IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 12-0130

ROBERT JACOBSEN,

Plaintiff/Appellee,

v.

ALLSTATE INSURANCE COMPANY,

Defendant/Appellant.

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

On Appeal from the Eighth Judicial District Court, Cause No. ADV-03-201(D)
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INTRODUCTION, SUMMARY OF ARGUMENT & INTEREST OF *AMICUS CURIAE*

In what may be an unprecedented decision, the court below certified a class of insurance claimants to seek punitive damages without establishing any right to compensatory damages and without showing harm—or, as the court put it, "irrespective of individual outcomes." Or. In Re Mots. Challenging 4th Amend. Compl. & Or. Certifying Class Action 140, 145 (Jan. 30, 2012) ("Or."). This violated settled Montana law—reiterated by this Court in Jacobsen's first appeal—that a punitive damages award must be predicated on compensatory damages. The decision below also violated principles of constitutional due process, which limit the size of punitive damage awards *and* give defendants the right to notice—not only of the conduct that may subject them to punishment but also of the nature and extent of any such punishment—and to a meaningful opportunity to be heard in their own defense. *E.g.*, *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

To escape these critical constraints, the district court declared the Plaintiffs' alleged injury "indivisible" (Or. 155)—and thus not subject to compensatory damages or individual defenses. But the court never explained the meaning of "indivisible" or mentioned any evidentiary basis for it. Instead, the court appears to have relied on nothing more than Allstate's supposedly

rising profits and declining claim payments. This is precisely the sort of "unsavory" evidence that the U.S. Supreme Court has said time and again cannot support punitive damages.

Left undisturbed, the decision below will thus leave Allstate—and future business defendants in Montana—to litigate a punitive damages class action against thousands of claimants with both arms tied behind its back: First, it cannot challenge the size of its punitive liability based upon a comparison with any compensatory award. And second, Allstate is now procedurally barred from defending itself by showing that, in its interactions with each class member, and given the particular circumstances of each such interaction, its conduct was entirely appropriate—or at least not so malicious as to merit punishment. Each of these limitations is unconstitutional, and together they unquestionably demand reversal.

If that were not enough, the district court also ignored the basic element of the principal statutory cause of action at issue here. To establish a violation of the Montana Unfair Trade Practices Act ("UTPA"), a plaintiff must show "actual damages caused by the insurer's violation" of the Act. Mont. Code Ann. § 33-18-242(1). With its novel "indivisible injury" concept, however, the district court authorized an award of punitive damages to an entire class without showing that any claims were improperly handled. This, too, was error.

Such mistaken class-action innovations directed at a business defendant are of particular concern to the Chamber of Commerce of the United States of America, which is the world's largest business federation. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in courts throughout the nation on issues of national concern to the business community. This is such a case.

FACTUAL BACKGROUND

To appreciate the district court's error in certifying the class here, it is important to recall this Court's instructions in Jacobsen's first appeal. There, litigating only for himself, Jacobsen won compensatory damages consisting of attorneys' fees and punitive damages. But this Court held that attorneys' fees do not qualify as compensatory damages, and that "without an award of compensatory damages, there can be no award of punitive damages." *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 66, 351 Mont. 464, 215 P.3d 649. This

Court thus remanded for trial on an alternative theory of compensatory damages.

Despite this Court's command that punitive damages be linked to compensatory damages, on remand the district court certified a class of plaintiffs regardless of compensatory damages—indeed, "irrespective of individual outcomes." Or. 140, 145; *accord id.* at 88, 89, 103, 142. In other words, the court not only authorized class-wide punitive damages without compensatory damages, but without any individual *injuries*.

Individual harm could be set aside, the court said, because the class "as a whole" suffered "indivisible harm." Or. 155. Remarkably, the court never defined this pivotal term. Yet it repeatedly asserted that the class suffered "indivisible harm" thanks to what it called Allstate's "zero-sum economic theory." *Id.* As evidence of this "theory," the court apparently relied upon a PowerPoint slide (submitted by the named plaintiff) that was allegedly created by McKinsey & Company. Doc. 222, Ex. A. Among other things, the "zero-sum" slide stated that "improving Allstate's casualty economics will have a negative economic impact on some medical providers, plaintiff attorneys, and claimants"; "[z]ero sum economic game—Allstate gains—[o]thers must lose." *Id.*

Notably, the slide did not say anything about reducing claims, much less reducing *legitimate* claims. To the contrary—in a portion not mentioned by the district court—the slide called for paying "fair value," and stated that Allstate's current payments were "above fair value" based on the following:

- "Abusive medical testing and treatment";
- "Unnecessary plaintiff attorney payments"; and
- "Claimant payments above fair value."

Id. Moreover, Allstate submitted evidence showing that it was overpaying claims by an average of sixteen percent. Doc. 233, Aff. Sullivan ¶ 2.

Nonetheless, ignoring this additional evidence, and without citing any evidence that the "zero-sum" language affected Allstate's *revised* claims-processing policies (summarized in a manual called "Claim Core Process Redesign" or "CCPR"), the district court repeatedly characterized the "zero-sum economic game" as Allstate's "theory" of claim reimbursement. Or. 60, 89, 102, 103, 106, 110, 111, 136, 139, 142, 155. And the court accepted Plaintiffs' assertion that, since implementation of the new system, profits were rising and "Allstate has reduced the amount paid out for bodily injury claims by almost 20 percent." Or. 61.

Taking these assertions together, the district court concluded that Allstate's supposed "zero-sum" "theory," its alleged rising profits, and its

purported declining payouts were all connected. And on that basis, the court certified a Rule 23(b)(2) class. According to the court, the practices in Allstate's revised manual "are a common pattern and practice," and "Allstate's . . . use of this pattern and practice . . . 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* [sic] *profit increases and corresponding decreases in the total amount of compensation* paid to the . . . claimants.

Or. 155 (emphasis added). Nowhere did the district court cite evidence showing an "inversely proportional relationship" between Allstate's alleged profit increases and supposed decreases in claims payments. Nor did the court explain how such a relationship, standing alone, satisfied the actual damage requirement of the UTPA or negated the possibility of Allstate showing a "reasonable basis in law or in fact for contesting the claim or the amount of the claim." Mont. Code Ann. § 33-18-242(5).

Nevertheless, the district court authorized "class-wide punitive damages . . . predicated on the above-referenced class-wide conduct." Or. 156. And because the court determined to award such damages "irrespective of individual outcomes" (*id.* at 140, 145), Allstate could not defend itself from this punishment by showing that individual class members were not harmed, or

were overpaid, or that Allstate's actions toward each class member were appropriate in the circumstances.

Notably, in seeking certification on these novel terms, Plaintiffs' counsel requested fees under Montana's "private attorneys' general doctrine." Or. 149-150. "Under this doctrine, the court has discretion to award a prevailing party the cost of attorney fees incurred in successfully prosecuting litigation if . . . the litigation vindicated constitutional interests," "private enforcement was necessary," and "a significant number of people stand to benefit." *Id.* at 149 (citation omitted). Although no fees were awarded under this theory (the court held that constitutional interests were not sufficiently implicated), the district court did assert that the class claim "furthers the important public policy" of "*regulating the insurance industry*." *Id.* at 150 (emphasis added). The court did not attempt to square this conclusion with the Montana Constitution, which commands that "no person . . . charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others." Mont. Const. art. III, § 1.[1]

[1] In addition to certifying a "punitives only" class, the district court overlooked the statute of limitations, which bars third-party claims within a year of settlement or judgment and first-party claims two years from the alleged violation. Mont. Code Ann. § 33-18-242(6).

ARGUMENT

I. In certifying a punitive damages-only class, the decision below violates Allstate's constitutional right to due process.

The district court's naked attempt to regulate the insurance industry through a class-certification decision violates the United States Constitution. An award of punitive damages is a punishment, and as such it is subject both to "procedural and substantive constitutional limitations . . . . The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments." *Seltzer v. Morton*, 2007 MT 62, ¶ 149, 336 Mont. 225, 154 P.3d 561 (2007) (quoting *State Farm v. Campbell*, 538 U.S. 408, 416 (2003)). By certifying a class to inflict punishment on Allstate "irrespective of individual outcomes" (Or. 140), the district court violated Allstate's right to substantive *and* procedural due process. We address these violations in turn.

A. By certifying a punitive damages class "irrespective" of individual class member harm, the decision below violates Allstate's right to substantive due process.

As the U.S. Supreme Court has repeatedly held, "[d]espite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment imposes substantive limits on that discretion." *Cooper Indus., Inc.*

v. Leatherman Tool Group, Inc., 432 U.S. 424, 433 (2001). One such limit is that "[i]t should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive 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." *Campbell*, 538 U.S. at 419 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). Indeed, this principle is embodied in this Court's own precedents.

1. As a matter of fact, the district court's decision flouts the instructions of this Court in this very case—holding that, "without an award of compensatory damages, there can be no award of punitive damages." *Jacobsen*, ¶ 67. Though not couched as a matter of due process, this is settled Montana law. *Id.*; Mont. Code Ann. § 27-1-220 ("a judge may award, *in addition to compensatory damages*, punitive damages") (emphasis added). Of course, sometimes compensatory damages are small or difficult to calculate. And in such cases, "although the amount or extent . . . cannot be shown in money value, exemplary damages may be awarded"—"*if actual damage is shown.*" *Paulson v. Kustom Enterprises, Inc.*, 157 Mont. 188, 202, 483 P.2d 708, 716 (1971) (citation omitted; emphasis added).

That last phrase is key. It is black-letter law that to support punitive damages there must be actual damages—that is, some injury. "[A]ctual damages are a predicate for punitive damages, and an individual with no real or actual damages has no right of action for punitive damages." *Stipe v. First Interstate Bank-Polson*, 2008 MT 239, ¶ 23, 344 Mont. 435, 188 P.3d 1063 (2008); *accord Paulson*, 483 P.2d at 715 ("[p]unitive damages are not given as a matter of right, nor can they be made the basis of recovery independent of a showing which would entitle the plaintiff to an award of actual damages").[2]

This makes sense. Without some injury, and a plaintiff willing to assert that injury, counsel for a class of punitive damages plaintiffs is nothing less than a roving private attorney general, attempting to dole out punishments on behalf of the public at large. That is unlawful. To be sure, the Montana False Claims Act authorizes private citizens to sue for penalties on behalf of the public (Montana Code Annotated §§ 17-8-403, 17-8-406), but Montana Rule 23 does not. As this Court explained in *Paulson*:

> No right of action for exemplary damages ... is ever given to any private individual who has suffered no real or actual damages. *He has no right to maintain an action merely to inflict punishment upon some supposed wrongdoer.* If he has no cause of action

[2] Indeed, punitive damages aside, Montana law does not allow *any* UTPA claim to be maintained apart from actual damages. Mont. Code Ann. § 33-18-242(1).

> independent of a supposed right to recover exemplary damages, he has no cause of action at all.

Paulson, 483 P.2d at 715 (emphasis added).

The decision below violated these principles by authorizing punitive damages "irrespective" of whether individual class members were injured—which is to say, regardless of whether they had a cause of action. Thus, the court authorized class counsel to serve as private attorneys general—which, ironically, is precisely how they styled themselves, having asked to recover attorneys' fees under Montana's "private attorneys' general" doctrine. The district court correctly declined this request, but failed to see the contradiction between that decision and its certification of a class effectively represented by private attorneys general.

2. In violating these principles of Montana law, the district court also violated the federal due process standards enunciated in *Campbell*. There, the Supreme Court considered the substantive due process limits on punitive damage awards—especially the "most important indicium" of reasonableness, the "degree of reprehensibility of the defendant's misconduct." *Campbell*, 538 U.S. at 419. As noted above, a court weighing reprehensibility must "presume[] a plaintiff has been made whole for his injuries by compensatory

damages" (*id.*); yet the decision below ignores that very presumption by failing to require that class plaintiffs first show a right to compensatory damages.

This was a categorical error. As other leading courts have repeatedly found, a jury must consider compensatory damages *before* punitive damages. *E.g.*, *Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1262 (Fla. 2006) ("As a matter of law, the punitive damages award violates due process because there is no way to evaluate the reasonableness of the punitive damages award without the amount of compensatory damages having been fixed"); *Sw. Ref. Co., Inc. v. Bernal*, 22 S.W.3d 425 (Tex. 2000) (rejecting trial plan that called for deciding "class representatives' actual damages" before punitive damages, because it "allowed the jury [to] decide punitive damages for the entire class without knowing the severity of the offense or the extent of compensatory damages, if any, for each of the 885 plaintiffs"); *cf. Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 418 (5th Cir. 1998) ("[p]unitive damages must be determined after proof of liability"). Here, however, the court below did away with compensatory damages altogether. Thus, the court did not merely put the cart *before* the horse, it altogether did away with the horse.

Compounding its error, the court also failed to require that individual plaintiffs suffer any actual harm. Thus, if the decision below stands, the jury in this case will be permitted to award punitive damages for acts that *did not*

actually injure the class plaintiffs. This is forbidden. *Campbell* makes clear that courts may not "expand the scope of the case so that a defendant may be punished for any malfeasance." *Campbell*, 538 U.S. at 424. As the U.S. Supreme Court further explained:

> A defendant's dissimilar acts, 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.* Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.

Id. at 422-423 (emphasis added). Applying this principle, the Court rejected the lower court's reliance on "tangential" evidence that "bore no relation" to the plaintiff's harm. For example, the plaintiffs there had introduced evidence:

- "that State Farm's [allegedly bad faith] decision . . . was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide";
- that "State Farm's continuing illicit practice created market disadvantages for other honest insurance companies because these practices increased profits"; and
- that State Farm made underpayments to third-party claimants "on the theory that each dollar of profit made by underpaying a third-party claimant is the same as a dollar made by underpaying a first-party."

Id. at 420, 424. Note the similarities to the assumptions relied on by the district court here:

- that Allstate's claims practices "are a common pattern and practice," resulting from its so-called zero-sum economic theory; and

- that there was an "inversely proportional relationship between Allstate [sic] profit increases and corresponding decreases in the total amount of compensation paid to the . . . claimants."

Or. 155.

In both cases, the lower courts focused on the companies' broad practices and general information about profits. At least in *Campbell*, however, the lower court could compare the evidence to actual injuries suffered by the plaintiffs. *See Campbell*, 538 U.S. at 419 (*e.g.*, the insurer "altered the company's records to make [the plaintiff] appear less culpable"). Here, by contrast, the individual class members need not be harmed *at all*—allowing Allstate to be punished for "any malfeasance." *Id.* at 424.

Thus, if allowed to proceed, the punitive damages in this case will be "[i]mposed indiscriminately" and hence would have a "devastating potential for harm." *Campbell*, 538 U.S. at 417. But, as the Court held in *Campbell*, "[a] State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim." *Id.* at 418 (citation omitted). Rather, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.* at 426. And

for that reason, as a leading commentator has put it, "[t]here is no substitute for a jury's particularized determinations as to whether, and how, punishable conduct affected each claimant." 2 McLaughlin on Class Actions § 8:18 (8th ed.).

In short, by requiring *no* harm to the individual plaintiffs, and *no* damages to be recovered, the district court breached Allstate's right to substantive due process.

3. Nor did the court save its decision by declaring that the class suffered "indivisible harm." Or. 155. As noted, the court never explained what this phrase meant, but it may have been drawn from *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011). According to the district court, under *Dukes*, "monetary relief is available as a remedy incidental to class-wide declaratory and injunctive relief . . . only if the monetary relief . . . affords *indivisible . . . relief* . . . to the class as a whole." Or. 138 (emphasis added). Of course, the Supreme Court in this passage spoke of indivisible "relief," not injury. And *Dukes* did *not* affirm that monetary relief is available under Rule 23(b)(2). To the contrary, it acknowledged its earlier "serious doubt" about that and held instead that claims for monetary relief "*may not*" be certified under 23(b)(2), "at least where . . . the monetary relief is not incidental to the injunctive or declaratory relief." *Dukes*, 131 S.Ct. at 2557.

But the deeper problem with the district court's use of the phrase "indivisible injury" is that there is nothing here to support *any* class-wide injury—"indivisible" or not. The only fact even related to injury the court cited was a supposed "inversely proportional relationship between Allstate profit increases and corresponding decreases in the total amount of compensation paid to the class ... as a whole." Or. 155. Even if that assertion bears out at trial, it proves nothing relevant here. Making a profit is not unlawful. Nor does it necessarily cause injury to decrease aggregate claims payments—particularly where, as here, Allstate showed that it had been *overpaying* claims by sixteen percent.

But even if there were something wrong with generally declining reimbursements and rising profits, merely identifying such a trend still shows no connection to an individual plaintiff's injury—as required by due process. As the court held in *Campbell*, "[c]ourts [may not] expand the scope of the case so that a defendant may be punished for any malfeasance"; instead, "the precise award in any case ... must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Campbell*, 538 U.S. at 424, 425.

Here, the district court did not identify any actual harm to any actual plaintiff. To the contrary, it eschewed that very inquiry. Accordingly, it erred

in certifying the class based solely on the prospect that *some* class members, sometime, might be able to justify punitive liability.

B. The decision below violates Allstate's right to procedural due process by allowing Allstate to be punished without any opportunity to defend itself.

The district court's certification also deprived Allstate of procedural due process—namely, notice and an opportunity to be heard. We discuss these in turn.

1. The decision below first deprived Allstate of its right to fair notice—both of its supposed wrong and its possible penalties. As the Supreme Court has held, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. "Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior." *Campbell*, 538 U.S. at 418. Here, by untethering punitive damages from any requirement of compensatory damages or individual harm, the district court left Allstate exposed entirely to the whim of a jury to punish for "any malfeasance" without limit—that is, "indiscriminately." *Id.* at 424.

This was unconstitutional. As the Supreme Court warned in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), defendants lack any means of challenging the existence, cause, or magnitude of harms to non-parties:

> [P]ermitting punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified.

Id. at 354. Similarly, here, Allstate cannot challenging the existence, cause, or magnitude of injuries to class members. After all, what, really, is "indivisible harm" to the class as a whole? Beyond supposedly rising profits and declining claims, under what specific circumstances did this "indivisible" injury occur, and how did Allstate cause it? How, exactly, did this "indivisible harm" affect class members, either individually or as a group? And most important, how could Allstate—or any other company—eliminate or at least reduce its exposure under such a theory in the future?

Trial here will not—and cannot—answer such questions. Indeed, the only significant difference between this case and *Philip Morris* is that the district court's proposed approach is not "*near* standardless"; it *is* standardless. Allstate will leave trial no wiser as to "the conduct that will subject [it] to

punishment" or of "the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. "Arbitrariness, uncertainty, and lack of notice" are guaranteed. *See Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2625 (2008) ("the real problem" with punitive damages awards is their "stark unpredictability").

As noted, the district court sought to justify its decision as "further[ing] the important public policy" of "*regulating the insurance industry*." Or. 150 (emphasis added). But punishment without guidance as to how to properly order one's future conduct is not "regulation" in any meaningful sense.

Indeed, juries are notoriously ineffective at traditional regulation even when operating under clear guidance. But when permitted to inflict punishment for something as amorphous as "indivisible harm," a jury's attempt at regulation is a disaster. That is why regulation is committed by law to agencies aware of the risks and benefits of corporate conduct and thus able to: (a) identify the desired behavior; and (b) calculate the punishment necessary to deter misbehavior without over-deterring. *See* Mont. Const. art. III, § 1 ("The power of the government of this state is divided into three distinct branches-legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others . . . ."); *Mont. Wildlife Fed. v. Sager*, 190 Mont. 247, 620 P.2d 1189, 1198 (1980) ("when dealing with the police

power to protect the public safety and welfare, it is for the legislature to decide what regulations are needed").

Unlike legislatures and executive departments, juries are charged with resolving only specific disputes between "adversaries asserting specific claims or interests peculiar to themselves." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 n.10 (1974). Jurors hear only the facts presented by the parties—subject to rules of evidence—and lack any legal mandate (let alone the capacity) to investigate circumstances beyond the case. This lack of authority and power to gather information stands "in sharp contrast to the political processes in which the [legislature] can initiate inquiry and action, define issues and objectives, and exercise virtually unlimited power by way of hearings and reports, thus making a record for plenary consideration and solutions." *Id.* Juries "may be competent to determine and assess compensatory damages," but "are unlikely . . . to have even the most rudimentary comprehension of what reasonably must be done to assure the safety of . . . the public." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 285 (1984) (Powell, J., dissenting). And for that reason, juries are inept at regulation—including conveying to the regulated community the regulation's goals and how that community can avoid future punishment.

Because it deprives Allstate of fair notice of the conduct exposing it to punishment, the decision below is unconstitutional.

2. In addition to depriving Allstate of its right to fair notice, the district court's decision effectively prevents Allstate from defending itself.

As the Supreme Court has held, the Due Process Clause "prohibits a state from punishing an individual without first providing that individual with an 'opportunity to present every available defense.'" *Philip Morris*, 549 U.S. at 353 (citation omitted). It has long been settled that due process entitles civil defendants to an "opportunity to answer" (*Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 280 (1855)) and a "right to be heard" on the claims asserted against them (*Ownbey v. Morgan*, 256 U.S. 94, 111 (1921); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("every available defense")). The means by which these rights are protected may vary with "the nature of the proceeding and the character of the rights which may be affected by it." *Dohany v. Rogers*, 281 U.S. 362, 369 (1930). But in all cases, "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quotations omitted).

By declaring the harms of the class here "indivisible," the district court effectively deprived Allstate of its right to be heard on all the claims asserted against it. Much as the defendant in *Philip Morris* had no opportunity to defend

itself against claims of injuries supposedly inflicted on non-party victims (*Philip Morris*, 549 U.S. at 353-354), Allstate is now prevented from defending itself against the claims of many class members. Allstate cannot show, for example, that some plaintiffs were not harmed—or indeed, were overpaid. Nor can Allstate show that its treatment of each individual class member was reasonable and, hence, well outside the realm of reprehensibility necessary to sustain a punitive award.

In its "indivisibility" holding, the district court not only ignored the constitution, it set aside a fundamental provision of the UTPA—the requirement that liability be "*reasonably clear*" before an insurer is obligated to "attempt in good faith to effectuate a prompt, fair and equitable settlement." Mont. Code Ann. § 33-18-201 (emphasis added). This is a high bar. *See Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 39, 357 Mont. 293, 239 P.3d 904 (liability is not reasonably clear unless "the facts, circumstances and applicable law leave little room for objectively reasonable debate"). Under the certification decision here, however, Allstate will be prevented from raising this statutory defense.

In short, Allstate was denied any reasonable opportunity to be heard on the alleged harms to the thousands of individuals certified as a class here. This, too, was a violation of due process.

CONCLUSION

"Punitive damages are a powerful weapon," which, "[i]mposed indiscriminately," "have a devastating potential for harm." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, concurring). Here, acting as a self-described insurance industry regulator, the district court created a new class-action mechanism—a punitive damages-only class—that likewise has "a devastating potential for harm." This not only violated the decisions of this Court and the UTPA, it flagrantly violated Allstate's right to substantive and procedural due process. The decision below must be reversed.

DATED this 20th day of June, 2012.

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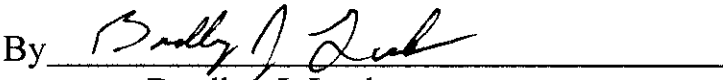
By 
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CERTIFICATE OF COMPLIANCE

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I hereby certify that I served true and accurate copies of the foregoing *Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Defendant-Appellant* by depositing said copies into the U.S. mail, postage prepaid, addressed to the following:

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