IN THE SUPREME COURT OF MONTANA
NO. DA 12-0130

ROBERT JACOBSEN, and all others similarly situated,

Plaintiff and Appellee,

vs.

ALLSTATE INSURANCE COMPANY.

Defendant and Appellant

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

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I. STATEMENT OF ISSUE ADDRESSED

Equitable relief through class action provides a way for obtaining redress for many victims' claims, which would otherwise be too small to warrant individual litigation. Class litigation of insurance actions on behalf of victims involving widespread and similar wrongful conduct serves public policy by deterring wrongful claims conduct and preventing bad actor competitors from gaining economic advantage over insurers that handle claims legally and ethically. Insurance is an important socioeconomic product essential in modern life. The insurance transaction is not made solely for private gain, but for the benefit of society. Insurers recognize that their business involves the public trust and that they have legal and ethical obligations beyond those in other business transactions. When insurers take advantage of claimants, the public interest suffers.

II. STATEMENT OF THE CASE

United Policyholders adopts the factual and procedural summary utilized by counsel for Plaintiffs-Appellees, whose position United Policyholders supports.

III. SUMMARY OF THE ARGUMENT

Every person is at the mercy of an insurer to perform its moral and legal obligations after an accident or loss. Our society expects, and requires through the operation of law, that each citizen bear financial responsibility for harms they cause others and for which they are lawfully accountable. People and businesses

purchase liability insurance to fulfill these obligations and to soften the financial consequences of legal responsibility. The liability insurance product offers two primary benefits: it provides money to compensate those wrongfully harmed, and it gives peace of mind for the insured knowing he or she can survive the financial impact of an accident or loss.

The insurance contract creates a legal duty for the insurer to pay covered losses on the insured's behalf. It also creates a moral obligation the insurer owes to society. Society suffers when an individual is not able to work, pay bills, consume and pay taxes. Liability insurance is intended to fully indemnify for the harm caused and enables both the injured and responsible parties to continue to contribute to society. The concepts of good faith and fair dealing are important in the liability insurance setting, due to the unique nature of the product and the disparate, often desperate, circumstances and motives of parties.

Montana recognizes the obligation of insurers to act in the utmost of good faith and fair dealing to their insureds. Mont. Code Ann. §33–18–201. Public policy extends these obligations to innocent victims of automobile incidents, pursuant to Mont. Code Ann. §61-6-301 and Mont. Code Ann. §61-6-103. The insurance industry recognizes its obligation to act in the utmost of good faith and fair dealing, as evidenced in the training and reference textbooks for claims

handlers and in internal claims handling documents prepared by individual insurance companies.

When insurers skirt these statutory and ethical obligations by designing and implementing schemes to profit at the expense of the people its product is intended to protect, these people are often at a disadvantage, as the amount of their direct losses may not justify the expense of litigation. Rule 23(b)(2) M.R.Civ.P., allows similarly situated victims of such institutional wrong to aggregate their claims, and courts should not hesitate to use it in furtherance of the public interest for which it is intended.

IV. ARGUMENT

A. THE BUSINESS OF INSURANCE AND THE PUBLIC TRUST.

Insurance is a product that transfers risk and gives people access to resources they would otherwise be unable to afford. Simply stated, insurance is a method of hedging life's perils; for the price of the premium, the insurer assumes the financial risk of a potential loss. Insurers sell policies to large numbers of similarly situated insureds and pool their premiums. When an insured suffers a covered loss, the insurer pays the loss from the pool of premiums, which have been invested by the insurer until the time of payment. Even before the first loss, insurers actuarially determine the amount of premium based on anticipated losses, overhead, fees, taxes, return on investment and even expected profit. In return, large numbers of

policyholders obtain peace of mind that the risk and cost of loss is transferred to the insurer.

In most cases, individuals and businesses would not be able to afford the loss insured against, so insurance is essential to preserve wealth. At each step of an economic transaction, from funding an endeavor to buying a house, serving dinner, or driving a car, insurance provides a safety net and degree of financial support. When the risk of loss is assumed by a third party banks lend money, products are manufactured and exchanged, and asset values tend to increase. As a result, individuals and businesses achieve more affluence and purchase more insurance to protect from financial ruin or unaffordable loss. In short, as a society's affluence increases, so does reliance on insurance. Today, insurance is a necessity, not a luxury.[1]

Insurance differs from any other business involving commercial contracts, based on the high degree of interaction with a potentially vulnerable portion of the consuming public. As explained in an insurance industry treatise, *The Legal Environment of Insurance*:

> Insurance contracts cover fortuitous events, are contracts of adhesion and indemnity, must have the public interest in mind, require the utmost good faith, are executory and conditional, and must honor reasonable expectations . . .

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[1]Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 Wm. & Mary L. Rev. 1489, 1495 (2010) (explaining insurance as a socioeconomic institution).

> Insurance contracts are different from other commercial contracts because insurance is more a necessity than a matter of choice. Therefore, insurance is a business affected with a public interest, as reflected in legislative and judicial decisions.[2]

Because insurers occupy a unique position, jurists, regulators, and legislators have promulgated a specialized field of law with numerous safeguards, rules, statutes and regulations they must follow. The current insurance system of regulation and state common law rules benefit insurers, policyholders, and the general public.[3] Accordingly, public policy and state laws cited in this case are critical; insurance companies know their products are subject to and involved with the public trust.

B. MONTANA LAW IMPOSES A REQUIREMENT OF ETHICAL CLAIMS CONDUCT TO BOTH FIRST AND THIRD PARTY VICTIMS OF AUTOMOBILE ACCIDENTS.

Montana, like forty-six other states in the nation, requires automobile owners to purchase and maintain automobile liability coverage.[4] "It is the public policy of this State, under §61-6-301, MCA, and §61-6-103, MCA, that every owner of a motor vehicle operated in Montana must procure a policy of insurance which continuously provides coverage up to the limits set forth in the two

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[2] *The Legal Environment of Insurance*, at 180.
[3] *Stempel on Insurance Contracts*, at §1.02.
[4] Mont. Code Ann. §61-6-301; Mont. Code Ann. §61-6-103.

statutes."[5] These statutes were "enacted for the benefit of the public and not for the benefit of the insured" "to protect members of the general public who are innocent victims of automobile accidents" from uncompensated injury."[6]

Montana also provides direct rights of action to first and third party claimants in Mont. Code Ann. §33-18-201 and Mont. Code Ann. §33-18-242.[7] As this Court explained, these provisions are intended to further the public interest:

> Insurance companies have, and are able to exert, leverage against individual claimants because of the disparity in resource base. Justice delayed is often justice denied. Public policy calls for a meaningful solution. The legislature has spoken and we, by this decision, breathe life into the legislative product.[8]

Accordingly, "[t]he duty owed a third-party claimant by an insurer is akin to, yet distinct from, the fiduciary duty running from an insurer to its insured. The latter duty being a common law duty attendant a contract of insurance."[9]

These duties, and the public policy supporting them, are most frequently encountered and applied in automobile liability coverage.[10]

> One of the most significant obligations that innocent victims of automobile accidents incur and for which mandatory liability insurance laws were enacted, is the

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[5] *Bain v. Gleason* (1986), 223 Mont. 442, 447, 726 P.2d 1153, 1156.
[6] *Iowa Mut. Ins. Co. v. Davis* (1988), 231 Mont. 166, 173, 752 P.2d 166, 171.
[7] *Marzolf v. Hoover* (D. Mont. 1984), 596 F. Supp. 596; *Klaudt v. State Farm Mut. Auto. Ins. Co.* (1983), 202 Mont. 247, 658 P.2d 1065.
[8] *Klaudt,* 202 Mont. at 253 658 P.2d at 1068.
[9] *Marzolf*, 596 F. Supp. at 599.
[10] *Ridley v. Guaranty Nat'l Ins. Co.* (1997), 286 Mont. 325, 951 P.2d 987.

> obligation to pay the costs of medical treatment . . . Medical expenses from even minor injuries can be devastating to a family of average income. The inability to pay them can damage credit and, as alleged in this case, sometimes preclude adequate treatment and recovery from the very injuries caused. Just as importantly, the financial stress of being unable to pay medical expenses can lead to the ill-advised settlement of other legitimate claims in order to secure a benefit to which an innocent victim of an automobile accident is clearly entitled. We conclude that this is not what was intended by the Montana Legislature when mandatory liability insurance laws and unfair claims practice laws were enacted.[11]

These laws are not intended to apply only to costs of medical treatment; lost wages and property damage are other significant obligations that will impact a victim's ability to survive financially.[12]

Montana's mandatory liability coverage and unfair claims practice laws do not only protect innocent victims of automobile incidents, they protect the public interest:

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[11] *Ridley*, 286 Mont. at 336, 951 P.2d at 993 ("leveraging of undisputed claims in order to settle disputed claims is exactly what the Montana Legislature sought to prohibit when it enacted § 33–18–201(13), MCA, of the Unfair Claims Practices Act."); *DuBray v. Farmers Ins. Exchange,* 2001 MT 251, ¶15, 307 Mont. 134 36 P.3d 897 ("Nothing in *Ridley* suggests that its scope should be categorically limited to medical expenses. Rather, medical expenses are just one of the obligations incurred by victims that mandatory liability insurance laws were designed to alleviate. Lost wages which are reasonably certain and directly related to an insured's negligence or wrongful act are another example."); *Lorang v. Fortis Insurance Co.*, 2008 MT 252, 345 Mont. 12, 192 P.3d 186.

[12] *DuBray,* at ¶15; *Lorang,* at ¶166.

> [S]ociety suffers any time an individual or a business is unable to continue to be a contributing member due to the financial impact of a property loss or a lawsuit. By indemnifying an individual (restoring him or her to the same financial position as before the loss), insurance enables the individual to continue as a worker, a consumer, and a taxpayer.[13]

Before liability laws were compulsory, the injured victim, his family, and the community at large shouldered the financial loss that occurred when a responsible party could not indemnify a victim. By making automobile liability insurance compulsory, Montana shifted this burden to the insurers that choose to assume the risk. But when those losses are not promptly, consistently and fully indemnified, the burden is again borne by the community. Montana has a strong public interest in ensuring that automobile liability insurers fulfill their obligations.

C. INSURERS RECOGNIZE THEIR OBLIGATIONS OF ETHICAL CLAIMS CONDUCT.

Claims representatives are taught honest and honorable ways to adjust claims. The standard textbook for claims handlers, which leads to an Associate in Claims designation, was historically James J. Markham, et al., *The Claims Environment* (1st ed., Insurance Institute of America 1993). There is now a second

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[13] James J. Markham, et al., *The Claims Environment* (1st ed., Insurance Institute of America 1993) at 2. This textbook is published by the Insurance Institute of America, which describes itself as an "independent, nonprofit educational organization" "serving the needs of the property and liability insurance business."

edition of *The Claims Environment*.[14] These textbooks set forth simple, clear claims handling principles that highlight duties of ethical and good faith treatment owed to policyholders and claimants.[15] The Insurance Institute of America has published a treatise dealing exclusively with this basic relationship, in which the public policy underlying an insurer's ethical duties are explained:

> The trend toward permitting third parties to have an extra-contractual right of action under the new statutes seems to be a matter of public policy designed "to gain prompt compensation of injured persons, encourage settlements, and discourage litigation. Insurers may not sit back and relax simply because court congestion shields them for a time."[16]

In another claims management reference regarding ethical adjusting, the Insurance Institute of America acknowledged:

> The business of insurance, perhaps more than any other, is based on trust and commitment. Insurance products are intangible and simply reflect a promise on the part of insurance companies to indemnify insureds for financial losses if an insured event occurs in the future. The contract between the insurer and the insured is a contract of utmost good faith and requires honesty and trust from both parties.[17]

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[14] Doris Hoopes, *The Claims Environment* (2d ed., Insurance Institute of America 2000).

[15] *Id.*

[16] William Park Rokes, *Aggressive Good Faith and Successful Claims Handling* (1st ed., Insurance Institute of America 1987) at 100 (*citing Avila v. Travelers Ins. Companies*, 481 F.Supp. 431, 437 (C.D. Cal. 1979)).

[17] George A. White, Ronald Duska & Victor D. Lincoln, *Organizational Behavior in Insurance*, vol. 1, 62 (1st ed., Insurance Institute of America 1992).

Many, if not most, executive claims managers possess the Society of Chartered Property and Casualty Underwriters designation, CPCU.[18] A CPCU agrees to abide by the Canons of the CPCU Code of Professional Ethics, which include:

> CANON 1: "Insurance professionals should endeavor to place the public interest above their own."
>
> CANON 2: "Insurance professionals should seek continually to maintain and improve their professional knowledge, skills and competence."
>
> CANON 3: "Insurance professionals should obey all laws and regulations; and should avoid any conduct or activity which would cause unjust harm to others."
>
> CANON 4: "Insurance professionals should be diligent in the performance of their occupational duties and should continually strive to improve the functioning of the insurance mechanism."
>
> CANON 5: "Insurance professionals should aspire to raise the professional and ethical standards in the insurance and risk management profession."
>
> CANON 6: "Insurance professionals should strive to establish and maintain dignified and honorable relationships with those whom they serve, with fellow insurance professionals, and with members of other professions."[19]

Accordingly, major insurance companies recognize and teach that claims adjustment must be done in the utmost of good faith. They understand their claims

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[18] Jerry D. Choate, CEO of Allstate from 1994 to 1999, is reportedly a member. See http://www.nndb.com/people/570/000128186/ (last accessed 7/20/12).

[19] The Canons and Rules of the Code of Professional Ethics, http://www.aicpcu.org/doc/canons.pdf, pp. 5-10 (last accessed 7/23/12).

actions are subject to the public interest. Industry standards require prompt, full and fair claims payments based on claims handling standards developed by claims executives. While its attorneys may argue the law requires less, the insurance claims industry has adopted a duty of good faith and fair dealing as a fundamental obligation.

D. THE STRONGEST POSSIBLE CONSUMER SAFEGUARDS, INCLUDING CLASS CERTIFICATION FOR INJUNCTIVE RELIEF UNDER RULES 23(a) AND (b), M.R.CIV.P. ARE NECESSARY TO FURTHER THE PUBLIC INTEREST IN FAIR AND ETHICAL ADJUSTMENT OF CLAIMS.

The judiciary is often the last and most effective line of protection for the public interest and the interests of innocent claimants and insureds:

> Insurance is purchased routinely and has become pervasive in our society. It protects against losses that otherwise would disrupt our lives, individually and collectively. The public interest, as well as the individual interests of millions of insureds, is at stake. This is the foundation for the general judicial conclusion that the business of insurance is cloaked with a public purpose or interest. This perception also explains the extensive regulation of the insurance industry in the United States, not just through legislative and administrative processes, but also through the judicial process. In fact, as with developments in other areas of tort law, the recognition of the tort of bad faith in insurance cases represents a judicial response to the perceived failure of the other branches of government to regulate adequately the claims processes of the insurance industry. Had the early attempts at regulation been more effective, the tort of bad faith might never have come into existence.[20]

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[20] Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies By Statute*, 26 U. Mich. J.L. Ref. 1, 10-12 (1992).

History has shown time and again that some insurers will violate their legal and ethical obligations to profit at the expense of their customers, innocent victims, and society in general. And frequently, the vulnerable and disadvantaged persons subjected to these institutional wrongs lack resources to tackle the corporate Goliath.[21]

For a great majority, class action may be the sole means to seek redress from institutional wrongs:

> Class actions enable the adjudication of similar claims in one action, thereby relieving overburdened courts of the need to separately litigate numerous individual, largely duplicative claims. Class actions assure a remedy for law violations that otherwise may escape redress because they involve claims that are too small to prosecute individually. The class action provides a remedy for persons who might lack the resources to otherwise sue those with vastly greater resources. It can vindicate the rights of absent class members who might be unaware of their rights or too timid or fearful of retaliation to assert them. It provides an incentive to lawyers to undertake a case they otherwise might not find lucrative enough to take on as an individual action. The class action seeking injunctive relief has been successfully used to address systemic deficiencies in government programs and institutions that could not be remedied in individual

[21] *See Banks v. New York Life Ins. Co.* (La.App. 1 Cir. 1997), 705 So.2d 1168, 1173 Fitzsimmons, J., concurring; *Ferguson*, 2008 MT 109, ¶39, 342 Mont. 380, 180 P.3d 1164 (efficient remedy of class-wide declaratory relief was appropriate in insured's suit for declaratory judgment that automobile insurer breached contract and adjustment duties; the size of the average claim was so small that relief for the average class member was not economically available outside class litigation).

> actions because of limitations on discovery and relief and inadequate resources.[22]

When the institutional behavior of an insurer to a similarly situated class is at issue, Rule 23(b)(2) certification is the appropriate means to challenge that behavior. Subdivision (b)(2) was added to Federal Rule of Civil Procedure 23[23] in 1966, primarily to facilitate social reform in the civil-rights area. But social reform was not the only intended use for subdivision (b)(2). It is "intended to reach situations where a party has taken action or refused to take action with respect to a class, and 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."[24] The advisory notes specifically provide that the subdivision could

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[22] Sidney S. Rosdeitcher, *Supreme Court's Term and Class Actions: Impact on Public Interest Litigation and Access to Justice*, Brennan Center for Justice at New York University School of Law, http://www.brennancenter.org/content/resource/supreme_courts_term_and_class_actions_impact_on_public_interest_litigation_ (last accessed 7/20/12); *see also Richmond v. Dart Industries, Inc.* (Ca. 1981), 129 Cal.3d 462, 469 174 Cal.Rptr. 515, 520 ("By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.")

[23] Rules 23(a) and (b), M.R.Civ.P., and the Federal Rules of Civil Procedure 23(a) and (b) are identical, so cases interpreting the federal rule are instructive. *McDonald v. Washington* (1993), 261 Mont. 392, 399-400, 862 P.2d 1150, 1154 (*citing Doninger v. Pacific Northwest Bell, Inc.* (9th Cir. 1977), 564 F.2d 1304, 1309).

[24] See Advisory Committee Notes to Fed. R. Civ. P. 23(b)(2), 1966 Amendment.

be used to enforce consumer rights, and it has been consistently used for that purpose.[25]

Rule 23(b)(2) has been consistently used to challenge unfair trade practices and enforce consumer rights when individual damage from an insurer's institutional wrong may not be sufficient, from an economic viewpoint, to justify the legal expense necessary to challenge that wrong.[26] In such situations, the

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[25] *Id.*; see *also In re Consolidated "Non–Filing Insurance" Fee Litig.* (M.D.Ala.2000), 195 F.R.D. 684, 695 (stating that plaintiff class can obtain a declaration that defendants' conduct violated RICO); *Stewart v. Cheek & Zeehandelar, LLP* (S.D. Ohio 2008), 252 F.R.D. 387 (23(b)(2) (class certified for violations of the Fair Debt Collection Practices Act); *Bertozzi v. King Louie Int'l, Inc.*, (D.C.R.I. 1976), 420 F.Supp. 1166, 1180 (23(b)(2) (class certified for violations of the Securities Exchange Act); *Stern v. Lucy Webb Hayes Nat. Training School for Deaconesses & Missionaries*, (D.C.D.C. 1973), 367 F.Supp. 536, *opinion supplemented* (D.C.D.C. 1974), 381 F.Supp. 1003 (purchasers of health services from a hospital could maintain a class action against the hospital trustees on the theory of breach of trust for injunctive relief and, possibly, damages to be paid into the hospital's funds).

[26] *Ferguson*, at ¶42 (reversing district court's denial certification under 23(b)(2) where relief sought by Ferguson on behalf of the class was an order compelling Safeco to properly perform its statutory adjustment duties); *Lebrilla v. Farmers Group, Inc.* (Cal. App. 4th 2004) 119 Cal.App.4th 1070, 16 Cal.Rptr.3d 25 (lower court erred in not certifying a class challenging Farmers' practice of installing imitation crash parts on its insureds' vehicles or indemnifying insureds' based on the cost of imitation crash parts). Vanishing premium plaintiffs have successfully certified class actions against life insurance companies under Fed.R.Civ.Pro. 23(b)(2) when a common scheme of deception is adequately presented, such as scripted sales presentations, uniform training for agents, or a contractual flaw in the written materials distributed to potential customers. *See Elkins v. Equitable Life Ins. Co.* (M.D. Fla. Jan. 27, 1998), 1998 WL 133741, at **12-13; *Duhaime v. John Hancock Mut. Life Ins. Co.* (D. Mass. 1997), 177 F.R.D. 54, 64; *Cope v. Metropolitan Life Ins. Co.* (Ohio 1998), 696 N.E.2d 1001, 1004.

alternative "is simply for the wrong to go uncorrected."[27] While this alternative is objectionable in many situations, it is intolerable when an insurer uses its advantages to victimize to people its products were intended to protect.[28] Bad actors that refuse to adhere to ethical claims conduct should not get a competitive advantage over those that play by the rules. Failing to enforce complete legal accountability encourages more institutional wrongful behavior because rules and standards are meaningless. Without accountability for breaching obligations of good faith claims handling, claimants, the insurance industry, and the public are harmed. The law not should minimize these obligations by limiting access to class action remedies.

IV. CONCLUSION

Amicus recognizes and appreciates the extremely important role insurance companies fill in modern society. Profitable and financially stable insurance companies promote a healthy society and system, where the risk of loss may be

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[27] *Murer v. State Comp. Mut. Ins. Fund* (1997), 283 Mont. 210, 942 P.2d 69, *accord Eisen v. Carlisle and Jacquelin* (1974), 417 U.S. 156, 161, 94 S.Ct. 2140, 2144, 40 L.Ed.2d 732 ("Economic reality dictates that petitioner's suit proceed as a class action or not at all."); *Lebrilla*, 119 Cal.App.4th at 1087, 16 Cal.Rptr.3d at 39 ("the amount of recovery for each class member makes separate small actions impractical").

[28] *See* Mark Romano, *Low Ball: An Insider's Look at How Some Insurers Can Manipulate Computerized Systems to Broadly Underpay Injury Claims*, http://www.consumerfed.org/pdfs/Studies.ComputerClaims06-04-12.pdf (dated June 4, 2012) (last accessed 7/23/12) (describing the advantage insurers have in utilizing computer-based assessments that can be easily and broadly manipulated to reduce bodily injury claim payments).

spread among various parties. In that way, prompt and proper payment goes to those who suffer life-altering catastrophes affecting their persons and property; the burden of the loss has falls on the insurer and not the victim or the insured, their families or the community. But when an insurer uses unscrupulous claims adjustment practices to get an edge, the system fails. Not only does the burden assumed by the insurer again fall on the community, the insurer gains a competitive edge over honest competition. Rule 23(b)(2) is the proper means to redress such institutional wrongs. Claims of many individuals are resolved at the same time, eliminating the possibility of repetitious litigation, providing small claimants with a method of obtaining redress, and, in this case, giving the State a means to enforce its public interest laws. Based on the foregoing, United Policyholders requests that this Court grant the relief sought by Plaintiff-Appellees.

DONE and DATED this 30th day of July, 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(c) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionally spaced Times New Roman typeface of 14 point; is double spaced; and the word count calculated by Microsoft Word is 4,057, exclusive of the Certificate of Compliance and Certificate of Service.

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CERTIFICATE OF SERVICE

I, Amy Eddy, an attorney at the law offices of BOTTOMLY EDDY & SANDLER, pllp, do hereby certify that on the 30th day of July, 2012, a true and correct copy of the foregoing document was served on the following, first class postage prepaid:

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