damage claims.” The District Court construed the class claim to be that Allstate’s use of the CCPR violates these general principles, “irrespective of individual outcomes.” This Court apparently adopts the same analysis. Opinion, ¶ 40.

¶141 I question this approach of evaluating the validity of the CCPR—or any other settlement practice, for that matter—under § 33-18-201, MCA, based on certain criteria that are selectively plucked from the statute, while ignoring other criteria in the statute. It strikes me that this approach violates the cardinal rule that, “[i]n the construction of a statute, the office

of the judge is simply 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.” Section 1-2-101, MCA. The Legislature crafted the various subsections of § 33-18-201, MCA, to address specific settlement practices. Subsection (1) states that an insurer may not “misrepresent pertinent facts or insurance policy provisions relating to coverages at issue.” Subsection (6) states that an insurer may not “neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.” I do not subscribe to the view that the fact-finder in a class trial can determine whether the CCPR is per se invalid under subsections (1) and (6)—as to all class members— by simply disregarding the individualized inquiry plainly required by the statute as to such questions as whether liability had become reasonably clear, whether the allegedly misrepresented facts were pertinent to coverages at issue, and whether Allstate had a reasonable basis in law or in fact for contesting the claim or the amount of the claim (*see* § 33-18-242(5), MCA).

¶142 I do not mean to suggest that no class action is possible under § 33-18-201, MCA. I do believe, however, that the supposed common question here—whether Allstate’s use of the CCPR violates § 33-18-201(1) and (6), MCA—cannot be answered for an entire class of claimants. Whether Allstate deliberately crafted the CCPR in such a way as to avoid review on a classwide basis (an allegation that surfaced in the District Court proceedings) is beside the point. Our duty here is to ascertain whether, under the criteria of § 33-18-201(1) and (6), MCA, there is a question of law or fact that “is capable of classwide resolution—which means that determination of its truth or falsi-

ty will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*, 131 S. Ct. at 2551. In my view, there is no such common question, and I thus would hold that commonality, under Rule 23(a)(2), is not met.

¶143 Third, I also share Justice Baker’s concerns about whether Jacobsen meets the typicality and adequacy requirements of Rule 23(a)(3) and (4). Dissent, ¶ 96 n. 2. The named plaintiff’s claim will be typical of the class where there is a nexus between the injury suffered by the plaintiff and the injury suffered by the class. *McDonald v. Washington*, 261 Mont. 392, 402, 862 P.2d 1150, 1156 (1993). Such nexus normally exists where proving the named plaintiff’s claim will necessarily prove all class members’ claims. *McDonald*, 261 Mont. at 402, 862 P.2d at 1156.

¶144 Here, Jacobsen does not contend that the amount of his settlement was unfair or inequitable or that his claim was not promptly resolved. Section 33-18-201(6), MCA. Moreover, he cannot claim that Allstate, through the CCPR’s “attorney economics script,” misrepresented pertinent facts or insurance policy provisions relating to coverages at issue to Jacobsen’s detriment, § 33-18-201(1), MCA, given that he actually consulted and retained counsel who assisted him with settling his claim. Jacobsen’s claim was adjusted to a represented settlement. He therefore is not a member of the class, which is defined as all unrepresented claimants “whose claims were adjusted by Allstate in Montana to an unrepresented settlement since deployment” of the CCPR. Jacobsen has already had his claim re-opened and re-adjusted for payment of additional settlement amounts for his bodily injury claim. Consequently, he cannot have



his claim re-opened. Further, Jacobsen no longer pursues a property damage claim, which is included in the class definition, and he is a third-party claimant seeking emotional distress damages. He thus would not be representative of first-party claimants or those claimants with property damage. Lastly, Jacobsen's claims will be subject to unique defenses, not the least of which are: different statutes of limitations for first-and third-party claims; his admission that he spoke to an attorney but chose not to hire one; the basis of his emotional distress; and his desire to have an early settlement. I thus would hold that Jacobsen's claims are not typical and that he is not an adequate representative of the class under Rule 23(a)(3) and (4), respectively.

#### **V. Conclusion**

¶145 In conclusion, I believe the Court has wrongly remade this case into an action for damages under the UTPA (§ 33-18-242, MCA) and, in so doing, has distorted the rules for certifying a class under Rule 23(b)(2) and jeopardized class members' due process rights. I further believe that the Rule 23(a) requirements of commonality, typicality, and adequacy are not met here. For all of the reasons set forth above, I respectfully dissent.

S/ LAURIE McKINNON

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**APPENDIX B**


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MONTANA EIGHTH JUDICIAL DISTRICT  
COURT, CASCADE COUNTY

<p>ROBERT JACOBSEN, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>ALLSTATE INSURANCE COMPANY, Defendant.</p>	<p>Cause No.: ADV-03-201(d)</p> <p><b>ORDER IN RE MISCELLANEOUS REMAND MOTIONS CHALLENGING FOURTH AMENDED COMPLAINT AND ORDER CERTIFYING RULE 23(b)(2) CLASS ACTION</b></p>
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On January 27, 2011, the following motions came on for oral argument pursuant to prior orders of the court:<sup>1</sup>

- (1) *Allstate's Motion to Vacate Order Granting Leave to File 4th Amended Complaint, filed 05-06-10 (Doc. 220 and 223);*
- (2) *Allstate's Motion to Stay Answer Deadline In Re 4th Amended Complaint, filed 05-25-10 (Doc. 230 and 238);*
- (3) Allstate's Motion to Dismiss/Strike Counts IV, V, and VI and to Dismiss Defendant Conners, filed

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<sup>1</sup> *Order Noticing Scope Of Hearing* (Doc. 313, filed 01-25-11) and *Order Granting Plaintiff's Motion To Continue Motions Hearing* (Doc. 304, filed 09-30-10).

05-25-10 (Doc. 229, 231, 240-241, and 248-249);  
and

- (4) *Plaintiff's Motion to Certify Class*, filed 05-07-10  
(Doc. 221–22, 232-33, 239, 247, and 257).

Plaintiff Robert Jacobsen appeared through counsel Lawrence A. Anderson and Daniel P. Buckley. Defendant *Allstate Insurance Company* (Allstate) appeared through counsel Robert H. King, Jr., *pro hac vice*, Paul R. Haffeman, and Dennis Tighe.

The following related motions are also fully-submitted on the briefs:

- (A) Allstate's *Motion To Strike Supplemental Facts Set Forth In Plaintiff's Reply In Support Of Class Certification* (Doc. 247, 257, and 266); and  
(B) Allstate's *Objections And Response To Plaintiff's Supplemental Submission To Plaintiff's Motion To Certify Class* (Doc. 318, 319, and 323-28).

The court hereby addresses the referenced motions as follows.

### **CONTENT OUTLINE**

Due to the extraordinarily large number of issues presented in the above-reference motions and briefing and the extraordinarily litigious nature of both parties in this case, this responsive order is extraordinarily lengthy. For organizational clarity, this order is organized topically as follows:

- I. PROCEDURAL BACKGROUND
- II. FACTUAL RECORD
  - 1. Pre-Remand Factual Record
    - A. Casualty CCPR Unrepresented Segment Practices

- B. Adjustment Of Plaintiff's Individual Claim
- 2. Plaintiff's Post-Remand Factual Showings
  - A. McKinsey Documents/Berardinelli Showing
  - B. Russ Roberts Rule 26(B)(4)/701-03 Expert Disclosure
  - C. Liddy Slides
  - D. Allstate Incentive Compensation Plan
  - E. Shannon Kmatz Affidavit
  - F. Jose Cornejo Trial Testimony Excerpt
  - G. Christine Sullivan Testimony Excerpt
  - H. 2007 CFA Study In Re Allstate Business Practices
- 3. Allstate's Post-Remand Responsive Showing

### III. LEGAL ANALYSIS

- 1. Allstate's Motion To Vacate/Oppose Filing Of 4<sup>th</sup> Amended Complaint And Motion For Leave To Belatedly Dispute Substantive Rule 15(A) Validity Of 4<sup>th</sup> Amended Complaint
- 2. Allstate's Rule 15(A) Motion To Dismiss/Strike 4<sup>th</sup> Amended Complaint
  - A. Rule 15(A) Futility – Permissible Scope Of Proceedings On Remand
  - B. Rule 15(A) – Undue Prejudice, Burden, And Expense

- C. Rules 15(A) And 12(B)(6) – Rule 23 Futility Of New Class Claims And Remedies As A Matter Of Law
- 3. Allstate’s Motion To Extend Deadline For Answering Fourth Amended Complaint
- 4. Allstate’s Motion To Strike 4<sup>th</sup> Amended Complaint In Re Defendant Charles Connors
- 5. Allstate’s Motion To Strike 4<sup>th</sup> Amended Complaint In Re Law Of The Case In Re Merits Of Post-Remand Claims
- 6. Plaintiff’s Rule 23 Motion To Certify Class Action
  - A. Identification Of Class Claim And Resulting Class Definition
  - B. Rule 23(A)(1) – Numerosity
  - C. Rule 23(A)(2) – Commonality
  - D. Rule 23(A)(3) – Typicality
  - E. Rule 23(A)(4) – Adequacy Of Class Representative
  - F. Rule 23(B)(2) – Declaratory Judgment, Injunctive Relief, And Incidental Monetary Relief (Disgorgement & Punitive Damages)
    - (1) Equitable Relief (Injunction & Disgorgement) As A Permissible Remedy For Class-Wide UTPA Violations
    - (2) Prohibitive Injunction As Rule 23(B)(2) Relief
    - (3) Mandatory Injunctive Relief (Re-Opening Of Individual Cases) As Rule 23(B)(2) Relief

- (4) Mandatory Injunction For Equitable Disgorgement Of Unjust Profits As Rule 23(B)(2) Relief
  - (5) Punitive Damages As A Permissible Form Of Incidental Rule 23(B)(2) Monetary Relief
  - (6) Equitable Remedies And Adequacy Of Remedies At Law
  - (7) Equity Of Profit Disgorgement Cumulative To Punitive Damages And Mandatory Re-Opening Of Individual Claims
- G. Class Attorney Fees -Private Attorney General Doctrine
- H. Class Attorney Fees – Common Fund Doctrine

#### IV. ORDER AND JUDGMENT

##### **PROCEDURAL BACKGROUND<sup>2</sup>**

This case initially arose from a dispute between Plaintiff Robert Jacobsen (Plaintiff) and Defendant *Allstate Insurance Company* (Allstate) regarding All-

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<sup>2</sup> Due to both parties' reference to and reliance upon various aspects of the procedural history of this case as relevant to various procedural and substantive issues now in dispute on remand, including but limited to the state of the law of the case and the very scope of remand itself (see, *e.g.*, *Allstate's Opposition Brief To Plaintiff's Motion To Amend*, Doc. 216, p. 11-27; *Defendants' Memorandum In Re Motion To Strike And Dismiss*, Doc. 231, p. 17-18; *Defendants' Reply Brief In Support Of Motion To Strike*, Doc. 248); 01-27-11 Motions Hearing Tr. 6:23-25:6 and 189:1-193:1), the court reluctantly sets forth the tortuous procedural history of this case.

state's handling of Plaintiff's third-party bodily-injury claim involving an Allstate insured under a standard automobile liability insurance policy. On February 21, 2003, Plaintiff's initial complaint asserted the following non-class claims:

- (1) statutory claims alleging various violations of the Montana Unfair Trade Practices Act (UTPA), to wit §§ 33-18-201(1), (3), (4), (6), (7), (8), and (13), MCA;
- (2) a common law claim for negligent infliction of emotional distress (NIED);
- (3) a common law claim for intentional infliction of emotional distress (IIED);
- (4) a federal law claim alleging RICO wire fraud in violation of 18 U.S.C. §§ 1961-68; and
- (5) a punitive damages claim pursuant to § 27-1-221, MCA.

(*Complaint*, Doc. 1).

Contemporaneous with service of the initial complaint, Plaintiff served his first discovery requests on Allstate. (Doc. 41, Ex. A). Without specific reference to the *Claims Core Process Redesign* (CCPR) manuals or process, Plaintiff generally requested a broad scope of information and production regarding Allstate's general claims adjustment policy and procedures and all files and records specifically pertaining to Plaintiff's claim. (Doc. 41, Ex. A).

On May 9, 2003, Plaintiff filed an amended complaint (*First Amended Complaint*) adding an additional claim (unauthorized practice of law) against the involved Allstate adjuster (Charles Connors) and a separate UTPA claim against an unidentified defendant to be named later. (*First Amended Com-*

*plaint*, Doc. 5). On June 6, 2003, the court issued an initial scheduling order which, *inter alia*, set a discovery deadline of February 27, 2004, and a jury trial for May 10, 2004.

On July 30, 2003, Allstate produced its complete claims file regarding Plaintiff's claim. On December 18, 2003, under an explanatory cover letter, Allstate served its formal responses to Plaintiff's first discovery requests. (Doc. 41, Ex. A and B). Beyond largely non-specific, boiler plate objections, Allstate's formal discovery responses did specifically disclose and identify, as "the two documents most likely responsive to" Plaintiff's RFP No. 1, the existence of the two manuals then constituting its governing policies and procedures for adjusting unrepresented automobile-related casualty claims, *i.e.*, its *Claims Core Process Redesign Implementation Training Manual: Tort States* (CCPR or Casualty CCPR) and *Claims Policy Procedures Practices* (CPPP) manuals. (Doc. 41, Ex. A). However, Allstate refused to actually produce the CCPR and CPPP manuals except under a proposed protective order submitted for Plaintiff's consideration. (Doc. 41, Ex. A and B).<sup>3</sup> Although he would later, *after the second discovery deadline*, vehemently claim that Allstate improperly objected to and withheld production of the CCPR, Plaintiff did not timely

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<sup>3</sup> Then known to Allstate but unknown to Plaintiff, Allstate had previously derived and condensed a substantial portion of the CCPR program from the so-called "McKinsey documents." The McKinsey documents were the product of a prior claims adjustment redesign study and proposal conducted and produced for Allstate by an independent management and consulting firm, *McKinsey & Co.* Allstate's discovery responses and related cover letter did not disclose or reference even the existence of the McKinsey documents. (Doc. 41, Ex. A and B).



respond to Allstate's discovery posture, either by a challenging motion to compel or by timely remitting the proposed protective order stipulation to Allstate's counsel.

On January 15, 2004, without reference to a discovery dispute, Plaintiff moved the court to vacate the original scheduling order to afford him additional opportunity to add additional parties. (Doc. 20). On February 20, 2004, the court granted Plaintiff's motion to vacate the initial scheduling order. (Doc. 22). On February 26, 2004, the court further granted

Plaintiff leave to file a second amended complaint (*Second Amended Complaint*):

- (1) asserting additional NIED and IIED claims against Connors;
- (2) joining Allstate agent Carl Nelson as an additional defendant; and
- (3) asserting a new UTPA claim against Nelson. (Docs. 17-19 and 23).

On March 11, 2004, upon consultation with the parties, the court then issued its second scheduling order which, *inter alia*, set a new:

- (1) pleadings amendment deadline (06-11-04);
- (2) discovery deadline (09-30-04); and
- (3) final pretrial conference (12-01-04).<sup>4</sup>

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<sup>4</sup> Prior to the second scheduling order, the court implemented a general practice of not setting a trial date until confirmation at the final pretrial of completion of discovery and pretrial motion practice in order to facilitate a firm trial date as soon thereafter as the parties request.

(Doc. 25). At the close of the extended discovery period on September 30, 2004, Plaintiff had filed no motion to compel Allstate to further respond to his initial discovery requests and had also failed to respond to Allstate's proposed protective order regarding the CCPR and CPPP manuals.

On October 1, 2004, in utter disregard of the court-ordered discovery deadline, Plaintiff, pursuant to stipulation with Allstate, noticed the out-of-state depositions of Allstate adjuster Connors (10-7-04, Denver, Co.) as well as three other supervisory adjusters (10-08-04, Omaha, NB). (Doc. 29-32). Five days later, the afternoon before the post-deadline Connors deposition and 6 days after the court-ordered discovery deadline, Plaintiff finally faxed to Allstate's counsel the protective order stipulation proposed 10 months earlier.<sup>5</sup> Plaintiff would later attribute the delay to inadvertent clerical error in his office. Because he was then in transit to the out-of-state depositions, Allstate's counsel did not ultimately produce the CCPR (Doc. 72) until sometime after the out of state depositions, but did produce the related CPPP manual at the first out-of-state deposition. As before, Allstate again did not produce or reference the existence of the McKinsey documents.

Irrespective of Allstate's belated production of the CCPR (Doc. 72), Plaintiff independently acquired an Allstate CCPR manual (Doc. 73) from another source prior to the out of state depositions on October 7-8, 2004. Contrary to his later assertion, Plaintiff did thus have an opportunity to examine all three of the post-deadline deponents about their involvement

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<sup>5</sup> Upon notice of the stipulation, the court approved and filed the stipulated protective order on November 5, 2004 (Doc. 34).

in the adjustment of Plaintiff's claim and their understanding and application of the CCPR procedures and practices in general. However, because Plaintiff failed to notice Rule 30(b)(6) corporate representative depositions, the out of state deponents were not authorized to testify about Allstate's underlying corporate purpose and objective in implementing the CCPR. Despite awareness of the CCPR as early as December of 2003, Plaintiff did not in the ensuing ten months prior to the close of discovery ever attempt to specifically discover the CCPR's pre-implementation origin, development, or purpose through timely noticed Rule 30(b)(6) depositions or other specifically propounded discovery.

Nonetheless, on October 14, 2004, 5 days after the unauthorized post-deadline depositions, 14 days after the second court-ordered discovery deadline, and without post-deadline leave of court, Plaintiff served a second set of discovery requests, this time specifically seeking production of the CCPR and unlimited disclosure and production of all records and information pertaining to, referenced by, or generated pursuant to or under the CCPR since 1995. (Doc. 33 and 40). Two weeks later, on or about October 29, 2004, Plaintiff sent Allstate a proposed stipulation to re-open discovery to allow further discovery regarding the CCPR program.

In response, in the form of its own proposed stipulation and explanatory cover letter, Allstate refused to stipulate to re-open discovery, but proposed an extension of the then-governing but as yet unexpired litigation deadlines imposed under the second scheduling order. (Doc. 47, Ex. A). Plaintiff's counsel promptly signed and remitted Allstate's proposed stipulation and the court then entered a third sched-

uling order pursuant to stipulation. (Doc. 35). In accordance with the stipulation, the stipulated order did not extend or re-open the previously-expired discovery deadline. Despite the unmistakably contrary language of the proposed stipulated order and explanatory cover letter, Plaintiff would later claim that he signed the stipulated order under the mistaken belief that Allstate had signed and remitted Plaintiff's originally-proposed stipulation.

Several weeks later on December 2, 2004, Allstate timely filed a comprehensive, potentially dispositive motion and supporting brief for summary judgment on all of Plaintiff's then-pled claims. (Doc. 36). As of the filing date of Allstate's motion, Plaintiff had not filed any prior motion to extend, re-open, or compel previously requested discovery. (See Doc. 37, p. 2). However, on December 6, 2004, four days after Allstate's summary judgment motion, Plaintiff filed a motion to vacate the recently stipulated third scheduling order and to re-open discovery in order to allow further discovery regarding unspecified "new issues" regarding the CCPR. (Doc. 37).

On December 8, 2004, six days after Allstate filed its motion for summary judgment, over two months after the last discovery deadline expired, and over three months after the revised deadline for amendment of pleadings, Plaintiff filed a motion and brief for leave to file a third amended complaint to:

- (1) restate Counts 1-5 (individual UTPA claims against Allstate) without revision ;
- (2) restate Counts 6-8 (individual NIED, IIED, and RICO mail fraud claims against Allstate) without revision;

- (3) abandon Count 5 (individual UTPA claim against Allstate alleging violations of §§ 33-18-201(3), (7), and (8), MCA);
- (4) abandon Counts 10-11 (individual NIED and IIED claims against Conners);
- (5) revise Count 9 (individual unauthorized practice of law claim against Conners) to expressly state the claim against Allstate based on Conners' conduct as its agent;
- (6) state new Count 10 (individual actual fraud claim against Allstate based on alleged concealment of unspecified material facts);
- (7) state new Count 11 (individual tort claim against Allstate); and
- (8) state new class claims against Allstate regarding CCPR unrepresented claims adjustment practices in Montana, including:
  - (A) three separate UTPA claims under §§ 33-18-201(1), (4), and (6), MCA;
  - (B) a RICO mail fraud claim;
  - (C) an actual fraud claim;
  - (D) a related UTPA-based tort claim;
  - (E) a claim for declaratory and injunctive relief regarding Allstate's policies and procedures for adjustment of unrepresented claims under the CCPR; and
  - (F) punitive damages.

(Doc. 39 and 44).

In conjunction with his motion to re-open discovery and to add class action claims, Plaintiff simultaneously filed separate motions to compel responses to

his timely-filed *First Discovery Requests (Plaintiff's Motion To Compel Discovery* (1<sup>st</sup>), Doc. 41, filed 12-08-04) and his unauthorized post-deadline *Second Discovery Requests (Plaintiff's Motion To Compel Discovery* (2<sup>nd</sup>), Doc. 40, filed 12-08-04). Like their predicate discovery requests, the motions did not specifically request or reference the McKinsey documents. (Doc. 40-41 and 84-85).<sup>6</sup> Rather, both motions focused on the CCPR and other related materials. (*Id.*).

By stipulated order filed January 4, 2005, the court vacated its third scheduling order pending resolution of the parties' pending motions. (Doc. 62). On December 5, 2005, the court denied Plaintiff's untimely motions to re-open discovery, to compel further responses to his original and post-deadline discovery requests, and to amend his complaint to add class claims on an institutional bad faith theory predicated on Allstate's CCPR practices and procedures. (Doc. 93, filed 12-02-05, amended *nunc pro tunc*, Doc. 94, filed 12-28-05). Although it *sua sponte* recognized the McKinsey documents as the potential

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<sup>6</sup> Even as of this late date, Plaintiff was apparently unaware of the McKinsey documents. (See Doc. 112, p. 2, filed 01-27-06). The McKinsey documents do not appear of record in this case until referenced *sua sponte* by the court in its 12-02-05 *Order Denying Plaintiff Leave To Add Class Action Claims [And] Denying Plaintiff's Motions To Compel Discovery*. (Doc. 93, p. 26-31). Plaintiff's first reference to the McKinsey documents as a predicate for relief did not occur until a 01-18-06 motions hearing as the substantive predicate of an even later *Rule 60(b) Motion Regarding Plaintiff's Motion To Compel* (Doc. 112, filed 01-27-06) as suggested by the court as a procedural means to allow Plaintiff to back-up his cursory hearing assertion that the McKinsey documents were in fact within the substantive scope of his original timely-filed discovery requests.

evidentiary missing link for Plaintiff's CCPR-based class action bad faith claims (Doc. 93, p. 27-30),<sup>7</sup> the court denied Plaintiff's various eleventh hour discovery and class-related motions on several grounds under M.R.Civ.P. Rules 15(a), 16, 56, and 23(b) because:

- (1) in the face of Allstate's pre-deadline objections to Plaintiff's non-specific *First Discovery Requests*, Plaintiff had failed, without any showing of excusable neglect, to conduct discovery in a reasonably diligent manner despite an extended discovery period;
- (2) despite Allstate's well-known and longstanding use of the CCPR program, its readily discoverable origin and nature, whether by independent means or by diligent discovery practice in this case, and most significantly, Plaintiff's negligent disregard of Allstate's timely identification of the CCPR and offer to produce it under a protective order on December 18, 2003, the asserted basis for his untimely motions was the somewhat disingenuous assertion that he was previously unable to timely obtain the CCPR "manual(s)." Plaintiff's motions to compel made no reference the McKinsey documents in particular or documents or policies precedent to the CCPR in general;

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<sup>7</sup> The court's *sua sponte* reference to the McKinsey documents derived from an article (*Insurance Consumer Counsel's Column, False Promises – Allstate, McKinsey, And The Zero Sum Game*, Berardinelli, David J., J.D.) published in the Autumn 2005 edition of the Montana Trial Lawyers' Association *Trial Trends* publication.

- (3) Plaintiff had made no particularized showing that the requested discovery extension was reasonably likely to lead to discovery of relevant evidence;
- (4) granting the untimely motions under those circumstances would unfairly result in significant cost and delay by allowing Plaintiff to defeat a timely-filed, potentially dispositive summary judgment motion by radically changing the nature and complexity of the case on the eve of the court's consideration of the motion; and
- (5) "despite the facial appeal of [Plaintiff's new] theory of institutional bad faith . . . as more particularly articulated in the [MTLA legal journal], reported decisions addressing similar claims based on the CCPR indicate[d]" that, without reference to the McKinsey documents and thus an evidentiary link indicating that the CCPR practices and procedures may be improper *per se*, Plaintiff "ha[d] not made a sufficient showing that questions of fact and law common to the proposed class would predominate over questions individual to class members as required" for his newly-contemplated Rule 23(b)(3) class action.

(Doc. 93, p. 22-33 and 43-55, as amended *nunc pro tunc* Doc. 94).<sup>8</sup>

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<sup>8</sup> This paraphrased summary sets forth the substantive essence of the express reasoning set forth in the court's pertinent orders. (Doc. 93, p. 22-33 and 43-55, subsequently incorporated by reference in Doc. 122, p. 2-3). On appeal, Plaintiff would later patently misrepresent and repeatedly mischaracterize the court's reasoning as cursory, "without much substantive analysis." (Jacobsen's 09-28-07 *Opening Brief On Appeal* (p. 41) and



On December 28, 2005, following prior oral argument, the court ruled on Allstate's various summary judgment motions, thereby effectively reducing and framing Plaintiff's claims for trial to the following non-class claims ultimately pled under his subsequently filed *Third Amended Complaint*:

- (1) UTPA claim – misrepresenting pertinent facts regarding an insurance claim in violation of § 33-18-201(1), MCA
- (2) UTPA claim – refusing to pay a claim without conducting a reasonable investigation based upon all available information in violation of § 33-18-201(4), MCA;
- (3) UTPA claim – neglecting to attempt in good faith to promptly, fairly, and equitably settle a claim in which liability was reasonably clear in violation of § 33-18-201(6), MCA;
- (4) related tort claims, to wit:
  - (A) misrepresenting pertinent facts regarding an insurance claim;
  - (B) refusing to pay a claim without conducting a reasonable investigation; and/or
  - (C) neglecting to attempt in good faith to promptly, fairly, and equitably settle a claim in which liability was reasonably clear; and
- (5) punitive damages claim pursuant to §§ 27-1-220 and 27-1-221, MCA.

(Doc. 95, filed 12-28-05).<sup>9, 10 & 11</sup> Of further later significance, the court also denied Allstate's motion for summary judgment precluding Plaintiff from recovering attorney fees incurred in the *prior* adjustment dispute as an element of damages in the subsequent UTPA action under § 33-18-242(4), MCA. (Doc. 95, p. 64-75) (ultimately revised to an equity theory at trial on subsequent legal developments, Doc. 159, filed 10-17-06).

On January 18, 2006, this matter came on for hearing on various non-class claim issues including scheduling and Allstate's supplemental summary

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<sup>9</sup> Although the summary judgment ruling initially sustained the IIED and NIED claims against the challenge asserted, it left unresolved whether they were sufficient as a matter of law on the available evidence. (Doc. 93, p. 36-41). On further motion and briefing (Doc. 100, 107, and 109), the court ultimately granted Allstate summary judgment on the IIED and NIED claims due to insufficiency of evidence. (Doc. 118).

<sup>10</sup> Although it had previously denied leave to file a third amended complaint to add contemplated class claims, the court was inclined to grant the 12-08-04 *Motion To Amend Complaint* to the extent that (1) Plaintiff sought to state new or revised non-class claims and (2) the court's forthcoming summary judgment ruling on the then-pending non-class claims did not preclude the contemplated new or revised non-class claims. (*Order Denying Plaintiff Leave To Add Class Action Claims . . . And Tentatively Granting Plaintiff Qualified Leave To Amend And Add Individual Claims*, Doc. 93, p. 60-61). In the wake of the summary judgment ruling (Doc. 95), the court, by reference to specifically authorized non-class claims, granted leave to file a third amended complaint. (Doc. 96). Plaintiff filed the court-authorized *Third Amended Complaint* on 01-27-06. (Doc. 113).

<sup>11</sup> By stipulation, the court separately dismissed Carl Nelson (Doc. 78 and 80, filed 01-14-05) and Charles Connors (Doc. 132-33, filed 09-07-06) as individual defendants in this action.

judgment motion regarding Plaintiff's IIED and NIED claims. (Doc. 108). During the hearing, with reference to his ongoing non-class claims, Plaintiff cursorily asserted that the McKinsey documents were encompassed within the general scope of his original, timely-propounded discovery requests (Doc. 41, Ex. A-B). However, due to his inability to identify a specific timely-propounded discovery request that at least generally encompassed the McKinsey documents, the court suggested *sua sponte* that Plaintiff file *an appropriately supported* Rule 60(b) motion to make a particularized showing. (Doc. 108.1 and 01-18-06 Hearing Tr.).

On January 27, 2006, pursuant to Rule 60(b)(1), (3), and (6), Plaintiff filed a "Rule 60(b)" motion asking the court to "revisit" its prior order denying his "*Motion To Compel*" and "*Motion for a new scheduling order*" (Doc. 93-94) on the asserted grounds that:

- (1) the McKinsey documents and attached Berardinelli affidavit constituted the evidentiary missing link necessary to show the unlawful purpose and effect of the CCPR; and
- (2) his prior discovery requests "included the CCPR" and thus the "the McKinsey documents would be covered" within the scope of those prior requests.

(*Plaintiff's Rule 60(b) Motion*, Doc. 112 and 117).<sup>12</sup> However, disregarding the whole reason for the Rule

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<sup>12</sup> Typically imprecise, Plaintiff's Rule 60(b) motion and briefing did not specify or distinguish which prior "motion to compel" he was referring to. (Doc. 112 and 117). This distinction was critically important because one of his prior motions to compel (Doc 41) pertained to his original, timely-propounded discovery requests and the other (Doc. 40) pertained to his unauthorized, post-deadline second discovery requests. Plaintiff had no such

60(b) motion and apparently expecting the court to scour the record to support his cursory assertions, Plaintiff again failed to identify a single, timely-filed discovery request (Doc. 41, Ex. A-B) that was at least generally inclusive of the subsequently ascertained McKinsey documents. (See Doc. 112, 117, 120, and 122).<sup>13</sup> Thus, solely relying on the substantive relevance of the newly-discovered McKinsey documents and his unsupported cursory assertion of discovery misconduct by Allstate, Plaintiff made *no particularized showing* as to how or why *any* of the following asserted grounds warranted the requested Rule 60(b) relief:

- (1) Rule 60(b)(1) (“mistake, inadvertence, surprise or excusable neglect”);
- (2) Rule 60(b)(3) (“fraud, misrepresentation or other misconduct of an adverse party; or
- (3) Rule 60(b)(6) (“any other reason justifying relief from the operation of the judgment”).

(Doc. 112 and 117). Consequently, the court took no action on the patently unsupported motion, thereby effectively denying it without comment by operation of M.R.Civ.P. Rule 60(c) (60 day deadline). (*Order Affirming Denial Of Plaintiff's Rule 60(b) Motion*, Doc. 118, filed 06-22-06).

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problem with precision on appeal. See Jacobsen's 01-07-08 *Reply Brief And Support Of Cross Appeal* (p. 1 and 7-8), Montana Supreme Court No. DA 07-0170.

<sup>13</sup> Although he could not be bothered with attempting to make this critical particularized showing to the district court, Plaintiff had no such problem on appeal. (See Jacobsen's 01-07-08 *Reply Brief And Support Of Cross Appeal* (p. 7-8), Montana Supreme Court No. DA 07-0170.

On July 3, 2006, on the assertion that the court did not understand that the limited purpose of his Rule 60(b) motion was to obtain discovery of the McKinsey documents only in regard to his still-pending *non-class* institutional bad faith claims,<sup>14</sup> Plaintiff moved the court to reconsider its denial of the Rule 60(b) motion and thereby compel Allstate to produce the McKinsey documents in relation to the pending non-class claims. (*Plaintiff's Motion For Clarification*, Doc. 120, p. 2). On August 6, 2006, affirming that it was well aware of the scope and purpose of his otherwise cursory and unsupported Rule 60(b) motion (*i.e.*, compelled production of the McKinsey documents in relation to ongoing non-class claims), the court again denied Plaintiff's motion to compel production of the McKinsey documents on the ground that, despite two more opportunities in the form of his Rule 60(b) motion (Doc. 112 and 117) and subsequent motion for clarification (Doc. 120), Plaintiff again failed to specifically identify a single timely-propounded discovery request encompassing the McKinsey documents and further failed to show excusable neglect or good cause for failing to conduct discovery with reasonable diligence *prior to the close of the extended discovery period* on September 30, 2004.

Of particular later significance, in the unmistakably narrow context of explaining its understanding of the scope and purpose of Plaintiff's Rule 60(b) mo-

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<sup>14</sup> Contrary to Plaintiff's subsequent assertions to this court and later on appeal, the court clearly recognized that the limited scope and purpose of the Rule 60(b) motion was to obtain the McKinsey documents as evidence of institutional bad faith relevant to his still-pending non-class UTPA, common law, and punitive damages claims. (See Doc. 112, 117, 120, and 122).

tion (non-class discovery of McKinsey documents) vis-à-vis the class claim related scope and purpose of his prior motions to compel (Doc. 39-41), the court's order stated:

. . . the substantive content of the McK[insey] [d]ocuments, as referenced in the [c]ourt's prior [class claim-related] order (Doc. 93), was squarely within the scope of the [*untimely*<sup>15</sup> supplemental] discovery previously sought by Plaintiff *in relation to his proposed class action claims*.

(Doc. 122, p. 2) (emphasis added). Thus, contrary to Plaintiff's patently self-serving, out-of-context misrepresentation on appeal,<sup>16</sup> this court did not determine or acknowledge that the McKinsey documents were "squarely within the scope of the discovery Plaintiff previously sought" prior to the close of discovery in regard to his original non-class claims.<sup>17</sup>

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<sup>15</sup> Plaintiff's second set of discovery requests for the CCPR and related materials since 1995 propounded without leave of court two weeks after the close of the extended discovery period (09-30-04). Plaintiff likewise did not file his cursory motion to compel responses to those untimely discovery requests until two months after the close of discovery. (Doc. 40-41).

<sup>16</sup> Jacobsen's 09-28-07 *Opening Brief On Appeal* (p. 2-3, 40-41, and 43) and Jacobsen's 01-07-08 *Reply Brief And Support Of Cross Appeal* (p. 7), Montana Supreme Court No. DA 07-0170.

<sup>17</sup> Despite questions and speculation in a hearing colloquy, this court at no time adjudged that the McKinsey documents were or were not within the scope of Plaintiff's original, non-specific discovery requests. As a requisite predicate for Rule 37 relief, and later Rule 60(b) relief, the court merely had the audacity to demand and expect the moving party crying "foul" to make a particularized showing, beyond cursory assertion, that they were. Consequently, prior to this order, neither this court

On October 16, 2006, Plaintiff's remaining UTPA, tort, and punitive damages claims proceeded to trial. At the close of trial, the jury found Allstate liable on all of Plaintiff's remaining UTPA and tort claims except for failure to conduct a reasonable investigation as required by § 33-18-201(4), MCA. The jury accordingly awarded Plaintiff \$68,372.78 in compensatory damages (\$66,666.67 in attorney's fees and \$1,705.71 in costs) caused by Allstate's improper conduct in the prior, underlying adjustment dispute. In a subsequent punitive damages phase conducted pursuant to §§ 27-1-220 and 27-1-221, MCA, the jury further awarded \$350,000.00 in punitive damages.

After the punitive damages phase, the court reviewed the punitive damages award for:

- (1) compliance with Montana statutory standards as required by §§ 27-1-221(7)(c) and 27-1-221(7)(b), MCA, and
- (2) compliance with the substantive and procedural due process standards of the Fourteenth Amendment to the United States Constitution as independently required by State Farm Mut. Auto

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nor the Montana Supreme Court has made any finding that the McKinsey documents were in fact within the scope of any specific, timely-propounded discovery request. Thus was the state of the record upon which this court "grievously erred" (Jacobsen's 09-28-07 *Opening Brief On Appeal*, p. 40, Montana Supreme Court No. DA 07-0170) and "acted without conscientious judgment" (Jacobsen, ¶ 58). Upon independent *sua sponte* post-remand review, it is apparent that Plaintiff could have avoided all of this by timely showing in 2005-06 that the McKinsey documents were, as appears, at least *arguably* within the general scope of his original, non-specific RFP Nos. 1, 2, 6, 12, 15, 29-30, and 34-35.

Ins. Co. v. Campbell (U.S. 2003), 538 U.S. 408, 416-18, 123 S.Ct. 1513, 1519-21.

*(Order Reviewing And Affirming Punitive Damages Award*, Doc. 184, filed 11-21-06). Upon review of the punitive damages award pursuant to §§ 27-1-221(7)(c) and 27-1-221(7)(b), MCA, and Marie Deonier & Assoc. v. Paul Revere Life Ins. Co., 2004 MT 297, ¶¶ 38-40, 323 Mont. 387, 101 P.3d 742 (court findings of fact and conclusions of law on review must be in light most favorable to prevailing party and be supported by substantial credible evidence in accordance with the findings of fact and conclusions of law implicit in the jury's verdict); accord DeBruycker v. Guaranty Nat'l Ins. Co. (1994), 266 Mont. 294, 880 P.2d 819, the court found and concluded that, although the jury could reasonably have concluded otherwise, there was minimally sufficient evidence *on which the jury could reasonably have concluded that*:

- (1) Allstate intentionally misrepresented to Plaintiff that unrepresented claimants generally received more compensation for injuries than represented claimants;
- (2) when Plaintiff experienced post-settlement pain and medical difficulty and then contemporaneously requested additional post-settlement assistance or compensation, Allstate knew or intentionally disregarded a high probability that:
  - (A) Plaintiff's injuries were much more serious than originally-contemplated;
  - (B) Plaintiff required significant additional medical care and treatment and compensation for his injuries;



- (C) Plaintiff was financially destitute and required immediate assistance to obtain additional medical care and otherwise compensate him for his injuries; and
  - (D) the parties' original unrepresented settlement and release agreement was based on a material mistake of fact, *i.e.*, the seriousness of Plaintiff's covered injuries;
- (3) upon knowledge and awareness of Plaintiff's post-settlement medical complications, Allstate deliberately and indifferently disregarded his medical condition and related financial needs;
  - (4) Allstate therefore knew or intentionally disregarded the fact that denying Plaintiff's request for additional compensation would cause him to incur substantial attorney fees and related costs to press Allstate for compensation;
  - (5) pursuant to a systematic policy and practice designed to maximize profit by encouraging quick post-injury settlements with unrepresented third-party claimants, Allstate essentially leveraged Plaintiff into a hasty settlement and release of claim by exploiting his immediate need and desire for compensation for lost wages;
  - (6) when it became evident that the original, hasty settlement was manifestly inadequate and unfair, Allstate indifferently turned its back on Plaintiff until he obtained counsel and threatened litigation;
  - (7) with the manifest purpose and design to avoid class action and bad faith claims, Allstate has intentionally and craftily designed its CCPR procedures to be facially neutral and thus dependent upon application in individual cases. However as

illustrated here, even if not intended to result in tortious conduct, Allstate is, at a minimum, consciously disregarding a high probability that its CCPR procedures are resulting in or promoting tortious conduct in individual cases in the State of Montana; and

- (8) such conscious disregard further manifests that Allstate made a cold business decision that isolated statutory or common law bad faith liability is simply the cost of doing business in order to maximize profits.

(*Order Reviewing And Affirming Punitive Damages Award*, Doc. 184, p. 22-24). Based on these findings and conclusions, *inter alia*, the court ultimately affirmed the punitive damages award in conformance with Montana statutory standards under §§ 27-1-221(7)(c) and 27-1-221(7)(b), MCA, and applicable federal due process standards. (*Id.*, p. 39-40).

Both parties appealed. (*Jacobsen v. Allstate*, Montana Supreme Court No. DA 07-0170). Reversing the district court on three of seven issues raised on appeal, the Montana Supreme Court first held that the district court erred in allowing Plaintiff to recover attorney fees incurred as a result of the tortious conduct by Allstate that necessitated this UTPA/tort action. *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶¶ 16-24, 351 Mont. 464, 215 P.3d 649. With a pen stroke, the Court further summarily held that the district court erred in following longstanding Montana precedent expressly stating the standard for recovery of parasitic emotional distress damages<sup>18</sup> be-

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<sup>18</sup> *First Bank (NA) – Billings v. Clark* (1989), 236 Mont. 195, 206, 771 P.2d 84, 85 (absent evidence of physical or mental injury, parasitic emotional distress damages recoverable only if

cause continued recognition of that clear and unequivocal precedent would “render meaningless the [same] ‘heightened’ standard” the Court later adopted for stand-alone IIED and NIED claims. Jacobsen, ¶¶ 64-67.

Summarily glossing over the foregoing procedural history and accepting as gospel Plaintiff’s blatant misrepresentation that this court “candidly noted [that] the McKinsey documents were squarely within Jacobsen’s original discovery request,” the Montana Supreme Court further held that the district court erred and “acted without conscientious judgment in denying [Plaintiff’s] motions to compel the McKinsey documents, notwithstanding that the discovery deadline had passed.” Jacobsen, ¶¶ 57-58. Without regard for Plaintiff’s manifest misconduct of discovery, the Montana Supreme Court thus chided that “district courts must remain mindful of the fundamental purpose of discovery – to promote ascertainment of the truth and the ultimate disposition of the lawsuit in accordance therewith.” Jacobsen, ¶ 58.

Accordingly, the Court reversed the compensatory award as based on the erroneous attorney fees award and this court’s failure to allow the jury to consider parasitic emotional distress as an element of compensatory damages. Jacobsen, ¶ 67. Despite holding that the district court correctly determined that minimally sufficient evidence of actual malice

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the emotional distress is serious and severe, as defined by *Restatement (Second) Of Torts* § 46 (1965)); Johnson v. Supersave Markets, Inc. (1984), 211 Mont. 465, 472-73, 686 P.2d 209, 212-13 (absent evidence of physical or mental injury, parasitic emotional distress damages recoverable only if the predicate tort resulted in a substantial invasion of a legally protected interest and caused a significant impact on the person).

existed to submit Plaintiff's punitive damages claim to the jury, Jacobsen, ¶¶ 34-41, the Supreme Court further reversed the punitive damages award based on its reversal of the compensatory predicate. Jacobsen, ¶ 67. Thus, the Montana Supreme Court ultimately:

- (1) remanded “for a new trial in light of our holding that the [district] court erred in not allowing the jury to consider [parasitic] emotional distress as an element of damages;”
- (2) ordered the district court to “compel production of the *McKinsey* documents” on remand; and
- (3) directed that a “compensatory award for emotional distress, could, in the discretion of the jury, serve as a predicate for an award of punitive damages.”

Jacobsen, ¶ 67.

On remand, rather than proceed to retrial on his previously-stated non-class UTPA and punitive damages claims *as narrowly requested on appeal*,<sup>19</sup> Plaintiff again sought leave to radically expand the scope of this litigation by adding new class action theories with revisions to his prior non-class claims, to wit:

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<sup>19</sup> On appeal, Plaintiff narrowly “requested that the Court [merely] order a retrial of the punitive damage[s] stage of the case, and . . . allow Plaintiff to conduct the appropriate depositions and discovery on” the McKinsey documents. “The initial jury found malice *without* the benefit of the “McK[insey] documents.” “Plaintiff should be entitled to a re-trial *on punitive damages only*, and the jury should be entitled to hear the full account of Allstate’s purpose and intent behind the CCPR.” (Jacobsen’s 09-28-07 Opening Brief On Appeal, p. 43, Montana Supreme Court No. DA 07-0170) (emphasis added).

- (1) Count 1 (UTPA claim against Allstate) – misrepresenting pertinent facts regarding an insurance claim in violation of § 33-18-201(1), MCA
- (2) Count 2 (UTPA claim against Allstate) – neglecting to attempt in good faith to promptly, fairly, and equitably settle a claim in which liability was reasonably clear in violation of § 33-18-201(6), MCA;
- (4) Count 3 (tort claims against Allstate), *i.e.*:
  - (A) misrepresenting pertinent facts regarding an insurance claim; and
  - (B) neglecting to attempt in good faith to promptly, fairly, and equitably settle a claim in which liability was reasonably clear;
- (5) Count 4 – Rule “23(b)(2) and/or (3)” class action claim against Allstate predicated on the above-referenced UTPA and tort theories and Allstate’s systematic use of the CCPR program as to “all unrepresented” first-party and third-party claimants adjusted under the CCPR program in Montana;
- (6) Count 5 – claim for common fund recovery of attorney fees and costs incurred in prosecuting the class action; and
- (7) Count 6 – claim for recovery of class action attorney fees as a “Private Attorney General” on the asserted theory that the ‘state of Montana, through its insurance commissioner, has declined or failed to enforce the provisions of §§ 33-18-201(1) and (6), MCA.”

(Plaintiff’s *Fourth Amended Complaint*, Doc. 219). Although not entirely clear, the court construes

Plaintiff's *Prayer For Relief* to request the following forms of individual and class relief:

(A) Non-Class Relief:

- (1) Compensatory Damages, “general and special” damages to compensate Plaintiff “for Allstate’s wrongful conduct” (¶¶ 2 and 10, p. 11);
- (2) Punitive Damages pursuant to §§ 27-1-220 and 27-1-221, MCA (Doc. 219, p. 12, ¶ 1); and
- (3) Attorney Fees & Costs “as provided by law” (Doc. 219, p. 12, ¶ 12) and

(B) Class Relief:

- (1) Class Certification pursuant to M.R.Civ.P. Rules “23(b)(2) and/or (3)” (Doc. 219, p. 11, ¶ 3 and p. p. 9, ¶ 46);
- (2) Declaratory Judgment that Allstate’s systematic use of the Casualty CCPR program in Montana violates(d) §§ 33-18-201(1) and 33-18-201(6), MCA (Doc. 219, p. 12, ¶¶ 7-9);
- (4) Prohibitive Injunction enjoining Allstate from continued use of the Casualty CCPR program in unrepresented claims adjustment in Montana (Doc. 219, p. 12, ¶ 7);
- (5) Mandatory Injunction requiring Allstate to:
  - (A) “re-open all claims in which liability was reasonably clear in which [Allstate] applied the CCPR paradigm in settling such cases” (Doc. 219, p. 12, ¶ 8); and
  - (B) “disgorge the unlawful profits [Allstate] made through its systematic violation of

§§ 33-18-201(1) and (6), MCA (Doc. 219, p. 12, ¶ 9);

- (6) Punitive Damages pursuant to §§ 27-1-220 and 27-1-221, MCA (Doc. 219, p. 12, ¶ 11); and
- (7) Attorney Fees & Costs “as provided by law” (Doc. 219, p. 12, ¶ 12), *i.e.*,
  - (A) Private Attorney General recovery of attorney fees incurred in prosecuting class claims (Doc. 219, p. 11, ¶ 4); and
  - (B) Common Fund recovery of attorney fees incurred in prosecuting class claims (Doc. 219, p. 11, ¶¶ 5-6).

(Plaintiff's *Fourth Amended Complaint*, Doc. 219).

Against this procedural backdrop, the following non-discovery motions are currently pending on remand:

- (1) Allstate's Motion to Vacate Order Granting Leave to File 4<sup>th</sup> Amended Complaint, filed 05-10-10 (Doc. 220 and 223) (in re *Defendant's Opposition To Plaintiff's Motion To Amend Complaint* (Doc. 216, filed 05-10-10));
- (2) Allstate's Motion to Stay Answer Deadline In Re 4<sup>th</sup> Amended Complaint, filed 05-25-10 (Doc. 230 and 238);
- (3) Allstate's Motion to Dismiss/Strike Counts IV, V, and VI and to Dismiss Defendant Connors, filed 05-25-10 (Doc. 229, 231, 240-241, and 248-249);
- (4) Plaintiff's Motion to Certify Class, filed 05-10-10 (Doc. 221–222, 232-233, 239, 247, and 257);

- (5) Allstate's *Motion To Strike Supplemental Facts Set Forth In Plaintiff's Reply In Support Of Class Certification* (Doc. 247, 257, and 266); and
- (6) Allstate's *Objections And Response To Plaintiff's Supplemental Submission To Plaintiff's Motion To Certify Class* (Doc. 318, 319, and 323-28).

The court addresses these motion as follows.<sup>20</sup>

### **FACTUAL RECORD**

The motions at issue raise various related and interwoven issues regarding the sufficiency of the current state of the factual record under the various standards applicable under M.R.Civ.P. Rules 12(b)(6), 15(a), and 23. At this stage of the case on remand, the factual record is divisible for clarity into two distinct subdivisions – the pre-remand factual record and the additional post-remand factual showings made by the parties in relation to the various post-remand motions addressed by this order. The following summary recitation and characterization of the pertinent factual record constitutes neither an adjudication on the ultimate merits of the referenced facts nor a statement of previously adjudicated facts.

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<sup>20</sup> These issues are further affected and compounded by the following post-hearing motions and filings, to wit, *Plaintiff's Supplemental Submission In Re Class Certification* (Doc. 315, filed 02-11-03); Allstate's *Objections And Response* (Doc. 318, filed 02-18-11); Allstate's *Notice Of Issue* (Doc. 319, filed 02-22-11); *Plaintiff's Objection To Defendant's Notice Of Issue* (Doc. 323, filed 03-03-11); *Plaintiff's Reply In Re Supplemental Submission* (Doc. 324, filed 03-03-11); Allstate's *Response To Plaintiff's Objection* (Doc. 325, filed 03-09-11); Allstate's *Motion To Strike Plaintiff's "Reply"* (Doc. 326, filed 03-09-11); *Plaintiff's Response To Allstate's Motion To Strike* (Doc. 327, filed 03-11-11); and Allstate's *Notice Of Issue* (Doc. 328, filed 03-17-11).



In the limited procedural contexts of M.R.Civ.P. Rules 15(a), 12(b)(6), and 23, the following recitation of the relevant pre-remand and post-remand factual record is no more than a reference to a non-exclusive summary of facts existing or shown as a matter of record as available proof of Plaintiff's pending claims on remand.

**1. PRE-REMAND FACTUAL RECORD.**

Consistent with the court's various pre-remand orders (Doc. 93-94, 95, and 184) except for pre-remand discussion of McKinsey documents issues, this subdivision sets forth a non-exclusive statement of pertinent facts from the pre-remand pretrial and trial records as now again pertinent under the applicable standards of Rules 12(b)(6), 15(a), and 23. Despite the foregoing reference to the prior orders of the court, this statement of facts does not constitute a statement of facts found or adjudicated by the court on the contested merits or in accordance with other procedural or substantive civil rules at issue in those prior orders.

**A. Casualty CCPR Unrepresented Segment Practices.**

In 1995, following analysis of claims adjustment data, Allstate adopted and implemented a company-wide policy, known as Claim Core Process Redesign (CCPR), revising its procedures and practices for adjusting represented and unrepresented bodily injury claims.<sup>21</sup> The express purpose and goal of the CCPR

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<sup>21</sup> As filed in this case, CCPR-Doc. 72 is the CCPR produced by Allstate and is the CCPR manual at issue in this case. It is titled *CCPR Implementation Training Manual (Tort States) (July 1995)*. As pertinent here, it includes a general overview section listed in the table of contents as Ch 1. – *CCPR Imple-*

was to increase Allstate's profit margin by increasing

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*mentation Training Manual (Tort States) July 1995* and a more specific section listed in the table of contents as Ch. 3 – *Unrepresented Segment Training, July 1995*.

In contrast, CCPR-Doc. 73 is the CCPR independently obtained by Plaintiff from a third-party source. Although filed by Plaintiff in this case as the CCPR without distinction as to components, Doc. 73 actually consists of two separate CCPR training manuals. The first manual is the *CCPR Implementation Training Manual, Litigation Management* (February 1997), consisting of six chapters. As indicated by the title and its first chapter, this manual sets forth Allstate's policies and procedures for litigation management distinct from its policies for the non-litigation adjustment of unrepresented claims. For clarity, the Court will hereinafter refer to this manual as CCPR-Doc. 73(LM).

The second manual included in CCPR-Doc. 73 starts with the seventh segment of CCPR-Doc. 73, as filed in this case. However, when distinguished from the above-referenced CCPR-Doc. 73(LM), the second manual in Doc. 73 is actually a revised version (September 1995) of the above-referenced July 1995 CCPR implementation manual produced by Allstate in this as CCPR-Doc. 72. For clarity, the Court will hereinafter refer to the second manual as CCPR-Doc. 73(IM).

As pertinent here, the only significant difference between CCPR-Doc. 72 and CCPR-Doc. 73(IM) is that the outside cover page and preface-disclaimer page are missing from CCPR-Doc. 73(IM) and the table of contents nomenclature is different. However, as pertinent here, Ch. 1 and Ch 3. of CCPR-Doc. 72 and CCPR-Doc. 73(IM) (Ch. 1 – *Claims Core Process Redesign* and Ch. 3 – *Unrepresented Segment Training*) are otherwise virtually identical except for the version designations (July 1995 and Sept. 1995) on the face pages for those chapters. Despite minor aesthetic and language variations, the portions of the July-1995 version produced by Allstate (CCPR-Doc. 72) and September-1995 version independently obtained by Jacobsen (CCPR-Doc. 73(IM)) referenced herein are virtually and substantially identical except where otherwise indicated herein.

customer service to reduce the number of represented claims and more effectively and consistently managing its claims adjustment practices and procedures. (CCPR-Doc. 72, pp. 1-1 through 1-12 and 1-15; CCPR-Doc. 73(IM), pp. 1-1 through 1-12 and 1-15; see also CCPR-Doc. 73(LM), pp. 1-4 through 1-6).

The CCPR specifies distinct claims adjustment practices and procedures for represented claims and unrepresented claims, a more controlled and consistent process for evaluation of claims (*e.g.*, Colossus evaluation program), and specialized handling of minor impact soft tissue injuries (MIST). (CCPR-Doc. 72, p. 1-6; CCPR-Doc. 73(IM), p. 1-6; see also CCPR-Doc. 73(LM), p. 1-5). The *Unrepresented Segment Training* section of the CCPR sets forth Allstate's revised procedures and practices for adjusting unrepresented claims. (CCPR-Doc. 72, Ch. 1 and Ch. 3, CCPR-Doc. 73(IM), Ch. 1. and Ch. 3). Based on Allstate's claims research and analysis, the CCPR cites the following fact findings as the foundational basis for the CCPR procedures and practices for unrepresented claims:

- (1) on average, represented claims settle for 2-3 times more than unrepresented claims;
- (2) Allstate claims adjusters did not previously initiate contact with 1/3 of claimants;
- (3) only about one 1/3 of claimants are predisposed to retain counsel;
- (4) most claimants who retain counsel do so within 2 weeks, and in some cases within days of an accident;
- (5) Allstate previously did not typically make settlement offers before claimants retained counsel;

- (6) improved rapport with a claims representative would likely eliminate attorney involvement in nearly 50% of claims; and
- (7) an explanation of the settlement process and expression of genuine empathy for the insured would tend to establish rapport with the claimant.

(CCPR-Doc. 72, pp. 3-3 and 3-10; CCPR-Doc. 73(IM), pp. 3-3 and 3-10). Accordingly, an express goal of the CCPR was to revise Allstate's practices and procedures to "significantly reduce" represented claims by changing the way it treats claimants and developing positive relationships with them. (CCPR-Doc. 72, pp. 1-2, 1-6, 1-8, 1-9, and 3-52; CCPR-Doc. 73(IM), pp. 1-2, 1-6, 1-8, 1-9, and 3-52; see also CCPR-Doc. 73(LM), pp. 1-4 through 1-5, 5-54, and 5-61).

In furtherance of this goal, the CCPR defined the following general objectives for adjusting unrepresented claims:

- (1) extremely rapid initial contact to educate claimant's about Allstate's approach to fair claim settlement;
- (2) anticipation and resolution of a broad range of claimant needs in a genuine and empathetic manner;
- (3) rapid liability investigation and resolution of property damage issues with use of appropriate flexibility to maintain rapport;
- (4) regular follow-up claimant contact to reduce the need for attorney involvement; and
- (5) appropriate settlement value offers to all claimants to ensure they have the opportunity to make the best economic decision.

(CCPR-Doc. 72, p. 3-11; CCPR-Doc. 73(IM), p. 3-11). To accomplish these objectives, the CCPR requires adjusters to follow the following general outline upon initial contact with an unrepresented claimant:

- (1) establish empathy and gather injury facts;
- (2) confirm customer service pledge;
- (3) gather loss facts;
- (4) confirm liability decision;
- (5) discuss payment of medical bills;
- (6) assist in providing for car repairs;
- (7) assist in arranging for alternate transportation;
- (8) explain the BI settlement process and discuss attorney economics; and
- (9) close and follow-up.

(CCPR-Doc. 72, p. 3-13; CCPR-Doc. 73(IM), p. 3-13; see also CCPR-Doc. 73(LM), p. 5-8).

The CCPR further provides detailed instruction for many of the initial contact outline requirements including establishing empathy (CCPR-Doc. 72, p. 3-14; CCPR-Doc. 73(IM), p. 3-14), a customer service pledge form (CCPR-Doc. 72, pp. 3-7 and 3-15; CCPR-Doc. 72(IM), pp. 3-7 and 3-15), and discussion of attorney economics and involvement. (CCPR-Doc. 72, pp. 3-8, 3-9, and 3-24 through 3-29; CCPR-Doc. 73(IM), p. 3-8, 3-9, and 3-24 through 3-29). In regard to the customer service pledge, the CCPR includes a pledge form for distribution to every claimant. (CCPR-Doc. 72, p. 3-7; CCPR-Doc. 73(IM), p. 3-7). In pertinent part, the pledge form promises that Allstate will:

- (1) fully explain the process, take the time to answer all questions and concerns that you may have, and keep you informed throughout the claims process;
  - (2) conduct a quick, fair investigation of the facts of your case; and
  - (3) to the extent [the Allstate] policyholder was at fault in the accident: . . . We will discuss fair payment for your claim when you are ready.
- (CCPR-Doc. 72, p. 3-7; CCPR-Doc. 73(IM), p. 3-7).

In regard to attorney economics, the CCPR sets for the following guidelines for claims adjusters, *inter alia*:

- (1) discuss statute of limitations and customer's ability to file a court action at any time during that period. Explain early settlement option or waiting until whenever claimant is ready;
- (2) reiterate that Allstate settles many claims directly with accident victims;
- (3) acknowledge that they may be contacted by attorneys; and
- (4) indicate that while some claimants choose to seek attorney representation, it is by no means a requirement. Even if the claimant chooses to seek representation, it may be advantageous to work with us first. Assess claimant's interest in receiving the "Do I Need an Attorney ?" form. . . .

(CCPR-Doc. 72, p. 3-28; CCPR-Doc. 73(IM), p. 3-28). Accordingly, the CCPR advises claims adjusters to use the following "attorney economics script:"

[q]uite often our customers ask if an attorney is necessary to settle a claim. Some people choose to hire an attorney, but we would really like the opportunity to work directly with you to settle the claim.

Attorneys commonly take between 25-40% of the total settlement you receive . . . plus expenses incurred. If you settle directly with Allstate, however, the total amount of the settlement is yours.

At any time in the process you may choose to hire an attorney. I would, however, like to make an offer to you first. This way, should you go to an attorney, you would be able to negotiate with the attorney so his/her fees would only apply to amounts recovered through litigation over my offer to you.

(CCPR-Doc. 72, p. 3-29; CCPR-Doc. 73(IM), p. 3-29).

The CCPR further provides instruction for when adjusters should use the “Do I Need an Attorney ?” form, to wit:

In general, you should use this form to assist in explaining the role of attorneys in the claim process to unrepresented claimants. The “Attorney” form should reinforce some of the things you have already explained to the claimant. . . .

The purpose and intent of this form is to provide factual information to claimants concerning the role of attorneys. Please note that you must not attempt to persuade claimants not to retain an attorney. Your role should be to provide important information to claim-

ants concerning attorneys, enabling the claimant to make a more informed decision.

Remember, the decision on whether to retain an attorney is the claimant's, and we must honor and respect that decision.

(CCPR-Doc. 72, 3-9; CCPR-Doc. 73(IM), p. 3-9). In pertinent part, the "Do I Need an Attorney ?" form states:

. . . [E]ach year Allstate settles claims directly with many accident victims with no attorneys involved . . .

A recent study by the Insurance Research Council found that people who settle insurance claims without an attorney generally settle their claims more quickly than those who have hired attorneys. . . .

Attorneys commonly take between 25 to 40% of the total settlement you receive . . . plus expenses . . . If you settle directly . . . the total amount of the settlement is yours.

\* \* \*

You may hire any attorney at any time in the process. Under (state) law in most cases, you have up to (#) year(s) after your accident to file a court action against the at-fault party. Before you decide to see an attorney, you may wish to seek an offer with Allstate first. If an attorney believes he or she can achieve a higher settlement, you can then see whether the attorney is able to accomplish that. And, you may wish to hire an attorney on the condition that the contingent fee apply only to the settlement amount in excess of what



Allstate offered to you without the attorney's assistance.

\* \* \*

Whether you should retain an attorney is your decision. Allstate will not penalize you in any way for retaining an attorney. An attorney may be able to provide valuable advice, and may be important in complex and serious cases. Again, however, you may wish to seek an offer from Allstate . . .

(CCPR-Doc. 72, p. 3-8; CCPR-Doc. 73(IM), p. 3-8).

The CCPR further discusses what claims adjusters may permissibly tell claimants about the role of attorneys in the claims process and gives examples and instruction about how to respond to claimants in different scenarios. (CCPR-Doc. 72, 3-24 through 3-27; CCPR-Doc. 73(IM), pp. 3-24 through 3-27). It also generally discusses and cautions against "tortious interference with the attorney-client relationship," unauthorized practice of law, and violations of applicable statutory and regulatory restrictions. (*Id.*). *Inter alia*, the CCPR states:

[w]ith the unrepresented segment, we hope to show claimants that an attorney is not needed to be treated fairly, or to receive a prompt, fair offer of settlement. Our communications should simply reinforce our central theme of treating claimants fairly: claimants do not need attorneys to receive fair treatment or a fair settlement.

We should provide claimants with factual information about the role of attorneys in the claims process. We must never advise claimants not to seek an attorney, suggest that at-

torneys are never needed in the claim settlement process, or imply in any way that a claimant will be penalized by Allstate for retaining an attorney, but only provide factual information as to the typical role of attorneys in the claim process. In each case, claimants must be aware that the decision to retain an attorney is theirs.

\* \* \*

In summary, in dealing with unrepresented claimants, we should provide factual information on the role of attorneys in the claim process, and the ability of claimants to receive a fair settlement without an attorney. Our emphasis should be on reducing the need for an attorney through the services we provide, and not advising claimants not to seek an attorney. We should always inform claimants that they may retain an attorney at any time, and that Allstate will not penalize them in any way for that decision.

(CCPR-Doc. 72, pp. 3-24 through 3-27; CCPR-Doc. 73(IM), pp. 3-24 through 3-27).

To assist claims adjusters in identifying unrepresented claims suitable for prompt *Fast Track* settlement, the CCPR includes a *Fast Track Evaluation Worksheet* setting forth the threshold requirements for *Fast Track* processing and settlement:

- (A) unrepresented claimant;
- (B) no coverage questions;
- (C) soft tissue injuries only;
- (D) no residuals – good prognosis;

(E) no aggravation of preexisting conditions; and

(F) requires treatment for less than 60 days.

(CCPR-Doc. 73(IM), p. 3-62).<sup>22</sup> Finally, located on a preface page prior to the table of contents, the CCPR contains the following superseding provision:

all of our processes must comply with state laws, regulations, and court decisions. To the extent that the procedures, processes, forms, scripts, or other material conflicts with your state's laws, state law will take precedence. The material in this manual must be modified or revised to conform to state law when implementing Core Process practices and procedures.

(CCPR-Doc. 72, preface).<sup>23</sup>

**B. Adjustment Of Plaintiff's Individual Claim.**

On May 12, 2001, Plaintiff was involved in a rear-end traffic accident at the intersection of 3rd Street N.W. in Great Falls. After the light turned green, Plaintiff's pick-up truck was still stopped behind another vehicle at the intersection when a Ford Aerostar passenger van driven by Donald Lee<sup>24</sup> struck Plaintiff's vehicle from behind. The impact

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<sup>22</sup> The *Fast Track Evaluation Worksheet* is either missing from, or was not originally included in, the July-1995 CCPR (CCPR-Doc. 72) filed in this case.

<sup>23</sup> The outside cover page and preface-disclaimer page are apparently missing from the CCPR version independently obtained by Jacobsen (CCPR-Doc. 73(IM)).

<sup>24</sup> Allstate insured Lee under a standard motor vehicle liability policy.

lifted the rear end of Plaintiff's truck and drove it forward approximately 20 feet into the intersection. After the collision, Plaintiff immediately experienced dizziness and shoulder pain when he got out of his truck and walked around at the scene. The Great Falls Police Department cited Lee for careless driving and Plaintiff for no insurance.

Upon their arrival at the scene, responding paramedics applied a cervical collar to Plaintiff and transported him to a hospital emergency room where he was diagnosed with a cervical strain (whiplash injury). Plaintiff was then discharged with a cervical collar. Preferring non-prescription pain relievers, he refused prescription pain medication and muscle relaxants. Three days later, on May 15<sup>th</sup>, Plaintiff returned to the emergency room with pain in his left shoulder, arm, and forearm. Plaintiff was diagnosed with a cervical strain, trapezius strain, and forearm strain and then prescribed Vicodin and Flexeril. He was further advised to return to a walk-in clinic if pain persisted.

On May 17<sup>th</sup>, Plaintiff underwent a follow-up examination by Dr. Ron Peterson regarding continuing headaches, sore jaw and teeth, sore abdomen, dizziness, soreness in his neck, shoulder, and arm, and low back pain. Dr. Peterson diagnosed him with cervical and lumbar strain, with cervical radiculitis, muscle spasms, and muscle contraction headaches. Dr. Peterson prescribed pain medication and referred Plaintiff for physical therapy. Plaintiff then commenced a course of prescribed physical therapy (3 times a week for 1 month) and therapeutic massage sessions with various providers. On May 22<sup>nd</sup>, Plaintiff's physical therapist assessed him as follows:

[Plaintiff has] improving cervical spine pain complaints. The *patient reports resolution of low back pain complaints from the accident. The patient indicates a history of having difficulty moving his left upper extremity two days after the accident which has now completely resolved.* Physical therapy examination does reveal some slight weakness at his left bicep musculature. Cervical range of motion is not significantly limited at this time. The *patient denies any unusual symptoms in the head or face and is not having any peripheral pain or numbness tingling.*

(05-22-01 Initial PT Evaluation, Jeff Swift, R.P.R.) (emphasis added). The physical therapist documented the following treatment plan:

the treatment plan is to continue with modalities in order to help facilitate soft tissue healing and decrease pain and muscle spasm. We will progress the patient into a range of motion and strengthening program with healing time constraints. I plan to see this patient 2 to 3 times per week for 2 to 3 weeks . . . [with the ultimate goal of returning] *the patient back to work as a carpet and floor repairman without significant limitations.*

(*Id.*) (emphasis added). Medical records indicate that Plaintiff continued with physical therapy and therapeutic massage through June 8, 2001.

On May 17, 2001, after Dr. Peterson's examination, Allstate claims examiner Chuck Connors (Connors) called and made contact with Plaintiff for the first time. Plaintiff recalls that his initial conversation with Connors on May 17<sup>th</sup> lasted "approximately

1 hour.” Over the course of the conversation and pursuant to Allstate policy,<sup>25</sup> Connors interviewed Plaintiff about the accident and explained the claims process by, *inter alia*:

- (1) expressing empathy for Plaintiff’s loss and wishing him a speedy recovery;
- (2) confirming and gathering details about the injury;
- (3) acknowledging Allstate’s liability; and
- (4) explaining the claims process, including attorney economics;
- (5) discussing property damage settlement;
- (6) discussing a vehicle rental; and
- (7) discussing the availability of advance payments for medical damages and lost wages.

In accordance with Allstate policy,<sup>26</sup> Connors further discussed with Plaintiff the substantive equivalent of Allstate’s “attorney economics script,”<sup>27</sup> to wit:

[q]uite often our customers ask if an attorney is necessary to settle a claim. Some people choose to hire an attorney, but we would really like the opportunity to work directly with you to settle the claim.

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<sup>25</sup> CCPR-Doc. 72 (Ch. 3 – *Unrepresented Segment Training, July 1995*); CCPR-Doc. 73(IM) (Ch. 3 – *Unrepresented Segment Training, Sept. 1995*).

<sup>26</sup> CCPR-Doc. 72 (Ch. 3 – *Unrepresented Segment Training, July 1995*); CCPR-Doc. 73(IM) (Ch. 3 – *Unrepresented Segment Training, Sept. 1995*).

<sup>27</sup> CCPR-Doc. 72, p. 3-29; CCPR-Doc. 73(IM), p. 3-29.

Attorneys commonly take between 25-40% of the total settlement you receive . . . plus expenses incurred. If you settle directly with Allstate, however, the total amount of the settlement is yours.

At any time in the process you may choose to hire an attorney. I would, however, like to make an offer to you first. This way, should you go to an attorney, you would be able to negotiate with the attorney so his/her fees would only apply to amounts recovered through litigation over my offer to you.

Connors *did not* advise Plaintiff that, based on Allstate's research, claimants represented by attorneys receive settlements that are 2-3 time larger on average than those received by claimants who do not have the assistance of counsel.<sup>28</sup> Connors similarly *did not* advise Plaintiff that it is therefore Allstate's corporate policy and objective to attempt to quickly settle claims<sup>29</sup> like his before claimants retain counsel.

In response to Connors' statements about attorney economics, Plaintiff initially told Connors that he did not want to immediately settle the claim because he didn't yet know how bad he was hurt. However, he requested immediate advance payment for lost wages because he could not work for two weeks

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<sup>28</sup> CCPR-Doc. 72, p. 3-3; CCPR-Doc. 73(IM), p. 3-3.

<sup>29</sup> See CCPR-Doc. 72 (Ch. 1 -*CCPR Implementation Training, July 1995* and Ch. 3 -*Unrepresented Segment Training, July 1995*); CCPR-Doc. 73(IM) (Ch. 1 -*CCPR Implementation Training, Sept. 1995* and Ch. 3 -*Unrepresented Segment Training, Sept. 1995*).

and needed to make a past due mortgage payment. Connors responded that Allstate didn't advance lost wages prior to settlement, but that he would check on it and get back to Plaintiff. After consultation with his supervisor (Rory Francis) and pursuant to Allstate's then-prevailing practice and interpretation of Ridley v. Guaranty Nat'l Ins. Co. (1998), 286 Mont. 325, 951 P.2d 987, Connors told Plaintiff that Allstate would not advance payments for wage loss prior to final settlement of the claim. There is no evidence that Connors specifically discussed Ridley with Plaintiff.

Prior to first contact with Connors, Plaintiff had already discussed his claim with an unidentified attorney. Thereafter, in the course of his initial discussion with Connors regarding lost wages, Plaintiff told Connors that he "didn't really want" to retain an attorney, but that he still might have to because the attorney told him that the attorney would make his mortgage payment if retained. (Jacobsen Depo., pp. 116 and 119). Plaintiff agreed with Connors that employing an attorney would likely "drag" the process out and preclude a quick settlement of the claim. (Jacobsen Depo. p. 119).

Plaintiff recalls that he and Connors had a number of lengthy telephone discussions prior to the initial settlement. Although Plaintiff had the impression that Connors wanted to settle the claim as soon as possible, Plaintiff was independently eager to quickly settle the claim to obtain immediate payment for lost wages. Plaintiff was aware of Connors' interest in a quick settlement, but was admittedly not overly "protective" of his own interests. (Jacobsen Depo. pp. 123-24).



Later on May 17<sup>th</sup>, following additional discussion, Conners offered Plaintiff \$3,000.00 (\$2,000.00 for general damages and \$1,000.00 for lost wages) with medical expenses open and payable for 30 days. Based on Plaintiff's account of his condition and prognosis, Conners was generally aware of Plaintiff's diagnoses, prognosis, and that his doctor had prescribed a course of physical therapy sessions. However, Conners had not independently obtained or reviewed Plaintiff's medical records or consulted with any of his medical care providers – he relied exclusively on the preliminary information provided by Plaintiff. Plaintiff rejected Conners' first offer and counter-offered to settle for \$6,000.00 with medical expenses open for 60 days. Following further discussion, Conners made a second settlement offer to Plaintiff – \$3,500.00 (\$2,000.00 for general damages and \$1,500.00 for lost wages) with medical expenses open and payable for 45 days from the date of settlement. Plaintiff initially rejected this offer as well. However, in order to obtain immediate payment for lost wages, Plaintiff called back on May 18, 2001, and accepted Conners' second settlement offer. Conners then processed the settlement as a *Fast Track* settlement under the CCPR guidelines for unrepresented claims.

Conners directed Plaintiff to a local Allstate agent at its Great Falls drive-up property damage claims processing office where he then voluntarily signed a written release and accepted a check from Allstate for \$3,500.00 in final settlement of his claim. At the time of signing, Plaintiff understood that he was giving up his right to seek additional payments except for outstanding medical expenses. Conners did not typically distribute settlement payments out of the Great Falls office but Conners did so in this

case to accommodate Plaintiff's need for immediate payment. (Conners Depo., p. 209-11).

Approximately three weeks after the settlement, on or about June 13, 2001, Plaintiff experienced severe pain in his left arm and shoulder while mowing his lawn. The pain ultimately required him to go to the emergency room at 3:00 – 4:00 a.m. the next morning, June 14<sup>th</sup>. On or about June 15, 2001, Plaintiff called Conners, told him that he was again experiencing arm pain, and asked Conners to reconsider their agreement and provide additional assistance. In essence, Conners replied that he could not help because Plaintiff had already settled his claim and signed a release.

Later, after seeing another doctor due to Dr. Peterson's unavailability, Plaintiff retained Great Falls attorney Richard Martin. By correspondence dated June 21, 2001, Martin demanded that Allstate rescind the initial release and re-open Plaintiff's claim.<sup>30</sup> Thereafter, on June 25<sup>th</sup>, Allstate transferred Plaintiff's file to an adjuster in its represented claims division.

By correspondence dated November 7, 2001, Martin further demanded that Allstate advance payment for lost wages to Plaintiff pursuant to Ridley. Based on the-then prevailing state of Montana case law, see Safeco v. District Court, 2000 MT 153,

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<sup>30</sup> Conners' claim file log entry, dated July 2, 2001, consistently states:

File was open – file was settled, but now claimant has attorney who wants to break the release and have us pay in advance meds and wages. Called attorney to discuss. He was not available. Left message for him to call me.

300 Mont. 123, 2 P.3d 834, Allstate again refused to advance payment for lost wages. However, on December 4, 2001, Allstate deviated from its prevailing practice and agreed to advance lost wages to Plaintiff. Two days later, on December 6, 2001, the Montana Supreme Court clarified Safeco and held that Ridley also required insurance companies to advance payment for lost wages when liability is reasonably clear. See Dubray v. FIE, 2001 MT 251, 307 Mont. 134, 36 P.3d 897.

On October 30, 2002, Martin proffered Plaintiff's first formal settlement demand – a \$250,000.00 policy limits demand. On November 27, 2002, the parties formally settled Plaintiff's claim for \$200,000.00 without need for a settlement conference or litigation. Although Plaintiff later claimed that he didn't want to settle for \$200,000.00 because it was not adequate compensation, he voluntarily accepted Allstate's offer on the advice of counsel (Martin). On December 2, 2002, Plaintiff voluntarily signed a comprehensive release approved by his counsel. Plaintiff's attorney fee agreement required him to pay his counsel \$68,372.78 (\$66,666.67 for attorney's fees and \$1,705.71 for costs) out of the \$200,000.00 total settlement amount. But for the efforts of Plaintiff's subsequently-hired attorney (Richard Martin), Allstate would not have re-opened Plaintiff's underlying claim and he would not have obtained the fair and adequate compensation otherwise due to him.

## **2. PLAINTIFF'S POST-REMAND FACTUAL SHOWINGS.**

*Inter alia*, Plaintiff's post-remand factual showing includes the following subject matters:

- (1) McKinsey Documents/Berardinelli Information;

- (2) Rule 26(b)(4)/701-03 Expert Testimony (Russ Roberts);
- (3) Liddy Slides;
- (4) Allstate Incentive Compensation Plan;
- (5) Shannon Kmatz Affidavit;
- (6) Jose Cornejo Trial Testimony Excerpt;
- (7) Christine Sullivan Testimony Excerpt; and
- (8) 2007 Consumer Federation Of America (CFA) study entitled, “*The “Good Hands” Company Or A Leader In Anti-Consumer Practices? Excessive Prices And Poor Claims Practices At The Allstate Corporation,*” J. Robert Hunter, July 18, 2007.

See *Plaintiff’s Brief In Support Of Motion To Certify Class* (Doc. 222); *Plaintiff’s Reply Brief In Support Of Motion To Certify Class* (Doc. 239); *Plaintiff’s Response To Allstate’s Motion To Strike Supplemental Facts* (Doc. 257); *Plaintiff’s Supplemental Submission Of The Record In Support Of Plaintiff’s Motion To Certify Class* (Doc. 315).<sup>31</sup>

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<sup>31</sup> As a threshold matter, Allstate asserts various evidentiary objections to Plaintiff’s various post-remand factual showings. See Allstate’s *Motion To Strike Supplemental Facts In Plaintiff’s Reply* (Doc. 247, 257, and 266) and *Defendant’s Objections And Response To Plaintiff’s Supplemental Submission* (Doc. 318-19 and 323-26). The summary essence of these objections is that Plaintiff’s various Rule 23 factual showings, *in current form*, are inadmissible as trial evidence on various evidentiary grounds. However, Allstate has cited no controlling authority for the proposition that a rigorous Rule 23 analysis necessarily requires a preliminary factual showing in a trial-admissible form. Moreover, the court cannot conclude and Allstate has further failed to show that Plaintiff cannot, upon further discovery and pretrial refinement, ultimately present the subject factual

**A. McKinsey Documents/Berardinelli Showing.<sup>32</sup>**

Based on the pre-remand affidavit of David J. Berardinelli and referenced information (Plaintiff's 01-27-06 *Rule 60(b) Motion*, Doc. 112, Ex. A-B), Plaintiff has made a preliminary factual showing that:

- (1) Berardinelli has specialized knowledge and familiarity with Allstate's CCPR claims handling system;
- (2) Allstate adopted and implemented the CCPR system in 1995 based on a prior claims adjustment redesign study, conducted in four distinct phases including but not limited to testing conducted by an independent management and consulting firm, *McKinsey & Co.*, with Allstate's assistance and input;
- (3) the McKinsey documents "are a grouping of approximately 12,500 PowerPoint slides prepared by McKinsey to accompany design project pro-

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information in a trial-admissible form. Therefore, the court overrules and denies without prejudice Allstate's various objections and motions to the ultimate trial-admissible evidentiary sufficiency of Plaintiff's preliminary Rule 23 factual showings in this case.

<sup>32</sup> *Inter alia*, Plaintiff's post-remand factual showing includes a showing of the substance and evidentiary effect of the McKinsey documents. (Doc. 222, 239, and 315)). Plaintiff's original McKinsey documents showing was a pre-remand showing in support of his *Rule 60(b) Motion* (Doc. 112). Because the court and the jury did not consider the factual merits of the original pre-remand showing on the above-referenced procedural grounds, the court references the original pre-remand showing with Plaintiff's post-remand McKinsey documents showing.

gress presentations made by McKinsey to Allstate management [personnel] between September 1992 and approximately September 1997;”

- (4) Berardinelli has previously obtained the McKinsey documents from Allstate through court-ordered discovery in 2-3 civil lawsuits against Allstate in New Mexico;
- (5) “selected McKinsey documents Exhibits B and C [to Doc. 112, Ex. B in this case] explain the intent, purpose, and the goals for redesign. In particular, the information in these McKinsey documents shows how and why McKinsey and Allstate designed the CCPR as a profit generating scheme designed to divert money from the [insurance] trust fund of policyholders premiums held by Allstate to satisfy legitimate claims in order to generate excess illicit claims profit without regard to the merits of the claims being made;”
- (6) “[t]he McKinsey documents . . . describe Allstate’s intent to deliberately abuse the fiduciary insurance relationship. Those particular documents – and the evidence of intent – are *not* contained in the CCPR training manuals. Although the CCPR training manuals were, for the most part, excerpted from the McKinsey documents, Allstate did not include the critical statements about its intent, purpose, and goals from the McKinsey documents as part of the CCPR training manuals. Rather, the CCPR manuals are a distillation of the McKinsey documents regarding processes and procedures;”
- (7) “[t]he McKinsey documents . . . explain the reasons for the procedures and processes set forth in

the CCPR. The McKinsey documents are critically important to putting the CCPR in context because the McKinsey documents provide the evidence of intent, motive, and goals for implementing the processes and procedures set forth in the CCPR;” and

- (8) “[a]s explained in the McKinsey documents, Allstate adopted McKinsey’s CCPR program knowing that it was based on a Zero Sum Game principle that was expressly contrary to the Fiduciary Principle upon which American insurance law has been based for over 150 years, for the express purpose of diverting part of the policyholder premium fund which it expressly charges to pay claims into illicit corporate profits.”

(Pre-Remand *Affidavit Of David Berardinelli*, Doc. 112, Ex. B).<sup>33</sup> The attached *Berardinelli* article, which he attested to as setting forth information that he acquired in prior bad faith litigation against Allstate, sets forth a similar but more detailed factual account of the origin, purpose, and intent of the CCPR with reference to specific McKinsey documents. The affidavit further specifically includes and references a representative collection of “verbatim quotes” from the McKinsey documents as support for his assertions regarding their content and significance.

Supplementing the pre-remand Berardinelli showing, Plaintiff has now further shown an actual

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<sup>33</sup> To the extent that the Berardinelli affidavit and referenced information set forth assertions of law rather than fact, the court views the assertions of law as merely indicative of the potential evidentiary relevance of the referenced or implicated factual information.

representative sampling of the McKinsey documents. (*Plaintiff's Brief In Support Of Motion To Certify Class*, Doc. 222, Ex A (Anderson Affidavit, Ex. A)). Plaintiff has likewise shown that he obtained these documents from Allstate on remand. (*Id.*). Although reasonably susceptible to other interpretation, this sampling of the McKinsey documents supports and is consistent with Plaintiff's pre-remand Berardinelli showing.

**B. Russ Roberts – Rule 26(b)(4)/701-03  
Expert Disclosure.**

Pursuant to M.R.Evid. Rules 702-04, M.R.Civ.P. Rule 26(b)(4), and this court's M.R.Civ.P. Rule 16 scheduling order, Plaintiff noticed the anticipated expert testimony of Mr. Russ Roberts, an independent business management consultant of 36 years. (Doc. 237, filed 06-11-10). Plaintiff's Rule 26(b)(4) disclosure for Roberts consists of five single-spaced pages listing his specialized education, training, experience, and knowledge base related to the matters at issue in this case. *Inter alia*, the disclosure references his study and analysis of the Allstate CCPR processes, the McKinsey study and documents, and prior recognition as an expert witness in similar or related insurance bad faith litigation against Allstate in New Mexico in 2004-05.<sup>34</sup> For the detailed rea-

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<sup>34</sup> Beyond cursory assertion by Allstate, the court is unaware of any record basis upon which to conclude that Allstate did not adjust unrepresented automobile-related casualty claims in New Mexico under the same or substantially similar version of the Claim Core Process Redesign Implementation Training Manual: Tort States used in Montana. Compare Claims Core Process Redesign Implementation Training Manual: Threshold States. The court likewise has no record basis to conclude that



sons set forth in his Rule 26(b)(4) disclosure, as affirmed by his subsequent affidavit, Roberts stated the following “key [summary] findings and conclusions resulting from [his] review of Allstate’s claim strategy, organization design, and change[d] management program.”

- (1) “[i]n adopting the CCPR, Allstate replaced its traditional, professional craftsmanship approach to individualized, local claims adjusting with the science of batch processing claims establishing low loss values out of a centralized profit center;”
- (2) internal data and analysis generated by Allstate indicates that represented settlements generally result in settlement five times greater than unrepresented settlements;
- (3) “Allstate developed and implemented management systems to reduce claims settlements to levels below those required to indemnify claimants, to retain the shortfall in claims payments in operating surplus for ultimate reallocation to shareholders and management, and to impose the resultant adverse impact costs of this practice onto claimants, third parties, and the public at large;”
- (4) “[t]he Fast Track claims process was the most egregious and extreme component of Allstate’s incentive-based claims practices;”
- (5) “Allstate’s Fast Track claims processing segment produced the intended results in each of the [proposed] class member’s cases;” and

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an insurer’s duties under New Mexico law significantly vary from an insurer’s duties under the Montana UTPA.

- (6) “[i]nternal regional claims competition, and the ability to set discriminatory performance goals, resulted in additional underpayments to Montana claimants.”

(*Roberts Affidavit*, Doc. 239, attached Ex.; *Roberts Expert Disclosure*, Doc. 237 and 267; *Plaintiff’s Supplemental Submission*, Doc. 315, p. 1-4 (Roberts Report Excerpts)).

**C. Liddy Slides.**

Plaintiff has shown the existence and content of five PowerPoint slides (*i.e.*, a cover slide and p. 10-11, 19, and 20) as purportedly presented at a Strategic Decisions Conference on June 1, 2006, to the *Sanford Bernstein & Co.* by Allstate’s Chairman and Chief Executive Officer Edward M. Liddy (*Plaintiff’s Supplemental Submission*, Doc. 315, Ex. A). On their face, the Liddy slides appear to reference and report on the profit-positive financial performance or results of Allstate’s CCPR claims adjustment program as it relates to adjustment of bodily injury, property damage, comprehensive, and homeowners claims. (*Id.*). As manifest by the title page and the 2006 Allstate copyright mark on the bottom of slide p. 10-11, 19, and 20, the Liddy slides appear to be internal Allstate documents. Although reasonably susceptible to other interpretation, the Liddy documents appear to support and be consistent with Plaintiff’s above-referenced Berardinelli and Roberts showings.

**D. Allstate Incentive Compensation Plan.**

Plaintiff has further shown the existence and content of an internal Allstate document self-captioned as the “MCM/CDM Incentive Compensation Plan [-] A Performance-based Compensation Plan for Eligible Market Claim Managers and Claim

Development Managers.” (*Plaintiff’s Supplemental Submission*, Doc. 315, Ex. B). As manifest by the inside “organization”/contents page (p. 2), the document appears to be an internal Allstate document. By its express terms, the Incentive Compensation Plan:

- (1) indicates that the Plan became effective in 1994-95 (*e.g.*, p. 1.2 and 3.1);
- (2) applies to qualifying “Market Claim Managers and Senior Market Claim Managers who manage Market Claim Offices, and all Claim Development Managers functioning as Claim development Managers” (p. 1.1);
- (3) provides that “the MCM final annual award corresponds to actual Market Claim Office performance” and “[t]he CDM final award is aligned with the same business objectives, measurements, and weights as the Territorial Claim Manager” (p. 1.2);
- (4) links Plan members’ compensation to each employee’s “ability to fulfill Individual MCO Performance Objectives that support overall Allstate PP&C priorities” (p. 1.3);
- (5) states that “[f]or each [incentive plan assessment] component, the measures used to gauge performance reflect the Allstate PP&C customer and business priorities” (p. 1.4);
- (6) states that, *inter alia*, each Plan member’s “Individual MC Performance Objectives . . . are developed in alignment with your Region’s customer service and business objectives” (p. 1.4);
- (7) states that each “Individual[’s] MCO Performance Objectives (IPOs) . . . will come off a menu and

support specific department/function goals which, in turn, are linked to Allstate's PP&C objectives" (p. 2.2);

- (8) states that "Individual MCO Performance Objectives are quantitative and the results are numerically measurable or verifiable" (p. 2.2);
- (9) states that, "[a]long with Allstate PP&C objectives to enhance customer service and provide shareholder value, your IPO's give you specific direction or focus in your job, providing the framework for important decisions and actions" (p. 2.2);
- (10) sets forth an illustrative example of Plan "performance benchmarks for Allstate PP&C and Individual MCO Performance Objectives" with reference, *inter alia*, to bodily injury (BI) claims file reviews (p. 2.2 thru 2.6);
- (11) states that the Plan "acknowledges and rewards your contributions to PP&C results" (p. 2.7); and
- (12) states that "[c]ontinued success in achieving our Allstate PP&C objectives can only be attained by focusing increased attention on Market Claim Office performance" (p. 8.1). (Doc. 315, Ex. B). Although reasonably susceptible to other interpretation, the MCM/CDM Incentive Compensation Plan appears to support and be consistent with Plaintiff's above-referenced Berardinelli and Roberts showings.

**E. Shannon Kmatz Affidavit.**

Based on the Affidavit of Shannon Kmatz, Plaintiff has shown an example of how Allstate applies its MCM/CDM Incentive Compensation Plan in relation to unrepresented *Fast Track* segment claims under

the CCPR/Colossus program. (*Plaintiff's Supplemental Submission*, Doc. 315, Ex. C and D). Plaintiff has further shown that Kmatz has personal knowledge of this dynamic based on his experience as an unrepresented segment claims adjuster in New Mexico from 1997-2000. (*Id.*).<sup>35</sup> The Kmatz Affidavit sets forth facts that appear to support and be consistent with Plaintiff's above-referenced Berardinelli and Roberts showings.

**F. Jose Cornejo Trial Testimony Excerpt.**

Based on the prior New Mexico testimony of Jose Cornejo, Plaintiff has shown, based on Allstate's New Mexico operations, that Allstate's CCPR unrepresented *Fast Track* process has or can result in unrepresented settlements in up to 75% to 80% of *Fast Track* claims (described as unrepresented BI claims where the claimant received medical treatment for less than 90 days). (*Plaintiff's Supplemental Submission*, Doc. 315, Ex. E). Plaintiff has further shown that Cornejo has personal knowledge of this fact based on his experience and observations as Allstate's Market Claim Manager in its New Mexico Market Claims Office in Albuquerque, New Mexico, prior to the date of his testimony in November of

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<sup>35</sup> Beyond cursory assertion by Allstate, the court is unaware of any record basis upon which to conclude that Allstate did not adjust unrepresented automobile-related casualty claims in New Mexico under the same or substantially similar version of the *Claim Core Process Redesign Implementation Training Manual: Tort States* used in Montana. Compare *Claims Core Process Redesign Implementation Training Manual: Threshold States*. The court likewise has no record basis to conclude that an insurer's duties under New Mexico law significantly vary from an insurer's duties under the Montana UTPA.

2009. (*Id.*)<sup>36</sup> Although subject to challenge on evidentiary relevance or weight upon a showing by Allstate that its application of the CCPR is different or yields different results in New Mexico than Montana, the Cornejo testimony appears to support and be consistent with Plaintiff's above-referenced Berardinelli and Roberts showings.

**G. Christine Sullivan Testimony Excerpt.**

Based on the prior New Mexico testimony of Allstate's Vice President of Property-Casualty Claims, Christine Sullivan, Plaintiff has shown that Allstate settles approximately 50% of the total number of BI claims settled each year pursuant to the CCPR unrepresented *Fast Track* process. (*Plaintiff's Supplemental Submission*, Doc. 315, Ex. F). Although possibly subject to qualification, clarification, or other evidentiary challenge in context, the Sullivan testimony excerpt appears to be pertinent to and consistent with Plaintiff's above-referenced Berardinelli and Roberts showings.

**H. 2007 CFA Study In Re Allstate Business Practices.**

Based on the July 18, 2007, report of J. Robert Hunter, Director of the Consumer Federation Of

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<sup>36</sup> Beyond cursory assertion by Allstate, the court is unaware of any record basis upon which to conclude that Allstate did not adjust unrepresented automobile-related casualty claims in New Mexico under the same or substantially similar version of the *Claim Core Process Redesign Implementation Training Manual: Tort States* used in Montana. Compare *Claims Core Process Redesign Implementation Training Manual: Threshold States*. The court likewise has no record basis to conclude that an insurer's duties under New Mexico law significantly vary from an insurer's duties under the Montana UTPA.

America (CFA), Plaintiff has shown, in pertinent part, that:

- (1) CFA is a consumer-oriented association engaged in monitoring and investigating insurance industry practices to inform and advocate on behalf of insurance consumers. The author of this 2007 CFA study has “more than 45 years experience in evaluating the impact of the insurance marketplace on consumers” (p. 9);
- (2) Allstate “has become the country’s second largest property and casualty insurer, after State Farm. . . . Primary lines of business are private passenger automobile and homeowners insurance, which respectively represent approximately 70% and 25% of [its] total book of property and casualty business” (p. 6);
- (3) the purpose of insurance is “to spread risk. Insurance is a type of social contract, involving a simple subsidy. Everyone buying insurance contributes to a common fund from which those with claims will be paid” (p. 8);
- (4) as indicated in McKinsey slide no. 5166, Allstate intended the CCPR “to radically alter [its] whole approach to the business of claims.” The CCPR is based on a “Zero Sum Game theory” which “pit[s] Allstate and its shareholders against its policy holders for share of the [insurance] claim fund.” As indicated in the McKinsey documents, “[i]mproving Allstate’s casualty economics will” cause Allstate to gain and cause ‘some medical providers, plaintiff attorneys, and claimants’ to “lose” (p. 21, citing Berardinelli theory);
- (5) “[a]s the key element of CCPR, Allstate uses a program known as ‘Colossus’ sold by Computer

Sciences Corporation (CSC). CSC . . . [markets] Colossus as ‘the most powerful cost savings tool’ and also [suggests] that, “the program will immediately reduce the size of bodily injury claims by up to 20 percent.’ . . . [A]ny insurer who buys a license to use Colossus is able to calibrate the amount of ‘savings’ it wants Colossus to generate . . . If Colossus does not generate sufficient ‘savings’ to meet the insurer’s needs or goals, the insurer simply goes back and ‘adjusts’ the benchmark values until Colossus produces the desired results” (p. 21, citing Berardinelli theory);

- (6) “[p]rograms like Colossus are designed to systematically reduce payments to policyholders without adequately examining the validity of each individual claim. The use of these programs appears to sever the promise of good faith that insurers owe to their policyholders. Any increase in profits results that results from arbitrarily selected reductions in claims payments cannot be considered legitimate” (p. 21);
- (7) from 1987-96, Allstate paid out 73% of its property-casualty premiums as claims benefits compared to an industry average of 70% for that same period (p. 1 and 21-22);
- (8) following implementation of its CCPR program in 1996, from 1997-2006, Allstate paid out only 59% of its property-casualty premiums as claims benefits compared to an industry average of 65% for that same period, resulting in significantly higher profits (p. 1-2 and 21-22);
- (9) since 1996, Allstate has reduced the amount paid out for bodily injury claims “by almost 20 percent relative to the industry,” a remarkable achieve-



ment on the same or similar “industry average claims” (p.2 and 21-22);

- (10) Allstate, through its Chief Financial Officer (Dan Hale), has publicly touted its extraordinary profitability and attributed it, *inter alia*, to its CCPR claims processes (p. 23); and
- (11) “Allstate has [thus] adopted claims payment techniques that appear to routinely underpay claims. It adopted these techniques after being told by a consultant that these systems would put [Allstate] in a ‘zero sum game’ with their policyholders, in which Allstate management and shareholders would benefit financially at the expense of policyholders” (p. 29).

(Doc. 257, Exhibit). Although subject to challenge and different interpretation before the ultimate trier of fact, the claims-pertinent portions of the 2007 CFA study are consistent with and build upon the Berardinelli and Roberts showings.

### **3. ALLSTATE’S POST-REMAND RESPONSIVE SHOWING.**

In addition to various legal arguments regarding the pre-remand factual record, the pre-remand rulings by this court, the effect of the Montana Supreme Court’s rulings on appeal, and the sufficiency of Plaintiff’s post-remand factual showings, Allstate has filed the *Affidavit Of Christine Sullivan* (Doc. 233) as a supplemental factual showing in support of its opposition to Plaintiff’s motion for class certification. In summary essence, Allstate has thus made the following factual showings:

- (1) Allstate’s considerations in developing the CCPR process included:

- (A) its recognition in the mid-1990's that its "claims expenses were low" but "its total pay-out on claims was increasing at a pace faster than the rest of the industry" (p. 1);
- (B) a resulting mid-1990's closed casualty claims file review indicated that Allstate "was over-paying claims on average by 16%, due to 'padding' of claims, exaggeration of injuries, and in some cases outright fraud" (p. 2);
- (C) Allstate "claimant surveys indicated that claimants wanted:
  - (1) to be contacted within 24 hours after their accident;
  - (2) to know precisely who was responsible at Allstate for handling claims;
  - (3) to be treated more courteously; and
  - (4) . . . more information about the claims process" (p. 2);
- (2) Allstate commissioned a "third-party consultant, McKinsey & Company," to "assist Allstate with portions of its [claims process] review. During this review, McKinsey prepared many materials for consideration by Allstate, but those materials did not establish Allstate company policy or practices. . . . The presentation materials generated by McKinsey during this review have sometimes been generally referred to as 'McKinsey documents'" (p. 2);
- (3) the "processes and procedures actually implemented [by Allstate] as a result of this review were rolled out in late 1995 and characterized as Allstate's „Claims Core Process Redesign" (p. 2);

- (4) “[i]nitially, [the] Casualty CCPR included five re-designed claims processes relating to:
- (A) evaluation;
  - (B) special investigative units;
  - (C) minor impact soft tissue claims;
  - (D) uninsured motorist claim handling; and
  - (E) unrepresented claim handling.

These processes were reflected in various versions of the *Claim Core Process Redesign Implementation Training Manual: Tort States* and the *Claims Core Process Redesign Implementation Training Manual: Threshold States* that were used by Allstate for training purposes” (p. 2-3);

- (5) “[t]here were also some processes described as CCPR processes that were developed in the mid-1990’s without assistance from McKinsey. For example, the processes reflected in Allstate’s *CCPR Defense of Litigated Files Manual* were developed exclusively by Allstate” (p. 3);
- (6) since initial implementation, Allstate has, “without assistance from McKinsey,” “modified” “[s]ome of the processes initially implemented.” “For example, in October of 2000 a revised ‘CCPR Manual’ was distributed for use in the field. McKinsey did not have any role in development or implementation of the revised processes including the 2000 CCPR manual. I have reviewed Trial Exhibit 41 which includes the October 2000 revisions with the exception of the Defense of Litigated Files (DOLF) materials; (p. 3);
- (7) “Allstate has also discontinued using certain aspects of the processes initially rolled out as part

of [the] Casualty CCPR. For example, Allstate discontinued using its *Customer Service Pledge*, *Quality Service Pledge*, and *Do I Need An Attorney* forms in approximately 2002 (p. 3);

- (8) “[t]he term ‘CCPR’ has been used over time to refer to a variety of claims practices only some of which were developed during the review conducted in the mid-1990’s with the assistance of McKinsey & Co. Accordingly, categorical assertions that any document relating to CCPR is related to or developed during Allstate’s review in the mid-1990’s with the assistance of McKinsey is inaccurate” (p. 3);
- (9) “[b]eginning in late 1995, nationwide implementation of the redesigned practices began on a rolling basis. During the course of the rollout,” Allstate made “non-material modifications . . . to the implementation training manuals resulting in various versions labeled July 1995, September 1995, and October 1995. Additionally, the type of *CCPR Implementation Training Manual* used in a particular state depended on the basic legal issue of whether bodily injury claims were processed as torts (tort states) or not (threshold states)” (p. 4);
- (10) “[b]ecause all processes were also conformed to local law, there may also have been aspects of the redesigned processes that were locally modified to accommodate specific state laws or practices. Modifications to the redesigned processes and/or ‘CCPR processes’ that have been subsequently implemented were not necessarily adopted nationwide. Accordingly, categorical assertions that CCPR was a company-wide practice with no dis-

tinguishing difference between one state and another is inaccurate” (p. 4); and

- (11) reference to various Insurance Resource Council (IRC) studies (1994, 1999, and 2003) received, maintained, and referenced by Allstate “in the ordinary course of its regularly conducted business” (p. 4).

Although various contradictory factual assertions may implicate genuine issues of material fact with Plaintiff’s characterization of the evidence, the *Affidavit Of Christine Sullivan* (Doc. 233) does not preclude or invalidate Plaintiff’s contrary proof as a matter of law.

### **LEGAL ANALYSIS**

By various procedural means and subject to the manifest law of the case on remand, Allstate essentially seeks court rulings effectively precluding the new or revised claims asserted in Plaintiff’s post-remand *Fourth Amended Complaint* (Doc. 219), including but not limited to its post-remand class action claims, thereby effectively forcing this matter to proceed to a second trial on remand on Plaintiff’s last surviving pre-remand individual claims (3 non-class UTPA claims, 3 related tort claims, and a derivative non-class punitive damages claim). In contrast, Plaintiff seeks significant expansion of the substantive scope of this seemingly endless litigation to assert new class action theories seeking various forms of declaratory, injunctive, equitable, and supplemental relief. To the extent possible, the court attempts to logically address this mishmash in the following progression.

1. ALLSTATE'S MOTION TO VACATE/  
OPPOSE FILING OF 4<sup>TH</sup> AMENDED  
COMPLAINT AND MOTION FOR LEAVE  
TO BELATEDLY DISPUTE SUBSTANTIVE  
RULE 15(A) VALIDITY OF 4<sup>TH</sup> AMENDED  
COMPLAINT.

Allstate first moves the court to vacate, “*nunc pro tunc*,” its prior *Order Granting Plaintiff Leave To File Fourth Amended Complaint* (Doc. 215, filed 05-05-10) on the asserted ground that Allstate “inadvertently failed to file a motion for extension” of time to respond to *Plaintiff's Motion To Amend Complaint* (Doc. 212, filed 04-07-10). (Allstate's Motion To Vacate Fourth Amended Complaint And For Extension Of Time To Oppose Motion To Amend, Doc. 220). Allstate then further seeks corresponding leave to belatedly file a brief in opposition to Plaintiff's motion for leave to file a fourth amended complaint. (*Id.*). Since Plaintiff has already properly filed his *Fourth Amended Complaint* on leave of court and the ultimate issue is the substantive sufficiency of the complaint, the court must first address whether to overlook Allstate's procedural neglect and allow it to belatedly dispute the substantive sufficiency of the complaint. If so, the court will then address the substantive sufficiency of the complaint under M.R.Civ.P. Rule 15(a).

As to its motion for leave to belatedly dispute the substantive sufficiency of the *Fourth Amended Complaint*, Allstate makes no showing or assertion as to the basis for the asserted “*nunc pro tunc*” relief, *i.e.*, how or why *the court* erred. Allstate attributes its own procedural neglect to a purported, non-record agreement between counsel for an extension of the response time. (*Id.*). Allstate further asserts that re-

relief from the clear and unequivocal response brief deadline is warranted due to “the complexity of the issues involved.” (Allstate’s Motion To Vacate Fourth Amended Complaint And For Extension Of Time To Oppose Motion To Amend (Doc. 220)). Plaintiff “takes no position on Allstate’s request for additional time” to file a brief opposing Plaintiff’s motion for leave to amend, but nonetheless asserts that he properly and timely filed his *Fourth Amended Complaint* in accordance with the court’s authorizing order. (*Plaintiff’s Response* (Doc. 223)).

As a threshold procedural matter, Plaintiff properly filed and duly served his motion for leave to file an amended complaint pursuant to M.R.Civ.P. Rule 15(a). (*Plaintiff’s Motion To Amend Complaint* (Doc. 212, filed 04-07-10)). The court properly and timely granted the unopposed motion pursuant to MUDCR<sup>37</sup> Rule 2. Based on a purported agreement *between counsel without leave of court*, Allstate simply ignored its 10 day response deadline.

Beyond its failure to timely respond to Plaintiff’s motion, Allstate’s belated motion for extension of response time similarly fails to show any particularized cause for relief from the procedural deadline other than the cursory assertion that parties agree that “the complexity of the issues involved” warrant extension the response time. (Allstate’s *Motion For Extension Of Time*, Doc. 220). Further manifesting the parties’ continuing disregard for the court and applicable procedural rules, Allstate presumptively filed its untimely response brief prior to obtaining leave of court on its motion seeking leave to do so.

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<sup>37</sup> Montana Uniform District Court Rules, Title 25, Chapter 19, MCA.

*(Defendant's Opposition To Plaintiff's Motion To Amend, Doc. 216).*

As a threshold matter, the parties' purported agreement to disregard inconvenient procedural rules is not a sufficient showing of excusable neglect for disregard of procedural deadlines. Due to the overwhelming per judge civil and criminal caseloads and dockets in this District, this court cannot and should not have to continue to countenance the parties' disregard of briefing and other procedural rules without prior leave of court. At the end of the day, the governing rules of procedure either mean something or they do not, notwithstanding the all too common assertion of counsel that this case is the special case warranting exception from the rule. Nonetheless, now "mindful" without misplaced focus on procedural rules that "the fundamental purpose" of the rules of civil procedure is "to promote ascertainment of the truth and the ultimate disposition of the lawsuit in accordance therewith," see Jacobsen, ¶¶ 57-58, this court is now seemingly compelled by the law of the case to look past such procedural disregard and address the merits of Allstate's untimely opposition to Plaintiff's initial motion to file his *Fourth Amended Complaint*. Therefore, Allstate's motion for leave to belatedly dispute the substantive sufficiency of Plaintiff's *Fourth Amended Complaint* (Doc. 212 and 219) under M.R.Civ. P. Rule 15(a) is hereby granted. The court will thus consider *Defendant's Opposition To Plaintiff's Motion To Amend* (Doc. 216) on the merits.



**2. ALLSTATE'S RULE 15(A) MOTION TO DISMISS/STRIKE 4<sup>TH</sup> AMENDED COMPLAINT.**

Pursuant to M.R.Civ.P. Rules 12(b)(6) and 15(a), Allstate moves the court to preclude amendment to add, or alternatively to dismiss or strike, Plaintiff's post-remand class action claims and related relief. (*Defendants' Motion To Dismiss/Strike*, Doc. 229, 231, 240-41, and 248-49; see also *Defendant's Opposition To Plaintiff's Motion To Amend*, Doc. 216).

After the filing of a responsive pleading, a plaintiff may amend a complaint only upon stipulation or leave of court. M.R.Civ.P. Rule 15(a). When procedurally proper, Rule 15(a) permits revision of existing claims and addition of new claims and parties. Priest v. Taylor (1987), 227 Mont. 370, 377-79, 740 P.2d 648, 652-54. The court must "freely" and liberally allow amendment" of pleadings under Rule 15(a) "when justice so requires". Hobble-Diamond Cattle Co. v. Triangle Irr. Co. (1991), 249 Mont. 322, 325, 815 P.2d 1153, 1155.

However, M.R.Civ.P. Rule 15(a) does not require free and liberal amendment as a matter of right in every case. Allison v. Town of Clyde Park, 2000 MT 267, ¶ 20, 302 Mont. 55, 11 P.3d 544; Stundal v. Stundal, 2000 MT 21, ¶ 13, 298 Mont, 141, 995 P.2d 420. The court may properly deny amendment of a pleading if the proposed amendment:

- (1) would substantially prejudice the opposing party;
- (2) would cause undue delay;
- (3) is made in bad faith;
- (4) is based upon a dilatory motive;

- (5) is the result of repeated failure to cure deficiencies by amendments previously allowed;
- (6) would be frivolous, futile, or insufficient as a matter of law; or
- (7) would otherwise result in injustice.

Stundal, ¶ 12; Peuse v. Malkuch (1996), 275 Mont. 221, 227, 911 P.2d 1153, 1156-57; Lindley's, Inc. v. Professional Consultants, Inc. (1990), 244 Mont. 238, 242, 797 P.2d 920, 923; *see also* Geil v. Missoula Irrig. District, 2004 MT 217, ¶ 22, 322 Mont. 388, 96 P.3d 1127 (court may deny motion to amend when justice so requires); Hawkins v. Harney, 2003 MT 58, ¶ 39, 314 Mont. 384, 66 P.3d 305 (denial of frivolous, futile, or legally insufficient new claim).

**A. Rule 15(a) Futility – Permissible Scope Of Proceedings On Remand.**

Allstate first asserts that the new matters pled in Plaintiff's *Fourth Amended Complaint* impermissibly exceed the limited scope of the Montana Supreme Court's remand order. (*Defendant's Opposition To Plaintiff's Motion To Amend*, Doc. 216; *Defendants' Memorandum In Re Motion To Strike And Dismiss*, Doc. 231, p. 17-18; 01-27-11 Hearing Tr. 6:23-25:6).

Under the law of the case doctrine, a prior decision by an appellate court regarding a particular issue is binding and generally precludes the same parties from relitigating the same issue in subsequent litigation in the same case. *E.g.* Murphy Homes, Inc. v. Muller, 2007 MT 140, ¶ 56, 337 Mont. 411, 162 P.3d 106; Grenfell v. Anderson, 2002 MT 225, ¶ 18, 311 Mont. 385, 56 P.3d 326; Gilder, ¶¶ 12-14; Hafner v. Conoco, Inc., 1999 MT 68, ¶ 20, 293 Mont. 542, 977 P.2d 330; Scott v. Scott (1997), 283 Mont. 169, 175-

76, 939 P.2d 998, 1001-02; Haines Pipeline Constr., Inc. v. Montana Power Co. (Haines II) (1994), 265 Mont. 282, 289, 876 P.2d 632, 637; Zavarelli v. Might (Zavarelli II) (1989), 239 Mont. 120, 124-25, 779 P.2d 489, 492-93; Carlson v. Northern Pac. Ry. Co. (1929), 86 Mont. 78, 81, 281 P. 913, 914. The law of the case doctrine applies only to issues of law actually decided on appeal as well as any component or constituent sub-issues essential to the decision by necessary implication. Renville v. Farmers Ins. Exchange (Renville II), 2003 MT 103, ¶¶ 14-16, 315 Mont. 295, 69 P.3d 217; Gilder, ¶ 12; Hafner, ¶ 20; Haines II, 265 Mont. at 290, 876 P.2d at 637; Zavarelli II, 239 Mont. at 124-25, 779 P.2d at 492-93; O'Brien v. Great Northern R.R. Co. (O'Brien II) (1967), 148 Mont. 429, 440, 421 P.2d 710, 716; Carlson, 86 Mont. at 81, 281 P. at 914; Wastl v. Montana Union Ry. Co. (1900), 24 Mont. 159, 61 P. 9, 11. However, when not contrary to an express limiting instruction on remand or otherwise inconsistent with the appellate decision, “the issues are generally open on a retrial” and the district court may in the interests of justice “make any order or decision in further progress of the case . . . as to any question not presented or settled” by the appellate decision. Haines II, 265 Mont. at 290-91, 876 P.2d at 637-38; Zavarelli II, 239 Mont. at 125-26, 779 P.2d at 493; see also Story v. City of Bozeman (Story II) (1993), 259 Mont. 207, 230, 856 P.2d 202, 216 (unqualified remand for new trial “opens anew all questions in the case”); O'Brien II, 148 Mont. at 440-41, 421 P.2d at 716 (unqualified remand for new trial “returns” the parties “to the positions they occupied before” trial).

Here, Plaintiff liberally construes the scope of remand to allow him to revise and add non-class claims and parties and to further add a related class

action claim for various forms of class relief. (See Plaintiffs *Fourth Amended Complaint*; Doc. 219, p. 8-12). The following Jacobsen provisions are the apparent bases for Plaintiff's liberal construction of the scope of remand:

- (1) Jacobsen, ¶ 67 (unqualified reversal and remand for new trial with compelled production of *McKinsey* documents);
- (2) Jacobsen, ¶ 55 (recognizing that this court “treated the denied” discovery motions and motions to add class claims “as interdependent” and that it denied *McKinsey*-related discovery motion in regard to both individual and class action institutional bad faith theories);
- (3) Jacobsen, ¶ 56 (noting that Plaintiff appealed the court's denial of all of his “various motions directed at compelling discovery of the *McKinsey* documents”); and
- (4) Jacobsen, ¶ 58 (chiding this court to disregard procedure over merits and noting, without distinction for individual or institutional class claims, that “*McKinsey* documents were indeed critical to Jacobsen's theory that Allstate's policies regarding unrepresented claimants constituted bad faith”).

In contrast, pursuant to Jacobsen, ¶ 67, Allstate more narrowly construes the substantive scope of remand to be limited to a new trial on the previously-tried non-class claims (*i.e.*, 3 UTPA claims, 3 related tort claims, and derivative punitive damages claims) subject to:

- (1) the now-clarified standard for recovery of parasitic emotional distress damages;

- (2) no consideration of Plaintiff's underlying attorney fees and costs as elements of compensable damages or as an equitable exception to the American Rule; and
- (3) Plaintiff's discovery of the *McKinsey* documents.

(01-27-11 Hearing Tr. 6:23-25:6). While accurately characterizing Jacobsen's ultimate summation and remand order, ¶ 67, Allstate glosses over the other significant reason for reversal – this court's refusal to grant Plaintiff's "various motions directed at compelling discovery of the *McKinsey* documents" in regard to both his then-pled non-class claims and his then-contemplated class action claims. See Jacobsen, ¶¶ 55-58 and 67. As first recognized by this court (Doc. 93, p. 27-30) and later in Jacobsen, ¶¶ 55 and 58, Plaintiff's *McKinsey*-related discovery motions were "critical" to Plaintiff's pre-remand class and non-class claims "that Allstate's policies regarding unrepresented claimants constituted bad faith." By failing to clearly distinguish between Plaintiff's pre-remand class and non-class claims as they related to its *McKinsey*-related ruling, see Jacobsen ¶¶ 52-58 and 67, the Montana Supreme Court neither expressly nor implicitly limited the scope of remand other than by requiring remand and retrial in accordance with its various express holdings. Thus, except as inconsistent with Jacobsen's various holdings on the enumerated issues addressed on appeal, the issues in this case are again generally open anew on remand in accordance with the Montana Rules of Civil Procedure.

Subject to various other pending and potential post-remand challenges under other motions and

rules of procedure,<sup>38</sup> the express and implied scope of remand does not as a matter of law preclude amendment of the pleadings to add new or revised legal claims and theories, including but not limited to class claims, that are otherwise consistent with Jacobsen's express holdings and remand summation. Therefore, for purposes M.R.Civ.P. Rule 15(a), the newly-asserted claims in Plaintiff's *Fourth Amended Complaint* are not futile as a matter of law as beyond the express or implied scope of remand on appeal.

**B. Rule 15(a) – Undue Prejudice, Burden, And Expense.**

Pursuant to M.R.Civ.P. Rule 15(a), Allstate next asserts that addition of the newly-asserted class claims and relief will result in unfair prejudice, burden, and expense to Allstate at this stage of the litigation. (*Defendant's Opposition To Plaintiff's Motion To Amend*, Doc. 216, p. 10-11). Without further analysis, Allstate quotes the court's pre-remand ruling<sup>39</sup> on Plaintiff's original motion to amend and add Rule 23(3)(b)(3) class claims, to wit:

[o]ver two years since the commencement of this case and several months after the close of 19 months of discovery, Jacobsen seeks to radically enlarge the nature and scope of this action. If the [c]ourt permits amendment, the

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<sup>38</sup> Including but not limited to challenges to (1) the correctness of Plaintiff's predicate complaint assertions as to the state and effect of the law of the case and (2) the substantive threshold legal sufficiency under M.R.Civ.P. Rules 15(a)/12(b)(6), 12(f), and 23 of the newly-asserted class claims and relief.

<sup>39</sup> *Order Denying Plaintiff Leave To Add Class Claims* (Doc. 92, filed 12-02-05, p. 31-33).

dominant issue will no longer be whether Allstate treated Jacobsen properly on the facts of this case, but rather, whether Allstate has mistreated Jacobsen and all other unrepresented Montana claimants as a matter of course pursuant to its corporate policy and practices under the CCPR. Jacobsen correctly asserts that the proposed class claims are generally related to and generally based on the same general legal theory as Jacobsen's currently-pled individual claims. However, the very nature of the class claims will necessarily increase both the legal and factual complexity and scope of this action and thereby:

- (1) require Allstate to radically re-focus, expand, and rearrange its defense midstream;
- (2) require significant additional discovery (*e.g.*, Jacobsen's own discovery requests, identification of class members, and individual factual issues);
- (3) require substantial additional pre-trial motion practice to determine the threshold validity of the class claims under Rule 23 and for additional summary judgment motions and motions in limine; and
- (4) accordingly require substantial time, burden, and expense.

Thus, under the circumstances, addition of Jacobsen's class claims at this point would result in substantial prejudicial and undue delay, burden, and litigation expense.

(*Defendant's Opposition To Plaintiff's Motion To Amend*, Doc. 216, p. 10-11).

Although it accurately quotes the selected excerpt from the court's prior pre-remand ruling on Plaintiff's motion to conduct additional discovery and add class claims, Allstate disregards the distinct procedural context of the ruling – a Rule 15(a) determination of substantive futility and substantial prejudice, delay, burden, and expense resulting from Plaintiff's untimely and non-diligent discovery efforts. (Doc. 93, p. 43-55). Recognizing the evidentiary potential but not passing on the substantive sufficiency of the *McKinsey* documents, the court narrowly ruled that Plaintiff's lack of *procedural* due diligence and excusable neglect in the conduct of pre-remand discovery precluded him from substantively sustaining his then-contemplated class claims through further discovery. (Doc. 93, p. 26-33).

Plaintiff is not similarly handicapped on remand. He now has the benefit of the crucially important *McKinsey* documents and related evidence in support of his new Rule 23(b)(2) class theories. Unlike before and in accordance with the court's ensuing Rule 23 analysis, Plaintiff now has the previously-missing evidentiary link upon which the ultimate finder of fact, if it finds Plaintiff's evidence credible and persuasive, could *conceivably* find merit in his class claims. With this conceivable proof of a systemic pattern and practice in violation of the Montana's Unfair Trade Practices Act and for the reasons manifest in the court's ensuing Rule 23 analysis, Plaintiff can now overcome the previously insurmountable threshold pleading hurdles of Rules 15(a) and 12(b)(6) as they relate to the substantive requirements of Rule 23. Thus, the post-remand procedural



and substantive contexts are fundamentally different and more favorable to Plaintiff than before.

At this even later date, Allstate's original assertion of prejudice (undue burden, cost, and delay caused by Plaintiff's prior conduct of this case) is even more compelling than before. However, the Montana Supreme Court has clearly and unequivocally rejected this view and chided this court to allow Plaintiff to proceed on the merits. Jacobsen, ¶¶ 57-58. The court is thus compelled to ultimately conclude pursuant to M.R.Civ.P. Rule 15(a) that, in light of the law of the case and the new evidence and claims on remand, the interests of justice on the merits outweigh and control over the resulting burden, delay, and cost to Allstate.

**C. Rules 15(a) and 12(B)(6) – Rule 23 Futility Of New Class Claims And Remedies As A Matter Of Law.**<sup>40</sup>

Pursuant to M.R.Civ.P. Rules 15(a) and 12(b)(6) and on various asserted grounds, Allstate asserts that Plaintiff's newly-asserted class claims are futile as a matter of law regarding the applicable class certification requirements of M.R.Civ.P. Rule 23. (*Allstate's Opposition To Plaintiff's Motion To Amend*,

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<sup>40</sup> Because Plaintiff's *Fourth Amended Complaint* is unclear and ambiguous as to whether and to what extent his claims are predicated on Rules 23(b)(1) and/or 23(b)(3), Allstate's Rule 15(a) briefing attempts to cover all three subparts of Rule 23(b). However, Plaintiff's subsequently filed Rule 23 briefing (Doc. 222, p. 12-17 and Doc. 239, p. 8-10; see also 01-27-11 Hearing Tr. 170:1 - 172:2) manifests that he primarily seeks Rule 23(b)(2) certification and, as an alternative fall-back, "hybrid" certification of Rule 23(b)(3) punitive damages class. Thus, the court focuses on these clarified theories.

Doc. 216, p. 11-27; *Defendants' Memorandum In Re Motion To Strike And Dismiss*, Doc. 231, p. 4-17 and 19-20). Allstate's assertions largely track with similar objections on the law and evidence in the more substantive post-pleading context of Rule 23. (*Defendant's Opposition To Plaintiff's Motion For Class Certification*, Doc. 232).

For purposes of M.R.Civ.P. Rule 15(a), a new claim is not futile or insufficient as a matter of law unless "the pleader can develop no set of facts . . . that would entitle the pleader to the relief sought." Hobble-Diamond, 249 Mont. at 325, 815 P.2d 1153, 1155-56. This Rule 15(a) standard is thus essentially a Rule 12(b)(6) pleading standard. See Miller v. Rykoff-Sexton, Inc. (9<sup>th</sup> Cir. 1988), 845 F.2d 209, 214 (citing 3 J. Moore, *Moore's Federal Practice* ¶ 15.08[4] (2d ed. 1974)); Milanese v. Rust-Oleum Corp. (2<sup>nd</sup> Cir. 2001), 244 F.3d 104, 110; compare Hobble-Diamond, 249 Mont. at 325, 815 P.2d 1153, 1155-56. Consequently, a proposed legal claim is futile as a matter of law for purposes of Rule 15(a) only if the claim is either not a cognizable legal claim as a matter of law or if, as a matter of law, the pleader can develop no set of facts that would entitle the pleader to relief under an otherwise legally cognizable claim. Kleinhesseling v. Chevron, U.S.A. (1996), 277 Mont. 158, 161, 920 P.2d 108, 110; Capital Ford Lincoln Mercury (1995), 272 Mont. 425, 428-29, 901 P.2d 112, 114; Boreen v. Christenson (1994), 267 Mont. 405, 408, 884 P.2d 761, 762. In assessing the threshold legal sufficiency of the claim, the court must take all factual assertions pled in the complaint as true and view them in the light most favorable to the claimant. See, e.g., Kleinhesseling, 277 Mont. at 161, 920 P.2d at 110; Boreen, 267 Mont. at 408, 884

P.2d at 762; Willson v. Taylor (1981), 194 Mont. 123, 126, 634 P.2d 1180, 1182.

Pursuant to M.R.Civ.P. Rule 23(c)(1) (2011),<sup>41</sup> an initial class action certification is a preliminary, interlocutory matter subject to revision prior to final disposition of the case. See also West v. Capitol Federal Sav. and Loan Ass'n (10<sup>th</sup> Cir. 1977), 558 F.2d 977, 982. Accordingly, district courts have broad discretion under Rules 23(c)(1) and 23(d) to more precisely modify and tailor class definitions to comport with the requirements of Rules 23(a) and 23(b). Powers v. Hamilton County Public Defender Comm'n (7th Cir. 2007), 501 F.3d 592, 619; In re Monumental Life Ins. Co. (5th Cir. 2004), 365 F.3d 408, 414; Prado-Steiman ex rel. Prado v. Bush (11th Cir. 2000), 221 F.3d 1266, 1273. Under these standards, a plaintiff is not bound to an originally-proposed class definition, particularly for purposes of a threshold futility analysis under Rules 12(b)(6) and 15(a).

As manifest in the court's ensuing Rule 23 analysis, Plaintiff's asserted class claim, as construed by the court, as a matter of law states a cognizable Rule 23(b)(2) class action claim for cognizable forms of declaratory, injunctive, punitive, and supplemental relief. As the moving party under the Rule 15(a) and 12(b)(6) futility standard, Allstate has failed to show as a matter of law that Plaintiff can develop no set of facts that would entitle him to the requested Rule 23(b)(2) class relief. Despite considerable pleading imprecision on its face,<sup>42</sup> Plaintiff's *Fourth Amended*

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<sup>41</sup> See also M.R.Civ.P. Rule 23(c)(1)(c) (2011).

<sup>42</sup> Even if strictly construed as facially deficient, the facial deficiencies in Plaintiff's *Fourth Amended Complaint* are readily curable by further amendment in accordance with the liberal

*Complaint*, as construed by the court in the ensuing Rule 23 analysis, is minimally sufficient to state a Rule 23(b)(2) class action claim for which requested relief could conceivably be granted on proof of relevant facts. Therefore, Allstate has not shown sufficient cause for preclusion, dismissal, or striking of Plaintiff's asserted class claim and related relief pursuant to Rules 12(b)(6) and 15(a).

**3. ALLSTATE'S MOTION TO EXTEND DEADLINE FOR ANSWERING FOURTH AMENDED COMPLAINT.**

Allstate next moves the court to stay or extend the prior deadline for answering Plaintiff's *Fourth Amended Complaint* (Doc. 219, filed 05-06-10). (*Allstate's Motion to Stay Answer Deadline In Re 4<sup>th</sup> Amended Complaint* (Doc. 230, filed 05-25-10)). Plaintiff does not object. (*Plaintiff's Response* (Doc. 238, filed 06-14-10)). Accordingly, good cause exists to extend Allstate's deadline for answering Plaintiff's *Fourth Amended Complaint* until 30 days after the filing date of this order.

**4. ALLSTATE'S MOTION TO STRIKE 4<sup>TH</sup> AMENDED COMPLAINT IN RE DEFENDANT CHARLES CONNERS.**

Pursuant to M.R.Civ.P. Rule 12(f), Allstate moves the court to strike the *Fourth Amended Complaint* reference to Charles Connors as an individual party-defendant in this case. (*Defendants' Memorandum In Re Motion To Strike And Dismiss*, Doc. 231, p. 20.). Plaintiff did not respond and oppose this portion of Allstate's motion. (*Plaintiff's Response To All-*

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construction of the Rule 23(b)(2) class claim as manifest in the ensuing Rule 23 analysis.

*state's Motion To Dismiss*, Doc. 241). By stipulation, the court previously dismissed Charles Conners from this action with prejudice. (*Stipulation and Order*, Doc. 132-33). This ruling was neither challenged nor disturbed on appeal. See *Jacobsen*. Therefore, pursuant to M.R.Civ.P. Rule 12(f) and the law of the case, Allstate's motion to strike the *Fourth Amended Complaint* reference to Charles Conners as an individual party-defendant is hereby granted.

**5. ALLSTATE'S MOTION TO STRIKE 4<sup>TH</sup> AMENDED COMPLAINT IN RE LAW OF THE CASE IN RE MERITS OF POST-REMAND CLAIMS.**

Pursuant to M.R.Civ.P. Rule 12(f), Allstate moves the court to strike, as an improper assertion of law, the assertion in ¶ 36 of Plaintiff's *Fourth Amended Complaint* that the referenced jury "verdict" and post-verdict punitive damages review "findings and rulings" were "affirmed by the Montana Supreme Court" and are thus "now the law of the case, and/or subject to res judicata principles." (*Defendants' Memorandum In Re Motion To Strike And Dismiss*, Doc. 231, p. 17-18). Plaintiff did not respond and oppose this portion of Allstate's motion. (*Plaintiff's Response To Allstate's Motion To Dismiss*, Doc. 241). The court concurs that the referenced assertion is an improper and impertinent assertion of law as averred in the complaint. Therefore, pursuant to M.R.Civ.P. Rule 12(f), Allstate's motion to strike the above-referenced assertion of law from ¶ 36 of Plaintiff's *Fourth Amended Complaint* is granted.

## **6. PLAINTIFF'S RULE 23 MOTION TO CERTIFY CLASS ACTION.**

A class action is an exception to the general rule “that litigation is conducted by and on behalf of the individual named parties.” General Tel. Co. Of S.W. v. Falcon (U.S. 1982), 457 U.S. 147, 155, 102 S.Ct. 2364, 2369; Califano v. Yamasaki (U.S. 1979), 442 U.S. 682, 700-01, 99 S.Ct. 2545, 2557, 61 L.Ed.2d 176. The purpose of a class action is to promote “efficiency and economy of litigation” by conserving the “resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion.” American Pipe & Constr. Co. v. Utah (U.S. 1974), 414 U.S. 538, 553, 94 S.Ct. 756, 766; Falcon, 457 U.S. at 155, 102 S.Ct. at 2364. A class action is appropriate where “a multiplicity of small individual suits for damages” cannot provide effective and “economically feasible” legal redress for the subject wrong. Deposit Guaranty Nat'l Bank v. Roper (U.S. 1980), 445 U.S. 326, 339, 100 S.Ct. 1166, 1174.

M.R.Civ.P. Rule 23 governs the certification and administration of class action litigation under Montana law. Because Fed.R.Civ.P. Rules 23(a) and 23(b) are substantively similar to Montana Rule 23, federal case law regarding Fed.R.Civ.P. Rule 23 “is instructive” in interpreting Montana Rule 23. Sieglock v. BNSF, 2003 MT 355, ¶ 10, 319 Mont. 8, 81 P.3d 496; McDonald v. Washington (1993), 261 Mont. 392, 400, 862 P.2d 1150, 1154.

One or more representative members of a proposed class may litigate a claim on behalf of the class as a whole only if the proposed class action satisfies all four enumerated requirements of M.R.Civ.P. Rule 23(a) (numerosity, commonality, typicality, and ade-

quacy of representation) and at least one of the three enumerated requirements of Rule 23(b). See M.R.Civ.P. Rules 23(a) and 23(b). In determining whether class certification is appropriate, the district court is afforded “the greatest respect and the broadest discretion” because “it is in the best position to consider the most fair and efficient procedure for conducting any given litigation.” Sieglock, ¶ 8; McDonald, 261 Mont. at 399, 862 P.2d at 1154. Within this broad discretion, the district court must, “as soon as practicable,” “determine by order” whether to certify and maintain the litigation as a class action. M.R.Civ.P. Rule 23(c)(1). In assessing whether Rule 23 certification is proper, the court may not adjudicate the ultimate merits of the asserted class claims. Mattson v. Montana Power Co., 2009 MT 286, 352 Mont. 212, 215 P.3d 675; ¶¶ 64-67; Eisen v. Carlisle & Jacquelin (U.S. 1974), 417 U.S. 156, 177-78, 94 S.Ct. 2140, 2152-53, 40 L.Ed.2d 732.

However, the court must nonetheless conduct a “rigorous” Rule 23 analysis that will necessarily require it to “probe behind the pleadings” to consider the merits of the relevant factual and legal issues to ensure that a sufficient factual and legal basis exists for the class action within the relevant Rule 23 criteria. Wal-Mart Stores, Inc. v. Dukes (U.S. 2011), \_\_\_ U.S. \_\_\_, \_\_\_, 131 S.Ct. 2541, 2551-52, 180 L.Ed.2d 374; Falcon, 457 U.S. at 160, 102 S.Ct. at 2372; Ellis v. Costco Wholesale Corp. (9<sup>th</sup> Cir. 2011), 657 F.3d 970, 980-81; Castano v. American Tobacco Co. (5<sup>th</sup> Cir. 1996), 84 F.3d 734, 744 (meaningful Rule 23 inquiry requires understanding of the claims, defenses, relevant facts, and applicable substantive law); Sirota v. Solitron Devices, Inc. (2<sup>nd</sup> Cir. 1982), 673 F.2d 566, 571 (court may properly allow pre-certification discovery and conduct an evidentiary hearing to de-

termine whether the class action claim meets Rule 23 requirements); Mattson, ¶¶ 64-67 (citing and adopting similar federal analysis from Falcon, Cas-tano, Sirota). The party seeking class certification has the burden of showing a sufficient legal basis and ‘significant proof’ that all applicable Rule 23 requirements are satisfied. Wal-Mart, \_\_ U.S. at \_\_, 131 S.Ct. at 2551-53 (Rule 23 not a mere pleading standard – showing of significant proof required) (citing Falcon, 457 U.S. at 1557-8, 102 S.Ct. at 2370-71); accord McDonald, 261 Mont. at 400, 862 P.2d 43 at 1155.<sup>43</sup>

By implication from the express Rule 23(a) requirements, the class definition must be reasonably precise by reference to objective criteria and the class representative must be a member of the class. In re A.H. Robins Co. (4<sup>th</sup> Cir. 1989), 880 F.2d 709, 728 (Rule 23 implicitly requires an identifiable class and that named plaintiffs be members of such class), *overruled on other grounds*, Amchem Products, Inc. v. Windsor (U.S. 1997), 521 U.S. 591, 618, 117 S.Ct. 2231, 2247, 138 L.Ed.2d 689; C.A. Wright, A.R. Miller & M.K. Kane, *Federal Practice and Procedure: Civil 2d* vol. 7A, § 1760 (3rd. West 2011); *Manual for Complex Litigation (4<sup>th</sup>)* § 21.222 (West 2011). A class definition referencing subjective states of mind or criteria that require circular or presumptive pre-judgment on the merits of the asserted claim is not

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<sup>43</sup> This burden requires the plaintiff to plead the asserted class claim with sufficient precision to objectively define a distinct class and thus facilitate court assessment of applicable Rule 23 criteria. See Falcon, 457 U.S. at 160-61, 102 S.Ct. at 2372; see also M.R.Civ.P. Rule 23(c)(1)(b) (2011) (certification order must define the class and class claims, issues, or defenses).



sufficiently objective and precise for certification. Chiang v. Veneman (3<sup>rd</sup> Cir. 2004), 385 F.3d 256, 272; *Manual for Complex Litigation (4<sup>th</sup>)* § 21.222 (West 2011); see also Gonzales v. Montana Power Co., 2010 MT 117, ¶¶ 16-20, 356 Mont. 351, 233 P.3d 328 (re-stating a facially “fail-safe” class definition). The court has broad discretion to modify or tailor a proposed class definition to facilitate certification or continued maintenance of a class action in the interests of justice. See M.R.Civ.P. Rule 23(c)(1); C.A. Wright, A.R. Miller & M.K. Kane, *Federal Practice and Procedure: Civil 2d* vol. 7A, § 1760 (3<sup>rd</sup> ed. West 2011); see also Chiang, 385 F.3 at 270-72 (modifying class definition); Gonzales, ¶¶ 16-20 (restating a facially “fail-safe” class definition).

Because these threshold class definition principles arise by implication from the express Rule 23 requirements, an analytical question exists as to whether the court should first consider the sufficiency of the class definition prior to analysis of the express criteria or whether it should first analyze the express criteria and then analyze and tailor the class definition with respect thereto. C.A. Wright, A.R. Miller & M.K. Kane, *Federal Practice and Procedure: Civil 2d* vol. 7A, § 1760 (3<sup>rd</sup> ed. West 2011). For analytical clarity, the court here addresses the sufficiency of the proposed class definition as a threshold matter prior to, but in accord with, its subsequent analysis of the express Rule 23 criteria.

**A. Identification Of Class Claim And Resulting Class Definition.**

Plaintiff's post-remand motion for class certification proposes a class defined as:

all unrepresented individuals who had either third-party claims or first-party claims against Allstate whose claims were adjusted by Allstate in Montana using its CCPR program.

(Plaintiff's *Fourth Amended Complaint*, Doc. 219, ¶ 46, p. 9; Plaintiff's *Brief In Support Of Motion To Certify Class*, Doc. 222, and Plaintiff's *Reply Brief In Support Of Motion To Certify Class*, Doc. 239, p. 7-8). Allstate asserts on various grounds that the proposed class is deficiently overbroad and amorphous. (Allstate's *Opposition To Plaintiff's Motion For Class Certification*, Doc. 232, 9-10; Defendants' *Memorandum In Re Motion To Strike And Dismiss*, Doc. 231, p. 5-8; 01-27-11 Motions Hearing Tr. 43:13-49:3).

Whether a proposed class definition is sufficiently precise and homogeneous for Rule 23 purposes is necessarily a function of the nature of the common questions of fact and law embodied in the asserted class claims. Separate and apart from the individual claims asserted in this case, the court construes the substantive essence of Plaintiff's asserted class claim to be that, irrespective of individual outcomes, the unrepresented segment adjustment practices specified in Allstate's *CCPR Implementation Manual (Tort States)* (hereinafter Casualty CCPR) constitute a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class as a whole, thereby resulting in indivisible harm to the class as a whole by operation of Allstate's own zero-sum economic theory and the resulting inversely proportional relationship between Allstate's profit increases and corresponding decreases in the total amount of compensation paid to the class of unrepresented claimants as a whole. Irrespective

of outcomes in individual cases, Plaintiff's asserted class claims thus present common questions of fact and law as to whether:

- (1) the Casualty CCPR's unrepresented segment adjusting practices are a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class of unrepresented claimants as a whole;
- (2) Allstate's common, systematic use of this pattern and practice in Montana caused indivisible harm to the class as a whole by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of unrepresented claimants as a whole; and
- (3) Allstate has consciously disregarded a high probability that the net effect of its Casualty CCPR's unrepresented segment practices would result in net settlement payouts to the class as a whole less than the net amount previously sufficient to fully and fair settle unrepresented claims under Montana law.

The court will address the sufficiency of the proposed class definition within this framework of common questions of fact and law.

Allstate asserts that inclusion of first-party claimants renders the proposed class definition overbroad or amorphous because Plaintiff is not a first-party claimant and has made no evidentiary showing that Allstate adjusts first-party claims in the same manner as third-party claims. However, as pertinent here, the current evidentiary record, including but

not limited to the express provisions of the Casualty CCPR, manifests substantial proof that:

- (1) Allstate systematically adjusted unrepresented casualty claims, *i.e.*, bodily injury and related property damage claims, in Montana under the various successive editions of the Casualty CCPR, *i.e.*, the *CCPR Implementation Manual (Tort States)*;
- (2) at least two of the successive editions of the Casualty CCPR, July 1995 and September 1995, are of record in this matter (CCPR-Doc. 72 and CCPR-Doc 73(IM));
- (3) the successive editions of the Casualty CCPR used in Montana do not materially vary in regard to unrepresented claims;
- (4) the generally applicable Casualty CCPR provisions at issue generally apply similarly to all unrepresented claims regarding automobile-related bodily injury and property damage claims without material distinction between third-party and first-party claims; and
- (5) despite case-specific issues peculiar to individual claims, Allstate subjected Plaintiff to the same unrepresented segment practices that it generally and systematically applied to all unrepresented claimants as a common pattern and practice.

Substantial credible evidence thus exists that Allstate systematically adjusted unrepresented claims involving automobile-related bodily injury or property damage claims in the same general manner as generally prescribed by the Casualty CCPR. Other than cursory assertion regarding unspecified distinctions between first and third-party claims, Allstate

has made no particularized evidentiary showing to the contrary.

As a matter of law without distinction between first and third-party claims, §§ 33-18-201(1) and (6), MCA, essentially require Allstate to promptly, accurately, truthfully, fairly, and in good faith adjust bodily injury and property damage claims. Despite case-specific fact variation, the general nature and types of the principle issues involved in adjustment of automobile-related bodily injury and property damage claims (*e.g.*, coverage determination, fault, causation, damages, and defenses) do not materially differ depending on whether the unrepresented claim is a third-party liability claim, first-party liability claim, or first party UM/UIM claim. Allstate has made no particularized showing of how or to what extent the Casualty CCPR adjustment process materially varies for first and third-party unrepresented claims. Consequently, inclusion of first-party unrepresented claims does not render Plaintiff's proposed class definition overbroad or amorphous in regard to the above-identified common questions of fact and law.

Allstate further asserts that the inclusion of property damage-only claims renders the proposed class overbroad or amorphous because Plaintiff's claim was not a property damage-only claim and because Allstate adjusts property damage-only claims in a different manner than bodily injury and related property damage claims. As a threshold matter, the court construes Plaintiff's class claim as properly pertaining only to unrepresented automobile-related bodily injury or property damage claims adjusted under the Casualty CCPR. As in the foregoing analysis of purported first/third party distinctions, the express provisions of the Casualty CCPR indicate that

Allstate adjusts automobile-related property damage-only claims in the same general manner as automobile-related property damage claims incident to automobile-related bodily injury claims. Allstate has made no particularized showing to the contrary. Thus, inclusion of automobile-related property damage only claims will not render the proposed class overbroad or amorphous in regard to the above-identified common questions of fact and law.

Allstate further asserts that the proposed class definition is overbroad or amorphous because it does not distinguish between *Fast Track* and non-*Fast Track* claims or between claims in which liability was or was not reasonably clear. As manifest in the express provisions of the Casualty CCPR, the *Fast Track* process is merely an integral subcomponent of the Casualty CCPR's unrepresented segment adjusting process. The *Fast Track* process pertains to a qualifying subset of unrepresented claims. *Inter alia*, the *Fast Track* criteria include claims that have "no coverage questions" in regard to which *Allstate unilaterally* determines liability is reasonably clear. However, the *Fast Track* process is not a stand-alone subcomponent of the CCPR's unrepresented segment process. Other generally applicable Casualty CCPR unrepresented segment practices still generally apply to *Fast Track* claims in the same manner as non-*Fast Track* claims.

That no threshold coverage issue exists and that Allstate unilaterally determines that liability (fault) for the accident may be reasonably clear does not preclude the potential for, and common occurrence of, further significant case-specific issues including, *inter alia*, individualized causation and damages issues. See 02-27-11 Hearing Tr. 196:22-197:10; see

also § 33-18-242(5), MCA (permissible reasonable basis dispute of claim/amount of claim). Contrary to Allstate's unqualified assertion that "Jacobsen's complaint is predicated on [the] „fast track“ handling" of his claim (Doc. 232, p. 11), other factors indicate otherwise, *e.g.*:

- (1) Plaintiff had no role in designating and processing his claim as a *Fast Track* claim;
- (2) Allstate unilaterally designated Plaintiff's claim as a *Fast Track* claim; and
- (3) Plaintiff's pared-down, post-remand individual claim, *i.e.*, that the CCPR-based adjustment of his claim violated §§ 33-18-201(1) and (6), MCA, references the *Fast Track* process only as an indivisible subcomponent of the broader, generally applicable Casualty CCPR unrepresented segment practices. (See Plaintiff's *Fourth Amended Complaint*, Doc. 219, ¶¶ 11-18 and 31-38).

Despite other case-specific issues, Plaintiff's asserted individual and class claims clearly share a common focus on the actual and intended effect of the Casualty CCPR's generally applicable unrepresented segment practices, including but not limited to the subset of *Fast Track* practices, in increasing the number of quick, unrepresented settlements of all automobile-related bodily injury or property damages claims, thereby increasing net profit and correspondingly decreasing net pay-outs to the class of claimants as a whole by operation of Allstate's zero-sum economic theory. Therefore, the failure to differentiate between *Fast Track* and non-*Fast Track* claims or between claims in which Allstate determined that liability was or was not reasonably clear will not render the proposed class definition overbroad or

amorphous in regard to the above-identified common issues of fact and law.

Allstate further asserts that the proposed class definition is overbroad or amorphous by failing to distinguish between unrepresented claimants who are lawyers and those who are not. (See 01-27-11 Hearing Tr. 60:13-61:7). Central to this assertion is the assumption that every “unrepresented” lawyer-claimant has the specialized tort claim adjusting and litigation expertise sufficient to deal with Allstate on relatively equal terms. This cursory assumption does not accurately reflect the great diversity in the various fields of specialized expertise among lawyers and that the field of tort claim adjusting and litigation is a highly specialized subset of the broad and diverse practice of law. Allstate’s assertion is further predicated on the erroneous assumption that even relatively sophisticated lawyer-claimants were aware of the theory, design, and intent behind the Casualty CCPR’s unrepresented segment practices. Thus, although potentially relevant to case-specific issues in individual cases, the failure to distinguish lawyer-claimants and non-lawyer-claimants does not render the proposed class definition overbroad or amorphous in regard to the above-identified common questions of fact and law.

Without conceding that it unfairly settled any claims, Allstate next asserts that the proposed class definition is defective by failing to distinguish between claims fairly settled and those unfairly settled. Aside from this initial inconsistency, this assertion is further inconsistent with Allstate’s hearing assertion (01-20-11 Hearing Tr. 194:13-196:17) that Plaintiff improperly seeks a “fail-safe” class circularly defined by reference to a presumptive pre-judgment on the



merits of individual claims. However, the issue of whether and to what extent individual class members ultimately received fair settlements is an individualized, case-specific issue that does not render the proposed class definition overbroad or amorphous in regard to the above-identified issues of fact and law common to the class as a whole. Thus, failure to distinguish between fairly and unfairly settled claims does not render the proposed class overbroad or amorphous.

Allstate further asserts that the proposed class definition is defective by failing to exclude claims for which it paid policy limits. The apparent basis of this assertion is that claimants who received policy limits received prompt, full, and fair settlement within the full scope of the insurer's liability under the applicable policies. However, this assumption reflects only ultimate outcomes of individual claims without consideration of the preliminary manner, means, and course of adjustment systematically applied to the class as a whole in the context of the insurer's duties under §§ 33-18-201(1) and (6), MCA. Whether a policy limits payment was a prompt, full, and fair settlement of an individual claim is an individualized, case-specific matter not determinative of the above-referenced issues of fact and law common to the class as a whole.

Allstate further asserts that the proposed class definition is defective by inclusion of unrepresented claims made within the scope of applicable coverage deductibles. Because the amount of the loss claimed by the insured did not exceed the policy deductible, such claims by nature involved no adjustment representation or decision by the insurer. Plaintiff has made no contrary factual or legal showing. The court

concur with Allstate's assertion that inclusion of within-deductible claims would render the proposed class overbroad or amorphous. Consequently, any certified class definition must necessarily exclude unrepresented claims made within the scope of applicable coverage deductibles.

Allstate further asserts that the proposed class definition is defective by failing to distinguish between claims related to motor vehicles and claims not related to motor vehicles. As pertinent here, substantial proof exists that:

- (1) Allstate has systemically adjusted unrepresented claims for motor vehicle-related bodily injury and property damage under the common pattern and practice prescribed by the various versions of the Casualty CCPR;
- (2) Allstate has contemporaneously adjusted other various types of claims, such as homeowners claims and represented motor vehicle claims, under other CCPR variants or otherwise; and
- (3) Plaintiff's claim was a motor vehicle-related bodily injury and property damage claim.

Although the homeowners CCPR and represented/litigated casualty CCPR have some degree of general commonality with the Casualty CCPR, they are wholly distinct and independent adjustment regimes focused on fundamentally different types, manners, or circumstances of adjustment than those addressed by the unrepresented segment of the Casualty CCPR. Thus, any certified class definition must necessarily apply only to unrepresented motor vehicle-related bodily injury or property damage claims adjusted under the Casualty CCPR.

In accordance with the foregoing class definition analysis and its subsequent analysis of the express Rule 23(a) criteria, the court finds the following restated class definition to be sufficiently precise and homogenous for purposes of Rule 23:

- (1) all unrepresented claimants who made first-party or third-party claims to Allstate;
- (2) for an amount in excess of the applicable policy deductible;
- (3) for bodily injury or property damage related to an underlying motor vehicle incident or occurrence; and
- (4) whose claims were adjusted by Allstate in Montana to an unrepresented settlement since deployment in Montana of the various versions of the Casualty CCPR (*CCPR Implementation Manual (Tort States)*).

The court will thus address the express Rule 23 criteria in the context of this revised class definition.

**B. Rule 23(a)(1) – Numerosity.**

Rule 23(a) first requires that the class be ‘so numerous that joinder of all members is impractical.’ M.R.Civ.P. Rule 23(a)(1) (numerosity). Rule 23(a)(1) does not require proof of “an exact class size or identity of class members” – it requires only a reasonable estimate of the size of the class. Robidoux v. Celani (2<sup>nd</sup> Cir. 1993), 987 F.2d 931, 935. However, “mere allegations of numerosity and speculation as to class size are not sufficient.” Aiello v. Providian Financial Corp. (Bankr. N.D. Ill. 1999), 231 B.R. 693, 711; see also Wal-Mart, \_\_ U.S. at \_\_, 131 S.Ct. at 2551-52 (Rule 23 more than a pleading standard – plaintiff must make relevant factual showing).

Here, Plaintiff previously proposed a Rule 23(b)(3) class essentially consisting of all unrepresented third-party claimants who made an automobile-related bodily injury claim against an Allstate insured. (*Plaintiff's Motion To Amend*, p. 14, Doc. 39). Based on the deposition of local Allstate Agent Chuck Conners, Plaintiff reasonably estimated the size of the first proposed class at around 600 hundred members. (*Id.* at 11). In the pre-remand context of M.R.Civ.P. Rule 15(a), the court found this showing to be a sufficient showing of numerosity. (*Order Denying Plaintiff Leave To Add Class Action Claims*, Doc. 93, p. 36-37).

Plaintiff's post-remand request for class certification now proposes a broader class including first-party claimants and automobile-related property damage claims. (Plaintiff's *Fourth Amended Complaint*, Doc. 219, ¶ 46, p. 9). Despite the extensive post-remand motion practice and briefing to date, Plaintiff has made no additional showing of numerosity, instead simply stating that:

[t]his court has previously determined that Plaintiff's proposed class meets the numerosity requirement. (*See Order of December 2, 2005*, p. 37). The present proposed class is even larger than that previously proposed.

(*Plaintiff's Brief In Support Of Motion To Certify Class*, Doc. 222, p. 8, and *Plaintiff's Reply Brief In Support Of Motion To Certify Class*, Doc. 239). This cursory assertion is not a reasonably precise estimate of the size of the newly proposed class. However, Plaintiff's prior showing, based on the Conners deposition testimony, does at least minimally constitute a non-speculative showing that that the proposed class is so numerous that joinder of all mem-

bers is impractical. Allstate's briefing does not materially dispute the numerosity requirement regarding Plaintiff's asserted post-remand class claims. (See *Defendant's Opposition To Plaintiff's Motion For Class Certification*, Doc. 232; *Defendants' Memorandum In Re Motion To Strike And Dismiss*, Doc. 231). Under these circumstances, Plaintiff's proposed class action minimally satisfies the Rule 23(a)(1) numerosity requirement.

**C. Rule 23(a)(2) – Commonality.**

Rule 23(a) next requires that the asserted class claims involve “questions of law or fact common to the class.” M.R.Civ.P. Rules 23(a)(2) (commonality). Closely related, the commonality requirement “tend[s] to merge” with the Rule 23(a)(3) typicality requirement. *Wal-Mart*, \_\_ U.S. at \_\_, fn. 5, 131 S.Ct. at 2551 (complementary guideposts to ensure economy of class action and uniformity of class and class issues – citing *Falcon*, 457 U.S. at 158, fn. 13, 102 S.Ct. at 2371); *McDonald*, 261 Mont. at 402, 862 P.2d at 1556 (commonality and typicality are closely related).

Commonality “does not require that every question of law or fact be common to every member of the class.” *McDonald*, 261 Mont. at 400, 862 P.2d at 1555; *Hanlon v. Chrysler Corp.* (9<sup>th</sup> Cir. 1998), 150 F.3d 1011, 1019. It merely requires that the “question of law linking the class members” be “substantially related to the resolution of the” class claim “even though individuals are not otherwise identically situated.” *McDonald*, 261 Mont. at 401, 862 P.2d at 1555. Use of “broad and general terms” is not sufficient alone to show commonality. *Sieglock*, ¶ 15.

A mere showing that the members of the class “have suffered a violation of the same provision of law . . . [that] can be violated in many ways” by “many different” people of “a single company” is not sufficient alone to show commonality. Wal-Mart, \_\_ U.S. at \_\_, 131 S.Ct. at 2551. The asserted class claim must “depend upon a common contention,” the adjudication of which will produce, “in one stroke,” a “common answer” for the class as a whole, thereby “resolv[ing] an issue that is central to the validity of” all or part “of each” individual member’s claim. Wal-Mart, \_\_ U.S. at \_\_, 131 S.Ct. at 2551; see also Esplin v. Hirschi (10<sup>th</sup> Cir. 1968), 402 F.2d 94, 100 (presence of residual individualized issues after resolution of the common issues does not preclude commonality and typicality).

Here, irrespective of other case-specific peculiarities of his own and other individual claims, Plaintiff’s asserted class claim focuses on the factual and legal issues common to the class as a whole, *i.e.*, whether:

- (1) the Casualty CCPR’s unrepresented segment adjusting practices are a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class of unrepresented claimants as a whole;
- (2) Allstate’s common, systematic use of this pattern and practice in Montana caused indivisible harm to the class as a whole by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of as a whole; and

- (3) Allstate consciously disregarded a high probability that the net effect of its Casualty CCPR's unrepresented segment practices would result in net settlement payouts to the class as a whole less than the net amount previously sufficient to fully and fair settle unrepresented claims under Montana law.

As evident in the above-referenced factual record and prior rulings of the court, significant proof exists that:

- (1) although Allstate advised unrepresented claimants of the seemingly claimant-adverse aspects of attorney economics, Allstate intentionally and systematically failed to similarly disclose that, based on its own research, represented claimants receive settlements at least 2-3 times larger, and as much as 5 times larger, on average than those received by unrepresented claimants;
- (2) Allstate developed the Casualty CCPR's unrepresented segment procedures with the knowledge and intent that implementation would generally reduce the net sum of unrepresented claims settlements below the level theretofore deemed sufficient to properly adequately compensate claimants under Montana law;
- (3) Allstate intentionally and systematically failed to disclose the significant and highly-touted profit motive driving its revised practice of encouraging unrepresented claimants to quickly settle their claims before they retained counsel;
- (4) the rationale underlying Allstate's profit motive in its Casualty CCPR unrepresented segment practices was a zero-sum economic theory that, by substantially reducing the amount of insur-

ance settlements previously viewed as fair and full on the merits, Allstate could and would substantially increase its profits at the expense of claimants;

- (5) Allstate intentionally and systematically failed to disclose to unrepresented claimants the nature and intended effect of its claimant-adverse zero-sum theory of unrepresented claims adjusting;
- (6) Allstate purposely designed the Casualty CCPR to be facially neutral and thus not overtly indicative of its underlying profit motive to substantially reduce unrepresented settlement amounts previously viewed as fair and full on the merits, thereby substantially increasing its profit at the expense of claimants;
- (7) Allstate consciously disregarded a high probability that the net effect of its Casualty CCPR's unrepresented segment practices would result in less than the theretofore full and fair settlements of unrepresented claims in accordance with Montana law; and
- (8) by operation of its zero-sum economic theory and irrespective of outcomes in individual cases, Allstate's implementation of the Casualty CCPR's unrepresented segment practices has resulted in a substantial, objectively measurable reduction in the total amount of compensation paid to the class of unrepresented claimants as a whole, thereby resulting in a corresponding, inversely proportional increase in its related profit margin.

Although likely subject to genuine material dispute on the evolving record prior to close of discovery and Rule 56 motion practice, these factual showings constitute significant and substantial proof of the above-



identified issues of fact and law common to the class as a whole. Consequently, despite other case-specific issues peculiar to the individual claims of Plaintiff and other class members, the proposed class action is capable, in a single stroke, of producing common answers to each of the above-identified issues of fact and law common to the class as a whole. Thus, as construed by the court, Plaintiff's asserted class claim satisfies the Rule 23(a)(2) commonality requirement.

**D. Rule 23(a)(3) – Typicality.**

Rule 23(a) also requires that the “claims” of the class representative be “typical of the claims” “of the class.” M.R.Civ.P. Rule 23(b)(3) (typicality). Closely related, the typicality requirement “tend[s] to merge” with the Rule 23(a) commonality requirement. *Wal-Mart*, \_\_ U.S. at \_\_, fn. 5, 131 S.Ct. at 2551 (complementary guideposts to ensure economy of class action and uniformity of class and class issues – citing *Falcon*, 457 U.S. at 158, fn. 13, 102 S.Ct. at 2371); *McDonald*, 261 Mont. at 402, 862 P.2d at 1556 (commonality and typicality are closely related – typicality ensures uniformity of class and class interests).

The class representative's claim “is typical if it stems from the same *event, practice, or course of conduct* that forms the basis of the class claims and is based on the same legal or remedial theory.” *McDonald*, 261 Mont. at 402, 862 P.2d at 1556 (emphasis added) (quoting *Jordan v. County of Los Angeles* (9<sup>th</sup> Cir. 1982), 669 F.2d 1311, 1321). Consequently, the class representative must:

- (1) “be a part of the class;”
- (2) have “the same interest” as the class; and

- (3) “suffer the same injury as the class members.”

Falcon, 457 U.S. at 156, 102 S.Ct. at 2370. “Typicality refers to the *nature of the* [class representative’s] *claim . . . and not to the specific facts from which it arose or the relief sought.*” Ellis v. Costco Wholesale Corp. (9<sup>th</sup> Cir. 2011), 657 F.3d 970, 984 (emphasis added) (citing Hanon v. Data Products Corp. (9<sup>th</sup> Cir. 1992), 976 F.2d 497, 508). If the class representative and the class members were all subjected to or affected by the same unlawful conduct, individual variations in fact patterns or claims do not preclude typicality in relation to the issues of fact and law common to the class. Robidoux v. Celani (2<sup>nd</sup> Cir. 1993), 987 F.2d 931, 936; McDonald, 261 Mont. at 403, 862 P.2d at 1557.<sup>44</sup>

In this case, there is significant proof of the above-referenced issues of fact and law common to the class as a whole under the court’s construction of Plaintiff’s asserted class claim. Within this framework, there is thus significant proof that Allstate subjected the class as a whole, including but not limited to Plaintiff, to the same systematic violation of §§ 33-18-201(1) and (6), MCA, through the pattern and practice of the Casualty CCPR’s unrepresented segment adjusting practices. Irrespective of other case-specific issues peculiar to individual cases, there is significant proof that:

- (1) Plaintiff and each class member are members of the above-defined class;

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<sup>44</sup> Similarly, the fact that some individual class members “are indifferent or even opposed to the class relief sought” does not preclude Rule 23 typicality or adequacy or representation. McDonald, 261 Mont. at 402-03, 862 P.2d at 1556.

- (2) Plaintiff and each class member were at a minimum subjected to same allegedly unlawful conduct generally applied to the class as a whole; and
- (3) the allegedly unlawful conduct caused indivisible harm to the class as a whole by operation of All-state's zero sum economic theory.

Despite other case-specific peculiarities, Plaintiff's individual and class claims are based on the same practice or course of conduct and the same remedial legal theories – violations of §§ 33-18-201(1) and (6), MCA, and actual malice under §§ 27-1-220 and 27-1-221, MCA.

Other case-specific issues and defenses peculiar to the individual claims of Plaintiff and other class members are neither central to, nor determinative of, the above-referenced issues of fact and law common to the class as a whole. Class adjudication of the merits of these common issues of fact and law does not depend upon the ultimate merit of the case-specific individual claims of Plaintiff and other class members. Thus, irrespective of other case-specific peculiarities, Plaintiff's individual claim is typical of the asserted class claims in regard to the above-identified issues of fact and law common to the class as a whole.

**E. Rule 23(a)(4) – Adequacy Of Class Representative.**

Rule 23(a) lastly requires that the class representative be capable of “fairly and adequately protect[ing] the [common] interests of the class.” M.R.Civ.P. Rule 23(a)(4) (adequacy). Closely-related to the Rule 23(a) commonality and typicality requirements, the adequacy requirement focuses on

the “the competency of class counsel” and ensuring that that individual interests of the class representative do not conflict with the interests of the class. McDonald, 261 Mont. at 402, 862 P.2d at 1556 (commonality, typicality, and adequacy are closely related); Wal-Mart, \_\_ U.S. at \_\_, fn. 5, 131 S.Ct. at 2551 (citing Falcon, 457 U.S. at 158, fn. 13, 102 S.Ct. at 2371).

Here as construed by the court, Plaintiff’s asserted class claims satisfy the Rule 23(a) commonality and typicality requirements. Allstate has shown no compelling reason how or why this commonality and typicality will not ensure that Plaintiff’s individual interests will not conflict with the common interests of the class in adjudicating the above-identified issues of fact and law common to the class as a whole.

Rule 23(a)(4) further requires that the proposed class counsel be sufficiently “qualified, experienced, and generally capable to conduct the [proposed class] litigation.” McDonald, 261 Mont. at 403, 862 P.2d at 1556. In assessing the adequacy of class counsel, the court may consider any relevant consideration including but not limited to:

- (1) the nature and quality of the counsel’s conduct of the case to date;
- (2) prior experience as class counsel;
- (3) counsel’s resources and resulting financial ability to conduct the class litigation; and
- (4) the existence of other demanding obligations of the class counsel.

See M.R.Civ. Rule 23(g)(1) (2011); Smith v. Josten’s American Yearbook Co. (D. Kan. 1978), 78 F.R.D.

154, 163; Aiello v. Providian Financial Corp. (Bankr. N.D. Ill. 1999), 231 B.R. 693, 711, 713-14.

The court takes prior notice of the professional competency and experience of Plaintiff's co-counsel Lawrence A. Anderson and Daniel P. Buckley in this and other cases before this court. Both are known to the court to be competent and experienced in complex non-class litigation. Mr. Anderson is further experienced in complex class litigation in state and federal courts. The court has no basis upon which to conclude that counsel do not have sufficient financial resources to adequately conduct the proposed class litigation or that they will be unable to adequately balance the needs of the class litigation with other professional obligations. Therefore, Plaintiff's proposed class claim satisfies the Rule 23(a)(4) adequacy of representation requirement.

**F. Rule 23(b)(2) – Declaratory Judgment, Injunctive Relief, And Incidental Monetary Relief (Disgorgement & Punitive Damages).**

Plaintiff's primary theory of class action relief is a claim for class-wide declaratory, injunctive, and incidental monetary relief (equitable disgorgement and punitive damages) pursuant to M.R.Civ.P. Rule 23(b)(2). (*Plaintiff's Brief In Support Of Motion To Certify Class*, Doc. 222, p. 12-15, and *Plaintiff's Reply Brief In Support Of Motion To Certify Class*, Doc. 239, p. 8-9).<sup>45</sup> M.R.Civ.P. Rule 23(b)(2) provides for

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<sup>45</sup> As a secondary fall-back theory for class-wide punitive damages, Plaintiff seeks contingent certification of a Rule 23(b)(3) punitive damages class. (*Plaintiff's Brief In Support Of Motion To Certify Class*, Doc. 222, p. 15-17; *Plaintiff's Reply Brief In Support Of Motion To Certify Class*, Doc. 239, p. 9-10).

a “class as a whole” to obtain appropriate “final injunctive or corresponding declaratory relief” where a defendant has unlawfully “acted or refused to act on grounds that apply generally to the class as a whole.” Here, as construed by the court, Plaintiff’s class claim is that:

- (1) the Casualty CCPR’s unrepresented segment adjusting practices are a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class of unrepresented claimants as a whole;
- (2) Allstate’s common, systematic use of this pattern and practice in Montana caused indivisible harm to the class as a whole by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of as a whole; and
- (3) Allstate has consciously disregarded a high probability that the net effect of its Casualty CCPR’s unrepresented segment practices would result in net settlement payouts to the class as a whole less than the net amount previously sufficient to fully and fair settle unrepresented claims under Montana law.

In accordance with the foregoing Rule 23(a) analysis and factual showings, significant proof supports each of these assertions. Significant proof thus exists that

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Due to the cursory nature of Plaintiff’s briefing and logical inconsistency of this theory with his primary Rule 23(b)(2) theory, the court declines to address Plaintiff’s fall-back Rule 23(b)(3) theory.

“the party opposing the class has acted . . . on grounds generally applicable to the class” as a whole. Thus, the dispositive Rule 23(b)(2) issues are (1) whether the asserted class claim seeks permissible forms of injunctive relief that will benefit the class as a whole and (2) whether as a matter of law the requested forms of monetary relief, however characterized, are permissible forms of Rule 23(b)(2) relief incidental to the predicate declaratory and injunctive relief from which they flow.

As construed by the court, Plaintiff’s Rule 23(b)(2) class claim seeks the following declaratory, equitable, and punitive relief:

- (A) declaratory judgment pursuant to §§ 27-8-101 through 313, MCA (Uniform Declaratory Judgments Act), that:
- (1) the Casualty CCPR’s unrepresented segment adjusting practices are a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class of unrepresented claimants as a whole;
  - (2) Allstate’s common, systematic use of this pattern and practice in Montana caused indivisible harm to the class as a whole by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of as a whole; and
  - (3) Allstate has consciously disregarded a high probability that the net effect of its Casualty CCPR’s unrepresented segment practices would result in net settlement payouts to the

class as a whole less than the net amount previously sufficient to fully and fair settle unrepresented claims under Montana law;

- (B) mandatory injunction requiring Allstate to:
- (1) “re-open all [unrepresented] claims [adjusted under the Casualty CCPR] in which liability was reasonably clear;” and
  - (2) “disgorge the unlawful profits it made through its systemic violation” of § 33-18-201(1) and (6), MCA;
- (C) prohibitive injunction enjoining Allstate from “engaging in the unlawful conduct in [Montana] found by the jury in this” case; and
- (D) class-wide punitive damages predicated on the above-referenced class-wide conduct.

(Plaintiff’s *Fourth Amended Complaint*, Doc. 219, p. 9-12; Plaintiff’s *Brief In Support Of Motion To Certify Class*, Doc. 222, p. 12-15). The court will address Allstate’s remaining Rule 23(b)(2) contentions within this framework.

**(1) Equitable Relief (Injunction & Disgorgement) As A Permissible Remedy For Class-Wide UTPA Violations.**

Allstate asserts that equitable relief (injunctive relief and disgorgement) is not available as a matter of law to remedy the asserted class-wide violations of the Montana Unfair Trade Practice Act (UTPA). (*Defendant’s Opposition To Plaintiff’s Motion For Class Certification*, Doc. 232, p. 14-15; *Defendants’ Memorandum In Re Motion To Strike And Dismiss*, Doc. 231, p. 15). As an independent statutory remedy for violations of §§ 33-18-201(1) and (6), MCA, the UTPA



provides insureds and third-party claimants an independent private cause of action for:

- (1) compensatory damages for “actual damages” “proximately caused” by the subject violation; and
- (2) derivative punitive damages pursuant to § 27-1-221, MCA.

§§ 33-18-242(1) through (4), MCA. In contrast to the injunctive remedy available to the Montana Insurance Commissioner in a state enforcement action under § 33-18-1004, MCA, Allstate essentially asserts that the UTPA’s independent private action for actual compensatory and punitive damages is the exclusive remedy for violations of §§ 33-18-201(1) and (6), MCA.

However, Ferguson v. Safeco Ins. Co., 2008 MT 109, 342 Mont. 380, 180 P.3d 1164 (approving class action predicated on first-party UTPA claim) indicates that, distinct from an independent UTPA claim for damages under §§ 33-18-242(1) and (3), MCA, an insured may also state a UTPA-based Rule 23(b)(2) class action claim for declaratory and derivative non-compensatory injunctive relief notwithstanding that § 33-18-242(3), MCA, expressly bars all other first-party claims for “damages” except for breach of contract, fraud, and independent UTPA claims. In Ferguson, the Plaintiff’s insurer subrogated against the third-party tortfeasor’s liability insurer without fully compensating plaintiff for injuries sustained in the underlying motor vehicle collision. Ferguson, ¶¶ 3-4. In addition to her individual UTPA and other first-party claims for damages, the insured-plaintiff further sought Rule 23(b)(2) class declaratory and mandatory injunctive relief requiring the insurer to re-

view and re-adjust class members’ individual claims. Ferguson, ¶¶ 6 and 32-36. Citing Dubray v. Farmers Ins. Exchange, 2001 MT 251, ¶¶ 13 and 16, 307 Mont. 134, 36 P.3d 897 (UTPA-based third-party claim for declaratory judgment that liability for medical expenses was reasonably clear notwithstanding the bar of § 33-18-242(6)(b), MCA), the Montana Supreme Court held that the district court erred in denying the Plaintiff’s request for Rule 23(b)(2) class certification. Ferguson, ¶¶ 32-42. By implication, Ferguson and Dubray manifest that, as pertinent here, the limited scope and reach of § 33-18-242, MCA, is to clearly define, limit, and regulate first and third-party claims against insurers *for compensatory damages* but not to similarly preclude, limit, or otherwise regulate UTPA-based first and third party claims for declaratory relief and derivative non-compensatory relief.

The context and language of § 33-18-242, MCA, support this conclusion. As recognized by the Montana Supreme Court, the 1987 Montana Legislature enacted § 33-18-242, MCA, to protect insurers by:

- (1) “limiting the types of claims . . . against insurers;”
- (2) “protect[ing] insurers where they had a reasonable basis to deny a claim;”
- (3) “postpon[ing] third-party claims under the statute until the underlying claim had been resolved;” and
- (4) “increase[ing] the fine . . . against companies that violated provisions of the” UTPA.

O’Fallon v. Farmers Ins. Exchange (1993), 260 Mont. 233, 244, 859 P.2d 1008, 1015; see also Watters v. Guaranty Nat’l Ins. Co., 2000 MT 150, § 50, 300

Mont. 91, 3 P.3d 626 (acknowledging O'Fallon characterization of § 33-18-242, MCA).

Prior to the 1987 enactment of § 33-18-242, MCA, Montana law recognized a first-party common law bad faith claim for tort damages against an insurer predicated on the insurer's breach of the implied covenant of good faith and fair dealing in the handling of an insured's claim. See Lipinski v. Title Insurance Co. (1983), 202 Mont. 1, 15, 655 P.2d 970, 977 (insurer's common law duty of good faith and fair dealing with insured derives from covenant of good faith implied in every contract); Story v. City of Bozeman (1990), 242 Mont. 436, 450, 791 P.2d 767, 775 (covenant of good faith and fair dealing implied in every contract as a matter of law); see also Britton v. Farmers Ins. Group (1986), 221 Mont. 67, 72, 721 P.2d 303, 306 (distinguishing express contract duties from common law implied duty of good faith and fair dealing).<sup>46</sup> Because the implied covenant of good faith and fair dealing is an implied contract duty, Montana law has not similarly recognized a third-party common law bad faith claim against an insurer regarding the insurer's handling of a third-party claim. See Mountain West Farm Bureau Mut. Ins. Co. v. Brewer, 2003 MT 98, ¶¶ 37-40, 315 Mont. 231, 69 P.3d 642 (insurers have no common law duty of good faith to third-parties to the contract – implied covenant of good faith does not extend to third-party

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<sup>46</sup> See also § 28-1-211, MCA (implied covenant of good faith and fair dealing requires honesty in fact and observance of reasonable commercial standards of fair dealing in the trade); Phelps v. Frampton, 2007 MT 263, ¶ 29, 339 Mont. 330, 170 P.3d 474 (implied covenant requires good faith dealing with no attempt to deprive the other party of the benefit of the contract through dishonesty or abuse of discretion in performance).

beneficiaries of the contract); Story, 242 Mont. at 450, 791 P.2d at 775 (implied covenant of good faith arises as a matter of contract); see also Fode v. Farmers Ins. Exchange (1986), 221 Mont. 282, 284-86, 719 P.2d 414, 415-16 (shoe-horning asserted third-party common law bad faith claim into third-party UTPA-based claim).<sup>47</sup>

In contrast to a true common law bad faith claim,<sup>48</sup> pre-1987 Montana law also distinctly recognized UTPA-based first and third party tort claims

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<sup>47</sup> Compare Brewington v. Employers Fire Ins. Co., 1999 MT 312, ¶¶ 12-18, 297 Mont. 243, 992 P.2d 237 (anomalously sustaining third-party common law bad faith claim). Although it correctly held that § 33-18-242, MCA, does not apply to otherwise cognizable third-party claims, Brewington anomalously sustained a third-party bad faith claim by completely glossing over the more fundamental question of whether and on what legal basis a third-party common law bad faith claim could be cognizable as a matter of law for a stranger to the contract from which the implied covenant of good faith exclusively arises as a matter of law. Brewington, ¶¶ 12-18. Brewington's cited underpinnings are likewise distinguishable because the narrow focus of those cases was whether the exclusivity provision of the Montana Workers' Compensation Act precluded *any* post-employment tort claim against an insurer related to the handling of the claim – neither case addressed the more fundamental question of whether and on what legal basis a third-party common law bad faith claim could be cognizable as a matter of law for a stranger to the contract from which the implied covenant of good faith exclusively arises as a matter of law. See Hayes v. Fire Underwriters (1980), 187 Mont. 148, 609 P.2d 257; Vigue v. Evans Products Co. (1980), 187 Mont. 1, 608 P.2d 488; see also Mountain West Farm Bureau, ¶¶ 37-40 (insurers have no common law duty of good faith to third-parties – implied covenant of good faith does not extend to third-party beneficiaries of the contract).

<sup>48</sup> See Lipinski and Britton, *supra*.

against insurers for damages caused by applicable violations of § 33-18-201, MCA. See First Security Bank v. Goddard (1979), 181 Mont. 407, 419-20, 593 P.2d 1040, 1046-47 (statute-based first-party tort claim predicated on insurance code violation); Klaudt v. Flink (1983), 202 Mont. 247, 250-52, 658 P.2d 1065, 1066-67 (UTPA-based third-party tort claim against insurer for violation of § 33-18-201(6), MCA), *superseded in part*, § 33-18-242(6)(b), MCA (third-party UTPA claim premature until after underlying claim settled), *overruled in part on other grounds*, Fode v. Farmers Ins. Exchange (1986), 221 Mont. 282, 286-87, 719 P.2d 414, 416-17 (third-party Klaudt claim premature until underlying claim settled). In contrast to true common law claims, these statute-based tort claims are hybrids – applicable statutory duties coupled with a common law tort remedy not otherwise precluded by statute. See Klaudt, 202 Mont. at 250-52, 658 P.2d at 1066-67 (civil action “conferred by” statutory duty); Fode, 221 Mont. at 285, 719 P.2d at 416 (Klaudt claim is a civil action based on statutory duty with a common law tort remedy); O’Fallon, 260 Mont. at 243, 859 P.2d at 1014 (Klaudt claim is a private tort claim based on § 33-18-201(6), MCA); *see also* §§ 27-1-104 through 27-1-107, MCA (general civil action remedy); Wombold v. Associates Financial Services Co., 2004 MT 397, ¶¶ 32-47, 325 Mont. 290, 104 P.3d 1080 (common law tort remedy for private cause of action implied from consumer lending statute), *overruled on other grounds*, Essex Ins. Co. v. Moose’s Saloon, Inc., 2007 MT 202, ¶ 17 n.3, 338 Mont. 423, 166 P.3d 451.

Against this pre-1987 backdrop and as pertinent here, the express language of § 33-18-242, MCA, focuses on compensatory damages claims by:

- (1) creating a new first and third-party independent UTPA claim expressly *limited to claims “for actual damages”* “proximately caused by” violations of §§ 33-18-201(1), (4), (5), (6), (9), and (13), MCA. §§ 33-18-242(1) and (4), MCA (emphasis added);
- (2) barring first-party “*bad faith*” actions based on the insurer’s “handling of an insurance claim” in violation of the common law implied covenant of good faith and faith dealing. § 33-18-242(3), MCA (emphasis added); and
- (3) barring all other first-party claims “*for damages as result of the handling of an insurance claim*” except for first-party fraud or breach contract claims. § 33-18-242(3), MCA (emphasis added).

See §§ 33-18-242(1), (3), and (4), MCA. As a threshold matter, irrespective of the remedy sought, § 33-18-242, MCA, did not preclude or limit the continued independent viability of UTPA-based third-party claims predicated on violations of §§ 33-18-201(1) and (6), MCA.<sup>49</sup> See O’Fallon, 260 Mont. at 244, 859 P.2d at 1015 (§ 33-18-242, MCA, did not affect Klaudt-style UTPA-based claims); Brewington v. Employers Fire Ins. Co., 1999 MT 312, ¶¶ 13-14, 297 Mont. 243, 992 P.2d 237 (§ 33-18-242, MCA, does not apply to otherwise cognizable third-party claims).

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<sup>49</sup> Although specifically predicated on § 33-18-201(6), MCA, the Klaudt analysis is similarly applicable to other subsections of § 33-18-201, MCA, that, by their express terms, protect third-party rights. See Klaudt, 202 Mont. 250-52, 658 P.2d at 1066-67 (focusing on statutory language of § 33-18-201, MCA); compare Hart-Anderson v. Hauck (1988), 230 Mont. 63, 68-70, 748 P.2d 937, 940-41 (Klaudt inapplicable because § 33-18-201(7), MCA, is expressly applicable only to insureds).

In regard to first-party claims, the second clause of § 33-18-342(3), MCA, expressly bars only first-party claims for common law “*bad faith* in connection with the handling of an insurance claim.” Not predicated on the implied covenant of good faith, a first-party Goddard-style UTPA-based tort claim is not a true common law “*bad faith*” claim within the meaning of § 33-18-342(3), MCA. See Britton, 221 Mont. at 72, 721 P.2d at 306 (common law “*bad faith*” claim is predicated on breach of implied covenant of good faith); Dees v. American Nat’l Fire Ins. Co. (1993), 260 Mont. 431, 450 861 P.2d 141, 153 (Gray, J., concurring) (by reference to Britton recognizing that the § 33-18-342(3), MCA, limitation applies to first-party bad faith cases based on breach of common law implied covenant of good faith); Brewington, ¶¶ 13-14 (common law bad faith claim arises from implied covenant of good faith). Thus, the “*bad faith*” clause of § 33-18-242(3), MCA, does not preclude UTPA-based first-party Goddard-style claims.

Moreover, in limiting first-party claims for damages to first-party fraud, breach of contract claims, and independent UTPA claims (§ 33-18-242(1), MCA), the first clause of § 33-18-342(3), MCA, only bars other first-party claims *for compensatory “damages”* “suffered . . . as a result of the handling of an insurance claim.” See § 33-18-242(3), MCA (“an insured who has *suffered damages*”); see also §§ 33-18-242(1) and (4), MCA (distinctly treating compensatory “damages” and “exemplary damages”). As manifest in Ferguson, ¶ 36, and Dubray, ¶¶ 13 and 16, the first-party claim bar of § 33-18-342(3), MCA, thus does not bar a first-party UTPA-based claim (*e.g.*, Goddard-style) for other types of relief such as declaratory relief and derivative equitable and punitive relief. See § 33-18-242(3), MCA (expressly applicable

to “an insured who has *suffered damages* as a result” of claims handling); see also §§ 33-18-242(1) and (4), MCA (distinctly treating compensatory “damages” and “exemplary damages”); § 27-1-202, MCA (general legal remedy to compensate for harm is “damages”); § 27-1-301, MCA (punitive damages are not compensatory “damages”).

Here, as construed by the court, Plaintiff’s asserted UTPA-based class claim neither constitutes nor is tantamount to a claim for compensatory damages – it merely encompasses first and third-party (Goddard-style and Klaudt-style) claims for declaratory relief and related equitable and punitive relief predicated on asserted class-wide violations of §§ 33-18-201(1) and (6), MCA. Therefore, consistent with Ferguson, ¶ 36, and Dubray, ¶¶ 13 and 16, § 33-18-242, MCA, does not preclude Rule 23(b)(2) certification of Plaintiff’s asserted class claim as a matter of law.

Allstate further asserts that injunctive relief is not an available private remedy in UTPA-based claims as a matter of law because the UTPA provides injunctive relief only as a public remedy in a state enforcement action by the Montana Insurance Commissioner. (*Defendant’s Opposition To Plaintiff’s Motion For Class Certification*, Doc. 232, p. 15, fn. 20; *Defendants’ Memorandum In Re Motion To Strike And Dismiss*, Doc. 231, 15-16). While the only express UTPA provision for injunctive relief is as a public enforcement remedy available to the Montana Insurance Commissioner in a state enforcement proceeding, see §§ 33-18-1002 through 1004(3), MCA (UTPA state enforcement authority), the UTPA expressly provides that its state enforcement remedy does:



. . . not in any way relieve or absolve a person affected by the [administrative] order from any other liability, penalty, or forfeiture under law.

§ 33-18-1004(4), MCA. The UTPA further similarly provides that its state enforcement remedy:

may not be considered to affect or prevent the imposition of any penalty provided by this code *or by other law* for violation of any other provision of this chapter . . .

§ 33-18-1004(5), MCA (emphasis added); see also Klaudt, 202 Mont. at 251-52, 658 P.2d at 1067 (§ 33-18-1004 makes “evident that the insurance commissioner’s action is not the exclusive remedy for unfair trade practice violation[s]”). Thus, the UTPA’s express provision of injunctive relief as a state enforcement remedy does not bar or limit otherwise cognizable injunctive relief as a private remedy to redress asserted violations of §§ 33-18-201(1) and (6), MCA. Therefore, the UTPA does not preclude or limit Rule 23(b)(2) certification of the asserted class claims in this case.

**(2) Prohibitive Injunction As Rule 23(b)(2) Relief.**

The first form of Rule 23(b)(2) injunctive relief sought by Plaintiff is an injunction:

prohibiting [Allstate] from hereafter engaging in the unlawful conduct in this jurisdiction found by the jury in this cause, affirmed by this court in its post verdict review of punitive damages, and affirmed by the Montana Supreme Court.

(Plaintiff's *Fourth Amended Complaint*, Doc. 219, p. 9-12; *Plaintiff's Brief In Support Of Motion To Certify Class*, Doc. 222, p. 12-15). Allstate asserts that this requested injunctive relief is defectively vague and subjective. (*Defendant's Opposition To Plaintiff's Motion For Class Certification*, Doc. 232, p. 15-16).

A prohibitive injunction is an equitable remedy requiring a party "to refrain from a particular act." § 27-19-101, MCA. Whether as a form of individual or class relief, an injunction must "be specific in its terms" and "describe in reasonable detail" the prohibited acts. §§ 27-19-105(2) and 27-19-105(3), MCA. In the class action context, the injunction must be sufficiently specific, by reference to objective criteria, to be effective and enforceable on behalf of the class as a whole. See Shook v. Board of El Paso County Commissioners (10<sup>th</sup> Cir. 2008), 543 F.3d 597, 605-06; see also Chiang v. Veneman (3<sup>rd</sup> Cir. 2004), 385 F.3d 256, 272; C.A. Wright, A.R. Miller & M.K. Kane, *Federal Practice and Procedure: Civil 2d* vol. 7A, § 1760 (3<sup>rd</sup> ed. West 2011); *Manual for Complex Litigation* (4<sup>th</sup>) § 21.222 (West 2011).

Here, as a matter of law, the requested prohibitive injunction is a form of "final injunctive relief" within the meaning M.R.Civ.P. Rule 23(b)(2). However, Plaintiff's requested prohibitive relief is essentially no more than a directive to Allstate to modify its unrepresented segment practices to comply with the general requirements of §§ 33-18-201(1) and (6), MCA. Beyond this, Plaintiff has failed to articulate a specific, objectively-defined prohibition capable of uniformly providing effective and enforceable prohibitive injunctive relief to the class as a whole. In contrast to Gonzales, ¶¶ 16-20 (curatively restating facially "fail-safe" class definition), the court is further

unable to conceive of a specific, objectively-defined manner to provide effective prohibitive injunctive relief in this case. Thus, Plaintiff's proposed prohibitive injunctive relief is fatally vague and insufficient for certification as a form of Rule 23(b)(2) relief in this case.

**(3) Mandatory Injunctive Relief (Re-Opening Of Individual Cases) As Rule 23(b)(2) Relief.**

The second form of Rule 23(b)(2) injunctive relief sought by Plaintiff is a mandatory injunction compelling Allstate to "re-open all [unrepresented] claims [adjusted under the Casualty CCPR] in which liability was reasonably clear." (Plaintiff's *Fourth Amended Complaint*, Doc. 219, p. 9-12; *Plaintiff's Brief In Support Of Motion To Certify Class*, Doc. 222, p. 12-15). Allstate asserts that the requested mandatory injunctive relief is insufficiently vague, subjective, and dependent upon case-specific individual issues. (*Defendant's Opposition To Plaintiff's Motion For Class Certification*, Doc. 232, p. 2 and 15-16).

A mandatory injunction is an equitable remedy available under Montana law notwithstanding the apparently limited language of § 27-19-101, MCA (narrowly defining an injunction as a prohibitive remedy). Grosfield v. Johnson (1935), 98 Mont. 412, 421-22, 39 P.2d 660, 663-64. The primary purpose of a mandatory injunction is to return the injured party to the rightful position that the party would have been in but for the subject wrong. Butler v. Germann (1991), 251 Mont. 107, 110, 822 P.2d 1067, 1069, *overruled in part on other grounds*, Shammel v. Canyon Resources Corp., 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912; see also Mustang Holdings, LLC v. Zaveta, 2006 MT 234, ¶¶ 32-36, 333 Mont. 471, 143

P.3d 456 (citing Butler). Like a prohibitive injunction, a mandatory injunction must “be specific in its terms” and “describe in reasonable detail” the required acts. See §§ 27-19-105(2) and 27-19-105(3), MCA. In the class action context, the injunction must be sufficiently specific, by reference to objective criteria, to be effective and enforceable on behalf of the class as a whole. See Shook v. Board of El Paso County Commissioners (10<sup>th</sup> Cir. 2008), 543 F.3d 597, 605-06; see also M.R.Civ.P. Rule 23(b)(2); Chiang v. Veneman (3<sup>rd</sup> Cir. 2004), 385 F.3d 256, 272; C.A. Wright, A.R. Miller & M.K. Kane, *Federal Practice and Procedure: Civil 2d* vol. 7A, § 1760 (3<sup>rd</sup> ed. West 2011); *Manual for Complex Litigation (4<sup>th</sup>)* § 21.222 (West 2011).

Here, Plaintiff defines the mandatory injunction for re-opening of claims with reference to claims “in which liability was reasonably clear.” This criteria is a highly individualized, case-specific criteria insufficient to provide effective and enforceable relief to the class as a whole. See Shook, 543 F.3d at 605-06; Chiang, 385 F.3d at 272; C.A. Wright, A.R. Miller & M.K. Kane, *Federal Practice and Procedure: Civil 2d* vol. 7A, § 1760 (3<sup>rd</sup> ed. West 2011); *Manual for Complex Litigation (4<sup>th</sup>)* § 21.222 (West 2011).

However, Hern v. Safeco Ins. Co., 2005 MT 301, ¶¶ 10-13, 329 Mont. 347, 125 P.3d 597, exemplifies an appropriate form of Rule 23(b)(2) mandatory injunctive relief capable of providing uniform, effective, and enforceable relief to the class as a whole without need for individualized case-specific determinations in the context of the class action litigation. As in Hern, this court could conceivably fashion a mandatory injunction compelling Allstate to re-open and re-adjust individual claims by:

- (1) notifying all class members of the right and opportunity to obtain re-opening and re-adjustment of their individual claims by timely returning a proof of claim form; and
- (2) requiring it to then re-open and re-adjust each individual claim upon receipt of a timely filed proof of claim.

See similarly, Ferguson v. Safeco Ins. Co., 2008 MT 109, ¶¶ 34-36, 342 Mont. 380, 180 P.3d 109 (mandatory review and adjustment of claims in re “make-whole” priority over subrogation); Lebrilla v. Farmers Group, Inc. (Cal. App. 2004), 16 Ca.Rptr.3d 25, 39 (mandatory review of prior parts sales in re preference for original, non-imitation parts – cited in Ferguson). Except as inconsistent with the class relief, re-opening of each claim would revive the individual remedies and defenses otherwise available to each party in the ordinary course outside of the class action litigation. See Hern, ¶¶ 22-29 (in re individual members’ rights to dispute post-re-opening re-adjustment and precluding only post-reopening assertion of defenses inconsistent with the mandatory class relief). As manifest in Hern, this form of mandatory relief would be a form of “final injunctive relief” within the meaning M.R.Civ.P. Rule 23(b)(2) because the mandatory relief would merely require Allstate to re-open individual claims on notice and timely-filed individual proofs of claim without further involvement of this court in the class action. As in Hern, Ferguson, and Lebrilla, the resulting case-specific, individualized issues would then arise and be addressed on an individual case basis in the ordinary course of law outside the context of the class action litigation.

Notwithstanding, Allstate further asserts that a mandatory injunction compelling it to re-open individual claims would ‘serve only to facilitate the award of damages’ and is therefore a form of monetary relief unavailable as a matter of law in a Rule 23(b)(2) class action. (*Defendant’s Opposition To Plaintiff’s Motion For Class Certification*, Doc. 232, p. 16). However, mandatory re-opening of individual claims outside the scope of the class action is not a form of monetary relief – it is no more than an order requiring Allstate, on notice and receipt of timely individual proofs of claim, to re-open and re-adjust individual claims with no further involvement of the court in the class action. See Ferguson, ¶¶ 34-39 (mandatory review and adjustment of individual claims in re “make-whole” priority over subrogation); see also Hern, ¶¶ 22-29 (mandatory re-adjustment of individual claims). This form of mandatory injunctive relief is clearly not tantamount to monetary relief because it does not necessarily result in additional monetary relief in every case. As indivisible, class-wide injunctive relief, it implicates no due process concerns because it stops short at merely requiring Allstate to re-open the claims, thus in a single stroke restoring interested class members *and Allstate* to the pre-settlement status quo with all ordinarily attendant due process intact regarding each individual claim. See Hern, ¶¶ 22-29 (in re individual members’ rights to dispute post-re-opening re-adjustment and precluding only post-reopening assertion of defenses inconsistent with the mandatory class relief); compare Wal-Mart, \_\_ U.S. at \_\_, 131 S.Ct. at 2557-61 (Rule 23(b)(2) monetary relief analysis). Therefore, as construed by the court, the requested mandatory injunctive relief compelling Allstate to re-open individual class claims is capable of

uniformly providing effective and objectively enforceable Rule 23(b)(2) injunctive relief to the class as a whole.

**(4) Mandatory Injunction For Equitable Disgorgement Of Unjust Profits As Rule 23(b)(2) Relief.**

The third form of Rule 23(b)(2) injunctive relief sought by Plaintiff is a mandatory injunction compelling Allstate to “disgorge . . . unlawful profits made through its systemic violation of” §§ 33-18-201(1) and (6), MCA. (Plaintiff’s *Fourth Amended Complaint*, Doc. 219, p. 9-12; *Plaintiff’s Brief In Support Of Motion To Certify Class*, Doc. 222, p. 12-15). Allstate asserts that equitable disgorgement is a form of monetary relief unavailable as a matter of law in a Rule 23(b)(2) class action. (*Defendant’s Opposition To Plaintiff’s Motion For Class Certification*, Doc. 232, p. 16-17).

A mandatory injunction is a general equitable remedy primarily designed to restore a party to the rightful position that the party would have been in but for the subject wrong. Butler v. Germann (1991), 251 Mont. 107, 110, 822 P.2d 1067, 1069, *overruled in part on other grounds*, Shammel v. Canyon Resources Corp., 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912; *see also* Mustang Holdings, LLC v. Zaveta, 2006 MT 234, ¶¶ 32-36, 333 Mont. 471, 143 P.3d 456 (citing Butler). In contrast to the ordinary legal remedy of compensatory money damages, *see* §§ 27-1-107 through 27-1-202, MCA, disgorgement of unjust profits is a specific equitable remedy designed to prevent a tortfeasor from profiting from a conscious breach of duty. *Restatement (3<sup>rd</sup>) of Restitution* § 44(1) and comment d. Notwithstanding its mandatory injunc-

tive conveyance, disgorgement is a form of equitable monetary relief.

In the context of a breach of a non-fiduciary duty imposed by law, equitable disgorgement of profits is a remedy in restitution focused on the conduct of the tortfeasor, rather than the actual loss suffered by the plaintiff. *Restatement (3<sup>rd</sup>) of Restitution* § 44(1). In contrast to compensatory damages, equitable disgorgement is:

broader than mere restoration of what the plaintiff lost. Many instances of liability based on unjust enrichment do not involve the restoration of anything the claimant previously possessed including cases involving the disgorgement of profits wrongfully obtained. . . . [P]ublic policy . . . does not permit one to take advantage of his own wrong regardless of whether the other party suffers actual damage. . . . Where a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust the defendant may be under a duty to give the plaintiff the amount by which the defendant has been enriched. . . .

. . . The emphasis is on the wrongdoer's enrichment, not the victim's loss. In particular, a person acting in conscious disregard of the rights of another should be required to disgorge all profits because disgorgement both benefits the injured part[y] and deters the [tortfeasor] from committing the same unlawful actions again. . . . Disgorgement may include a restitutionary element, but it may



compel a defendant to surrender all money obtained through an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice . . . .

San Bernadino County v. Walsh (Cal. App. 2008), 69 Cal.Rptr.3d 848, 856-57; see also *Restatement (3<sup>rd</sup>) of Restitution & Unjust Enrichment* § 44 comment a (2011) (disgorgement strips the tortfeasor of wrongful gain and eliminates incentive for further similar conduct).

“Although both damages and restitution may remedy the same injury, damages differ from restitution in that damages are measured by the Plaintiff’s loss,” while “restitution is measured by the defendant’s unjust gain.” Larocca v. Borden, Inc. (1<sup>st</sup> Cir. 2002), 276 F.3d 22, 28; see also *Restatement of Restitution* § 3 comment a and c (disgorgement of wrongfully gained profits in excess of measurable damages may be equitable to prevent unjust enrichment by merely requiring tortfeasor to occasionally pay damages at law). Disgorgement “will sometimes yield a recovery where the claimant could not prove damages.” *Restatement (3<sup>rd</sup>) of Restitution* § 44 comment a. In the class context, equitable disgorgement does not necessarily require proof of the precise amount of resulting loss to the class or its individual members. Fletcher v. Security Pac. Nat’l Bank (Cal. 1979), 591 P.2d 51, 56-58 (disgorgement is proper class remedy – no requirement for individualized proof); see also ABC Int’l Traders, Inc. v. Matsushita Electrical Corp. (Cal. 1997), 931 P.2d 290, 303 (recognizing that disgorgement of profits does not require specifically identifiable victim who lost money as a result of an unfair business practice). Consequently, if otherwise

appropriate in equity in this case, equitable disgorgement is a suitable class-wide monetary remedy because it does not involve or require individualized proof of whether and to what extent individual class members received full and fair settlements under specific facts and circumstances of each case.

However, although Rule 23(b)(2) expressly contemplates class-wide declaratory and injunctive relief, it is “is silent” as to whether any form of monetary relief is available as a supplemental form of Rule 23(b)(2) relief incidental to the declaratory and injunctive relief. Allison v. Citgo Petroleum Corp. (5<sup>th</sup> Cir. 1998), 151 F.3d 402, 411. Noting its previously “expressed serious doubt” as to whether Rule 23(b)(2) permits any form of monetary relief,<sup>50</sup> the United States Supreme Court recently more narrowly held that Rule 23(b)(2) does not permit “monetary relief” that “is not incidental to” the primary declaratory

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<sup>50</sup> Wal-Mart, \_\_ U.S. at \_\_, 131 S.Ct. at 1255 (citing Ticor Title Ins. Co. v. Brown (U.S. 1994), 511 U.S. 117, 121, 114 S.Ct. 1359, 1361-61, 128 L.Ed.2d 33). Despite the prominent but single line reference in Wal-Mart to previously-expressed ‘serious doubt,’ the express language of Ticor neither expresses nor manifests such sweeping doubt. See Ticor, 511 U.S. at 117, 114 S.Ct. at 1361-61. Ticor did no more than “dismiss [a] writ of certiorari as improvidently granted” because the case raised an “entirely hypothetical question” regarding the due process implications of monetary relief in a Rule 23(b)(1)/23(b)(2) class action. Id. at 118, 114 S.Ct. at 1360. Without sweeping ominous foreboding either way, even Ticor’s explanatory *dictum* went no farther than cautiously recognizing the significance of the implicated constitutional concern of whether procedural due process requires notice and member opt-out for any type of class action involving any form of monetary relief. Ticor, 511 U.S. at 121-22, 114 S.Ct. at 1361-62. The sweeping reference to ‘serious doubt’ first appears in Wal-Mart. See \_\_ U.S. at \_\_, 131 S.Ct. at 1259 (introducing relevant procedural due process concerns).

and injunctive relief. Wal-Mart, \_\_ U.S. at \_\_, 131 S.Ct. at 2557-61. Expressly sidestepping the “broader question” of whether Rule 23(b)(2) ever permits any form of monetary relief, the Supreme Court ultimately held that the monetary relief specifically at issue in Wal-Mart (back pay) was not merely incidental to the requested Rule 23(b)(2) declaratory and injunctive relief. Wal-Mart, \_\_ U.S. at \_\_, 131 S.Ct. at 2557-61.

In so holding, the U.S. Supreme Court found that the requested back pay remedy was not susceptible to class-wide determination in a single stroke because the lack of Rule 23(a)(2) commonality rendered the requested back pay remedy no more than the sum of individualized, case-specific back pay determinations for each class member. See Wal-Mart, \_\_ U.S. at \_\_, 131 S.Ct. at 2557-58. Recognizing various negative due process implications of resolving individualized issues on a class basis without the procedural protections of Rule 23(b)(3) (individual notice and opt-out procedures),<sup>51</sup> the Supreme Court held that, “even assuming, *arguendo*, that ‘incidental’ monetary relief” is appropriate under Rule 23(b)(2), the back pay claims at issue were not incidental to the class declaratory and injunctive relief from which they sprang. Wal-Mart, \_\_ U.S. at \_\_, 131 S.Ct. at 2559-61.

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<sup>51</sup> Citing Phillips Petroleum v. Shutts (U.S. 1985), 472 U.S. 797, 812, 105 S.Ct. 2965, 2974-74 86 L.Ed.2d 268 (holding only that Rule 23(b)(3) notice and opt-out requirements satisfied minimum due process requirements in a state-court Rule 26(b)(3) class action involving 28,000 multi-state members for interest at varying rates on gas lease royalties).

Here, whether characterized as an equitable or mandatory injunctive remedy, the requested disgorgement of profits is ultimately a Rule 23(b)(2) monetary remedy. See Wal-Mart, \_\_ U.S. at \_\_, 131 S.Ct. at 2560 (claim for back pay is a monetary relief irrespective of equitable characterization). In this context, the initial Rule 23(b)(2) consideration in determining whether the subject monetary relief is merely incidental to the declaratory and injunctive relief at issue is whether the monetary relief is capable of providing indivisible class-wide relief in a single stroke without consideration of individualized, case-specific issues. Wal-Mart, \_\_ U.S. at \_\_, 131 S.Ct. at 2557-58 (contrasting “individualized” relief from “indivisible” relief). The related constitutional due process consideration is then whether, due to the effect of collateral estoppel,<sup>52</sup> the absence of the Rule

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<sup>52</sup> Also known as issue preclusion, collateral estoppel is a particular form of the doctrine of res judicata. Rausch v. Hogan, 2001 MT 123, ¶ 15, 305 Mont. 382, 28 P.3d 460. Both serve the “judicial policy favoring a definite end to litigation.” Kullick v. Skyline Homeowners Assoc., 203 MT 137, ¶ 17, 316 Mont. 146, ¶ 17, 69 P.3d 225, ¶ 17; Rausch, ¶ 14. Res judicata bars the same parties from relitigating the same cause of action in a subsequent proceeding – collateral estoppel bars the same parties from relitigating sub-issues actually litigated and determined in prior litigation irrespective of differences in causes of action. Rausch, ¶ 15; Lawlor v. Nat’l Screen Service Corp., 349 U.S. 322, 326, 75 S.Ct. 865, 867, 99 L.Ed. 1122 (1955); see also Finstad v. W.R. Grace Co., 2000 MT 228, ¶ 28, 301 Mont. 240, ¶ 28, 8 P.3d 778, ¶ 28 (res judicata bars relitigation of claims); In re Marriage of Stout, 216 Mont. 342, 349, 701 P.2d 729, 733 (1985) (res judicata applies only to same claims or causes of action); compare Haines Pipeline Constr. v. Montana Power Co., 265 Mont. 282, 288, 876 P.2d 632, 636 (1994) (collateral estoppel bars relitigation of legal issues and determinative facts actually or necessarily decided in a prior litigation irrespective of cause of action types and elements).

23(b)(3) notice and opt-out protections could prejudice the procedural and substantive rights of individual class members and the defendant to individualized adjudications on the case-specific merits of each individual claim. Wal-Mart, \_\_ U.S. at \_\_, 131 S.Ct. at 2559-60. If either concern is genuinely present in a particular case, procedural due process requires class prosecution of the monetary relief claim as a Rule 23(b)(3) class action rather than a Rule 23(b)(2) action. Id.

In this case, although likely subject to genuine material dispute on the evolving record, substantial proof exists that:

- (1) the Casualty CCPR's unrepresented segment adjusting practices are a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class of unrepresented claimants as a whole;
- (2) Allstate's common, systematic use of this pattern and practice in Montana caused actual indivisible harm to the class as a whole by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of as a whole;
- (3) Allstate has consciously disregarded a high probability that the net effect of its Casualty CCPR's unrepresented segment practices would result in net settlement payouts to the class as a whole less than the net amount previously sufficient to fully and fair settle unrepresented claims under Montana law; and

- (4) the occurrence and extent of the unjust enrichment is objectively measurable on class-wide basis without consideration of individual outcomes, by comparative analysis of relevant industry performance data and internal Allstate performance data.

Under these circumstances, unlike the individualized monetary relief at issue in Wal-Mart, the proposed equitable disgorgement is capable of providing indivisible, non-individualized class-wide relief in a single stroke incidental to the declaratory relief from which it flows.

Moreover, as construed by the court, neither the subject declaratory relief nor the derivative equitable disgorgement remedy would litigate any claim-specific individualized issue of fact or law – they touch and concern only the above-referenced issues of law and fact uniformly common to every class member on Plaintiff’s class proof. The requested equitable disgorgement is a non-individualized class-wide remedy focused on preventing unjust enrichment from a common pattern and practice of conduct generally applicable to the class as a whole without consideration for case-specific individual outcomes. Under this scenario, as a matter of law, equitable estoppel cannot prejudicially affect the respective rights of individual class members or Allstate regarding case-specific individualized issues. Consequently, the subject class-wide equitable disgorgement does not implicate the same due process concerns as the individualized monetary remedy at issue in Wal-Mart. Thus, the requested equitable disgorgement comports with due process as a Rule 23(b)(2) remedy merely incidental to the underlying

declaratory and other mandatory injunctive relief at issue in this case.

**(5) Punitive Damages As A Permissible Form Of Incidental Rule 23(b)(2) Monetary Relief.**

On the same grounds as it objects to equitable disgorgement as a class remedy, Allstate objects to Plaintiff's class claim for punitive damages as a form of monetary relief unavailable as a matter of law in a Rule 23(b)(2) class action. (*Defendant's Opposition To Plaintiff's Motion For Class Certification*, Doc. 232, p. 15-17).

In accordance with the foregoing Wal-Mart analysis regarding equitable disgorgement, monetary relief is available as a remedy incidental to class-wide declaratory and injunctive relief in a Rule 23(b)(2) class action only if the monetary relief:

- (1) affords indivisible, non-individualized relief in a single stroke to the class as a whole; and
- (2) comports with due process in the absence of the procedural protections of Rule 23(b)(3) (notice and opt-out provisions) by not prejudicing the rights of class members and the defendant to contest case-specific issues and defenses in individual cases.

See Wal-Mart, \_\_\_ U.S. at \_\_\_, 131 S.Ct. at 2557-61. In contrast to the compensatory purpose of money damages at law and the broader and distinct purposes of equitable disgorgement, punitive damages are a monetary remedy serving the specific and narrow purposes of "punishing" the offending tortfeasor for "actual fraud" or "actual malice" and further thereby deterring others from similar conduct by example. §§ 27-1-220(1) and 27-221, MCA; see also Tillet v.

Lippert (1996), 275 Mont. 1, 8, 909 P.2d 1158, 1162 (punitive damages serve not only to punish tortious conduct but also to set an example to the public for purposes of deterrence of similar conduct).

For purposes of punitive damages, a party commits “actual malice” if the party:

- (1) had knowledge of facts or intentionally disregarded facts that created a high probability of injury to the plaintiff; and
- (2) either deliberately proceeded to act:
  - (A) in conscious or intentional disregard of the high probability of injury to the plaintiff; or
  - (B) with indifference to the high probability of injury to the plaintiff.

§ 27-1-221(2), MCA. Here, although likely subject to genuine material dispute on continued evolution of the evidentiary record, there is substantial proof that:

- (1) the Casualty CCPR’s unrepresented segment adjusting practices are a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class of unrepresented claimants as a whole;
- (2) Allstate’s common, systematic use of this pattern and practice in Montana caused actual indivisible harm to the class as a whole by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of as a whole;



- (3) Allstate has consciously disregarded a high probability that the net effect of its Casualty CCPR's unrepresented segment practices would result in net settlement payouts to the class as a whole that were less than the net amount previously sufficient to fully and fair settle unrepresented claims under Montana law; and
- (4) the occurrence and extent of the actual harm common to the class as a whole is ascertainable and at least generally measurable on an indivisible class-wide basis without consideration of individual outcomes by comparative analysis of relevant industry performance data and internal Allstate performance data.

Thus, substantial evidence supports Plaintiff's claim that the pattern and practice application of the CCPR unrepresented segment practices in Montana subjected the class of unrepresented claimants as a whole to "actual malice" irrespective of individual outcomes.

As a threshold matter of law, punitive damages are generally not available without a predicate "award of compensatory damages." Jacobsen, ¶ 67. However, an award of punitive damages based on actual malice does not require an actual award of compensatory damages if the evidence shows that the predicate tort nonetheless caused actual harm or damage even if a specific monetary amount is not measurable or awarded. See Lipinski v. Title Ins. Co. (1983), 202 Mont. 1, 14-17, 655 P.2d 970, 976-78 (actual award of compensatory damages on a predicate tort of common law bad faith not required if "a basis for actual damages exists in the record"); Paulson v. Kustom Enterprises, Inc. (1971), 157 Mont. 188, 201-02, 483 P.2d 708, 715-16 (reversing summary judg-

ment against punitive damages claim where actual damages not available on the predicate tortious slander of title claim); Fauver v. Wilkoske (1949), 123 Mont. 228, 238-39, 211 P.2d 420, 425-26 (actual award of monetary damages not required as predicate for punitive damages if the evidence supports a finding of an actual “substantial injury” resulting from the predicate tort); Stipe v. First Interstate Bank-Polson, 2008 MT 239, ¶ 23, 344 Mont. 435, 188 P.3d 1063 (punitive damages does not require an actual award if there is a “*showing* of actual damages” – citing Paulson); see also Weinberg v. Farmers State Bank of Worden (1988), 231 Mont. 10, 31-32, 752 P.2d 719, 732 (punitive damages proper on nominal damages only “or where no monetary value assigned” to the “actual damages suffered”); Harris v. American Gen’l Life Ins. Co. (1983), 202 Mont. 393, 399-400, 658 P.2d 1089, 1092-93 (punitive damages proper on nominal damages only); Butcher v. Petranek (1979), 181 Mont. 358, 363-64, 593 P.2d 743, 746 (punitive damages proper on nominal damages or where no monetary value placed on actual damage/harm suffered); Lauman v. Lee (1981), 192 Mont. 84, 89-90, 626 P.2d 830, 833 (actual award of damages not required -punitive damages require only actual harm/injury); Miller v. Fox (1977), 174 Mont. 504, 509-10, 571 P.2d 804, 808 (actual damage award not required if proof of actual harm/damage). Thus, if the evidence is sufficient to support a finding that a tortfeasor’s class-wide conduct actually caused indivisible harm to the class as a whole, a class-wide punitive damages award does not require or depend on individual or class-wide determinations of compensatory damage or individualized, case-specific determinations of punitive damages. See Gonzalez v. Montana Power Co., 2010 MT 117, ¶¶ 12-14, 356 Mont.

351, 233 P.3d 328 (class punitive damages claim does not require individualized determinations).

Here, Plaintiff's class punitive damages claim is predicated on alleged class-wide tortious conduct systematically subjected upon the class as a whole. Plaintiff's affirmative proof of this claim is capable of showing, by operation of Allstate's zero-sum economic theory, that the class-wide conduct actually caused indivisible harm to the class as a whole, irrespective of other case-specific issues in individual cases. Thus, upon proof of "actual malice," proof of the underlying class claim (class-wide UTPA violations and resulting indivisible harm to the class as a whole) would constitute a sufficient predicate for a class-wide punitive damages award in this case. Because these indivisible, class-wide determinations do not adjudicate individualized, case-specific issues, the requested class-wide punitive damages remedy is capable of providing indivisible, non-individualized class-wide relief in a single stroke incidental to the Rule 23(b)(2) declaratory and mandatory injunctive relief from which it flows.

For the same reason, the requested class-wide punitive damages remedy does not implicate the same due process concerns as the individualized monetary remedy found problematic in Wal-Mart, \_\_\_ U.S. at \_\_\_, 131 S.Ct. at 2557-61. As manifest by the above-referenced issues of fact and law common to Plaintiff's asserted class claim, the proposed Rule 23(b)(2) declaratory judgment does not litigate any claim-specific individualized issue of fact or law – it touches and concerns only the issues uniformly common to every class member on Plaintiff's class proof. The complementary Rule 23(b)(2) mandatory injunctive relief compelling re-opening of individual

claims provides and guarantees to Allstate and each aggrieved class member the individual right and opportunity for an individualized determination on the merits of each claim, including but not limited to any appropriate case-specific claim for punitive damages. See Hern, ¶¶ 22-29. As matters of law and fact, equitable estoppel cannot prejudice Allstate or individual class members regarding individual, case-specific punitive damages claims because the class punitive damages claim does not litigate whether other case-specific facts and circumstances may further warrant individualized punitive damages awards in individual cases outside of this class litigation. Therefore, unlike the individualized monetary relief at issue in Wal-Mart, the class punitive damages claim in his case comports with due process as a Rule 23(b)(2) remedy merely incidental to the underlying declaratory and mandatory injunctive relief from which it flows.

**(6) Equitable Remedies And Adequacy Of Remedies At Law.**

Allstate further asserts that the various requested forms of equitable relief (injunctive relief and disgorgement) are not available class remedies in this case because other adequate remedies were or are ordinarily available to individual class members at law. (*Defendant's Opposition To Plaintiff's Motion For Class Certification*, Doc. 232, p. 15). Allstate specifically asserts that Plaintiff "does not allege that the putative class members do not have adequate remedies at law, or [that individual] actions for monetary damages would not afford an adequate remedy." (Id.).

As a general rule, equitable relief is an extraordinary remedy available only in the absence of an

adequate remedy at law. Eagle Watch Investments, Inc. v. Smith (1996), 278 Mont. 187, 192, 924 P.2d 257, 260; see also §§ 27-1-101, 107, and 202, MCA (damages are the ordinary remedy at law – equitable relief is an extraordinary remedy). §§ 27-19-102(1) and 27-19-102(3), MCA (injunctive relief available only if no adequate remedy at law); Shammel v. Canyon Resources Corp., 2003 MT 372, ¶ 17, 319 Mont. 132, 82 P.3d 912 (injunctive relief available only if no adequate remedy at law). However, with the modern merger of law and equity into a single civil action, see, e.g., M.R.Civ.P. Rules 1-2, alternative or complementary applications of various forms of legal and equitable relief are appropriate where necessary to provide effective comprehensive relief under the circumstances of each case. Rice v. C.I. Lanning, 2004 MT 237, ¶¶ 28-31, 322 Mont. 487, 97 P.3d 580; Butler v. Germann (1991), 251 Mont. 107, 822 P.2d 1067 (combination of money damages, mandatory injunctive relief, and prohibitive injunctive relief), *overruled in part on other grounds*, Shammel v. Canyon Resources Corp., 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912; *Restatement (2<sup>nd</sup>) of Torts* § 951 comment a (1979) (with the modern merger of law and equity into a single action, all of the various forms of legal and equitable relief are available to provide complete relief as necessary on a case basis); *Restatement (3<sup>rd</sup>) of Restitution & Unjust Enrichment* § 3 comment c (2011) (inadequacy of a remedy at law not necessarily required for equitable disgorgement of wrongful gain). Accordingly, even where individual actions for money damages are otherwise available at law, equitable relief is available on a class basis when necessary to:

redress wrongs otherwise unremediable because the individual claims involved [are] too

small, or the claimants too widely dispersed. Moreover, in the early development of our civil procedures it became apparent that judicial efficiency demanded the elimination of multiple suits arising from the same facts and questions of law.

See McDonald, 261 Mont. at 405, 862 P.2d at 1158 (quoting federal authority); see also § 27-19-102(3), MCA (injunctive relief proper when “necessary to prevent a multiplicity of judicial proceedings”); Ferguson, ¶¶ 32-38 (class-wide mandatory injunctive remedy).

Here, various individual remedies for money damages were ordinarily available at law to individual class members to obtain initial resolution of their claims and, as necessary, to redress case-specific violations of Allstate’s statutory UTPA. However, the class-wide matter at issue is the indivisible net effect of the Casualty CCPR unrepresented segment practices on the class as a whole, irrespective of individual outcomes. As is manifest in the tortuous history of this case, such class-wide conduct is not readily amenable to efficient comprehensive litigation in the non-class context of the case-specific facts and circumstances of individual claims. Further compounding matters, the nature of the asserted class claim and the resulting putative class definition limits the class to unrepresented claimants who have already settled their individual claims. Under these circumstances, the burden and cost of individualized, represented litigation of such broad-swath issues practically precludes efficient comprehensive litigation of the common class-wide issues through otherwise available individual remedies at law. Therefore, if particular equitable remedies are otherwise proper

in equity, the general rule favoring legal remedies over equitable remedies does not preclude them in this case.

**(7) Equity Of Profit Disgorgement Cumulative To Punitive Damages And Mandatory Re-Opening Of Individual Claims.**

Although equitable disgorgement would otherwise be a cognizable class remedy in this case, Plaintiff apparently seeks it cumulative to punitive damages and mandatory re-opening of individual cases. (Plaintiff's *Fourth Amended Complaint*, Doc. 219, p. 11-12). As a matter of equity independent of Rule 23, equitable disgorgement of profits is not an appropriate remedy if it will:

- (1) result in an inequitable windfall to the claimant; or
- (2) “conflict with liabilities or penalties” otherwise provided by law.

*Restatement (3<sup>rd</sup>) of Restitution* §§ 44(3)(b) and 44(3)(d) (2011).

Here, as manifest in the foregoing equitable disgorgement analysis, some degree of overlap exists between the remedy of equitable disgorgement and the complementary remedies of punitive damages and mandatory re-opening of individual cases. Equitable disgorgement and punitive damages both primarily focus on sanctioning and deterring the tortious conduct of the defendant rather than compensating the plaintiff for actual loss. Both require more than just a tortious breach of duty – both additionally require an intentional or conscious breach of duty to the plaintiff. Likewise, to the extent that it can also have a restorative or restitutionary character

apart from prevention of unjust enrichment, equitable disgorgement would also cumulatively overlap mandatory re-opening of individual claims because they would both remedy the same wrong – restoring class members to the pre-tort status quo.

Here, if Plaintiff's class proof is ultimately successful, the requested punitive damages remedy already adequately serves the purposes of directly sanctioning the wrongful conduct at issue and further deterring Allstate and others from similar intentional or conscious breach of duty. Likewise, to the extent that equitable disgorgement can also have a restorative or restitutionary character, the mandatory re-opening of claims remedy already adequately accomplishes the interests of class members and public policy in restoring individuals to the pre-tort status quo. Under these circumstances, application of equitable disgorgement cumulative to the otherwise complementary mandatory injunctive and punitive remedies at issue:

- (1) is not necessary for complete compensatory/restorative relief, prevention of unjust enrichment, or punitive/deterrent effect;
- (2) would inequitably subject Allstate to financial detriment beyond that necessary for complete compensatory/restorative relief, prevention of unjust enrichment, and punitive/deterrent effect; and
- (3) would result in inequitable windfall to the class.

Pursuant to *Restatement (3<sup>rd</sup>) of Restitution* §§ 44(3)(b) and 44(3)(d), application of equitable disgorgement cumulative to the otherwise complementary declaratory, mandatory injunctive, and punitive remedies at issue would thus be inequitable in this



case. Therefore, as a matter of equity, cumulative equitable disgorgement is not an appropriate Rule 23(b)(2) class remedy here.

**G. Class Attorney Fees -Private Attorney General Doctrine.**

As further supplemental relief, Plaintiff seeks application of the private attorney general doctrine for recovery of attorney fees incurred in prosecuting the class action. (Plaintiff's *Fourth Amended Complaint*, Doc. 219, p. 11-12). The "private attorney general" doctrine is a judicially-created equitable exception to the common law American Rule barring the prevailing party from recovering attorney fees except as otherwise provided by contract or statute. Bitterroot Protective Ass'n (BRPA III) v. Bitterroot Conservation District, 2011 MT 51, ¶ 20, 359 Mont. 393, 251 P.3d 131. Under this doctrine, the court has discretion to award a prevailing party the cost of attorney fees incurred in successfully prosecuting litigation if:

- (1) the litigation "vindicated constitutional interests;"
- (2) private enforcement was necessary and resulted in a significant burden on the plaintiff; and
- (3) a significant number of people stand to benefit from the decision.

BRPA III, ¶¶ 20-22; Baxter v. State, 2009 MT 449, ¶ 47, 354 Mont. 234, 224 P.3d 1211; American Cancer Society v. State, 2004 MT 376, ¶ 21, 325 Mont. 70, 103 P.3d 1085.<sup>53</sup> The first element of the doc-

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<sup>53</sup> Other equitable considerations may also be relevant in a particular case. See Finke v. State ex rel. McGrath, 2003 MT 48, ¶ 33, 314 Mont. 314, 65 P.3d 576 (otherwise proper attorney

trine does not necessarily require direct litigation of a constitutional issue if the legal matter at issue directly implicates a constitutional provision or interest. BRPA III, ¶¶ 23-26 (holding that litigation of public stream access and streambed preservation statutes in the public interest sufficiently implicated underlying constitutional interests). Under the second element, private enforcement is typically necessary “when the government, for some reason, fails to properly enforce interests which are significant to its citizens.” BRPA III, 27.

Here, Plaintiff’s class claim furthers the important public policy consideration embodied in the UTPA of regulating the insurance industry to ensure good faith, fair dealing, and reasonably prompt settlement of first and third party insurance claims in the State of Montana. Based on this important public policy and in light of the sworn statement of the Montana Insurance Commissioner,<sup>54</sup> the second and third elements of the private attorney general doctrine are arguably satisfied here. However, irrespective of the manifest significance of the important public policy implicated by the asserted class claim, Plaintiff has not articulated how this class action sufficiently implicates a specific constitutional provision or interest. Therefore, the private attorney general doctrine is not applicable in this case.

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fee award was inequitable against counties in relation to unconstitutional laws passed by the Legislature).

<sup>54</sup> *Affidavit Of Monica Lindeen* (Doc. 314, filed 01-27-11).

### **H. Class Attorney Fees – Common Fund Doctrine.**

As further supplemental relief, Plaintiff seeks common fund recovery of attorney fees incurred in prosecuting the class action. (Plaintiff's *Fourth Amended Complaint*, Doc. 219, p. 11-12). The "common fund" doctrine is a judicially-created equitable exception to the common law American Rule barring the prevailing party from recovering attorney fees except as otherwise provided by contract or statute. Murer v. State Compensation Mut. Ins. Fund (Murer III) (1997), 283 Mont. 210, 222, 942 P.2d 69, 76. The common fund doctrine provides that "when a party, through active litigation, creates a common fund which directly benefits an ascertainable class of non-participating beneficiaries," equity warrants that the party recover from the common fund proceeds the cost of reasonable attorney fees incurred in creating or maintaining the fund. Murer III, 283 Mont. at 222, 942 P.2d at 77; Means v. Montana Power Co. (1981), 191 Mont. 395, 403, 625 P.2d 32, 37. The concept of the common fund doctrine is to:

spread the cost of litigation among all beneficiaries so that the active beneficiary is not forced to bear the burden alone and [so] the "stranger" (*i.e.*, passive) beneficiaries do not . . . benefit at no cost to themselves.

Means, 191 Mont. at 403, 625 P.2d at 37. "Application of the common fund doctrine is especially appropriate in a case . . . where the individual damage from a [class-wide] wrong may not be sufficient from an economic viewpoint to justify the legal expense necessary to challenge that wrong." Murer III, 283 Mont. at 222-23, 942 P.2d at 77; Ferguson v. Safeco

Ins. Co., 2008 MT 109, ¶ 40, 342 Mont. 380, 180 P.3d 1164 (quoting Murer III).

Here, if successful, Plaintiff's class claim for punitive damages will create a common fund benefiting the class as a whole. As manifest in the foregoing Rule 23 analysis, application of the common fund doctrine is particularly appropriate where, as here, it is not economical for all class members to individually challenge the asserted class-wide wrong. Therefore, application of the common fund doctrine is an appropriate form of supplemental relief in this case.

### **ORDER AND JUDGMENT**

In accordance with the foregoing legal analysis, the court hereby orders, adjudges, and decrees as follows:

- (1) Allstate's motion (Doc. 220 and 223) for the court to vacate, nunc pro tunc, its prior *Order Granting Plaintiff Leave To File Fourth Amended Complaint* (Doc. 215) is hereby denied;
- (2) Allstate's motion (Doc. 220 and 223) for an extension of time and leave to belatedly dispute the substantive sufficiency of *Plaintiff's Fourth Amended Complaint* (Doc. 212 and 219) pursuant to M.R.Civ. P. Rule 15(a) is hereby granted and the court has thus considered the merits of Allstate's belated *Opposition To Plaintiff's Motion To Amend Complaint* (Doc. 216);
- (3) Allstate's Rule 15(a) motion (Doc. 216, 229, 231, 240-241, and 248-249) to preclude or dismiss the class action claims and relief pled in Plaintiff's *Fourth Amended Complaint* (Doc. 219) as precluded by the law of the case and scope of remand is hereby denied;

- (4) Allstate's Rule 15(a) motion (Doc. 216, 229, 231, 240-241, and 248-249) to preclude or dismiss the class action claims and relief pled in Plaintiff's *Fourth Amended Complaint* (Doc. 219) on the asserted grounds of undue prejudice, burden, and expense is hereby denied;
- (5) Allstate's Rules 15(a) and 12(b)(6) motion (Doc. 216, 229, 231, 240-241, and 248-249) to preclude or dismiss the class action claims and relief pled in Plaintiff's *Fourth Amended Complaint* (Doc. 219) as futile under Rule 23 is hereby denied;
- (6) Defendants' Rules 12(f) and 15(a) motion (231, 240-241, and 248-249) to strike and again dismiss Defendant Charles Connors as a party-defendant is hereby granted. Defendant Charles Connors is hereby stricken and again dismissed from the above-captioned matter as an individual party-defendant;
- (7) Allstate's Rule 12(f) motion (Doc. 231) to strike an improper and impertinent legal conclusion or assertion from ¶ 36 of the Plaintiff's *Fourth Amended Complaint* (Doc. 219) is hereby granted. The ¶ 36 legal assertion that that the referenced jury "verdict" and post-verdict punitive damages review "findings and rulings" "affirmed by the Montana Supreme Court" are thus "now the law of the case, and/or subject to res judicata principles" is hereby stricken from Plaintiff's *Fourth Amended Complaint* (Doc. 219);
- (8) to the extent inconsistent with the court's factual and legal analyses in this order, the following motions are hereby denied:
  - (A) Allstate's *Motion To Strike Supplemental Facts Set Forth In Plaintiff's Reply In Sup-*

*port Of Class Certification* (Doc. 247, 257, and 266);

(B) Allstate's *Objections And Response To Plaintiff's Supplemental Submission To Plaintiff's Motion To Certify Class* (Doc. 318, 319, and 323-25 in re Doc. 315);

(C) Allstate's *Motion To Strike Plaintiff's "Reply" In Regard To Supplemental Submission* (326-37);

(9) *Allstate's Motion to Stay Answer Deadline In Re 4<sup>th</sup> Amended Complaint* (Doc. 230 and 238) is hereby granted. Allstate shall file an answer, if any, to Plaintiff's *Fourth Amended Complaint* (Doc. 219), as affected by this order, no later than 30 calendar days from the date of service of this order;

(10) to the extent inconsistent with the court's factual and legal analyses in this order, Allstate's objection (Doc. 317) to the *Affidavit Of Monica Lindeen* (Doc. 314) is overruled;

(11) *Plaintiff's Motion to Certify Class* (Doc. 221–22, 232-33, 239, 247, and 257) is hereby granted only to the following extent:

(A) Class Action Certification. Pursuant to M.R.Civ.P. Rule 23(c)(1)(b) (2011), the court hereby certifies the following class action:

(1) Class Definition. The certified class includes:

(A) all unrepresented claimants who made first-party or third-party claims to Allstate;

- (B) for an amount in excess of the applicable policy deductible;
  - (C) for bodily injury or property damage related to an underlying motor vehicle incident or occurrence; and
  - (D) whose claims were adjusted by Allstate in Montana to an unrepresented settlement since deployment in Montana of the various versions of the Casualty CCPR (*CCPR Implementation Manual (Tort States)*);
- (2) Class Action Claim. The certified class claim is that:
- (A) the Casualty CCPR's unrepresented segment adjusting practices are a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class of unrepresented claimants as a whole;
  - (B) Allstate's common, systematic use of this pattern and practice in Montana caused indivisible harm to the class as a whole by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of unrepresented claimants as a whole; and
  - (C) Allstate acted with "actual malice," as defined by § 27-1-221(2), MCA, by intentionally, deliberately, and con-

sciously creating and disregarding a high probability that the net effect of its Casualty CCPR's unrepresented segment practices would result in net settlement payouts to the class as a whole less than the net amount previously sufficient to fully and fair settle unrepresented claims under Montana law;

- (3) Class Action Remedies. The certified class remedies available as a matter of law on proof of the certified class claim are:
- (A) declaratory judgment adjudicating the constituent assertions of the certified class claim;
  - (B) mandatory injunction requiring Allstate to:
    - (1) give all class members court-approved notice of the right and opportunity to obtain re-opening and re-adjustment of their individual claims by timely returning a proof of claim form; and
    - (2) re-open and re-adjust each individual claim upon receipt of a timely filed proof of claim;
  - (C) class-wide punitive damages pursuant to §§ 27-1-220 and 27-1-221(2), MCA (actual malice), predicated on the above-referenced class-wide conduct; and



(D) common fund recovery of class action attorney fees and costs upon a class-wide punitive damages award; and

(4) Class Action Defenses. The court certifies no class action defenses because none are at issue other than those addressed by this order; and

(B) Class Counsel. Pursuant to M.R.Civ.P. Rules 23(c)(1)(b) and 23(g), Lawrence A. Anderson and Daniel P. Buckley are hereby appointed as class co-counsel for the above-certified class action;

**SO ORDERED** this 30<sup>th</sup> day of January, 2012.

Dirk M. Sandefur  
DIRK M. SANDEFUR  
DISTRICT JUDGE

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**APPENDIX C**

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DA 07-0170

IN THE SUPREME COURT  
OF THE STATE OF MONTANA

2009 MT 248

ROBERT JACOBSEN,

Plaintiff, Appellee and Cross-Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth  
Judicial District,  
In and For the County of  
Cascade, Cause No. ADV 03-  
201(D)  
Honorable Dirk M. Sandefur,  
Presiding Judge

\* \* \*

Argued: September 24, 2008  
Submitted: November 18, 2008  
Decided: July 23, 2009

Filed: \_\_\_\_\_

Clerk

Justice W. William Leaphart delivered the Opinion of the Court.

¶1 Robert Jacobsen (“Jacobsen”) filed a complaint against Allstate Insurance Company (“Allstate”) alleging, *inter alia*, statutory and common law bad faith, intentional and negligent infliction of emotional distress, and actual malice. Jacobsen prevailed in a jury trial on his bad faith claims, and was awarded both compensatory and punitive damages. Allstate now appeals from various rulings of the Eighth Judicial District Court, Cascade County. Jacobsen cross-appeals from the District Court’s decision not to compel discovery, and from its determination that Jacobsen’s emotional distress was not sufficiently severe to be legally compensable. We affirm in part, reverse in part, and remand to the District Court for proceedings consistent with this opinion.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶2 Jacobsen sustained injuries in an auto accident caused by Allstate’s insured. Allstate accepted liability for the claim, and began negotiating a settlement with Jacobsen. Allstate’s claims adjuster processed Jacobsen’s claim pursuant to Allstate’s Claim Core Process Redesign (“CCPR”), which implemented certain policies and guidelines designed to promote quick settlements with unrepresented claimants. Six days after the accident, Jacobsen settled with Allstate for \$3,500 and 45 days of “open medicals”,<sup>1</sup> and signed a written release. Nearly a month later, Jacobsen asked Allstate to rescind the release because he had experienced shoulder pain

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<sup>1</sup> The term “open medicals” evidently means that Jacobsen would have been permitted to seek medical care for injuries caused by the accident for 45 days following settlement.

while mowing his lawn. Allstate refused to rescind the release, and Jacobsen retained Great Falls attorney Richard Martin to assist him. After Martin was retained, Allstate rescinded the release, and settled the claim for approximately \$200,000.

¶3 Jacobsen subsequently retained new counsel, and filed a complaint against Allstate seeking compensatory damages for, *inter alia*, violation of the Montana Unfair Trade Practices Act (“UTPA”), common law bad faith, intentional and negligent infliction of emotional distress, and actual malice.

¶4 Prior to trial, Allstate moved the District Court for summary judgment on Jacobsen’s negligent and intentional emotional distress claims. The court granted Allstate’s motion on the grounds that Jacobsen failed to prove serious or severe emotional distress as required by this Court’s decision in *Sacco v. High Country Independent Press*, 271 Mont. 209, 896 P.2d 411 (1995). Just prior to trial, the court clarified that its ruling also prohibited Jacobsen from presenting evidence of emotional distress damages arising out of Allstate’s alleged bad faith and actual malice. In the court’s view, our decision in *Sacco* imposed a duty upon a trial court to determine, as a threshold matter of law, that a plaintiff has proven his emotional distress is serious or severe before allowing any evidence of such to be presented to the jury, notwithstanding that the damages claimed are parasitic to the plaintiff’s underlying cause of action. Acting as the gatekeeper, the court concluded that Jacobsen had not met the serious or severe threshold.

¶5 On the eve of Jacobsen’s trial, we issued our decision in *Sampson v. Nat’l Farmers Union Property and Casualty Co.*, 2006 MT 241, 333 Mont. 541, 144 P.3d 797, holding that attorney fees were not recov-

erable as compensatory damages under the UTPA. Allstate moved the District Court to reconsider its prior ruling that Jacobsen could claim attorney fees as compensatory damages. In denying Allstate's motion, the District Court recognized that our decision in *Sampson* would generally preclude Jacobsen from recovering attorney fees under the UTPA. However, the court determined that Jacobsen's claim for attorney fees fell within an equitable exception to the generally applicable American Rule applied in *Sampson*. The District Court's decision was crucial to Jacobsen's case, because Jacobsen sought only two types of compensatory damages— emotional distress and attorney fees—and the court had already concluded that Jacobsen could not recover damages for emotional distress. Had it determined that Jacobsen's attorney fees were not recoverable as compensatory damages, he would have lacked a predicate offense upon which to base his claim for punitive damages, and his lawsuit would have been subject to dismissal for lack of damages.

¶6 The jury returned a verdict in favor of Jacobsen, finding that Allstate was liable for both common law and statutory bad faith, awarding as compensatory damages the attorney fees and costs incurred by Jacobsen in settling the underlying claim. The jury also awarded \$350,000 in punitive damages based upon its finding that Allstate acted with actual malice in settling Jacobsen's claim.

¶7 Both prior to and during the jury trial, the District Court made several discretionary rulings now on appeal: 1) granting Jacobsen's motion to exclude evidence that he signed a release in initially settling his claim, and refusing Allstate's proposed jury instruction regarding the legal effect of a re-

lease; 2) denying Allstate's motion to exclude testimony or argument that Allstate should or could have "advance paid" Jacobsen's wages in accordance with industry standards; 3) denying Allstate's motion for judgment as a matter of law on the grounds that Jacobsen presented sufficient evidence of actual malice to support an award of punitive damages; and 4) denying Jacobsen's various motions to compel discovery of the "McKinsey documents." In the interest of brevity, facts relevant to those issues are set forth where necessary below.

### ISSUES

¶8 We restate the issues on appeal:

¶9 1. In the context of a common law bad faith claim against an insurer, are a third-party plaintiff's attorney fees and costs incurred in settling the underlying claim recoverable as an element of damages?

¶10 2. Did the District Court err in allowing Jacobsen to introduce testimony regarding Allstate's refusal to "advance pay" Jacobsen's lost wages, and disallowing Allstate's proposed jury instruction regarding liability for refusing to advance pay the lost wages?

¶11 3. Did the District Court err in concluding there was sufficient evidence of actual malice to support an award of punitive damages?

¶12 4. Did the jury instructions and jury verdict form misstate the law and unfairly prejudice Allstate?

¶13 5. Did the District Court err in granting Jacobsen's motion to exclude evidence of the legal effect

of the release and refusing Allstate's proposed jury instruction regarding the release?

¶14 6. Did the District Court err in denying Jacobsen's various motions to compel discovery of the "McKinsey documents?"

¶15 7. Did the District Court err in ruling that Jacobsen was required to prove serious or severe emotional distress in order to recover emotional distress damages arising out of the underlying bad faith claim?

### DISCUSSION

¶16 1. In the context of a common law bad faith claim against an insurer, are a third-party plaintiff's attorney fees and costs incurred in settling the underlying claim recoverable as an element of damages?

¶17 Generally, we review a district court's decision regarding an award of attorney fees for abuse of discretion. *In re G.M.*, 2009 MT 59, ¶ 10, 349 Mont. 320, 203 P.3d 818. However, judicial discretion must be guided by the rules and principals of law; thus the appellate standard of review is plenary to the extent a discretionary ruling is based upon a conclusion of law. *State v. Mackrill*, 2008 MT 297, ¶ 37, 345 Mont. 469, 191 P.3d 451. The District Court's determination that Jacobsen's attorney fees were recoverable as an element of damages is a conclusion of law which we review for correctness. *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, ¶ 13, 322 Mont. 478, 97 P.3d 561.

¶18 There is no dispute that Montana follows the well established American Rule, which provides that a party prevailing in a lawsuit is generally not entitled to attorney fees absent a specific contractual

provision or statutory grant. *Sampson*, ¶ 15. The UTPA does not contain a statutory grant of attorney fees for insurance bad faith actions. *Sampson*, ¶ 22. We held in *Sampson* that pursuant to the American Rule, a third-party claimant may not recover attorney fees incurred in settling a claim for bad faith as an element of damages under the UTPA. Specifically, we noted that “[t]he Legislature did not construct the UTPA to provide for the recovery of attorney fees and therefore we cannot construe it to do so.” ¶ 22.

¶19 As in *Sampson*, Jacobsen is a third-party claimant who incurred attorney fees in settling an underlying claim, and claimed those fees and costs as an element of damages in a subsequent action for insurance bad faith. Jacobsen apparently concedes, and we agree, that pursuant to *Sampson*, his claim for attorney fees is subject to the American Rule. However, he argues the District Court correctly awarded attorney fees under an exception to the American Rule. Our analysis of this issue is therefore premised on the following: attorney fees are not a recoverable element of damages in a claim for insurance bad faith, whether brought under the UTPA or the common law, absent an exception to the American Rule.

¶20 The District Court relied on two exceptions to the American Rule in determining that Jacobsen’s attorney fees were recoverable: the “insurance exception,” and the “equitable exception.” Allstate argues that neither of the exceptions is applicable to this case, and there is neither “judicial nor legislative inclination to extend their rationale to third party insurance bad faith claims.” Jacobsen contends the exceptions are applicable where the party asserting at-



torney fees as damages cannot be made whole without such an award.

¶21 “The equitable exception to the [American] rule is available in those unique factual situations in which a party is forced into a frivolous lawsuit and must incur attorney’s fees to dismiss the claim.” *Goodover v. Lindeys, Inc.*, 255 Mont. 430, 447, 843 P.2d 765, 775 (1992). This exception has been narrowly construed, and its application is confined to situations in which the individual claiming fees has been forced into litigation through no fault of his own. *See Foy v. Anderson*, 176 Mont. 507, 580 P.2d 114 (1978) (the defendant was a passenger in an auto accident where the individual at fault sought to join her as a third party in the case, asserting that she had filed a claim against him, when in fact she had not); *Holmstrom Land Co. v. Hunter*, 182 Mont. 43, 595 P.2d 360 (1979) (the defendant water commissioner was sued by a landowner when, pursuant to a district court order, he padlocked the landowner’s headgate for failure to pay fees); *Stickney v. State, Cnty. of Missoula*, 195 Mont. 415, 636 P.2d 860 (1981) (the defendant justice of the peace was sued in her personal capacity after finding courtroom spectators in contempt and ordering them to leave, where no basis for personal liability existed). As we explained in *Goodover*, an individual’s position as the plaintiff in litigation will normally preclude application of the equitable exception to the American Rule. *Goodover*, 255 Mont. at 447. Jacobsen’s position as plaintiff in this litigation renders the equitable exception inapplicable. In contrast to the situations in which we have applied the equitable exception, Jacobsen was not forced into litigation, notwithstanding that he felt compelled to file suit as a result of Allstate’s bad faith. Ultimately, Jacobsen presents

neither authority nor policy sufficiently compelling for this Court to depart from our practice of “narrowly construing” the equitable exception to the American Rule.

¶22 Nor do we find the insurance exception applicable in the instant case. The insurance exception arises where an insurer breaches its duty to defend or indemnify the insured party, forcing the insured “to assume the burden of legal action to obtain the full benefit of the insurance contract . . . .” *Mountain West Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 36, 315 Mont. 231, 69 P.3d 652. This exception is justified by the contractual relationship between the insurer and the insured, and the enhanced fiduciary obligation which arises therefrom. *Brewer*, ¶ 37. We refused to extend the insurance exception to third-party claimants, as it would undermine the fundamental precept of the exception and “drive a stake into the heart of the American Rule.” *Brewer*, ¶ 40. Jacobsen argues that our holding in *Brewer* is limited to contract theory—that it does not preclude attorney fees to a third party who proves tortious conduct by the insurer. However, our decision in *Brewer* was based upon the lack of fiduciary duty running from an insurer to a third-party claimant. The same logic applies here: Allstate did not have a fiduciary duty to Jacobsen, because he was not a party to the insurance contract. The rationale underlying the insurance exception to the American Rule is the existence of a fiduciary duty, and no such duty exists here.

¶23 While this Court is at liberty to modify and apply the exceptions to the American Rule in the absence of legislative preemption (*Brewer*, ¶ 24) we decline to extend the exceptions to allow attorney fees

as an element of damages in the context of third party insurance bad faith claim. The American Rule is a foundation of our jurisprudence, and we must narrowly construe the exceptions lest they swallow the rule. Jacobsen's argument that attorney fees must be added to his recovery if the award is to truly make him whole is contrary to the generally applicable American Rule. *Schuff v. A. T. Klemens & Son*, 2000 MT 357, ¶ 97, 303 Mont. 274, 16 P.3d 1002; *citing Norfolk & Western Ry. Co. v. Liepelt*, 440 U.S. 490, 495, 100 S. Ct. 755, 758 (1980). In the context of bad faith claims brought under the UTPA, the legislature is the appropriate forum to rectify what we continue to recognize as a potentially unfair gap in existing law. *See Sampson*, ¶ 22. Given that the legislature has not deemed an award of attorney fees appropriate under the UTPA, it would be inconsistent to allow such damages to a third party claimant under the common law. Ultimately, we do not find Jacobsen's arguments in favor of a new exception to the American Rule sufficiently compelling to create such an inconsistency.

¶24 Moreover, we agree with Allstate that costs incurred by Jacobsen's attorney in settling the underlying claim are not recoverable as compensatory damages. Jacobsen first argues that Allstate waived any objection to costs on appeal because it failed to specifically object to the language regarding costs in the jury instruction, citing *Seltzer v. Morton*, 2007 MT 62, 336 Mont. 225, 154 P.3d 561. *Seltzer* merely sets forth the familiar proposition that a litigant who fails to lodge any objection to a jury instruction waives any subsequent objection on appeal. *Seltzer*, ¶ 54. Here, Allstate did object to the jury instruction contending that attorney fees were not recoverable. To say that Allstate's counsel was required to utter

the words “and costs” in order to preserve its objection to the jury instruction would represent an unreasonable elevation of form over substance. *See e.g. Centech Corp. v. Sprow*, 2001 MT 298, ¶ 20, 307 Mont. 481, 38 P.3d 812. Notwithstanding this discussion, we are unaware of any statutory authority allowing recovery of costs incurred in settling a claim.

¶25 2. Did the District Court err in allowing Jacobsen to introduce testimony regarding Allstate’s refusal to “advance pay” Jacobsen’s lost wages, and disallowing Allstate’s proposed jury instruction regarding liability for refusing to advance pay the lost wages?

¶26 This Court’s standard of review of rulings on the admissibility of evidence, including oral testimony, is whether the district court abused its discretion. *State v. Snell*, 2004 MT 334, ¶ 17, 324 Mont. 173, 103 P.3d 503. We similarly review a district court’s refusal to issue a proposed jury instruction for abuse of discretion. *Rohrer v. Knudson*, 2009 MT 35, ¶ 14, 349 Mont. 197, 203 P.3d 759. However, to the extent the district court’s discretionary ruling is based upon a conclusion of law, our review is plenary. *Mackrill*, ¶ 37.

¶27 The District Court granted summary judgment in favor of Allstate regarding Allstate’s liability under the UTPA for refusing to “advance pay” Jacobsen’s lost wages, ruling that Allstate’s conduct regarding lost wages could not be considered an attempt to “leverage an immediate settlement on terms favorable to Allstate.” Allstate subsequently filed a motion *in limine* seeking to exclude any testimony regarding the advance pay of lost wages. The District Court granted Allstate’s motion, barring Jacobsen

from introducing testimony suggesting Allstate had a legal duty to advance pay his lost wages, but stated that its ruling did not “preclude Plaintiff from presenting testimony that Allstate could have advanced lost wages to Jacobsen, or that it should have, in accordance with common or standard industry practices.”

¶28 Allstate argues that by granting summary judgment, the District Court established as the law of the case that Allstate’s refusal to advance pay lost wages was not an attempt to “leverage an immediate settlement on terms favorable to Allstate” in violation of the UTPA. Therefore, they argue, allowing any testimony regarding the appropriateness of Allstate’s decision not to advance pay Jacobsen’s lost wages contravened the law of the case and constituted reversible error. Jacobsen argues the testimony regarding the advance pay of lost wages merely provided factual context for the jury regarding the circumstances surrounding the initial claim settlement, and the District Court properly allowed the testimony on that basis. We agree.

¶29 The law of the case doctrine expresses generally the courts’ reluctance to reopen issues that have been settled during the course of litigation. *McCormick v. Brevig*, 2007 MT 195, ¶ 38, 338 Mont. 370, 169 P.3d 352; *In re Estate of Snyder*, 2007 MT 146, ¶ 27, 337 Mont. 449, 162 P.3d 87. Our jurisprudence applying the doctrine has generally arisen in the context of binding both the parties and the district court to the decisions of this Court in any subsequent proceedings, a concept properly referred to as the Mandate Rule. Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* vol. 18B, § 4478.3, 733 (3d ed., West 2005). We

have also held this principal applicable to the prior rulings of a trial court in the same case. *See State v. Carden*, 170 Mont. 437, 439, 522 P.2d 738, 740 (1976).

¶30 The District Court's order on summary judgment addressed the sufficiency of Jacobsen's Count 4, which alleged a violation of the UTPA by Allstate's failure to advance pay Jacobsen's wages when their insured's liability was reasonably clear. Allstate argued on summary judgment, and the District Court agreed, that pursuant to § 33-18-242(5), MCA, Allstate had a reasonable basis in law for not advance paying Jacobsen's wages, therefore it could not be held liable for violating the UTPA on that basis. The District Court's ruling established as the law of the case that Allstate's refusal to advance pay wages could not be considered an attempt to leverage settlements on the other portions of Jacobsen's claim in violation of the UTPA, because Allstate had a reasonable basis in law for refusing to do so.

¶31 However, the District Court's ruling did not, as Allstate suggests, have the effect of barring any testimony regarding the appropriateness of Allstate's decision not to advance pay Jacobsen's wages. Rather, the law of the case as established on summary judgment was that Allstate had no legal duty under the UTPA to advance pay Jacobsen's wages, not that its refusal to advance pay the wages could not be considered by the jury in any context. The District Court's order on Allstate's motion *in limine* reflected this distinction by barring Jacobsen's expert from testifying that Allstate had a legal duty to advance pay Jacobsen's lost wages, but allowing testimony suggesting that it could or should have advance paid the wages in accordance with standard or common

industry practices. While Allstate may be correct that the distinction was lost on the jury, that fact does not compel us to conclude that the District Court erred in allowing the testimony. Ultimately, if there was any misconception caused by the expert's testimony, Allstate's counsel had an opportunity to correct it on cross-examination. The District Court did not abuse its discretion by allowing Jacobsen's witness to testify as to his expert opinion on the standard or common industry practices with respect to advancing lost wages, or to the effect Allstate's refusal to advance the wages had on Jacobsen's decision to settle.

¶32 Nor did the District Court err in refusing Allstate's proposed jury instruction Number 25. Allstate argues that it offered the following instruction in order to mitigate the effect of the District Court's erroneous evidentiary ruling: "Before December 6, 2001, Montana law did not impose on Allstate a legal duty to advance pay lost wages to Mr. Jacobsen, whether he demanded payment or not, before final settlement of his personal injury claim. Up until that date, Allstate was not required to advance pay lost wages, so not advancing payment is not grounds for liability against Allstate."

¶33 The District Court acted within its discretion to refuse Allstate's proposed instruction, for the same reason its evidentiary ruling on the issue of advance pay was not in error. While Allstate's proposed instruction was a correct statement of the law with respect to Allstate's liability under the UTPA, violation of the UTPA based on those facts was no longer at issue. The District Court's earlier grant of summary judgment in favor of Allstate on Jacobsen's Count 4 (violation of the UTPA by refusal to advance pay lost

wages) rendered Allstate's proposed instruction irrelevant.

¶34 3. Did the District Court err in concluding there was sufficient evidence of actual malice to support an award of punitive damages?

¶35 We review a district court's decision to deny a motion for judgment as a matter of law *de novo*. *Vader v. Fleetwood Enterprises, Inc.*, 2009 MT 6, ¶ 20, 348 Mont. 344, 201 P.3d 139.

¶36 At the close of Jacobsen's case, Allstate moved the court for judgment as a matter of law<sup>2</sup> on the basis that Jacobsen failed to present clear and convincing evidence of actual fraud or actual malice in support of his claim for punitive damages. The District Court denied the motion, ultimately finding that as a matter of law, Jacobsen presented sufficient evidence to allow the punitive damages claim to be submitted to the jury. The jury ultimately awarded punitive damages based on its conclusion that Allstate acted with actual malice in settling Jacobsen's claim.

¶37 Allstate argues on appeal that the District Court erred in failing to grant its motion for judgment as a matter of law with respect to the malice claim which supported the punitive damage award. Allstate's argument is premised on the erroneous assumption that the District Court was required to apply the evidentiary standards set forth in the punitive damage statutes in reviewing Allstate's motion. In essence, Allstate suggests the District Court

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<sup>2</sup> Allstate inaccurately uses the term "motion for a directed verdict" rather than "motion for judgment as a matter of law" in describing the motion evidently made under M. R. Civ. P. 50(b).



should have acted as the preliminary finder of fact, weighing the quality of the evidence of malice to determine if the jury could find it “clear and convincing” and beyond “serious and substantial doubt.” Section 27-1-221(5), MCA. This view fundamentally miscomprehends the standard by which a district court must review a motion for judgment as a matter of law.

¶38 A motion for judgment as a matter of law is not a device by which the party bringing the motion can “invoke a reviewing court’s power to reexamine and reweigh the evidence before the jury,” rather, it must demonstrate a complete absence of any evidence which would justify submitting an issue to a jury. *Vader*, ¶ 32. Moreover, when considering such a motion, all evidence and any legitimate inference which might be drawn from that evidence must be considered in a light most favorable to the party opposing the motion. *Vader*, ¶ 32. We have noted that district courts must “exercise the greatest self-restraint in interfering with the constitutionally mandated processes of a jury decision.” *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 13, 336 Mont. 105, 152 P.3d 727.

¶39 In order to prevail on its motion, Allstate was required to show “a complete absence of any evidence” which would justify submitting to the jury the issue of whether Allstate acted with actual malice in settling Jacobsen’s claim. In other words, Allstate was required to show that Jacobsen failed to present sufficient evidence to satisfy the statutory elements of malice set forth in § 27-1-221, MCA:

(2) A defendant is guilty of actual malice if the defendant has knowledge of facts or in-

tentionally disregards facts that create a high probability of injury to the plaintiff and:

(a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or

(b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

¶32 The District Court was not, as Allstate suggests, required to find that Jacobsen established the elements of malice by “clear and convincing evidence” as required by § 27-1-221(5), MCA. Whether the evidence was sufficiently clear and convincing to establish liability was an issue reserved for the trier of fact, not the District Court. Section 27-1-221(6), MCA.

¶33 We must therefore determine whether Jacobsen presented any evidence which would justify submitting the issue of Allstate’s alleged malice to the jury. The record indicates Jacobsen presented evidence that Allstate had knowledge that the CCPR method used to settle Jacobsen’s claim would probably result in his receiving substantially less compensation for his injuries than he would receive if he was represented by an attorney. Allstate does not dispute that receiving less compensation for his injuries would have created a “high probability of injury” to Jacobsen, nor does it suggest that Allstate was not “indifferent to” the high probability that an unrepresented claimant would receive less than a represented claimant. Section 27-1-221(2)(a), (b), MCA. That was in fact the stated purpose of the CCPR. Essentially, the evidence Jacobsen presented was intro-

duced for the purpose of showing that by promoting the quick settlement of claims brought by unrepresented claimants (including Jacobsen) without adequate investigation, the CCPR itself, and as applied to Jacobsen, created a high probability of injury to unrepresented claimants, a probability that Allstate was intentionally disregarding. Jacobsen also presented evidence designed to show Allstate knew Jacobsen's injuries were potentially more severe than either party originally assumed, and that it deliberately proceeded to act with indifference to this information in refusing to reopen Jacobsen's claim. The District Court did not err in submitting Jacobsen's malice claim to the jury. Allstate failed to demonstrate a complete absence of any evidence that would justify submitting Jacobsen's malice claim to the jury. Vader, ¶ 32. Whether the evidence was clear and convincing to the District Court is ultimately irrelevant.

¶34 4. Did the jury instructions and jury verdict form misstate the law and unfairly prejudice Allstate?

¶35 We review a district court's jury instructions for abuse of discretion. *Olson v. Shumaker Trucking and Excavating Contractors, Inc.*, 2008 MT 378, ¶ 22, 347 Mont. 1, 196 P.3d 1265. We must determine whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case. *State v. Bullman*, 2009 MT 37, ¶ 15, 349 Mont. 228, 203 P.3d 768. In undertaking this review, we consider the jury instruction in its entirety, as well as in connection with the other instructions given and with the evidence introduced at trial. *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶ 74, 337 Mont. 411, 162 P.3d 106.

¶36 The District Court instructed the jury in Instructions 8 and 9 respectively, that it should find Allstate liable for bad faith under the UTPA or the common law if it found that Allstate “misrepresent[ed] pertinent facts regarding an insurance claim . . . .” The instructions were presumably based upon the codification of the UTPA in § 33-18-201, MCA, which states: “No person may, with such frequency as to indicate a general business practice, do any of the following: (1) misrepresent pertinent facts or insurance policy provisions relating to coverages at issue.” Allstate argues that by substituting the word “claims” for “coverages” the District Court changed the fundamental meaning of the statute.

¶37 At the outset, we note that Allstate’s argument as applied to Instruction 9, which addresses Jacobsen’s common law bad faith claim, is illogical. Allstate presents no authority in support of its contention that the District Court was required to use language from the UTPA to instruct the jury on common law bad faith. We therefore turn to whether the District Court’s modification of the statutory language in Instruction 8 was an abuse of discretion.

¶38 There is no requirement that a district court adopt verbatim the applicable statutory language when instructing the jury, “so long as the modification does not alter the meaning of the statute.” *State v. Anderson*, 2008 MT 116, ¶¶ 23, 24, 342 Mont. 485, 182 P.3d 80. In determining how to instruct the jury, the district court should take into consideration both the parties’ theories and the evidence presented at trial. *Cechovic v. Hardin & Assoc., Inc.*, 273 Mont. 104, 116, 902 P.2d 520, 527 (1995). Ultimately, a district court’s modification of the statutory language should maintain conformity with the law, while re-

maintaining appropriate in the factual context of the case.

¶39 Essentially, Allstate contends that the court, through its jury instruction, erred in interpreting § 33-18-201(1), MCA, as prohibiting the misrepresentation of facts as to “claims” when the statute only mentions “coverages.” We reiterate that the law does not require that a jury instruction reflect the exact wording of the statute, rather, it requires that the court refrain from changing the meaning of the statute. *Anderson*, ¶¶ 23, 24. The District Court’s instruction did not change the meaning of the statute. It would make little sense to limit the statutory prohibition on factual misrepresentation to “coverages,” when the issue of insurance coverage is essentially a contractual or legal issue focusing on the policy provisions rather than on factual representations from an insurer. Since the submission and processing of insurance claims is a more fact-driven process than the issue of insurance coverage, we conclude that the court did not err in including “claims” within the purview of the statutory prohibition.

¶40 5. Did the District Court err in granting Jacobsen’s motion to exclude evidence of the legal effect of the release and refusing Allstate’s proposed jury instruction regarding the release?

¶41 Upon Jacobsen’s motion, the District Court barred Allstate from “presenting any evidence or making any assertion as to the legal effect of the release” signed by Jacobsen. Consistent with this ruling, the court refused Allstate’s proposed jury instruction stating that a release is a contract which can be rescinded under certain circumstances. Allstate argues that because it relied upon the release in its subsequent dealings with Jacobsen, it had a

reasonable basis in law for contesting his demands, and it therefore should have been allowed to present evidence in support of that defense. Allstate's argument is premised on its contention that, as a matter of law, it was entitled to rely on the release up until the date it was rescinded.

¶42 The District Court's ruling on Jacobsen's motion *in limine* is an evidentiary ruling which we review for an abuse of discretion. *Snell*, ¶ 17. We also review the District Court's decision not to issue Allstate's proposed jury instruction for abuse of discretion. *Rohrer*, ¶ 14. To the extent the court's ruling on the proposed jury instruction was a conclusion of law, our review is plenary. *Mackrill*, ¶ 37.

¶43 A release is a contract, governed by contract law. *Westfall v. Motors Ins. Corp.*, 140 Mont. 564, 568, 374 P.2d 96, 98-99 (1962). A rescission "amounts to the unmaking of a contract, or an undoing of it from the beginning . . . ." 17B C.J.S. *Contracts* § 422 (1999). To rescind a contract is to declare it "void in its inception and to put an end to it as though it never were." *Black's Law Dictionary* 1306 (6th ed. West 1990). Because Allstate's rescission of Jacobsen's release effectively voided the release from the beginning, it was not, as a matter of law, entitled to rely upon the legal effect of the release prior to its rescission. Essentially, once Allstate rescinded the release, it had no legal effect. The District Court did not abuse its discretion by so instructing the jury.

### CROSS-APPEAL

¶44 6. Did the District Court err in denying Jacobsen's various motions to compel discovery of the "McKinsey documents?"

¶45 We review a district court’s discretionary rulings, including rulings regarding discovery matters, for abuse of discretion. *State v. Dunning*, 2008 MT 427, ¶ 21, 347 Mont. 443, 198 P.3d 828. A district court abuses its discretion if it acts arbitrarily without conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *Dunning*, ¶ 21.

¶46 The CCPR claims practices central to the issues in this case were implemented pursuant to the so called “McKinsey documents.” The McKinsey documents are “the product of Allstate’s CCPR pre-implementation study, the source from which the CCPR was condensed.” At the time of Jacobsen’s initial discovery request and corresponding motion to compel the CCPR, he was unaware of the existence of the McKinsey documents.

¶47 When Jacobsen became aware of the McKinsey documents, he sought leave of court to 1) file an amended complaint revising and adding individual claims, 2) assert new class action claims against Allstate, and 3) conduct additional discovery. The District Court denied Jacobsen leave to add class claims or to conduct additional discovery, finding that Jacobsen failed to establish due diligence or excusable neglect for his failure to conduct timely discovery of the McKinsey documents. The court’s order treated the denied motions as interdependent, finding that “the nature of his proposed class claims and the expansive scope of his request for additional discovery will cause substantial prejudice and undue delay, burden, and expense by transforming what is essentially an individual bad faith action into a class action institutional bad faith lawsuit that will require significant additional discovery and substantially in-

crease the amount and complexity of pretrial litigation.” Jacobsen filed two subsequent motions urging the court to allow discovery of the McKinsey documents, not in the context of an institutional bad faith action, but as relevant to Jacobsen’s individual claims. The court denied both motions.

¶48 On appeal, Jacobsen argues the court erred in denying his various motions directed at compelling discovery of the McKinsey documents. He asserts that the McKinsey documents were, (albeit unwittingly), squarely within both his initial discovery requests and the corresponding motion to compel, thus the District Court should have allowed discovery of the documents. Allstate, on the other hand, engages in an exhaustive review of the procedural history of the discovery phase of this case, arguing that the District Court correctly determined that granting Jacobsen’s motions would cause prejudice and delay, and that Jacobsen failed to demonstrate due diligence or excusable neglect sufficient to re-open discovery.

¶49 Allstate’s focus on the procedural history of the discovery phase of this case is misplaced. As the District Court candidly noted, the McKinsey documents were squarely within Jacobsen’s original discovery request. Importantly, in briefing to this Court, Allstate does not dispute that the McKinsey documents were within the scope of Jacobsen’s original discovery request; nor does it dispute the relevance of the McKinsey documents. While both the format and timing of Jacobsen’s motions regarding the McKinsey documents were unduly confusing, the issue before the District Court was not whether to re-open discovery, but whether to compel Allstate to produce documents that were within Jacobsen’s orig-



inal discovery request. It was therefore unnecessary to determine whether Jacobsen demonstrated due diligence or excusable neglect, because he was not seeking to re-open discovery.

¶50 Ultimately, district courts must remain mindful of the fundamental purpose of discovery—“to promote ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith.” *Menholdt v. State, Dept. of Revenue*, 2009 MT 38, ¶ 10, 349 Mont. 239, 203 P.3d 792; citing *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 392 (1947). “Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation.” *Menholdt*, ¶ 10. The McKinsey documents were indeed critical to Jacobsen’s theory that Allstate’s policies regarding unrepresented claimants constituted bad faith. The District Court acted without conscientious judgment in denying Jacobsen’s motions to compel the McKinsey documents, notwithstanding that the discovery deadline had passed. The District Court’s ruling resulted in substantial injustice to Jacobsen, thus the court was in error.

¶51 7. Did the District Court err in ruling that Jacobsen was required to prove serious or severe emotional distress in order to recover emotional distress damages arising out of the underlying bad faith claim?

¶52 The District Court determined that Jacobsen’s emotional distress damages were not compensable because he failed to make a threshold showing that his emotional distress was serious or severe. In reaching this conclusion, the court applied the standard set forth in *Sacco v. High Country Independent Press*, 271 Mont 209, 896 P.2d 411 (1995).

Jacobsen argues on appeal that the court erred in applying the *Sacco* standard, asserting that *Sacco* does not set a standard for proving emotional distress damages for torts in general, but rather sets the standard for maintaining an independent action for intentional or negligent infliction of emotional distress. Allstate asserts that pursuant to our holding in *First Bank (N.A.)-Billings v. Clark*, 236 Mont. 195, 771 P.2d 84 (1989), Jacobsen was required to demonstrate a physical manifestation of his emotional distress, notwithstanding that his claim was parasitic to an underlying tort.<sup>3</sup>

¶53 The District Court's determination that Jacobsen was required to make a threshold showing of serious or severe emotional distress in order to present evidence of such damages to the jury was a conclusion of law. Our standard of review is therefore plenary. *Mackrill*, ¶ 37.

¶54 In *Sacco*, this court undertook an extensive review of our jurisprudence governing the compensability of emotional distress in Montana. We explicitly recognized, for the first time, the independent torts of negligent or intentional infliction of emotional distress. *Sacco*, 271 Mont. at 236. Though we recognized these torts as viable stand-alone causes of action, we established a heightened standard of proof, requiring that a plaintiff claiming intentional or negligent in-

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<sup>3</sup> Allstate also seems to assert that emotional distress damages are not available in the context of a third-party UTPA claim. This assertion is without merit. Emotional distress damages are available in the context of insurance bad faith, whether brought under the UTPA or the common law. *See Gibson v. Western Fire Ins. Co.*, 210 Mont. 267, 682 P.2d 725, (1984); *Lorang v. Fortis Ins. Co.*, 2008 MT 252, 345 Mont. 12, 192 P.3d 186.

fliction of emotional distress must make a threshold showing to the court that their emotional distress is “serious or severe” in order to proceed to trial. *Sacco*, 271 Mont. at 236, 237.

¶55 Later, in *Vortex Fishing Systems, Inc. v. Foss*, we held in the context of emotional distress damages arising out of a human rights claim that “the tort standard [*Sacco*] for proof of independent actions for emotional distress does not apply . . . .” 2001 MT 312, ¶ 34, 308 Mont. 8, 38 P.3d 836. Rather, “the severity of the harm should govern the amount, not the availability, of recovery.” *Vortex*, ¶ 33. However, in so holding, we did not discuss those pre-*Sacco* cases which set the then-applicable standard for evaluating parasitic claims for emotional distress.

¶56 In *First Bank (N.A.)-Billings v. Clark*, we held that in the absence of a physical or mental injury, emotional distress damages arising out of an underlying tort are compensable only where the plaintiff can show the emotional distress suffered is “severe.” *First Bank*, 236 Mont. at 206. In so holding, we adopted comment j of the Restatement (Second), of Torts § 46 (1965), which includes language indicating that the distress inflicted must be “so severe that no reasonable person could be expected to endure it.” *First Bank*, 236 Mont. at 205, 206. We also unequivocally held that “[a] district court has the duty of determining the threshold question of whether any proof of such severe emotional distress exists sufficient to raise a question of fact for the jury.” *First Bank*, 236 Mont. at 206, 207. The *First Bank* court also cited *Johnson v. Supersave Markets, Inc.*, 211 Mont. 465, 686 P.2d 209 (1984), and *Noonan v. First Bank Butte*, 227 Mont. 329, 740 P.2d 631 (1987), for the proposition that absent a showing of a mental or

physical injury, emotional distress is compensable only if the tortious conduct results in a “substantial invasion of a legally protected interest and . . . [caused] a significant impact on the person . . . .” *First Bank*, 236 Mont. at 205, 206.

¶57 Nor did we discuss the effect of the *First Bank* line of cases in *Seltzer v. Morton*, 2007 MT 62, 336 Mont. 225, 154 P.3d 561 (2007) (where we noted that the District Court erroneously instructed the jury to apply the *Sacco* “serious or severe” standard to a claim for emotional distress damages parasitic to an underlying tort, but nonetheless indicated that the plaintiff had presented evidence of “serious or severe” emotional distress with “resultant physical complications”) ¶ 119, n. 11; or in *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 190, 345 Mont. 12, 192 P.3d 186 (where we again held in the context of a parasitic claim for emotional distress damages arising out of a UTPA violation that the *Sacco* “serious or severe” standard does not apply). While this Court did not explicitly state in *Seltzer* or *Lorang* what, if any, standard should apply in evaluating a parasitic claim for emotional distress damages, we did cite to Montana Pattern Jury Instruction 2d 25.02, 15.01-03, which states that “[the law does not set a definite standard by which to calculate compensation for mental and emotional suffering and distress.] *Lorang*, n. 29. The comments to the instruction state that it should be given “where emotional distress damages are allowed in the absence of independent tort claims . . . .”

¶58 We recognize that our case law has created confusion as to what, if any, standard applies when evaluating damages for parasitic emotional distress claims: must the court act as a gatekeeper and reject

claims that do not meet the threshold standard of serious or severe as suggested by the *First Bank* line of cases; or does the severity of the harm govern the amount, not the availability of recovery for parasitic emotional distress claims as suggested by *Vortex*, *Seltzer*, and *Lorang*? Ultimately, to hold that the standard for parasitic emotional distress damages is “serious or severe” would render meaningless the “heightened” standard we purported to establish in *Sacco* when we recognized the viability of an independent cause of action for emotional distress. We therefore hold that the “serious or severe” standard announced in *Sacco* applies only to independent claims of negligent or intentional infliction of emotional distress. To the extent our earlier cases, including *First Bank*, *Johnson*, and *Noonan*, suggest that a plaintiff must make a threshold showing of serious or severe emotional distress before a claim for parasitic emotional distress damages is allowed to go to the jury, we overrule those decisions. As for emotional distress that is claimed as an element of damage for an underlying tort claim (parasitic emotional distress damages), we hereby explicitly adopt the standard set forth in the Montana Pattern Jury Instruction (M.P.I.2d 25.02, 15.01-03), cited in *Lorang*, and set forth above.

¶60 In conclusion, because the District Court erred in allowing attorney fees and costs as damages, we reverse the award of compensatory damages which was based solely on those fees and costs. Further, without an award of compensatory damages, there can be no award of punitive damages. *Stipe v. First Interstate Bank -Polson*, 2008 MT 239, ¶ 23, 344 Mont. 435, 188 P.3d 1063. Accordingly, we reverse the punitive damage award. We remand for a new trial in light of our holding that the court erred

in not allowing the jury to consider emotional distress as an element of damages. A compensatory award for emotional distress, could, in the discretion of the jury, serve as a predicate for an award of punitive damages. We further direct the District Court on remand to compel production of the *McKinsey* documents.

S/ W. WILLIAM LEAPHART

We concur:

S/ JOHN WARNER

S/ BRIAN MORRIS

S/ GARY L. DAY

District Court Judge Gary L. Day

sitting in for former Chief Justice Karla M. Gray

Justice Patricia O. Cotter concurs and dissents.

¶61 I fully concur in the Court's resolution of Issues Two, Three and Four. I also concur in the resolution of Issues Six and Seven, though because I would uphold the award of attorney fees, I would not reverse the awards of compensatory and punitive damages or remand for a new trial. I concur but write separately to express my views with respect to Issue Five. I dissent from our resolution of Issue One.

¶62 First, I concur with this Court's ultimate resolution of Issue Five—which addresses whether the District Court erred in granting Jacobsen's motion to exclude evidence of the legal effect of the release, and refusing Allstate's proposed jury instruction in that

regard—but not on the basis of the Court’s rationale at ¶ 43, which I find circular. Rather, I would affirm on this issue for the simple reason that there was sufficient evidence presented to enable the jury to understand the ramifications of the release situation with which it was presented. Moreover, the District Court correctly instructed the jury that a release has no binding effect after rescission. Allstate was not precluded from cross-examining on this point, or from underscoring this instruction in its closing argument. Given these circumstances, I would not conclude that the District Court abused its discretion in the manner in which it ruled on these questions.

¶63 I dissent from the Court’s resolution of Issue One. As the Court notes, our caselaw indicates that the equitable exception to the American Rule is reserved for those situations in which an individual seeking attorney fees has been forced into litigation through “no fault of his own.” Opinion, ¶ 21. This is, of course, an equitable consideration based on the circumstances before a court. In this case it seems to me that Jacobsen was, in fact, forced into court by Allstate through no fault of his own. It is undeniably clear that even though Jacobsen was not a party to a contract with Allstate, Allstate had a statutory duty to settle the claim in good faith since liability was reasonably clear. *See* § 33-18-201(6), MCA. According to the jury, Allstate acted in bad faith, and thus violated its statutory duty to Jacobsen. This tortious conduct forced Jacobsen into the position of either doing nothing or seeking a vindication of his rights in a court of law. If Jacobsen had done nothing, Allstate would have thereby profited by its wrongful actions. Since “equity regards that as done which ought to have been done,” *Shook v. Woodard*, 129 Mont. 519, 527, 290 P.2d 750, 754 (1955), principles of equity

weigh in favor of granting Jacobsen attorney fees as damages for Allstate's bad faith, as he was compelled to hire an attorney in order to "convince" Allstate to settle his claim in good faith.

¶64 The Court states that "Jacobsen was not forced into litigation, notwithstanding the fact that he felt compelled to file suit as a result of Allstate's bad faith." Opinion, ¶ 21. With due respect, the fine distinction between being "forced" to defend and "feeling compelled" to sue to vindicate one's rights is thin to illusory. In both instances, the wronged party has no real choice but to respond to the actions taken by the wrongdoer, if he wants to protect his rights. Here, Jacobsen, through no fault of his own, was injured by Allstate's insured. Allstate then acted in bad faith when it refused to properly settle his claim. It is clear in this case that it wasn't until Jacobsen hired an attorney that Allstate felt "compelled" to adhere to the duty it owed to Jacobsen to adjust his claim in good faith.

¶65 As recognized by the Court, the equitable exception to the American Rule permits an award of attorney fees to a party who is forced into a frivolous lawsuit and must incur attorney fees to defend against the claim. Opinion, ¶ 21 (quoting *Goodover v. Lindsey's Inc.*, 255 Mont. 430, 447, 843 P.2d 765, 775 (1993)). I fully recognize that the cases cited by the Court, as well as others, see e.g. *Braach v. Graybeal*, 1999 MT 234, ¶ 10, 296 Mont. 138, 988 P.2d 761 (citing authorities), indicate that a party who initiates a suit—as opposed to a party who is forced to defend against one—*normally* cannot recover attorney fees under the equitable exception to the American Rule. See Opinion, ¶ 21. I agree that this consideration "normally" should apply, but it should



not apply in every instance, and it should not apply under the circumstances presented here. Rather, I would conclude that the counterpart to the right of a *defendant* to recover fees for being forced into litigation should be recognized for similarly situated *plaintiffs*. Just as equity should operate on behalf of a defendant forced into frivolous litigation, it should operate as well on behalf of a plaintiff whom a fact-finder concludes was forced to file litigation due to the bad faith—or, otherwise described, frivolous—conduct of the opposing party.

¶66 Here, Judge Sandefur found such an equitable exception to the American Rule, concluding that a plaintiff in a third party action against an insurer may recover fees if the insurer's actions compelled the plaintiff to file suit to recover what was due him under the liability policy, the fees were not incurred in relation to either a UTPA or tort action, and the fees are not otherwise recoverable under the Uniform Declaratory Judgment Act. It goes without saying that, if there was no bad faith, then the fees from the prior action would not have been recoverable.

¶67 Finally, I do not believe that the exception for plaintiffs which I espouse here would swallow the American Rule. This is not “loser pays.” Rather, it is only the bad faith or frivolous loser who pays. It is only fair, it seems to me, to accord the maligned plaintiff the same equitable considerations that we have historically accorded the maligned defendant. Accordingly, I would conclude that the District Court did not err under these facts in allowing attorney fees and costs as damages. I would affirm the award of attorney fees and dissent from the Court's failure to do so.

S/ PATRICIA COTTER

Justice James C. Nelson joins in the Concurrence and Dissent of Justice Patricia O. Cotter.

S/ JAMES C. NELSON

Justice Jim Rice, concurring in part and dissenting in part.

¶68 I agree with the Court's disposition of Issues 1, 3, 6, and 7, but dissent from Issues 2, 4, and 5. I believe the rulings involved in these issues deprived Allstate of a fair trial.

¶69 Initially, the District Court ruled summarily that Allstate could not be held liable under the UT-PA for failing to advance pay Jacobsen his lost wages, and indicated an intention to exclude evidence which would be contrary to this conclusion. However, at trial, the court permitted Jacobsen to offer Mr. Ramsey's expert testimony which, while not directly contradictory to the court's earlier order, clearly implied that Allstate was under such a duty. Perhaps realizing the potential confusion over the issue, the court told the jury:

Mr. Ramsey is going to testify, most likely, in reference to some various legal rules or at least that they exist under the statutes of the State of Montana and perhaps with general reference to some common law . . . he cannot and will not be allowed to testify as to what particular judicial decision, how they apply in this case and whether or not they have been violated in this case. At the end of the case, I will instruct you what the applicable law is.

After proceeding with Ramsey's testimony on the premise that it would later instruct the jury how to use his testimony about Allstate's failure to advance pay, the court failed to do so. The court did not provide the promised instructions, instead the court denied Allstate's request for and offering of a jury instruction which clarified Allstate did not have a legal duty to advance pay lost wages.

¶70 The Court dismisses Allstate's argument under Issue 2 by concluding the law of the case was only that Allstate did not have a legal duty under the UTPA, "not that its refusal to advance pay the wages could not be considered by the jury in any context." *Opinion*, ¶ 23. While this may resolve the issue in the Court's mind, it clearly does not resolve the question, in the jury's mind, of what use to make of Ramsey's testimony. Without the promised instruction, the jury was left with the impression from the substantial testimony regarding Allstate's duty to advance pay wages that Allstate had violated the UTPA for that reason alone, essentially reversing the District Court's earlier ruling in Allstate's favor on the issue. I would conclude that the District Court abused its discretion. *Rohrer v. Knudson*, 2009 MT 35, ¶ 14, 349 Mont. 197, 203 P.3d 759.

¶71 I also disagree with the Court's analysis of Issue 5, regarding the effect of the signed release. The Court dismisses Allstate's challenge to the District Court's exclusion of all evidence about the release: "[b]ecause Allstate's rescission of Jacobsen's release effectively voided the release from the beginning, it was not, as a matter of law, entitled to rely upon the legal effect of the release prior to its rescission." *Opinion*, ¶ 43. The issue, however, was not the ultimately void status of the release. Rather, the fo-

cus of the trial was upon Allstate's motives in its handling of Jacobsen's claim, including the actions it had taken prior to rescinding the release. The truth about Allstate's actions included the impact that the signed release had upon its decisions. Good or bad, the jury should have received that whole truth, including evidence enlightening the jury about Allstate's thought process at the time Jacobsen sought their help after the release had been signed but before it was rescinded. It is highly relevant and its omission unfairly prejudices Allstate. I believe this was likewise an abuse of discretion.

¶72 Finally, with regard to Issue 4, Allstate argues that the District Court erred by altering the language of the statute and using the word "claim" rather than "coverage" in its instruction to the jury about § 33-18-201(1), MCA. On that particular question, I also agree with Allstate. In ¶ 39, the Court simply offers good reasons for not following the statute. However, where the statute is declaring the substantive law of liability under the UTPA, I would follow it and require jury instructions to state the standards which the statute requires.

¶73 I dissent on these issues.

S/ JIM RICE

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**APPENDIX D**

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IN THE SUPREME COURT OF THE STATE OF  
MONTANA

DA 12-0130

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ROBERT JACOBSEN, and all others  
similarly situated,

Plaintiff and Appellee,

v.

ALLSTATE INSURANCE COMPANY,

Defendant and Appellant.

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ORDER

Appellant Allstate Insurance Company (Allstate) has filed a Petition for Rehearing with this Court on September 13, 2013. Appellee Robert Jacobsen filed a response in opposition on September 30, 2013. After due consideration,

IT IS HEREBY ORDERED that the Petition for Rehearing is DENIED.

IT IS FURTHER ORDERED that the Clerk of this Court give notice of this Order by mail to all counsel of record.

DATED this 8th day of October, 2013.

s/ Mike McGrath

Chief Justice

s/ Michael Wheat

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s/ Patricia Cotter

s/ Brian Morris

s/ Beth Baker

Justices

Justice Laurie McKinnon dissents.

I respectfully dissent from the Court's decision denying Allstate's request for a rehearing. I would grant the request for rehearing.

s/ Laurie McKinnon

Justice

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**APPENDIX E**

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**U.S. Constitution, Amendment 14, Section 1  
provides in relevant part:**

No State shall . . . deprive any person of life, liberty,  
or property, without due process of law . . . .

**Montana Code Annotated § 27-1-221 provides:**

Section 27-1-221. Punitive damages—liability—  
proof—award

(1) Subject to the provisions of 27-1-220 and this section, reasonable punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice.

(2) A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:

(a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or

(b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

(3) A defendant is guilty of actual fraud if the defendant:

(a) makes a representation with knowledge of its falsity; or

(b) conceals a material fact with the purpose of depriving the plaintiff of property or legal rights or otherwise causing injury.

(4) Actual fraud exists only when the plaintiff has a right to rely upon the representation of the defendant and suffers injury as a result of that reliance. The contract definitions of fraud expressed in Title 28, chapter 2, do not apply to proof of actual fraud under this section.

(5) All elements of the claim for punitive damages must be proved by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt.

(6) Liability for punitive damages must be determined by the trier of fact, whether judge or jury.

(7)(a) Evidence regarding a defendant's financial affairs, financial condition, and net worth is not admissible in a trial to determine whether a defendant is liable for punitive damages. When the jury returns a verdict finding a defendant liable for punitive damages, the amount of punitive damages must then be determined by the jury in an immediate, separate proceeding and be submitted to the judge for review as provided in subsection (7)(c). In the separate proceeding to determine the amount of punitive damages to be awarded, the defendant's financial affairs, financial condition, and net worth must be considered.

(b) When an award of punitive damages is made by the judge, the judge shall clearly state the reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of the following matters:



- (i) the nature and reprehensibility of the defendant's wrongdoing;
- (ii) the extent of the defendant's wrongdoing;
- (iii) the intent of the defendant in committing the wrong;
- (iv) the profitability of the defendant's wrongdoing, if applicable;
- (v) the amount of actual damages awarded by the jury;
- (vi) the defendant's net worth;
- (vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;
- (viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and
- (ix) any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages.

(c) The judge shall review a jury award of punitive damages, giving consideration to each of the matters listed in subsection (7)(b). If after review the judge determines that the jury award of punitive damages should be increased or decreased, the judge may do so. The judge shall clearly state the reasons for increasing, decreasing, or not increasing or decreasing the punitive damages award of the jury in findings of fact and conclusions of law, demonstrating consideration of each of the factors listed in subsection (7)(b).

(8) This section is not intended to alter the Montana Rules of Civil Procedure governing discovery of a de-

fendant's financial affairs, financial condition, and net worth.

**Montana Code Annotated § 33-18-201 provides:**

Section 33-18-201. Unfair claim settlement practices prohibited

A person may not, with such frequency as to indicate a general business practice, do any of the following:

- (1) misrepresent pertinent facts or insurance policy provisions relating to coverages at issue;
- (2) fail to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- (3) fail to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- (4) refuse to pay claims without conducting a reasonable investigation based upon all available information;
- (5) fail to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;
- (6) neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
- (7) compel insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds;
- (8) attempt to settle a claim for less than the amount to which a reasonable person would have believed

the person was was entitled by reference to written or printed advertising material accompanying or made part of an application;

(9) attempt to settle claims on the basis of an application that was altered without notice to or knowledge or consent of the insured;

(10) make claims payments to insureds or beneficiaries not accompanied by statements setting forth the coverage under which the payments are being made;

(11) make known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(12) delay the investigation or payment of claims by requiring an insured, claimant, or physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(13) fail to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or

(14) fail to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

**Montana Code Annotated § 33-18-242 provides:**

Section 33-18-242. Independent cause of action—burden of proof

(1) An insured or a third-party claimant has an independent cause of action against an insurer for actual damages caused by the insurer's violation of subsection (1), (4), (5), (6), (9), or (13) of 33-18-201.

(2) In an action under this section, a plaintiff is not required to prove that the violations were of such frequency as to indicate a general business practice.

(3) An insured who has suffered damages as a result of the handling of an insurance claim may bring an action against the insurer for breach of the insurance contract, for fraud, or pursuant to this section, but not under any other theory or cause of action. An insured may not bring an action for bad faith in connection with the handling of an insurance claim.

(4) In an action under this section, the court or jury may award such damages as were proximately caused by the violation of subsection (1), (4), (5), (6), (9), or (13) of 33-18-201. Exemplary damages may also be assessed in accordance with 27-1-221.

(5) An insurer may not be held liable under this section if the insurer had a reasonable basis in law or in fact for contesting the claim or the amount of the claim, whichever is in issue.

(6)(a) An insured may file an action under this section, together with any other cause of action the insured has against the insurer. Actions may be bifurcated for trial where justice so requires.

(b) A third-party claimant may not file an action under this section until after the underlying

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claim has been settled or a judgment entered in favor of the claimant on the underlying claim.

(7) The period prescribed for commencement of an action under this section is:

(a) for an insured, within 2 years from the date of the violation of 33-18-201; and

(b) for a third-party claimant, within 1 year from the date of the settlement of or the entry of judgment on the underlying claim.

(8) As used in this section, an insurer includes a person, firm, or corporation utilizing self-insurance to pay claims made against them.

**Rule 23 of the Montana Rules of Civil Procedure provides:**

Rule 23. Class Actions.

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to the findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be

identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.



(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require -- to protect class members and fairly conduct the action -- giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment;  
or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class

may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals.

(1) **Permitting or Refusing Class Certification.** The supreme court may permit an appeal from an order granting or denying class action certification under this rule if a petition for permission to appeal is filed with the supreme court within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or supreme court so orders.

(2) **Rejecting of Proposed Class Settlement.**

(A) The supreme court may, in its discretion, grant an appeal from an order finally and definitively rejecting a proposed class action settlement, provided that the appeal is filed within 14 days after entry of the order. An appeal does not stay proceedings in the district court unless the district court or the supreme court so orders. This section applies only to appeals in which both the class and the defendants join, and it does not apply when the district court's rejection of a settlement is conditional or when further proceedings relating to the proposed settlement are contemplated.

(B) In an appeal under subsection (A), the supreme court may appoint counsel, including but not limited to counsel for objectors, to represent the district court's position that the settlement is not fair and reasonable.

(C) The decision of the district court rejecting a settlement is reviewed for abuse of discretion.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) may consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

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**APPENDIX F**

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IN THE SUPREME COURT  
OF THE STATE OF MONTANA

No. DA 12-0130

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ROBERT JACOBSEN, and all other [sic] )  
similarly situated, )  
Plaintiff/Appellee, )  
-vs- )  
ALLSTATE INSURANCE COMPANY, )  
Defendant/Appellant. )

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**APPELLANT’S BRIEF**

*On Appeal from the Montana Eighth  
Judicial District Court, Cascade County,  
Cause No. ADV-03-201(D)  
Hon. Dirk M. Sandefur*

\* \* \*

**STATEMENT OF ISSUES**

This appeal arises from a District Court’s order (Doc. 337, the “Order”) certifying a class in an insurance bad faith action. The class representative (Jacobsen) alleges he suffered emotional distress caused by Allstate’s two-week delay in re-opening his third-party auto accident claim after his injury became more serious than initially diagnosed. After his claim was re-opened, it was ultimately settled with attorney assistance. Jacobsen does not assert that either

his bodily injury (“BI”) or property damage (“PD”) settlement was underpaid.<sup>1</sup>

However, the Order: (a) creates “class claims” predicated upon assumed *underpayment* to the “class as a whole,” which neither Jacobsen nor all class members would share, and (b) provides for “class relief in the form of the re-opening and re-adjustment of claims and an award of punitive damages to the “class as a whole,” to which neither Jacobsen nor all class members would be entitled. Jacobsen is not even a member of the “class” of *unrepresented* first and third-party BI and PD claimants the Order defines.

The Order provides that to prevail at trial, the “class” will not be required to prove that Jacobsen or any class member was actually harmed by the challenged practices. Instead, liability will be established if “indivisible harm” to the “class as a whole” can be proven formulaically, by showing that total claims payments to the “class as a whole” decreased, while Allstate profits increased. The Order precludes Allstate from presenting evidence that individual class members’ claims were properly handled and paid to defend itself from liability or punitive damages, holding that such evidence is “irrelevant” to the class claims of aggregate underpayment.

Specifically, this appeal raises the following issues:

- (1) Was it proper for the District Court to hold that Rule 23(a)’s commonality, typicality and adequacy requirements and the requirements of

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<sup>1</sup> Doc. 267, Ex. F, Pl. Resp. to Defs. 3rd Disc. Reqs., Int. 34; Doc. 219, 4th Am. Compl.

Due Process under the Montana and United States Constitutions were satisfied, where

(a) Jacobsen is not a member of the class certified,

(b) the “common questions” identified by the District Court even if resolved favorably to the class would not show that any class member — let alone every class member — was injured by the challenged practices, or entitled to punitive damages;

(c) proof of Jacobsen’s claim would not prove the claims of other class members; and

(d) Jacobsen’s claim is subject to unique defenses not applicable to other class members?

(2) Was it proper for the District Court to certify a Rule 23(b)(2) class, where:

(a) the defined class is overbroad and lacked homogeneity and cohesiveness necessary to satisfy Rule 23(b)(2) and the requirements of Due Process under the Montana and United States Constitutions because the defined class includes persons who could have no cause of action;

(b) the class claim for monetary relief (punitive damages) is not incidental to the injunctive and declaratory relief, and is in conflict with Montana law and Due Process requirements governing punitive damages;



(c) the injunctive and declaratory relief are mere precursors to recovery of monetary relief, and thus not “final” as required by the rule;

(d) the injunctive and declaratory relief are impermissibly vague; and

(e) the injunctive and declaratory relief improperly denies Allstate’s Due Process right to raise all defenses to individual class member’s entitlement to any relief?

(3) Did the District Court err by holding that the Montana Rules of Evidence do not apply to class certification proceedings?

### **STATEMENT OF THE CASE**

#### **A. The Prior Jacobsen Appeal.**

This case was previously before this Court on appeal following the trial of Jacobsen’s individual third-party “bad faith” claim against Allstate. The jury found that Allstate’s handling of Jacobsen’s BI claim constituted common law bad faith and violated two Montana Unfair Trade Practices Act (“UTPA”) subsections by (1) misrepresenting pertinent facts relating to coverage and (2) failing to effectuate a prompt, fair and equitable settlement of his claim when liability was reasonably clear.<sup>2</sup>

Allstate appealed from the judgment, arguing, in part, that the District Court erred in allowing Jacobsen to claim the attorneys’ fees and costs he had incurred in pursuing the underlying BI claim as dam-

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<sup>2</sup> The jury rejected Jacobsen’s claim that Allstate failed to conduct a reasonable investigation of his claim. (Doc. 165.)

ages in his “bad faith” claim. Jacobsen cross-appealed, arguing that the District Court erred in precluding evidence of “parasitic” emotional distress damages and by failing to compel production of the so-called “McKinsey documents.”<sup>3</sup>

Jacobsen’s notice of cross-appeal referenced the District Court’s denial of his motion for class certification. (Doc. 190.) The District Court had denied leave to amend to add class claims and denied class certification on the grounds that the amendment would be futile because the proposed Rule 23(b)(3) class for monetary damages raised individualized issues of causation and damage that would predominate. (Doc. 93, pp. 44-46.) Jacobsen did not, however, brief the issues relating to class certification, and this Court’s opinion did not address them.

This Court reversed the jury’s award of compensatory damages, holding that attorneys’ fees and costs were not recoverable damages under the UTPA or for common law bad faith. Because there were no other compensatory damages proven, this Court reversed the jury’s award of punitive damages. This Court also held, however, that Jacobsen should have been permitted to offer evidence of emotional distress at trial. This Court “remand[ed] for a new trial in light of our holding that the court erred in not allowing the jury to consider emotional distress as an element of damages. A compensatory award for emotional distress, could, in the discretion of the jury,

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<sup>3</sup> The term “McKinsey documents” is used to refer generally to materials generated by a third-party consultant McKinsey & Company (“McKinsey”), which Allstate retained to assist with portions of Allstate’s review of its claims handling practices in the mid-1990’s. (Doc. 233, Sullivan Aff., ¶¶ 2, 3.)

serve as a predicate for an award of punitive damages. We further direct the District Court on remand to compel production of the McKinsey documents.” *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, 1<sup>st</sup> 67, 351 Mont. 464, 215 P.3d 649.

### **B. Proceedings After Remand.**

After remand, the case was radically transformed from a re-trial of Jacobsen’s emotional distress claim into a sprawling class action, the scope of which far surpasses Jacobsen’s claim. Jacobsen filed a motion for leave to file a Fourth Amended Complaint that added a class claim on April 7, 2010 (Doc. 212), and later moved to certify a proposed class (Doc. 221). As support for the motion to certify, Jacobsen relied heavily upon “evidence” that was not admissible under the Montana Rules of Evidence, such as an unsworn expert report and an article authored by the Consumer Federation of America. (Doc. 239.) Allstate objected to such evidence. (Doc. 247.) After the class certification hearing, Jacobsen was given leave to submit additional “evidence” which was also inadmissible. (Doc. 315.) Allstate again objected to the admissibility of that “evidence.” (Doc. 318.)

### **C. The District Court’s Class Certification Order.**

On January 30, 2012, the District Court issued a 156-page Order (Doc. 337) granting Jacobsen’s motion to certify a class. The class ultimately requested by Jacobsen comprised first and third-party BI claimants (Doc. 222, Plaintiff’s Brief, p. 7), supposedly possessing claims predicated only upon Allstate’s (1) alleged failure to disclose to unrepresented claimants that represented claimants get paid more in set-

tlement, and (2) use of “fast track” to allegedly promote prompt settlements with inadequate investigation. (Doc. 219, 4th Am. Compl. 47b.) The District Court however, *sua sponte* created its own more expansive class definition, class claims and class relief.

The District Court certified a Rule 23(b)(2) class covering a period of at least fifteen years (disregarding all applicable statutes of limitation such as 33-18-242(7)(a) and (b)), composed of “(A) all unrepresented claimants who made first-party or third-party claims to Allstate; (B) for an amount in excess of the applicable policy deductible; (C) for bodily injury or property damage related to an underlying motor vehicle incident or occurrence; and (D) whose claims were adjusted by Allstate in Montana to an unrepresented settlement since deployment in Montana of the various versions of the Casualty CCPR (CCPR Implementation Manual (Tort States).” (Order, pp. 154-155.) The District Court “construed” the Fourth Amended Complaint to encompass the following class claims (although not actually pleaded):

- (A) the Casualty CCPR’s unrepresented segment adjusting practices are a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class of unrepresented claimants as a whole;
- (B) Allstate’s common, systematic use of this pattern and practice in Montana caused indivisible harm to the class as a whole by operation of its zero-sum economic theory and the resulting inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class of unrepresented claimants as a whole; and

- (C) Allstate acted with 'actual malice,' as defined by 27-1-221(2), MCA, by intentionally, deliberately and consciously creating and disregarding a high probability that the net effect of its Casualty CCPR's unrepresented segment practices would result in net settlement payouts to the class as a whole less than the net amount previously sufficient to fully and fair[ly] settle unrepresented claims under Montana law. (Order, p. 155.)

The District Court reached beyond the pleadings to fashion extraordinary class remedies:

- (A) declaratory judgment adjudicating the constituent assertions of the certified class claim;<sup>4</sup>
- (B) mandatory injunction requiring Allstate to:
- (1) give all class members court-approved notice of the right and opportunity to obtain re-opening and re-adjustment of their individual claims by timely returning a proof of claim form; and
  - (2) re-open and re-adjust each individual claim upon receipt of a timely filed proof of claim;
- (C) class-wide punitive damages pursuant to 27-1-220 and 27-1-221(2), MCA (actual malice), predicated on the above-referenced class-wide conduct; and
- (D) common fund recovery of class action attorney fees and costs upon a class-wide punitive damage award. (Order, p. 156.)

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<sup>4</sup> Jacobsen did not seek declaratory relief in his Fourth Amended Complaint.

The District Court also overruled all of Allstate's objections to the materials Jacobsen offered in evidence to support of class certification, holding that "trial admissible" evidence was not required. (Order, pp. 50, fn 31, 153-154.)

Allstate timely filed this appeal.

### **STATEMENT OF THE FACTS**

#### **A. The Underlying Dispute With Jacobsen.**

On May 12, 2001, Jacobsen was involved in a traffic accident with an Allstate insured. Neither Jacobsen, nor the medical professionals who initially examined or treated Jacobsen's injuries, thought his injuries were serious. (Doc. 161, Ex. 14, pp. 22, 40, 46.)

Allstate adjuster Charles Conners called Jacobsen on May 17, 2001. Jacobsen told Conners he had already discussed his claim with an attorney, who had offered to pay his mortgage for him, but that he didn't want to retain a lawyer. (TT, Day 3, p. 95.) Conners told Jacobsen that the decision to hire a lawyer was up to him. (TT, Day 4, p. 60.) Conners also told Jacobsen that an attorney could cost between 25-40%, plus expenses; Jacobsen had heard on television that lawyers charge one-third, which he thought was fairly high. (*Id.*, pp. 20, 62.) Jacobsen asked Conners if Allstate would advance pay his wages. (TT, Day 3, p. 66.) Allstate advanced paid medical bills but would not advance pay lost income, consistent with Montana law at the time. (*Id.*, pp. 66-67.)

In response to Jacobsen's expressed desire for immediate cash, Conners treated the claim as a "fast track" claim. (TT, Day 3, pp. 67-68.) He made a settlement offer to Jacobsen before his medical treat-

ment had been completed, although it is more common for fast track claims to settle after medical treatment has been completed. (*Id.*, pp. 61-64.) The settlement discussions were based on information supplied by Jacobsen, including his own understanding that his injury was minor, and that he would recover soon. (TT, Day 4, pp. 58-59.) Jacobsen initially demanded \$6,000, in addition to the settlement of his PD claim. (*Id.*, p. 56.) After some negotiation, Jacobsen accepted a BI settlement of \$3,500 with medical expenses open and payable for 45 days from the date of the settlement. (*Id.*, p. 57.) In consideration of the agreed payment, Jacobsen executed a full release. (*Id.*)

Jacobsen later experienced more pain in his shoulder and arm while mowing his lawn. (TT, Day 3, p. 194.) Even though the 45-days of open medicals had not expired, Jacobsen claimed he called Conners on June 15, 2001 and asked Conners to re-open the claim. (*Id.*, pp. 195-196.) Conners supposedly replied that Jacobsen had already signed a release. (*Id.*) On June 21, 2001 a lawyer retained by Jacobsen wrote Conners and demanded that Allstate rescind the release and re-open the claim. (Doc. 161, Ex. 1, pp. 148-149.) On July 3, 2001 Allstate agreed. (TT, Day 3, p. 160.) Months later, after Jacobsen had surgery on his shoulder, his claim settled for \$200,000. (*Id.*, p. 147.) Jacobsen does not complain that the settlement of his BI or PD claims was inadequate or unfair. (Doc. 267, Ex. F, P1. Resp. to Defs. 3rd Disc. Reqs. Int. 34.)

#### **B. Allstate's Development of CCPR.**

In the mid-1990s, Allstate knew that industry studies showed that despite increased auto safety measures, medical expenses and injury payments resulting from accidents were skyrocketing. Although

injuries reported were less severe, utilization of medical treatment was escalating, as was attorney involvement in auto accident claims. These studies suggested that even though lawyers and medical service providers were making substantial sums from auto injury claims, claimants were benefiting only marginally, if at all, from lawyer participation: on average, unrepresented claimants with certain types of minor injuries received more in net payments than similarly-injured represented claimants. (Doc. 233, Sullivan Aff., Ex. 1, pp. 1-7; 60-61.) Allstate also recognized that although its claims expenses were low, its total payout on claims was increasing at a pace faster than the rest of the industry. (Doc. 233, Sullivan Aff., ¶ 2.)

In an attempt to find out why, Allstate undertook a review of its casualty claims practices, beginning with an extensive closed claim file review. The results of the closed claim file review suggested that Allstate was over-paying claims on average by 16%, due to “padding” of claims, exaggeration of injuries, and in some cases outright fraud. (*Id.*) Overpayment of claims hurts all insurance consumers because such increased costs are ultimately reflected in increased premiums. *See, e.g.*, § 33-16-201(2)(a) (in setting rates, consideration “must be given” to “past and prospective loss experience”).

Allstate also conducted a claimant survey. The results indicated that claimants wanted to: (1) be contacted within 24 hours after their accident; (2) know precisely who was responsible at Allstate for handling the claim; (3) be treated more courteously; and (4) be given more information about the claims process. (Doc. 233, Sullivan Aff., ¶ 2.) One of the key findings confirmed both by the industry studies and



Allstate's analysis was that Allstate's failure to promptly and effectively communicate with claimants made it more likely that claimants would feel the need to hire lawyers to settle their claims. (*Id.*)

Allstate hired McKinsey & Company to assist in reviewing Allstate's claims processes. During this review, McKinsey prepared many materials for consideration by Allstate, which have been referred to as "McKinsey documents." (Doc. 233; Sullivan Aff., ¶ 3.) Allstate declined to adopt many of the concepts or ideas contained in those materials. (*Id.*) The only processes and procedures Allstate actually implemented with regard to casualty claims handling were rolled out beginning in late 1995 and contained in Allstate's 1995 "Claim Core Process Redesign" Manual ("CCPR"). (*Id.*, ¶ 4.) Those original processes and procedures have since been modified by Allstate from time to time without assistance from McKinsey. (*Id.*, ¶ 5.)

### **C. The CCPR Processes Challenged By Jacobsen.**

Jacobsen complained of only "three primary [CCPR] tactics" that he alleged were employed in the handling of his claim. (Doc. 222, p. 6.) First was the "9-step process," which is basically a roadmap for adjusting a claim and directed the adjuster to promptly and empathetically contact claimants and expedite the initial gathering and giving of claim information. (Doc. 72, CCPR, pp. 3-13.) Jacobsen's expert witness admitted there was nothing inherently wrong with the 9-step process.<sup>5</sup> (TT, Day 2, pp. 223-224.)

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<sup>5</sup> The nine-step approach was consistent with the purposes of the UTPA. Promptness in claim handling was one of the

Second, Jacobsen complained about the “attorney economics” script, which informed claimants that Allstate wanted a chance to work directly with them, that attorneys’ often charge between 25-40% of the total settlement, and that they may choose to hire a lawyer at any time in the process, but may want to consider getting an offer from Allstate first. (Doc. 73, CCPR, p. 5-29.) Connors testified that he used the script’s content only when claimants raised a question concerning attorney retention. (TT, Day 3, p. 96.) Although Jacobsen’s expert testified that the script was incomplete because it did not disclose that represented claimants get larger settlements (TT, Day 2, p. 236), he also admitted that attorney representation in simple claims is “not going to result in very much difference.”<sup>6</sup> He also acknowledged that attorney involvement “might make the claim drag out a little more . . . .”<sup>7</sup> (TT, Day 2, pp. 174-75.)

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preeminent concerns of the Legislature in enacting Section 33-18-201. *See, e.g.*, 33-18-201(2), (3), (5), (6), (12), (13), and (14).

<sup>6</sup> Studies from the Insurance Research Council (“IRC”) based upon 1997 and 2002 industry-wide data indicate that unrepresented claimants, on average, netted *more* than represented claimants after payment of attorneys’ fees, costs and economic losses. (Doc. 233, Sullivan Aff., Ex. 1, p. 60; Ex. 2, Injuries in Auto Accidents, p. 8; Ex. 3, Auto Injury Insurance Claims, pp. 10-11.)

<sup>7</sup> Montana law does not require claimants to hire lawyers to settle their claims. Implicit in Section 201’s emphasis on prompt claims handling is a recognition that: (a) attorney-driven litigation tactics do not promote prompt claim resolution (*see, e.g.*, 33-18-201(7) and (11)), and (b) claimants should be able to negotiate on their own with insurers to promptly settle their claims.

Third, Jacobsen alleged that the “fast track” claims adjustment method leads to overly prompt settlement without adequate investigation of claims. (Doc. 219, 4th Am. Compl., ¶ 47b.) But as Conners testified at trial, an adjuster was required to investigate liability and injuries to determine whether “fast track” processing was appropriate. (TT, Day 3, p. 56.)

**D. The So-Called “Zero Sum Game” Philosophy Had No Impact On Jacobsen’s Claim.**

The District Court predicated the “class claims” against Allstate upon McKinsey’s so-called “zero sum game” philosophy. But such a philosophy is not at issue with respect to Jacobsen’s claim, and therefore should not be at issue for a “class.”

Jacobsen submitted a McKinsey slide in support of class certification that graphically depicted some of the reasons how Allstate previously had been overpaying claims. (Doc. 222, Ex. A, #0001426.) At the top of the slide, it notes: [i]mproving Allstate’s casualty economics will have a negative economic impact on *some* medical providers, plaintiff attorneys and claimants.” (*Id.*, emphasis supplied.) Next to the graph it states: “Zero sum economic game — Allstate gains — Others must lose.” (*Id.*) The “*some*” who McKinsey predicted will “lose” are not *all* claimants, but rather medical providers who engaged in “abusive medical testing and treatment,” plaintiff attorneys who received “unnecessary . . . payments,” and claimants who received settlements “above fair value.” (*Id.*)

On its face the slide does not direct that legitimate claims should be underpaid. More importantly, Jacobsen does not contend that a “zero sum game” philosophy caused his claim to be underpaid, or that

such a philosophy caused him any emotional distress.

### **SUMMARY OF THE ARGUMENT**

This appeal questions whether a court may certify a class to pursue “class claims” separate and distinct from the individual claims of the named plaintiff or absent class members. Under Montana law, and fundamental norms of Due Process, the answer is “no.”

A class action is a procedural device, and may neither create nor abridge substantive rights. Class certification is appropriate only where the named plaintiff’s individual claim is representative of the absent class members’ individual claims. Only then may the result of the named plaintiff’s claim be applied, in victory or defeat, to the same claims of all absent class members. If the named plaintiff individually does not possess the same particular claims as the class he purports to represent, then class certification is unwarranted. Absent class members have a Due Process right not to be bound by the result of a claim litigated by a non-representative named plaintiff; conversely, Due Process protects Allstate against litigation brought by a non-representative plaintiff on behalf of a non-existent “aggregate” plaintiff class that is not subject to individualized defenses.

Rule 23(a)’s requirements “effectively limit the class claims to those fairly encompassed by the named plaintiff’s claims.” *Wal-Mart Stores, Inc. v. Dukes*, U.S. , 131 Sup. Ct. 2541, 2550 (2011) (citation omitted). But the Order creates “class claims” and “class relief” based upon a hypothetical “invisible harm” to the “class as a whole,” without any

regard for whether such first and third-party BI and PD claims are encompassed by Jacobsen's third-party claim for emotional distress, or whether all individual first and third-party class members had in fact suffered harm or would be entitled to the "class relief." In fact, the Order provides that individual outcomes in particular claims — *i.e.*, whether particular class members' claims were settled fairly or not — are irrelevant to the "class claims" or "class relief." (Order, p. 96.)

The class, class claims and class relief the Order creates conflict with Rule 23(a)'s requirements and Due Process. Jacobsen himself is not even a member of the "class" defined by the Order. Jacobsen has not asserted any individual claim challenging the fairness of his settlement, and thus cannot pursue such a claim on behalf of a class. Proof of Jacobsen's emotional distress claims at trial would not prove any of the class claims, nor entitle Jacobsen to the class relief. The idiosyncratic nature of his claim cannot satisfy Rule 23(a)'s commonality, typicality or adequacy requirements.

Nor are Rule 23(b)(2)'s requirements satisfied. The class defined by the District Court is hopelessly overbroad: it includes persons who have no cause of action for violation of 33-18-201(1) (because there was no misrepresentation involved in the handling of their claim) or 33-18-201(6) (because liability for their claim was not reasonably clear). The class as defined would also include persons whose claims were paid fairly, and thus have no UTPA or common law bad faith claim. The class thus lacks the homogeneity and cohesion required of Rule 23(b)(2) class.

The class certified is also not appropriate under Rule 23(b)(2) because it seeks monetary relief in the

form of punitive damages that is not incidental to the requested declaratory and injunctive relief. The Order violates fundamental Due Process protections because Allstate would be precluded from raising class member specific defenses, including that particular class members were not entitled to punitive damages because their claims were handled appropriately, paid fairly or were otherwise barred. A class award of punitive damages without any showing that any class member — let alone every class member — was entitled to actual damages or even suffered any injury violates Allstate's Due Process rights.

The injunctive and declaratory relief crafted by the District Court is also not suitable for Rule 23(b)(2) certification. The injunctive and declaratory relief are mere precursors for ultimate recovery of money by at least some class members, and thus not "final" as required by the rule. The injunctive and declaratory relief are also too amorphous and vague to support Rule 23(b)(2) certification. In addition, the Order precludes Allstate from raising defenses to individual class members' entitlement to declaratory and injunctive relief, which is again a violation of Allstate's Due Process rights.

Finally, the District Court based its class certification ruling upon inadmissible evidence, holding that the Montana Rules of Evidence do not apply to class certification proceedings. This, too, is error. Both this Court and the Montana Rules of Evidence require admissible evidence to be presented at the class certification stage. The promise or hope that admissible evidence may eventually be produced at trial to support class certification is not sufficient to meet a plaintiff's burden of establishing compliance with Rule 23's requirements.

### **STANDARD OF REVIEW**

A decision to certify a class under Rule 23, M. R. Civ. P., is reviewed for abuse of discretion. *Hop v. Safeco Ins. Co. of Ill.*, 2011 MT 215, ¶ 9, 361 Mont. 510, 261 P.3d 981. A decision based upon an inaccurate view of the law is an abuse of discretion. *Ihler v. Chisholm*, 2000 MT 37, ¶ 24, 298 Mont. 254, 995 P.2d 439. Like any “interpretation of the law,” legal conclusions are reviewed to determine whether those conclusions are “correct.” *Leichtfuss v. Dabney*, 2005 MT 271, ¶ 21, 329 Mont. 129, 122 P.3d 1220.

### **ARGUMENT**

Class actions are an exception to the general rule that a lawsuit only determines the rights of the named parties before the Court. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). A plaintiff is permitted to bring suit in a representative capacity on behalf of all members of a class “*only* if” all of the requirements of Montana Rule of Civil Procedure 23(a) are met, and at least one section of Rule 23(b). Rule 23, M. R. Civ. P. (emphasis supplied); *see also McDonald v. Washington*, 261 Mont. 392, 400, 862 P.2d 1150, 1155 (1993).

It is the plaintiff’s burden to prove compliance with Rule 23’s requirements. *McDonald*, 261 Mont. at 400, 862 P.2d at 1155. A mere “threshold showing” is not sufficient to support class certification; ‘actual, not presumed conformance’ with the Rule 23 requirements remains necessary.” *In re Hydrogen Peroxide*, 552 F.3d 305, 321-322 (3d Cir. 2009) (citation omitted); *see also Wal-Mart*, 131 Sup. Ct. at 2551.<sup>8</sup> If

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<sup>8</sup> Because M. R. Civ. P. 23(a) and (b) are identical to Fed. R. Civ. P. 23(a) and (b), federal interpretation of Fed. R. Civ. P. 23

a Rule 23 requirement overlaps with a merits issue, the District Court is still required to weigh the evidence and make a finding that the Rule 23 requirement has been satisfied. *Mattson v. Montana Power Co.*, 2009 MT 286 ¶ 67, 352 Mont. 212, 215 P.3d 675; *Wal-Mart*, 131 Sup. Ct. at 2552.

The District Court here erred by concluding that the certified class satisfies Rule 23(a)'s and/or Rule 23(b)(2)'s requirements, or Due Process. In so concluding, the District Court relied upon inadmissible evidence, and erroneously held that the Montana Rules of Evidence do not apply to class certification proceedings. As shown below, these errors, individually and cumulatively, warrant reversal.

**I. The District Court Erred By Holding That The Certified Class Meets The Requirements of Rule 23(a) and Due Process.**

Rule 23(a) requires that (1) the class be so numerous that joinder of all members is impractical; (2) the plaintiff's claim involves "questions of law or fact common to the class;" (3) the plaintiff's claim is typical of the class claim; and (4) the plaintiff fairly and adequately protect the interests of the class. Rule 23(a)(1)-(4), M. R. Civ. P. Rule 23(a)'s requirements are mandated by Due Process, because if they are not satisfied, it would be fundamentally unfair to apply the result of the named plaintiff's claim to the claims of absent class members. *See, e.g., Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982).

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is "instructive" in interpreting M. R. Civ. P. 23. *McDonald, supra*, 261 Mont. at 400, 862 P.2d at 1155.



Although technically distinct requirements, ‘Nile commonality and typicality requirements of Rule 23(a) tend to merge’ because “[b]oth serve as guideposts for determining . . . whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.’ *Wal-Mart*, 131 Sup. Ct. at 2551 n. 5, quoting *Gen. Tel. Co. of Southwest*, 457 U.S. at 157-8 n. 13. Commonality and typicality also ‘tend to merge with the adequacy-of-representation requirement, although the later requirement also raises concerns about the competency of counsel and conflicts of interest.’ *Id.* Here, neither Rule 23(a)’s commonality, typicality, nor adequacy requirements were satisfied.

**A. There Is No Commonality Between Jacobsen’s Claim And The “Class Claims.”**

Jacobsen’s claim is not predicated upon an assertion that his third-party BI and PD claims were ultimately settled unfairly or underpaid. On re-trial, Jacobsen’s claim for “actual damages” is limited to the alleged emotional distress he suffered for the approximately two-week period between the time he asked Allstate to re-open his claim, and the date Allstate agreed to do so. (Doc. 267, Ex. F, Pl. Resp. to Defs. 3rd Disc. Reqs., Int. 34.) The three factual/legal issues created by the District Court that are supposedly “common to the class as a whole” share nothing in common with Jacobsen’s claim and do not satisfy Rule 23(a)(2)’s commonality requirement.

To satisfy Rule 23(a)(2)’s commonality requirement, the question of law or fact common to the class must be capable of generating a common answer that

is central to the validity of the named plaintiffs and each class member's claim:

Their claims must depend upon a common contention — for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution — ***which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.*** *Wal-Mart*, 131 Sup. Ct. at 2551(emphasis supplied).

Merely alleging that class members “have all suffered a violation of the same provision of law” that “can be violated in many ways” does not establish commonality. *Id.*; see also *Mathis v. GEO Group*, 2012 WL 600865, at \*6 (E.D.N.C. Feb. 23, 2012) (“Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury.’ This does not mean merely that they have all suffered a violation of the same provision of law.”) (quoting *Wal-Mart*).

The common questions identified by the District Court do not meet this standard. The first question — whether CCPR’s unrepresented segment claims handling practices violate the UTPA — is precisely the type of generalized question that *Wal-Mart* identified as insufficient. See *Wal-Mart*, 131 Sup. Ct. at 2551. Such a generalized question cannot be answered for all class members at once. An independent cause of action for a UTPA violation or for common law bad faith requires a showing of “actual damages . . . caused by the violation.” § 33-18-242(1); *Watters v. Guaranty Nat. Ins. Co.*, 2000 MT 150,

¶ 50, 300 Mont. 91, 3 P.3d 626, *overruled in part on other grounds, Shilhanek v. D-2 Trucking, Inc.*, 2003 MT 122, 315 Mont. 519, 70 P.3d 721 (2003). As the District Court acknowledged, whether individual class members suffered “actual damages” is a case-specific, individualized inquiry — not a question that can be answered for the “class as a whole.” (Order, p. 126.)

The second “common question” is also deficient because whether CCPR’s unrepresented segment adjustment practices increased Allstate’s profits while decreasing “the total amount of compensation paid to the class as a whole” generates no common answer demonstrating a violation of § 33-18-201(1) or (6). An increase in Allstate’s profits (*i.e.*, nationwide revenue for all lines of insurance, including investment income, less expenses) and decrease in total payments “to the class as a whole” does not prove a misrepresentation needed to establish a violation of Section 201(1), nor does it prove a failure to promptly settle once liability is reasonably clear in violation of Section 201(6). Nor would that prove that Jacobsen’s claim, or any other class member’s claim, was underpaid. Jacobsen would certainly not concede that Allstate would be insulated from liability for underpayment of an individual class member’s claim if Allstate’s profits went down, and total claims payments to “the class as a whole” went up. Similarly, just because Allstate’s profits might go up, and total claims payments go down in any year would not establish improper underpayment of every, or any, individual class member’s claim.<sup>9</sup> *Cf. In re Countrywide Fin.*

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<sup>9</sup> The logic of using Allstate’s “profits” as a supposed indication of underpayment “to the class as a whole” is additionally flawed because a nationwide insurance company’s “profit” is

*Mortg. Lending Practices Litig.*, 2011 WL 4862174, at \*3 (W.D. Ky. Oct. 13, 2011 (use of class-wide statistical data “alone does not support a conclusion that every member of the class suffered the same injury, or any injury at all.”))

Similarly, the District Court’s third “common question” relating to “actual malice” needed for the class punitive damage claim also fails the commonality standard. To establish “actual malice” under Montana law, it must be shown that the defendant knew or intentionally disregarded facts that “created a high probability of injury to the plaintiff.” § 27-1-221(2), MCA. The Order provides that “actual malice” for the class punitive damage claim will be established if “net settlement payouts to the class as a whole . . . were less than the net amount previously sufficient to fully and fair[ly] settle unrepresented claims.” (Order, p. 89.) But Jacobsen does not assert that his claim was underpaid. Whether net settlement payments to the “class as a whole” went up or down simply has no bearing upon any alleged harm to Jacobsen. Such a showing, by itself, would thus not establish Allstate’s knowledge of a “high probability” of injury to Jacobsen.

Nor would such a showing establish a “high probability” of injury to any individual class member, because the fairness of any class member’s settlement can only be determined on a case-by-case basis, regardless of whether net settlement payments to

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impacted by numerous factors having nothing to do with whether Montana auto accident claims were properly paid, including an increase or decrease in the sales of policies, improvement in underwriting risks, the performance of investments made by the company and the occurrence of natural disasters, to name just a few.

the “class as a whole” went up or down. Comparing changes in total settlement payouts from year to year cannot show actual malice because the mix and severity of accidents in any given year may be different from a prior year for any number of reasons, which have nothing to do with whether claims were settled fairly. Paying less in claims in one year could be the result of overpayments in prior years.

Moreover, as this Court has recognized, “one jury may legitimately render a compensatory award that is significantly different from an equally legitimate compensatory award rendered by another jury upon substantially similar facts.” *Seltzer v. Morton*, 2007 MT 62, ¶ 96, 336 Mont. 225, 154 P.3d 561. What is true of jury verdicts is also true of settlements. Similar claims may be settled for different amounts, and still be fair settlements because there is a range of fair settlement values. This “common question” therefore cannot establish knowledge that all — or any -- individual claims were settled outside the range of fairness, and does not produce an answer “central to the validity of each one [of the class members’] claims in one stroke” as required to satisfy Rule 23(a)(2)’s commonality requirement. *Wal-Mart*, 131 Sup. Ct. at 2551.

**B. Jacobsen’s Claim Is Not Typical Of The Class, Nor Is He An Adequate Representative.**

To satisfy Rule 23(a)(3)’s typicality requirement, the class representative must “be a part of the class,” have “the same interest” as the class, and “suffer the same injury as class members.” *Gen. Tel. Co. of Southwest*, 457 U.S. at 156. There must be a nexus between the injury suffered by the plaintiff and the injury suffered by the class. *McDonald*, 261 Mont. at

4023, 862 P.2d at 1156. Such nexus is usually demonstrated by a showing that proving the named plaintiff's claim will prove all class members' claims. *See, e.g., Dieter v. Microsoft Corp.*, 436 F.3d 461, 466-468 (4th Cir. 2006); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (*en bane*). A plaintiff's claim is not typical "unless [he] has individual standing to raise the legal claims of the class." *Hop, supra* at ¶ 20 (reversing certification of class). A plaintiff does not satisfy the related adequacy requirement if his interests are "antagonistic to the interests of the class." *McDonald*, 261 Mont. at 403, 862 P.2d at 1156 (citation omitted). Jacobsen's claim is not typical of the class, nor is he an adequate representative.

Jacobsen is not even a member of the class. To be part of the class as defined by the District Court, a person's claim had to be "adjusted to an unrepresented settlement . . ." (Order, p. 154.) Because Jacobsen's initial release was rescinded at his lawyer's request, the release was void *ab initio* and "as if it never were." *Jacobsen, supra* at ¶ 51. His claim was then settled with a lawyer's assistance — not "to an unrepresented settlement." He thus is not a member of the class and his claim cannot be typical of the class. *See, e.g., LaMere v. Farmers Ins. Exchange*, 2011 MT 272, IN 33-36, 362 Mont. 379, 265 P.3d 617 (affirming denial of class certification for lack of standing).

Even if Jacobsen were a class member, he would still lack standing to pursue the class claims. When Allstate agreed to rescind his initial release, it reopened Jacobsen's claim and paid him an additional settlement amount for his BI claim. His claim is not typical of the class because he lacks "individual

standing” to have his claim re-opened again. *Hop, supra*; see also *Dodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999) (“Unless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief”). In addition, the class as defined by the District Court includes first and third party auto PD claimants. (Order, p. 154.) Jacobsen, a third-party claimant only, makes no claim that his auto PD claim was improperly handled; he only seeks emotional distress damages. His third-party emotional distress claim is thus not typical of any class auto PD claim, whether first or third-party. *Hop, supra*.

Additionally, proving Jacobsen’s claim would not prove claims of absent class members. As shown above, the facts of his claim are unique. Proving that Allstate “misrepresented pertinent facts” or failed to effectuate a fair settlement of Jacobsen’s third-party claim “in which liability has been reasonably clear” would not establish a like violation for any other putative first-party or third-party property damage or bodily injury claimant with different claim facts.

Finally, “[a] proposed class representative is neither typical nor adequate if [he] is subject to a unique defense that is likely to become a major focus of the litigation.” *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006); see also *Romberio v. Unumprovident Corp.*, 385 Fed. Appx. 423, 431-433 (6th Cir. 2009). Jacobsen’s claims will be subject to unique defenses that are likely to become the focus of any trial, including his responsibility for pushing for an early settlement of his claim, his admission that he spoke to an attorney but chose not to hire one, the cause of his alleged emotional distress, and the amount (if any) of compensatory and punitive dam-

ages that he should be awarded individually. Jacobsen's third-party UTPA claim is also subject to a different statute of limitations — one year from date of settlement — compared to two years from the “date of violation” for first-party claimants. *See* 33-18-242(7)(a) and (b). Jacobsen's issues therefore are entirely different from the so-called “common” class issues certified by the District Court. “[T]he challenge presented by a defense unique to a class representative . . . [is that] . . . the representative's interests might not be aligned with those of the class, and the representative might devote time and effort to the defense at the expense of issues that are common and controlling for the class.” *Beck*, 457 F.3d at 297.

## **II. The District Court Erred By Holding That The Certified Class Meets The Requirements of Rule 23(b)(2) and Due Process.**

Rule 23(b)(2) provides that a class action may be maintained if Rule 23(a) is satisfied and “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so the final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” M. R. Civ. P. 23(b)(2). These requirements are not mere technicalities: because absent class members are not entitled to notice or an opportunity to opt-out of a Rule 23(b)(2) class, these requirements are mandated by Due Process. The District Court here incorrectly analyzed these requirements, and the Order thus violates both the Rule and Due Process.



**A. The Proposed Class Is Overbroad And Lacks The Required Homogeneity And Cohesiveness.**

A Rule 23(b)(2) class action is referred to as a “mandatory” class because class members do not have an automatic right to notice or a right to opt-out of the class. *Wal-Mart*, 131 Sup. Ct. at 2558. The defining characteristic of a mandatory class is “the homogeneity of the interests of the members of the class.” *Reeb v. Ohio Dep’t of Rehab. and Corr.*, 435 F.3d 639, 649 (6th Cir. 2006); *see also Romberio, supra*, at 432-433.

Rule 23(b)(2) classes must not involve “significant individual issues . . . because it would be unjust to bind absent class members to a negative decision where the class representative’s claims present different individual issues than the claims of the absent class members.” *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998)(citation omitted); *see also Lemon v. Int’l Union of Operating Eng’rs.*, 216 F.3d 577, 580 (7th Cir. 2000). Cohesiveness and homogeneity are undermined when the class definition is so broad as to include individuals who have not been harmed, could have no cause of action, and are without standing to maintain an action on their own behalf. *See, e.g., Kartman v. State Farm Mut. Auto Ins. Co.*, 634 F.3d 883, 892 (7th Cir. 2011); *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 580 (N.D. Ill. 2005).

Here, the proposed class is overbroad and lacks cohesiveness and homogeneity. Class members are not entitled to any form of relief unless they have suffered actual harm or damage. *See, e.g., 33-18-242(1)* (creating private right of action for “actual damages caused by the violation”); *Watters, supra* (common law bad faith action requires damage

caused by bad faith conduct). But the class as defined would necessarily include many individuals who suffered no injury and thus could have no UTPA claim, either because their claims were properly paid, no misrepresentations were made to them, and/or their claims were promptly settled once liability was reasonably clear. Identifying absent class members who did suffer some injury would “depend on adjudication of facts particular to . . . subset[s] of the class,” defeating cohesiveness and homogeneity. *Lemon*, 216 F.3d at 580.

Nor can the defining characteristic of the class — Allstate settled the claim of an unrepresented claimant — provide the necessary cohesiveness and homogeneity. It cannot be assumed that Allstate caused all unrepresented claimants to decide not to hire a lawyer. “The reason Plaintiffs or putative class members decided to settle without retaining an attorney will be an individualized inquiry.” (*Martin v. Allstate Ins. Co.*, Circuit Court of Cook County, 2001; Doc. 232, Ex. C, p. 4.) Proving why a class member decided to be unrepresented is a “significant individual issue[]” that will “arise consistently,” defeating cohesiveness and homogeneity. *Barnes*, 161 F.3d at 143.

It similarly cannot be assumed that all unrepresented settlements result in underpayment. “Seriously injured claimants are more likely to seek representation than the superficially injured. Seriously injured claimants, on average, are likely to receive higher payments, not because they are represented, but because their injuries warrant higher payouts.” (*White v. Allstate Ins. Co.*, (D.C. Conn. 2001); Doc. 232, Ex. B, p. 5.) Establishing that one class member might have received a larger net settlement if a law-

yer had been retained “would not establish that fact for any other named Plaintiff or for any other putative class member.” (*Id.*) Proving that being unrepresented caused underpayment is a “significant individual issue[]” that will “arise consistently,” defeating cohesiveness and homogeneity. *Barnes*, 161 F.3d at 143.

**B. Certification of A Rule 23(b)(2) Punitive Damages Claim Is Inconsistent With Rule 23’s Plain Language, Structure And Due Process.**

Rule 23(b)(2) permits the certification of classes when “final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” As the *Wal-Mart* Court emphasized, “one possible reading” of the text of Rule 23(b)(2) is that it “does not authorize the class certification of monetary claims *at all*. 131 Sup. Ct. at 2557 (emphasis supplied). Class actions seeking monetary relief ordinarily must satisfy Rule 23(b)(3)’s predominance and superiority requirements, and provide putative class members with notice and an opportunity to opt-out of the class. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614-617 (1997).

The *Wal-Mart* Court left open (but explicitly declined to embrace) the possibility that monetary claims could be certified under Rule 23(b)(2), if those claims were “incidental” to injunctive or declaratory relief. 131 Sup. Ct. at 2560, quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998). The District Court held that punitive damages, as an “incidental” remedy, was appropriate here because: (1) it afforded indivisible, non-individualized relief in a single stroke to the class as a whole, and (2) comports with Due Process by not prejudicing the rights

of class members and Allstate to contest case-specific issues and defenses in individual cases *outside of the class action*. (Order, p. 138.) The District Court's decision is an incorrect interpretation of law, warranting reversal for the three reasons discussed below.

First, the punitive damage class claim is not "incidental" to the class declaratory and injunctive relief. Monetary relief is "incidental" when the "damages flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief," and does not require "the introduction of new substantial legal or factual issues, nor entail complex individualized determinations." *Wal-Mart*, 131 Sup. Ct. at 2560 (citation omitted).

The class punitive damage claim here clearly does not "flow directly" from the injunctive relief of mandatory claim re-opening and re-adjustment because it will be awarded before such re-opening occurs and is not based upon the results of any re-adjustments. Nor would it "flow" directly from the declaratory relief which is no more than a declaration that the law has been violated somehow. Under the District Court's ruling, "new substantial legal or factual issues" concerning Allstate's payments to "the class as a whole" would be required to establish "actual malice." Thus, even if "incidental" monetary relief was appropriate in a Rule 23(b)(2) class, the class punitive damage claim here cannot be considered "incidental." *See, e.g., Allison*, 151 F.3d at 416; *Burton v. Mountain West Farm Bureau Mut. Ins. Co.*, 214 F.R.D. 598, 610 (D. Mont. 2003).

Second, the District Court's creation of "class claims" that are separate and independent from the actual experiences of Jacobsen or other individual

class members, so as to avoid litigating case-specific issues, itself violates Allstate's Due Process rights. The District Court's attempt to aggregate all class members' hypothetical individual experiences, in the form of total payments made to the "class as a whole," forms the basis for both the District Court's class claim for violation of the UTPA and for an inference of "actual malice" necessary to support the award of punitive damages. But under the Order, Allstate is precluded from raising case-specific defenses, including that particular class members were not entitled to punitive damages because their claims were handled appropriately, paid fairly or were otherwise defensible or barred. (Order, pp. 96, 107.)

As this Court has recognized, "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense." *Seltzer*, *supra* at ¶ 145, quoting *Phillip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). Allstate thus has a Due Process right to raise case-specific defenses to individual class members' entitlement to punitive damages. *Cf. Wal-Mart*, 131 Sup. Ct. at 2561 (rejecting a "Trial by Formula" approach to class-wide monetary award because "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."); *see also U.S. v. City of New York*, 276 F.R.D. 22, 37 (E.D.N.Y. 2011) (" . . . a litigant may not convert an individual question into a common question by concocting a method of classwide proof that subverts rights created by the underlying substantive law . . . .")

A trial of such a class punitive damage claim, if it were conducted in accordance with Due Process requirements, would devolve into a series of mini-trials focusing upon individual class member's entitlement to punitive damages. Such individualized determinations are the antithesis of a proper Rule 23(b)(2) class. *See, e.g., Altier v. Worley Catastrophe Response, LLC*, 2011 WL 3205229, at \*13, (E.D. La. July 26, 2011) (denying certification under Rule 23(b)(2) where, *inter alia*, plaintiff sought punitive damages, noting that "a claim for punitive damages requires a focus on individualized issues to comply with constitutional protections"); *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 376 (E.D. Ark. 2007 ("... given the Supreme Court's repeated insistence that an award of punitive damages be reasonably related to the harm to the individual plaintiff, an award of punitive damages often must include an inquiry into each plaintiff's individual circumstances in order to determine the amount of punitive damages awardable to that plaintiff").

The District Court's reliance upon *Gonzalez v. Montana Power Co.*, 2010 MT 117, 356 Mont. 351, 233 P.3d 328 to support certification of a punitive damage class claim is misplaced. (Order, p. 141.) In *Gonzalez*, this Court affirmed a district court order granting class certification of a common law bad faith and breach of fiduciary duty claim for both compensatory and punitive damages under Rules 23(b)(1) and (b)(3) — **not** Rule 23(b)(2). *See* Order Granting Certification of Class Action, etc., Oct. 2, 2009, Cause No. DV-98-253, Appendix, Ex. 2. The District Court in *Gonzalez* certified class claims for both compensatory and punitive damages, and recognized that there would be a need for individualized determinations of compensatory damages, which did

not preclude Rule 23(b)(3) certification because common issues of fact or law predominated. (*Id.*, p. 10.) The defendants would presumably have the opportunity to raise individual defenses to class members' compensatory damage claims, leaving only those class members proving compensatory damages eligible for both compensatory and punitive damages. Here, because the Order precludes Allstate from raising individual defenses at all, it would allow recovery of punitive damages by absent class members with respect to whom Allstate fully met its obligations under Montana law.

Third, the District Court's Due Process analysis is flawed. Even if one accepted the District Court's view that class member specific issues could be excluded from the class action trial to be litigated elsewhere, absent Rule 23(b)(2) class members could argue that *they* are not bound by any judgment and are free to pursue identical class claims on their own because they got neither notice nor an opportunity to opt-out. *See, e.g., AT&T Mobility, LLC v. Concepcion, U.S. , 131 Sup. Ct. 1740, 1751 (2011)* ("For a class-action money judgment to bind absentees in litigation . . . absent class member *must* be afforded notice, an opportunity to be heard, and a right to opt-out of the class."); *Jefferson v. Ingersoll*, 195 F.3d 894, 896 (7th Cir. 1999) (" . . . the final resolution of a suit that proceeds to judgment (or settlement) under Rule 23(b)(2) may be collaterally attacked by class members who contend they should have been notified and allowed to proceed independently."). Such a potential result could deprive any future judgment of finality and clearly prejudice Allstate's Due Process rights.

**C. Both Montana Law And Due Process Preclude Rule 23(b)(2) Certification Of A Punitive Damages Claim Without Proof of Actual Damages For Individual Class Members.**

As this Court held, “without an award of compensatory damages, there can be no award of punitive damages.” *Jacobsen, supra* at 1167, *see also* 27-1-220(1). Such a rule is compelled by federal Due Process constraints upon the award of punitive damages. The “most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.” *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996). To satisfy Due Process, “exemplary damages must bear a ‘reasonable relationship’ to compensatory damages.” *Id.* “[P]unitive damages should only be awarded if the defendant’s culpability, *after having paid compensatory damages*, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” *State Farm Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (emphasis supplied).

In the class action context, this Due Process requirement has been held to compel determination of punitive damages only “*after* proof of liability to individual plaintiffs.” *Allison, supra*, 151 F.3d at 418. “[A]ssessing punitive damages on a class-wide basis before any determination is made as to the actual harm” caused to individual class members violates Due Process. *E.E.O.C. v. Sterling*, 788 F. Supp. 2d 83, 90 (W.D.N.Y. 2011). Such an approach, instead of “ensuring a proportional relationship between compensatory and punitive damages, as *State Farm [v. Campbell]* instructs, seeks to completely divorce any



relationship between those determinations.” *Id.* “[U]nless each alleged class member has *actually suffered harm from the pattern of illegal acts* — which is highly unlikely — . . . [i]ndividualized determinations are necessary to fully realize the extent of the harm caused by [the defendant’s] conduct and properly assess the need for punishment and deterrence.” *Nelson*, 245 F.R.D. at 377-378 (emphasis in original).

To avoid such “individualized determinations,” the District Court certified a punitive damages only class, with no corresponding class claim for compensatory or actual damages. The District Court justified its approach by relying upon cases that stated that punitive damages did “not require an actual award of compensatory damages if the evidence shows that the predicate tort nonetheless caused actual harm or damage, even if a specific monetary amount is not measurable or awarded.” (Order, pp. 140-41.)

But each of those cases required proof of actual harm to the plaintiff. *See, e.g., Lauman v. Lee*, 192 Mont. 84, 89, 626 P.2d 830, 833 (1981) (“The finding of actual damages is the primary requisite step toward any award of exemplary damages.”). None of those cases support the proposition that punitive damages can be awarded to “the class as a whole” and then distributed (presumably pro-rata) to class members *as to whom no actual harm or damage has been shown*. Because the District Court ruled that individualized determinations as to whether claims were paid fairly are irrelevant to the class claims and will not be permitted at the class trial (*see, e.g., Order*, pp. 126-128), there will be no evidence in the record establishing actual harm or damage to each

class member. Thus, the cases the District Court relied upon do not support certification of a punitive damage only class under such circumstances. Moreover, with one exception,<sup>10</sup> the cases cited by the District Court pre-date the United States Supreme Court's decisions in *BMW* and *Campbell* that mandate an inquiry into the ratio of punitive to compensatory damages. The continuing vitality of such cases is thus open to serious question.

Nor can the so-called "indivisible harm to the class as a whole" satisfy the required showing of actual harm or damage to each class member necessary to support a punitive damage claim. Neither a comparison of "industry performance data and internal Allstate performance data" (Order, p. 139), nor the supposed "inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class as a whole" (*id.*), are proxies for actual harm or damage to individual class members. Jacobsen offered no evidence demonstrating that the "industry" paid claims appropriately, or any justification for using industry averages as a measuring stick for compliance with the UTPA. Total claims payments may go up or down, or vary between companies, for a variety of different reasons having nothing to do with whether individual claims were properly or improperly paid. Whether Allstate paid more or less on claims than "industry" performance would

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<sup>10</sup> The only post *Campbell* and *BMW* case cited, *Stipe v. First Interstate Bank-Poison*, 2008 MT 239, ¶ 23, 344 Mont. 435, 188 P.3d 1063, was consistent with the federal authority, as it affirmed the granting of summary judgment in favor of a defendant on a punitive damage claim because "[p]unitive damages . . . are unavailable without a showing of actual damages."

not prove that all — or any — Allstate unrepresented claimants were underpaid. Similarly, whether Allstate’s profits went up and total claims payments went down does not prove that all — or any — individual class members’ claims were underpaid. The “class” as an entity cannot suffer “indivisible harm” unless it can be shown that each individual class member was harmed. *See, e.g., Nelson*, 245 F.R.D. at 378.

**D. The Class Injunctive And Declaratory Relief Certified Is Not “Final” As Required By Rule 23(b)(2).**

Rule 23(b)(2) “does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages.” *See Lemon*, 216 F.3d at 580 (quoting Fed. R. Civ. P. 23 Advisory Committee’s note). Injunctive and corresponding declaratory relief is not final within the contemplation of Rule 23(b)(2) when it only serves as a basis to present damage claims later. *See Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530-531 (D.C. Cir. 2006) (denial of class certification affirmed where injunction to reprocess baggage claims “would simply serve as a foundation for a damages award . . .”); *Rowe v. Bankers Life and Cas. Co.*, 2012 WL 1068754, at \*6 (N.D. Ill. Mar. 29, 2012) (denying Rule 23(b)(2) certification; “the Court questions whether [plaintiffs] inclusion of injunctive claims was simply a creative ‘effort to make the case more amenable to class certification.’” (citation omitted).

As the District Court admitted, the declaratory relief and mandatory injunction here “merely require[s] Allstate to re-open individual claims . . . [and] the resulting case-specific individualized issues would then arise and be addressed on an individual

case basis in the ordinary course of law outside the context of the class action litigation.” (Order, p. 127.) But this construct does not qualify for Rule 23(b)(2) certification because it “is designed to avoid the need to comply with Rule 23(b)(3) while preserving the possibility that some class members will be able to obtain monetary relief.” *Cholakyan v. Mercedes-Benz USA LLC*, 2012 WL 1066755, at \*20 (C.D. Cal. Mar. 28, 2012) (denying certification for an injunctively mandated adjustment program). That is not “final” relief within the meaning of Rule 23(b)(2).

Two recent federal appellate court decisions are illustrative. In *Kartman, supra*, the trial court certified a class of State Farm insureds who suffered hail damage to their roofs for injunctive relief under Rule 23(b)(2) requiring State Farm to re-inspect class members’ roofs. The Seventh Circuit reversed holding that, as here, the proposed injunctive relief “would in no sense be a final remedy. A class-wide roof re-inspection would only lay an evidentiary foundation for subsequent individual determinations of liability and damages.” *Id.*, at 886.

More recently in *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012), the district court granted certification of a class of disabled children who allegedly had been denied their rights under the Individuals with Disabilities Education Act (“IDEA”). The court certified injunctive relief under Rule 23(b)(2) requiring the school district to implement a remedial plan to identify IDEA-eligible students. The Seventh Circuit reversed, in part, because the proposed injunctive relief was not “final” within the meaning of Rule 23(b)(2): “if as a substantive matter the relief sought would merely initiate a process through which highly individualized determina-

tions of liability and remedy are made, this kind of relief would be class-wide in name only, and it would certainly not be final . . . [the] order merely establishes a system for eventually providing individualized relief. It does not on its own, provide ‘final’ relief to any class member.” *Id.*, at 499.

Although the District Court attempted to justify the mandatory injunctive relief it fashioned by reference to this Court’s decisions in *Ferguson v. Safeco Ins. Co.*, 2008 MT 109, 342 Mont. 380, 180 P.3d 1164, and *Hem v. Safeco Ins. Co.*, 2005 MT 301, 329 Mont. 347, 125 P.3d 597, neither decision supports the District Court’s order. Contrary to the District Court’s assertion, *Ferguson* did not involve a “mandatory review and adjustment of claims.” (Order, p. 128.) In *Ferguson*, this Court held that class certified injunctive relief would be appropriate requiring Safeco to return subrogated funds until such time as Safeco had determined whether the insureds had been “made whole.” The proposed injunctive relief did not require Safeco to re-adjust claims or conduct “made whole” determinations. It simply precluded Safeco from subrogating unless and until it had made the required “made whole” determination. *Ferguson*, at ¶¶ 34, 36.<sup>11</sup> That provided “final” relief by preventing Safeco from improperly seeking subrogation.

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<sup>11</sup> Similarly, this Court’s recent decision in *Diaz v. Blue Cross and Blue Shield of Montana*, 2011 MT 322, 363 Mont. 151, 267 P.3d 756 provides no support for the District Court’s class injunctive relief. The injunctive relief sought in *Diaz* — “to enjoin an insurer — the State — from exercising its exclusion before it conducts a made-whole analysis” — was appropriate for Rule 23(b)(2) treatment because the injunction itself constituted “final” relief: it prevented the unlawful conduct. Here, the proposed injunctive relief — re-opening and re-adjusting all claims

Nor does *Hern* support the certification. *Hern* was not even a Rule 23(b)(2) class action at all. It was an individual action brought in accordance with the terms of the settlement of a prior class action. The *settlement agreement* provided that the insurer would re-open and re-adjust claims upon submission of a proof of claim. The insurer's agreement to re-open and re-adjust claims was a matter of contract; it did not purport to be "final" injunctive relief under Rule 23(b)(2).<sup>12</sup>

**E. The Injunctive And Declaratory Relief Is Too Amorphous and Vague To Support Rule 23(b)(2) Certification.**

Under the Order, the class will supposedly seek a declaration that CCPR's "unrepresented segment adjusting practices are a common pattern and practice in violation of §§ 33-18-201(1) and (6)" and a mandatory injunction requiring Allstate to re-open and re-

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—provides no final relief, and is a mere precursor for individual attempts at monetary relief. *See, e.g., Cholakyan, supra.*

<sup>12</sup> The California appellate court decision, *Labrilla v. Farmers Group, Inc.*, 119 Cal. App. 4th 1070 (Cal. Ct. App. 2004), relied upon by the District Court is also distinguishable. That case arose under California's dissimilar class action rule, and under a statute that expressly provided for injunctive relief. *Id.*, at 1074. The class sought declaratory relief concerning the meaning of a policy provision, and then an ancillary injunction requiring the insurer to re-adjust class members' claims "with the judicially declared meaning of the like kind and quality provision." *Id.*, at 1076. The combination of the declaration and injunction provided "final" relief. Here, by contrast, no declaration concerning the meaning of any policy provision is sought, nor does the Order compel Allstate to readjust claims without the use of any particular CCPR process or protocol, or in accordance with any specific judicial declaration of requirements under the UTPA.

adjust claims. (Order, pp. 155-156.) But this “relief is so amorphous and vague that it cannot support class certification under Rule 23(b)(2).

Declaratory relief is not appropriate for “theoretical problems” or “giving abstract or advisory opinions.” *Northfield Insurance Co. v. Mont. Assoc. of Counties*, 2000 MT 256, 12, 301 Mont. 472, 10 P.3d 813. “At the class certification stage, the injunctive relief sought must be described in reasonably particular detail such that the court can at least conceive of an injunction that would satisfy” the requirements of Rule 23(b)(2). *Shook v. The Bd. of County Comm’n of the County of El Paso*, 543 F.3d 597, 605 (10th Cir. 2008). The proposed injunction here is simply to re-open and re-adjust all claims with no further direction whatsoever as to what is to be done with such re-opened claims. The declaratory relief sought is so generalized and vague as to provide no further guidance of how claims are to be re-adjusted. As Jacobsen’s own expert witness acknowledged, many facets of the CCPR unrepresented segment practices are unobjectionable — like the prompt, courteous contact of claimants, prompt processing of claims, and provision of information concerning the claims process. (TT, Day 2, pp. 223-224.) But the class relief provides no guidance of what Allstate should, or should not do, in re-adjusting class claims.

The class relief here thus suffers from flaws similar to those that lead the Seventh Circuit Court of Appeals to reverse class certification in *Kartman, supra*. In *Kartman*, the court found an injunction requiring State Farm to re-inspect class members’ roofs pursuant to a “reasonable, uniform and objective standard” to be “far too general to satisfy Rule 65(d), yet to be more specific would essentially re-

quire the court to write an insurance-adjustment code.” *Kartman*, supra, 634 F.3d at 893.

Here, too, the class declaratory and injunctive relief is fatally vague, and would give rise to numerous unresolved issues specific to each claim. *See, e.g., Intl Longshoremen Local 1291 v. Philadelphia Marine Trade Ass’n*, 389 U.S. 64, 74 (1967) (injunction is impermissibly vague when it contains “only an abstract conclusion of law, not an operative command capable of ‘enforcement’”); *Clarkson Co., Ltd. v. Shaheen*, 544 F.2d 624, 633 (2d Cir. 1976) (injunction must be set out in detail, thus enabling it to be obeyed easily and enforced effectively). Such amorphous relief cannot support a Rule 23(b)(2) certification. *Shook*, supra.

**F. The Rule 23(b)(2) Certification Improperly Denies Allstate Its Due Process Right To Raise All Defenses To Individual Class Member’s Entitlement To Injunctive And Declaratory Relief.**

No putative class member has an independent cause of action under the UTPA, or for common law bad faith, unless he or she has suffered “actual damages” caused by the alleged violation. § 33-18-242(1). The District Court created class claims and relief predicated upon “indivisible harm to the class as a whole” that make case-specific outcomes in individual claims irrelevant to the class claims. (Order, p.107.) Under such an approach, individual class members whose claims were paid fairly could benefit from declaratory and injunctive relief, even though they would have no individual cause of action. Such a result violates Allstate’s Due Process right to have an opportunity to present every defense to challenge individual class member’s entitlement to the class declaratory and injunctive relief. *See, e.g., Lindsey v.*



*Normet*, 405 U.S. 56, 66 (1972); *Seltzer*, *supra* at ¶ 45.

### **III. The District Court Erred By Holding That The Montana Rules Of Evidence Do Not Apply To Class Certification Proceedings.**

Aside from a few references to a limited number of “McKinsey documents,” the District Court justified its class certification order on “substantial proof” drawn from “evidence” submitted by Jacobsen that was clearly inadmissible under the Rules of Evidence. That inadmissible “evidence” included:

(1) opinions and statements contained in an unsworn expert report from Russ Roberts which was inadmissible hearsay (*Pannoni v. Board of Trustees*, 2004 MT 130, ¶ 48, 321 Mont. 311, 90 P.3d 438),<sup>13</sup>

(2) an article written by an advocacy group called the Consumer Federation of America, which was inadmissible hearsay (*Anderson v. Werner Enterprises, Inc.*, 1998 MT 333, IT 45, 292 Mont. 284, 972 P.2d 806);

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<sup>13</sup> In addition, many of Roberts’ opinions and statements related to supposed underpayment of claims, yet Roberts admitted under oath he did not have “detailed expertise to say that individual specific claims are undervalued.” (Doc. 318, Defs. Obj. and Resp. to P1. Supp. Submission, p. 7.) Expert opinions must be based upon adequate factual foundation, and not be mere speculation. *See, e.g., Mannix v. The Butte Water Co.*, 259 Mont. 79, 95-96, 854 P.2d 834, 844-45 (1993) (affirming exclusion of expert testimony because expert not qualified to offer opinions). Allstate had filed detailed motions in limine seeking to bar Roberts from offering most of his opinions, which it incorporated by reference in its objections to consideration of the Roberts Report for class certification purposes. (Doc. 267, Defs. Mot. in Limine #1-21; Doc. 318, Allstate’s Obj. and Resp. to Pl. Supp. Sub.)

(3) a self-serving affidavit submitted by one of Jacobsen's attorneys, David Berardinelli, characterizing the supposed meaning and purpose of certain McKinsey documents. This affidavit was never submitted or referenced in the class briefing or argument, and is essentially legal argument by Jacobsen's counsel. It is in any event hearsay, because it would constitute "evidence that is not subject to cross-examination" (*Peterson v. Doctors' Co.*, 2007 MT 264, ¶ 58, 339 Mont. 354, 170 P.3d 459) (Warner dissenting, citation omitted)

(4) an unauthenticated power point presentation Jacobsen referred to as the "Liddy slides" (*see, e.g., Smith v. Burlington Northern & Santa Fe Ry. Co.*, 2008 MT 225, Ill 43-44, 344 Mont. 278, 187 P.3d 639 (affiants lacking personal knowledge to "testify as to [the documents] genuineness and contents" cannot properly authenticate those documents);

(5) an unauthenticated "incentive compensation plan" (*Smith, supra*); and

(6) affidavits/testimony from a New Mexico bad faith case concerning claims handling practices in New Mexico, with no showing by Jacobsen that such claims handling practices were used in Montana.<sup>14</sup> (Order, pp. 57-59.)

Allstate moved to strike and/or objected to consideration of this evidence as inadmissible and irrelevant under the Montana Rules of Evidence. (Doc.

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<sup>14</sup> The District Court suggested that consideration of such New Mexico testimony was appropriate because Allstate had not shown that practices in Montana were different. (Order, p. 58, fn. 35.) But as this Court has made clear, it was Jacobsen's burden to show compliance with Rule 23's requirements. *McDonald, supra*, 261 Mont. at 400, 862 P.2d at 1155.

247, Mot. to Strike Supp. Facts; Doc. 318, Allstate’s Obj. and Resp. to Pl. Supp. Sub.) The District Court overruled Allstate’s objections, concluding that Allstate failed to cite to “controlling authority for the proposition that a rigorous Rule 23 analysis necessarily requires a preliminary factual showing in a trial-admissible form.” (Op. p. 50, fn 31.)<sup>15</sup> The District Court thus did not find the contested “evidence” admissible, it instead ruled that the Montana Rules of Evidence did not apply to class certification proceedings. This was an inaccurate view of the law.

Allstate had cited this Court’s decision in *Mattson v. Montana Power Co.*, *supra*, and the Montana Rules of Evidence as controlling authority for the proposition that admissible evidence must be presented to support Rule 23 class certification. (Doc. 318, p. 4.)

In *Mattson, supra*, this Court held that district courts were not to “take the Plaintiffs’ allegations in support of the class action as true” and were instead to “allow discovery and *hear evidence*” in order to answer “whatever factual and legal inquiries are necessary under Rule 23.” 2009 MT at ¶¶ 65-66 (emphasis supplied). In arriving at its conclusion, this Court expressly adopted the guidelines for addressing class certification set forth in *Miles v. Merrill Lynch & Co.*, 471 F.3d 24 (2d Cir. 2006). *Mattson*, at ¶ 67. As explained by the *Miles* court, a “district judge is to assess all of the relevant *evidence admitted* at the class certification stage and determine whether each Rule 23 requirement has been met . . . .” *Miles*, 471 F.3d at 42 (emphasis supplied).

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<sup>15</sup> Allstate, in fact, had cited to such controlling authority. See Doc. 318, p. 4.

This Court's *Mattson* ruling is in accord with the Montana Rules of Evidence. Montana Rule of Evidence 101(a) provides that "[t]hese rules govern all proceedings in all courts in the state of Montana, with the exceptions stated in this rule." Class certification proceedings are not among the exceptions listed. The exception under M. R. Evid. 101(c)(1) for "preliminary questions of fact" is not applicable. As explained in the commentary to the Federal Rules of Evidence for its substantively identical provision, this exception merely "restates, for convenience, the provision of the second sentence of Rule 104(a)." *Commentary to Fed. R. Evid. 1101(d)(1)*.

Rule 104(a) addresses "[q]uestions of admissibility generally." It states that "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges." Rule 104(a) does not suggest that the rules of evidence do not apply to class certification proceedings; it addresses how the court may make its determination as to whether to admit evidence in proceedings in which the rules of evidence otherwise apply. In the words of the Commentary to the Montana Rules of Evidence, a court "must be able to view potentially inadmissible evidence in order to determine whether [the evidence] can be admitted." *Commentary to M.R. Evid. 104(a)*. Thus, under both *Mattson* and the Montana Rules of Evidence, the rules of evidence should apply in the class certification context.

A party seeking class certification must affirmatively demonstrate compliance with the rule — in other words, "prove that there are *in fact* sufficiently

numerous parties, common questions of law or fact, etc.” *Wal-Mart*, 131 S. Ct. at 2551. Facts are proven with evidence. Requiring admissible evidence to substantiate compliance with Rule 23 is consistent with the “rigorous analysis” that this Court has held must be undertaken in the class certification context. *See, e.g., Mattson, supra*. Permitting class certification on the hope or expectation that admissible evidence can ultimately be presented at trial to substantiate class certification is the equivalent of allowing certification based upon the allegations of the complaint, a practice condemned both by this Court and the United States Supreme Court. *See, e.g., Mattson, supra; Wal-Mart, supra*. The District Court’s failure to apply the Rules of Evidence to exclude much of the material on which Jacobsen relied in moving for class certification was a legal error requiring reversal.

#### **CONCLUSION AND RELIEF REQUESTED**

For the reasons set forth herein, Allstate respectfully requests that this Court reverse the Order granting class certification in total, and remand the action for further proceedings.

Respectfully Submitted this 6th day of June, 2012.

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**APPENDIX G**

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IN THE SUPREME COURT  
OF THE STATE OF MONTANA

No. DA 12-0130

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ROBERT JACOBSEN, and all other [sic]	)
similarly situated,	)
Plaintiff/Appellee,	)
-vs-	)
ALLSTATE INSURANCE COMPANY,	)
Defendant/Appellant.	)

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**APPELLANT’S PETITION FOR REHEARING**

\* \* \*

Pursuant to Montana Appellate Rule 20, Defendant/Appellant Allstate Insurance Company (“Allstate”) respectfully Petitions for Rehearing of this Court’s August 29, 2013 decision (the “Opinion”).<sup>1</sup>

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<sup>1</sup> The Opinion is incorrect for a variety of reasons, but, given the limited grounds for this petition, Allstate has focused on the issues discussed herein.

## I.

**THE STAND-ALONE “ACTUAL  
FRAUD/ACTUAL MALICE” CLASS  
DETERMINATION CONFLICTS WITH  
STATUTES, CONTROLLING PRECEDENT  
AND OVERLOOKS FACTS MATERIAL  
TO THE DECISION.**

The Opinion “reverse[d] the District Court’s certification of a class-wide punitive damages award based on our concerns over the award’s potential effect on the due process rights of Allstate.” (Opinion, ¶ 76.) However, the Opinion created a different and unprecedented form of class relief that was neither requested by the plaintiff nor briefed by the parties: “The trier of fact in the class trial will also make a determination as to whether Allstate’s implementation of the CCPR program involved actual fraud or actual malice, such as could justify the entry of punitive damages following a finding of actual damages in the ensuing individual cases.” (Opinion, ¶ 90.) The Opinion’s *sua sponte* creation of an “actual fraud” or “actual malice” class determination is contrary to this Court’s decisions, Montana statutes and Due Process under the Montana and United States Constitutions, and overlooks facts material to the decision.

**A. The Creation of An “Actual Fraud” Class  
Determination Conflicts With *Gonzalez  
v. Montana Power Company*.**

This Court’s decision in *Gonzalez v. Montana Power Company*, 2010 MT 117, ¶ 14, 356 Mont. 351, 261 P.3d 328 expressly precludes certification of a class determination of “actual fraud” for punitive damages purposes:

“‘Actual fraud’ exists only when the plaintiff has a *right to rely* upon the representation of the defendant and suffers injury as a result of that reliance . . . . The question of whether a party has a right to rely upon another’s representation could create specific questions of proof best resolved in individual trials.” (Emphasis original.)

Although the Opinion discusses *Gonzalez* (at ¶ 78), it fails to consider the passage quoted above. Here, a class member’s right to rely on alleged misrepresentations, as well as whether such reliance caused that individual class member injury, would similarly “best be resolved in individual trials.” *Gonzalez* ¶ 14.

**B. A Stand-alone Determination of “Actual Malice” Improperly Uses the Class Procedural Device To Alter Substantive Rights.**

Due Process precludes using the class action procedural device to reduce or expand substantive rights. *See Wal-Mart Stores, Inc. v. Dukes*, 131 Sup. Ct. 2541, 2561.<sup>2</sup> An individual seeking only declaratory and injunctive relief would not be permitted to have a “stand-alone” determination of “actual malice” from a trier of fact, to possibly use in some subsequent litigation. Such a request would run afoul of

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<sup>2</sup> The *Wal-Mart* Court based its analysis on the Rules Enabling Act, but the same result is demanded by Due Process. *See, e.g., Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201,205 (Tex. 2007) (“... due process requires that class actions not be used to diminish the substantive rights of any party to the litigation.”) The Opinion does not discuss *Wal-Mart* in connection with the class “actual malice” determination.



this Court's precedent forbidding advisory opinions. *See, e.g., Plan Helena, Inc. v. Helena Reg'l Airport Auth Bd*, 2010 MT 26, ¶¶ 8-9, 355 Mont. 142, 226 P.3d 567. That result cannot be altered by labeling such a determination a “class determination,” because to do so would alter substantive rights. The Opinion’s creation of a “stand-alone” class determination of “actual malice” violates this principle in three distinctly different, but equally impermissible ways.<sup>3</sup>

First, divorcing an “actual malice” determination from the specifics of individual claims violates Due Process. Conduct “independent from the acts upon which liability was premised *may not* serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.” *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (emphasis supplied). Indeed, “the conduct that harmed [the plaintiff] is the *only* conduct that is relevant . . . .” *Id.*, at 424 (emphasis supplied). Due Process imposes such a limitation because only conduct that has a “nexus to the specific harm suffered by the plaintiff” can properly support a punitive damage award. *Id.*, at 422-23.

Here, the “actual malice” class determination will be made long before any of the subsequent individual suits are resolved, and the conduct upon which liability is premised in such subsequent suits may have nothing to do with the implementation of CCPR claims handling processes. Claims can be allegedly underpaid for any number of reasons having

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<sup>3</sup> The arguments that follow also apply to an “actual fraud” class determination.

nothing to do with CCPR's implementation (*e.g.*, mistake of fact, excusable oversight, negligence, good faith differences of opinion).

For example, if an adjuster simply forgot to include \$1,000 in medical bills in her evaluation of a particular claim, an allegedly improper motive in CCPR's implementation would neither be the conduct upon which liability was premised in a subsequent suit, nor would it have the required "nexus" to the harm suffered by plaintiff. However, if the class "actual malice" determination succeeded, that claimant would be entitled, upon proving compensatory damages for the adjuster's negligence, to have the jury instructed that Allstate acted with "actual malice," even though CCPR had nothing to do with forgetting to include medical bills in the claims analysis. Such a result improperly divorces the conduct causing harm from the "actual malice" determination in violation of Due Process.

This is a far cry from *Gonzalez*, where "[t]he *Gonzalez* class members' entitlement to compensatory damages would be established during the class trial and would support an award of punitive damages." (Opinion, ¶ 78.) In other words, in *Gonzalez* "the acts upon which liability was premised" would be the basis for punitive damages. There would be a "nexus" between the "actual malice" determined and plaintiffs' injuries. *Gonzalez* did not sanction the creation of a "free-floating" "actual malice" class determination untethered to the conduct upon which liability was premised.<sup>4</sup>

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<sup>4</sup> The defendants in *Gonzalez* were concerned there was no way to determine if the ratio of actual to punitive damages was constitutionally permissible. See *Gonzalez* Appellant's Brief, p.

Second, the class “actual malice” determination also violates Allstate’s Due Process right to raise all defenses. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). The class determination presumes that if improper motive can be shown with regard to the 1995 “implementation of CCPR,” combined with a subsequent “decrease in settlement payments to the class as a whole,” then there is necessarily “actual malice” for the entire class period of more than fifteen years. That unprecedented presumption has no basis in logic or fact. The record affirmatively demonstrated that CCPR processes have been modified over time, and that not all CCPR processes apply to every claim. (Doc. 233, Sullivan Aff., ¶ 5; *See* Appellant’s Reply Brief, pp. 6-7.) If a claimant who settled a claim in 2007 were to file a bad faith lawsuit seeking punitive damages, he or she would need to prove that Allstate acted with “actual malice” as to the actual processes applied to the claim, and Allstate could introduce evidence that the processes actually applied produced an appropriate result or were otherwise justified. The Opinion’s “actual malice” formulation, however, purports to bar such individual defenses, depriving Allstate of its right to defend itself against the class “actual malice” determination.<sup>5</sup>

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8. This Court found the District Court had sufficient “tools” to keep any punitive damage award within “acceptable bounds,” *i.e.*, within a constitutionally permissible ratio. (Gonzalez, ¶ 15.) Here, however, the situation is different: there are no “tools” left for the District Court to address the Due Process problems created by divorcing the class “actual malice” determination from the conduct giving rising to liability, because the Opinion purports to eliminate that requirement all together.

<sup>5</sup> Because *McReynolds v. Merrill Lynch*, 672 F.3d 482 (7th Cir. 2012) did not involve a class punitive damage claim, an attempt

Third, the Opinion’s “actual malice” class determination eliminates the requirement of proving a high probability of injury *to the plaintiff*, and replaces it with a showing of “actual malice” in the implementation of CCPR by proof of a “decrease in settlement payments *to the class as a whole*,” (Opinion, ¶ 48; emphasis supplied.) The “class as a whole” is not some independent entity with the power to sue and be sued regardless of whether each member of the class suffered a common injury. The Opinion wholly eviscerates Rule 23(a)’s commonality and typicality requirements that each member of the class must have suffered a common injury (*Wal-Mart*, 131 Sup. Ct. at 2551), and Section 27-1-221(2)’s requirement that there must be a high probability of injury “to the plaintiff.” As the Opinion itself implicitly acknowledges, even if the alleged decrease in settlement payments is the equivalent of injury “to the class as a whole,” it does not establish high probability of injury to each plaintiff, as required by both Section 27-1-221(2) and Due Process.

## II.

### **THE CLASS DECLARATORY AND INJUNCTIVE CLAIMS USE THE CLASS ACTION DEVICE TO ALTER SUBSTANTIVE RIGHTS IN CONFLICT WITH CONTROLLING PRECEDENT AND DUE PROCESS.**

As discussed, *supra* at p. 3, the class action procedural device cannot be used to alter substantive rights. However, as with the “actual malice” class, the Opinion’s re-formulation of the class declaratory

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to determine “actual malice” separate from liability, or an attempt to bar individual defenses, it did not address the Due Process concerns raised here.

and injunctive claims violates Allstate's Due Process right to raise defenses and alters the substantive requirements of the claims themselves, in an attempt to accommodate plaintiffs request for the procedural class action device.

**A. The Opinion Violates Allstate's Due Process Right To Raise All Available Defenses.**

Although agreeing that Allstate has a Due Process right to present every available defense to claims for punitive damages (Opinion, ¶ 78), the Opinion suggests Allstate may not contest the class declaratory and injunctive relief by presenting evidence that most, many or some claims were handled fairly and settled properly. (*Id.*, ¶¶ 45-46;66.) Allstate's Due Process right to present all defenses applies not just to punitive damage claims, but to every claim for relief. *See, e.g., Lindsey v. Normet*, 405 U.S. 56, 66 (1972). To rebut Jacobsen's assertion of *per se* violation of 33-18-201(1) or (6), Allstate must be able to point to both statistical evidence and specific individual examples of how applications of the CCPR processes produced results that comply with the statutory requirements. *See* Opinion, at ¶ 111 (McKinnon, J. , dissenting,) ("to prevail on such a challenge, the plaintiff must show that 'no set of circumstances exist under which'" CCPR would be valid); ¶ 141 (statute requires demonstrating liability was relatively clear, that misrepresentations were pertinent to coverage, and whether Allstate had reasonable basis to contest claim). "[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 131 Sup. Ct. at 2561.

**B. The Opinion Eliminates the UTPA's Standing Requirement, Thereby Creating a "Headless" Class In Violation of Rule 23 and Due Process.**

This Court has never sanctioned a class action where the putative class representative did not have individual standing to pursue the class claim. *See, e.g., Hop v. Safeco Ins. of Ill.*, 2011 MT 215, 361 Mont. 510, 261 P.3d 597; *LaMere v. Farmers Ins. Exchange*, 2011 MT 272, 362 Mont. 379, 265 P.3d 617. Such a "headless" class would violate Due Process by giving the class representative the unfair "advantage of being able to litigate not on behalf of [himself or herself], but on behalf of a 'perfect plaintiff' pieced together for litigation." *Broussard v. Meineke Disc Muffler Shapes, Inc.*, 155 F. 3d 331, 344-45 (4th Cir. 1998).

Allstate did not assert that Jacobsen lacked standing merely because his initial release was rescinded. (Opinion, ¶ 53.) Jacobsen also lacks standing because his claim was already re-opened and re-adjusted and he does not challenge the result of that process. And Jacobsen never took issue with the adjustment of his auto property damage claim. Therefore, he can show no injury warranting a further reopening of either his BI or PD claim. The UTPA conditions a private right of action upon actual damages caused by a violation. Section 33-18-242(1), MCA.<sup>6</sup> If a plaintiff cannot satisfy that requirement, he has no

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<sup>6</sup> Even if construed as a Declaratory Judgment Act claim, injury for the class representative and each class member is required. *Worth v. Seldin*, 422 U.S. 490, 499 (1975); *accord Lewis v. Puget Sound Power & Light Co.*, 2001 MT 145, ¶ 17, 306 Mont. 37, 29 P.3d 1028.

standing to pursue an UTPA cause of action for any type of relief, or to represent a class. *See, e.g., Hop.*<sup>7</sup>

The Opinion also creates a Due Process quagmire for the class members. A jury could conclude that Jacobsen, whose claim was re-opened within weeks of his requesting it and whose claim was ultimately settled to his satisfaction, is simply not entitled to relief on the merits. As the representative plaintiff, his failure to establish his own claim would normally result in a binding determination against all absent class members, who, in this case, are unable to opt out. (Opinion, ¶ 51.)

The Opinion suggests these problems with Jacobsen's typicality and standing can be avoided by ignoring them until subsequent individual actions. (Opinion, ¶ 57.) Class actions require the class representative --and his or her individual claims --to be a proxy for the absent class members and their claims; "as goes the claim of the named plaintiff, so goes the class." (*Id.*, ¶ 51; citation omitted.) The Opinion reverses this proposition, making Jacobsen's individual claim dependent upon the outcome of the class claims, and leaving the class with no true representative. (*Id.*, ¶ 57 (Jacobsen's injuries to be aired in

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<sup>7</sup> *Hop* cannot be distinguished by claiming that standing was absent there due to an inability to satisfy the "procedural" requirements of bringing an UTPA suit, rather than "any factual differences in the substantive details of his claim." (Opinion, ¶ 54.) Like Section 33-18-242(6), Section 33-18-242(1)'s requirement for actual damages caused by the violation is a condition precedent that must be satisfied for a private right of action under the statute. Moreover, *LaMere's* holding was based precisely on the "factual differences in the substantive details" of plaintiffs' claims. *LaMere* was not discussed by the Opinion with regard to standing or typicality.

a later, individual suit for damages “*if* the court awards the requested class injunctive and declaratory relief.”) Such a result violates Due Process. *See, e.g Phillips v Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

### CONCLUSION

For the reasons set forth above, Allstate respectfully requests that its Petition for Rehearing be granted, and the Opinion be modified by: (1) eliminating the “actual fraud/actual malice” class determination; and/or (2) reversing certification of the declaratory and injunctive classes.

Respectfully Submitted this 13<sup>th</sup> day of September, 2013.

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**APPENDIX H**

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\* \* \*

MONTANA EIGHT JUDICIAL DISTRICT COURT,  
CASCADE COUNTY

ROBERT JACOBSEN,  
Plaintiff,

vs.

ALLSTATE  
INSURANCE  
COMPANY and  
CHARLES CONNERS,  
Defendants.

Cause No. ADV-03-  
201(D)

Honorable Dirk M.  
Sandefur

**DEFENDANTS'  
OBJECTIONS AND  
RESPONSE TO  
PLAINTIFF'S  
SUPPLEMENTAL  
SUBMISSION TO  
PLAINTIFF'S  
MOTION TO CERTIFY  
THE CLASS**

\* \* \*

**B. As a Matter of Due Process, Class-wide  
Causation and Injury Cannot Be Proven  
Based Upon “Averages”.**

Plaintiff's reliance upon Roberts' opinion regarding “average” amounts of damage demonstrates that Plaintiff will not be able to prove causation or injury on a class-wide basis at trial and thus, class certification should be accordingly denied. *See, e.g., In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 311 (3d Cir. 2009) (“If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.” (ci-

tations omitted)). Rather than offer proof of class-wide individual injury, Plaintiff attempts to satisfy that requirement with mere “averages” by offering Roberts’ opinion that “[s]ince the *average* Allstate claims payment is estimated to be 20[%] below the market *average* and about 30% below the amount required to fully indemnify a claimant for his loss . . . .” (Pl. Supp. Submission, p. 3.) As a matter of due process, however, class-wide injury cannot be established based upon proof of “averages.” *Cf Aiello v. Providian Fin. Corp. (In re Aiello)*, 231 B.R. 693, 716 (N.D. Ill. 1999) (a court “cannot impute and award ‘average’ damages . . .”). By definition, an “average” is derived by combining figures both above the “average” and below the “average.” This necessarily means that an “average” cannot substitute as proof that any particular putative class member suffered an injury. *See, e.g., White v. Allstate Ins. Co.*, Case No. Civ. No. 3:98-cv-1586 (PCD) (D. Conn. 2001) (denying class certification in part because “[p]laintiffs rest their allegation of damages in part on evidence that Defendant was aware that ‘when an attorney represents a claimant, [it] pay[s] 2-3 times more to settle the claim.’ However . . . it is not clear that each class member may have sustained any damages at all from Defendant’s conduct.”) (attached to Defendants’ Opposition to Class Certification as Ex. B.).

Class certification is a procedural device that cannot either create or diminish substantive rights. *Deposit Guaranty National Bank v. Roper*, 100 S. Ct. 1166, 1171 (1980) (“Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.”) Under the Montana UTPA and common law bad faith, no claimant has standing to sue unless a defendant’s violation caused actual damage (injury).

*See, e.g.*, § 33-18-242; § 33-18-242(4) (private right of action limited to instances where plaintiff can prove “damages as were proximately caused by the violation . . .”); Defs. Brief pp. 14-15. A class action does not change this requirement. It must be proven that each class member suffered an injury caused by defendant’s violation, and Allstate would have a Due Process right to offer proof as to any or all class members to dispute such injury. *Advanced Acupuncture Clinic, Inc. v. Allstate Ins. Co.*, Civ. No. 07-4925, 2008 WL 4056244, \*15 (D.N.J. Aug. 26, 2008) (class certification denied in part because “[d]efendants would have the right to raise defenses against each individual claim.”). Accordingly, even assuming *arguendo* that the statements in Roberts’ report regarding “averages” are admissible, Plaintiff’s attempt to rely on such evidence is improper and insufficient to support class certification.

\* \* \*

DATED this 18th day of February, 2011.

\* \* \*