IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 19-0682

JACK KRAMER and KEN KRAMER, individually and on behalf of all others similarly situated,

Plaintiffs and Appellees,

v.

FERGUS FARM MUTUAL INSURANCE COMPANY,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Thirteenth Judicial District Court, Yellowstone County
Cause No. DV–19–0360
The Honorable Michael G. Moses, Presiding

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INTRODUCTION

This case involves coverage for General Contractor Overhead and Profit ("GCOP") under a farm mutual insurance policy. The case law on class certification in GCOP cases is in clear and uniform: When GCOP is determined case-by-case, as is the practice for Fergus Farm Mutual Insurance Company ("FFM"), certification is not appropriate. This case represents the first time any court, to FFM's knowledge, has diverged from this uniform authority and reached a different conclusion.

The District Court's certification is more unusual because FFM paid GCOP whenever a general contractor would be reasonably necessary, and also paid GCOP actually incurred by insureds even if a general contractor was not reasonably necessary. FFM simply required documentation confirming the expense was actually incurred for general contractor services and was not fraudulent.

In this case, Plaintiffs/Appellees Jack and Ken Kramer (collectively, "Kramers") hired a general contractor with a history of "storm-chasing" and fraudulent practices to conduct repairs after their simple hail loss. Specifically, the Montana Insurance Commissioner found the same contractor, in another case, "primarily provided false or misleading subcontractor invoices in order to receive additional funds (such as overhead and profit) from insurance claims." (*FFM's*

Brief in Response to Pls.' Motion for Rule 23(b)(3) Class Certification, CR 11, Ex. G, Ex. B p. 1.) Despite this, and despite the fact that a general contractor was not reasonably necessary on the Kramers' repair job, FFM was prepared to pay GCOP actually incurred upon the submission of subcontractor receipts. The Kramers refused to provide the information. They filed this lawsuit instead.

When the District Court granted class certification, it diverged from uniform authority and identified two "predominate" questions that were not submitted by the Kramers and which are not legitimately at issue. It also overlooked evidence that class certification would necessitate hundreds of mini-trials, contrary to certification's overriding goal to promote economy and efficiency. The District Court abused its discretion by granting the Kramers' Motion for Rule 23(b)(3) Class Certification and should be reversed.

ISSUES PRESENTED

1. Did the District Court abuse its discretion by certifying the proposed classes, when questions affecting individual class members predominate over common questions and resolution as a class action would be impractical?
2. Did the District Court abuse its discretion by basing its Rule 23 analysis on clearly erroneous findings of fact and incorrect conclusions of law? Specifically:

- Did the District Court commit clear error in finding emails may constitute evidence that FFM in fact applies the three-trade rule?
- Did the District Court commit clear error in finding FFM's practices may not conform to those of other Montana insurers?
- Did the District Court err in finding the reasonably necessary standard does not apply in determining whether GCOP is payable in advance of repairs?
- Did the District Court err in finding the Policy ambiguous by relying on provisions that set forth limits for different coverages and did not apply to the Kramers' loss?

STATEMENT OF THE CASE

The Kramers filed this action on March 28, 2019, bringing claims against FFM for breach of contract and violations of the Montana Unfair Trade Practices Act, Mont. Code Ann. § 33-18-201, *et seq*. ("UTPA"). (*Class Action Complaint*, CR 1, ¶ 54.) The District Court granted class certification on November 21, 2019. (*Order Re: Motion for Rule 23(b)(3) Class Certification*, App. 1-22.) FFM filed its Notice of Appeal on December 3, 2019. (CR 17.)

FACTS

The case arises from hail damage to three buildings (a house, detached garage and small shed) owned by the Kramers. (CR 11, p. 2.) At the time of the

loss—May 21, 2016—the buildings were covered by an FFM insurance policy ("Policy"). (CR 11, Ex. A.) The Policy provided property coverage, in pertinent part, for "Farmowner Dwelling," "Detached Garage—Broad," and "Small Shed—Basic." (CR 11, Ex. A at 167.)

A. The Policy's Loss Settlement Provisions

The Policy required FFM to pay the Actual Cash Value ("ACV") of the loss in advance of repairs. ACV is defined in relevant part as "the cost to repair or replace the property with materials of like kind and quality to the extent practical," with a deduction for depreciation. (CR 11, Ex. A at 183.) The insured is entitled to this payment whether or not repairs are performed. (CR 11, Ex. A at 183.)

If the insured elected to go forward with repairs, and the structure has Replacement Cost coverage, FFM paid the remaining difference between ACV and the Replacement Cost Value ("RCV"). (CR 11, Ex. A at 206.) FFM also paid GCOP to insureds who actually incurred such costs, even if GCOP was not initially considered necessary at the ACV stage, upon the insured's submission of documentation. (CR 11, Ex. G, ¶ 16.) When, as here, the Policy limit is at least 80% of the replacement cost, the total RCV is the smaller of: "(1) the cost to repair or replace the damage on the same premises using materials of like kind and

quality, to the extent practical; or (2) the amount spent to repair or replace the damage." (CR 11, Ex. A at 183.)[1]

B. The ACV Payment

On August 8, 2016—before the Kramers had made repairs—FFM issued an ACV payment of $11,323.76. (CR 11, Ex. B.) FFM informed the Kramers the amount represented the initial payment for the dwelling and detached garage and the final payment for the small shed (for which the maximum coverage was ACV), less the $2,000 deductible. (CR 11, Ex. B.) FFM sent the Kramers a proof of loss form to complete after repairs were performed and instructed them to provide documentation at that time, including "paid receipts and finished pictures." (CR 11, Ex. B.)

Though unnecessary, the Kramers hired a purported "general contractor," Jon Hooley of Big Sky Contractors. (CR 11, Ex. C, p. 2.) According to the Kramers, Hooley "was looking for business after the storm and approached the Kramers." (CR 11, Ex. C, p. 5.)

Soon after the initial ACV payment was made, a dispute arose as to whether siding had been damaged by hail. (CR 11, Ex. D.) FFM ultimately agreed to

[1] The Kramers' shed was not subject to the Replacement Cost Terms because they selected basic coverage for that structure. Only ACV was owed. (CR 11, Ex. A at 167.)

cover the siding, and on August 1, 2018, issued a supplemental ACV payment of $24,642.87. (CR 11, Ex. E.)

The ACV payments, in the total amount of $35,966.63, did not include GCOP. To be clear, GCOP covers overhead and profit for general contractor services—*i.e.*, the services of a separate contractor hired to oversee and coordinate repairs. (CR 11, Ex. G, ¶ 5.) Overhead and profit for contractors is a different item and is always paid as part of the normal cost of repair. (Transcript of Proceedings – Class Action Motion Hearing, p. 26 (October 25, 2019).) Regular profit and overhead for contractors is not at issue in this case.

Because ACV is calculated before and irrespective of actual repairs, FFM initially determined whether GCOP is likely to be part of "the cost to repair or replace." (CR 11, Ex. G, ¶¶ 5-7.) In making this determination, FFM follows the industry standard of paying GCOP when the services of a general contractor are reasonably necessary. (CR 11, Ex. G, ¶ 5.) The Kramers agree this is the applicable standard (*Motion for Rule 23(b)(3) Class Certification and Brief in Support,* CR 7, pp. 7-8), and the District Court recognized "[t]his 'reasonably necessary' standard is widely used in the insurance industry" (App. 4 (emphasis added).).

In the Kramers' case, GCOP was not included in the ACV payments because FFM determined a general contractor was not reasonably necessary. FFM hired an

independent adjuster to evaluate the Kramers' loss and assist in making this determination. (CR 11, Ex. H, ¶ 11.) The determination was based on the simple nature of the repair job, the amount involved, and the manner in which similar hail damage is routinely handled in Montana. (CR 11, Ex. H, ¶ 11.)

In the vast majority of wind or hail claims, insureds do not hire a general contractor because the insureds are easily able to arrange the work, even if three or more trades are involved. (CR 11, Ex. G, ¶ 14.) A typical hail claim might involve damage to a roof, rain gutters and a window. (CR 11, Ex. G, ¶ 14.) Montana insureds do not have difficulty either retaining a contractor who can perform all of the work, or making arrangements with two or three separate contractors. (CR 11, Ex. G, ¶ 14.) No general contractor is hired to oversee and coordinate the work. (CR 11, Ex. H, ¶ 12.)

To illustrate the rarity of what the Kramers did in this case, during the period from 2016-2018 FFM received over 500 claims from insureds with an ultimate value of more than $10,000, but even in these larger value claims just twelve insureds (the Kramers being one) actually retained the services of a general contractor. (CR 11, Ex. G, ¶¶ 9-10.) At the ACV stage, nothing about the Kramers' loss indicated it would be anything other than an ordinary hail loss. (CR 11, Ex. H, ¶ 11.)

Nonetheless, the Kramers argue GCOP should have been paid as ACV because of the so-called "three-trade rule." (CR 7, p. 5.) This rule would require an insurer to deem a general contractor reasonably necessary whenever three or more trades are likely to be involved on a project. (CR 7, p. 11.) However, FFM conclusively established it does not apply the three-trade rule, nor is it required to do so. (CR 11, Ex. G, ¶¶ 6-8, 22.)

FFM presented uncontroverted evidence and legal authority that the three-trade rule is not a legal requirement or industry standard in Montana. (CR 11, Ex. G, ¶ 22.) It is not required by the policy, statute, regulation or case law. (CR 11, Ex. F, ¶ 8.) While insurers may use some variation of a three-trade rule to help evaluate whether a general contractor's services are reasonably necessary, no uniform rule is accepted or mandated. (CR 11, Ex. F, ¶¶ 7-10; Ex. G, ¶¶ 6-8.)

The three-trade rule is not industry standard. Lee Richardson, a multi-line adjuster with Montana Claims Service, provided an affidavit in this case. (CR 11, Ex. F, ¶ 8.) Richardson has worked on thousands of wind and hail claims with approximately 50 different insurance companies over his nearly 30-year career. (CR 11, Ex. F, ¶ 5.) Richardson concluded FFM's practices "are consistent with the approach taken by other insurers in Montana" and "are industry standard in Montana, especially for farm mutual insurers." (CR 11, Ex. F, ¶ 6.) Richardson attested "insurers in Montana evaluate payment for general contractor profit and

overhead on a case-by-case basis. They do not mechanically apply a so-called 'three-trade rule.'" (CR 11, Ex. F, ¶ 8 (emphasis added).)

In summary, although FFM certainly looks at the number of trades required as a factor in determining whether a general contractor is reasonably necessary, FFM does not employ, nor is it required to employ, the three-trade rule to determine if GCOP is payable as ACV. (CR 11, Ex. G, ¶¶ 6-8.)

C. The RCV Payment

The Kramers' claim was a routine hail loss, but it was unique in at least two respects. First, it was one of only a handful of cases in which the insured unnecessarily hired a general contractor. Second, it was the only claim in FFM's experience in which the insured refused to provide subcontractor receipts and thus was not paid GCOP allegedly incurred as part of RCV.

Again, despite FFM's determination a general contractor was not reasonably necessary, and thus not part of ACV, FFM was ready to pay GCOP actually incurred by the Kramers as part of RCV. (CR 11, Ex. H, ¶¶ 16, 19-20.) It only needed subcontractor invoices to confirm GCOP was an actual part of the cost to repair. (CR 11, Ex. H, ¶¶ 16, 19-20.) More specifically, in these rare situations, FFM has paid GCOP as part of RCV if: (1) three or more trades were involved, (2) the general contractor actually subcontracted the work, rather than performing the work itself, and (3) invoices are submitted from subcontractors to ensure the

general contractor is seeking GCOP on the amount paid to subcontractors, rather than an artificial number that had been inflated by the general contractor. (CR 11, Ex. G, ¶ 15.) As noted previously, the Kramers' purported general contractor is the only general contractor to refuse to provide subcontractor invoices in this situation. Thus, the Kramers are the only FFM insureds to have arguably suffered any damages as a result of FFM's practice.

The Kramers decry these safeguards as unfair, but Montana has a history with general contractors taking advantage of insureds who suffer wind or hail damage. A publication from the Montana Commissioner of Securities and Insurance specifically warns Montana consumers to "[b]eware of disreputable contractors or 'storm chasers'" and notes "Montana has had many problems in recent years with people coming in from out of state to take advantage after major storms." (CR 11, Ex. G, Ex. A.)

FFM is acutely aware of these problems. In FFM's experience, individuals claiming to be "general contractors" solicit business from insureds who have suffered a wind or hail loss with the promise of negotiating a higher insurance payout. (CR 11, Ex. G, ¶ 18.) Estimates for repairs are much higher than estimates from local contractors who perform the same work. (CR 11, Ex. G, ¶ 18.) This type of contractor often represents that three or more trades will be involved in the repairs, but completes all the repairs itself. (CR 11, Ex. G, ¶ 18.)

The contractor seeks GCOP without performing the work of a general contractor, in addition to the overhead and profit normally paid to subcontractors. (CR 11, Ex. G, ¶ 18.)

Concerns of fraud were particularly apropos in this case. The contractor hired by the Kramers, Jon Hooley, was identified by the Montana Insurance Commissioner in a 2017 administrative proceeding as engaging in a fraudulent scheme to obtain GCOP payments from another Montana insurer. (CR 11, Ex. G, Ex. B.) The Insurance Commissioner found Hooley and his company "primarily provided false or misleading subcontractor invoices in order to receive additional funds (such as overhead and profit) from insurance claims." (CR 11, Ex. G, Ex. B, p. 1.) The agency's filing details five different hail claims and Hooley's attempt to defraud Mountain West Farm Bureau Mutual Insurance Company ("Mountain West") by seeking GCOP. (CR 11, Ex. G, Ex. B, pp. 2-6.)

Notably, this administrative action arose after Mountain West, consistent with industry standard in Montana, requested subcontractor invoices. (CR 11, Ex. G, Ex. B, pp. 3-6.) After reviewing the invoices, the Montana Insurance Commissioner concluded Hooley and his company "committed at least nine separate acts of insurance fraud by creating and/or submitting to Mountain West false or misleading 'final' invoices that contained work that was not performed, or false or misleading invoices from subcontractors, in support of claims for payment

under insurance policies." (CR 11, Ex. G, Ex. B, p. 7, ¶ 6 (emphasis added).) In light of this history, it is perhaps no surprise FFM's request for Hooley's invoices was refused.[2]

On or about September 20, 2018, the Kramers submitted a "final invoice" from Big Sky Contractors to obtain the final RCV payment. (CR 11, Ex. J.) The total cost of the project came to $55,766.70. (CR 11, Ex. J.) FFM requested subcontractor invoices in order to pay GCOP, but the Kramers refused. (CR 11, Ex. C, p. 13.) The Kramers did not even request the information from Hooley, opting instead to lay the groundwork for this lawsuit. (CR 7, p. 6, n. 13.)

D. This Lawsuit

The Kramers filed this lawsuit, a putative class action, alleging breach of contract and violations of the UTPA. The questions proposed for class certification have been a moving target. In their initial motion, the Kramers identified "two common questions of law [that] will govern resolution of the case," but after FFM established these were not the questions in dispute, the Kramers listed two different questions in their reply brief (also not the questions in dispute). (CR 7, p. 12; *Reply Brief in Support of Class Certification*, CR 14, p. 1.) The most significant change, however, came when the District Court identified two brand-

[2] The administrative action against Hooley was dismissed by stipulation on January 31, 2018. (CR 11, Ex. I.)

new questions in its certification order—questions that were never raised by the parties because they are not supported by the record. (App. 20.) A breakdown of this evolution follows:

Kramers' Opening Brief:

> Here, the resolution of two common questions of law will govern the resolution of this case. First, is FFM required to pay its insureds an additional 20% for O&P at the ACV stage on covered property losses? If so, is it also required to pay them 20% for O&P on the withheld depreciation if the insureds submit proof that they have completed the repairs and FFM issues the RCV payment?

(CR 7, p. 12.)

Kramers' Reply

> In this case, there are just two common questions: If RCV can include O&P when three or more trades are required, then shouldn't the ACV payment also include the O&P? And if so, when the insured completes the work, aren't they also entitled to the portion that had been held back with the depreciation?

(CR 14, p. 1.)

Order on Certification

> The predominate questions present in this case are twofold: 1) whether the Defendant's policy language regarding the insurer's duty to tender GCOP payments at both the ACV and RCV stages is so ambiguous as to be unfair; and 2) whether the Defendant's claim settlement practices with regard to GCOP fees are or are not in conformance with the practices of other Montana insurers as to be in violation of the Montana Unfair Trade Practices Act.

(App. 20.)

This evolving search for a common question underscores the problem with class certification in this case. Even assuming the Kramers have viable claims, their claims implicate a highly-individualized analysis of whether a general contractor is reasonably necessary that is not appropriate for certification. Certification would lead to a parade of distinct mini-trials that would make resolution far more difficult, rather than more efficient and economical. The District Court abused its discretion in looking past the actual issues at hand and the practical implications of class certification.

STANDARD OF REVIEW

A district court's decision on a motion for class certification is reviewed for an abuse of discretion. *Knudsen v. Univ. of Mont.*, 2019 MT 175, ¶ 6, 396 Mont. 443, 445 P.3d 834. However, to the extent a ruling on a Rule 23 requirement is supported by a finding of fact, that finding is reviewed under the "clearly erroneous" standard. *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 25, 371 Mont. 393, 310 P.3d 452. Findings are clearly erroneous if they are not supported by substantial evidence, the court misapprehended the effect of the evidence, or this Court's review of the record convinces it that a mistake was made. *Sinram v. Berube (In re S.W.B.S.)*, 2019 MT 1, ¶ 10, 394 Mont. 52, 432 P.3d 709. Also, to the extent a ruling on a Rule 23 requirement is supported by a legal conclusion, review of that conclusion is *de novo*. *Jacobsen*, ¶ 25.

SUMMARY OF THE ARGUMENT

To maintain a class action under Rule 23(b)(3), a plaintiff must establish that common questions predominate over individual questions and resolution as a class action is the superior method for adjudication. FFM provided uncontroverted evidence and legal authority demonstrating where a case-by-case analysis is employed to determine whether GCOP is payable, as here, predominance and superiority are lacking.

The District Court's rationale for distinguishing FFM's authority and finding Rule 23(b)(3) satisfied was based on findings of fact and law having no support in the record. No evidence was presented in the District Court that FFM applies a three-trade rule, or that its practices diverge from those of other Montana insurers. The District Court relied on inapplicable policy provisions to find a potential ambiguity, and apparently determine that the Policy does not support application of the reasonably necessary standard in calculating ACV.

A plaintiff seeking class certification must also present evidence satisfying each of the four requirements of Rule 23(a). The Kramers failed to sustain this burden because, among other things, the alleged common questions variously identified by the Kramers and the District Court would not generate any common answer central to each class member's claim. Indeed, as it relates to the Kramers' "RCV class," the Kramers are the only class members because they are the only

FFM insureds to not be paid GCOP that was (allegedly) incurred. The District Court abused its discretion in granting class certification.

ARGUMENT

A class action must meet the four requirements of Rule 23(a) and it must satisfy at least one of the three subsections of Rule 23(b). *Knudsen*, ¶ 7. The party seeking certification bears the burden of establishing each element of Rule 23. *Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, ¶ 27, 363 Mont. 151, 267 P.3d 756. A trial court must conduct a "rigorous analysis" as to whether evidence supports each element of class certification. *Ascencio v. Orion Int'l Corp.*, 2018 MT 121, ¶¶ 13-14, 391 Mont. 336, 417 P.3d 1094; *Morrow v. Monfric, Inc.*, 2015 MT 194, ¶ 10, 380 Mont. 58, 354 P.3d 558. A district court must weigh the evidence and "resolve[] factual disputes relevant to each Rule 23 requirement," even if the requirement is identical to a merits issue. *Jacobsen*, ¶ 29.

I. THE REQUIREMENTS OF RULE 23(b)(3) ARE NOT MET.

The Kramers moved for "Rule 23(b)(3) Class Certification." (CR 7, p. 1.) To certify a class under Rule 23(b)(3), the class must satisfy two requirements: (1) common questions of law or fact must predominate over any questions affecting only individual members; and (2) resolution as a class action must be superior to other available methods for fairly and efficiently adjudicating the controversy. *Ascencio*, ¶ 17. Rule 23(b)(3) thus focuses on the relationship between the

common and individual issues. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998).[3] Class determination is only appropriate "when the class members' claims depend on a common contention that is capable of classwide resolution." *Worledge v. Riverstone Residential Grp., LLC*, 2015 MT 142, ¶ 42, 379 Mont. 265, 350 P.3d 39. Here, no common contention is present.

A. Predominance Is Lacking.

"The predominance inquiry is more demanding than the commonality requirement of Rule 23(a) and requires courts to consider how a trial on the merits would be conducted if a class were certified." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 525 (5th Cir. 2007) (internal punctuation omitted). The inquiry "ultimately prevents the class from degenerating into a series of individual trials." *Id*. "[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001). Furthermore, "when individual rather than common issues predominate, the economy and efficiency of class action treatment are lost and the need for judicial supervision and the risk of confusion are magnified." *Id.*; *see also*

[3] This Court has recognized its "long history of relying on federal jurisprudence when interpreting the class certification requirements of Rule 23." *Jacobsen*, ¶ 32.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 624-25 (1997) (denying class certification where "uncommon questions abounded").

The only question the putative class members might share in this case is whether a general contractor's services were "reasonably necessary," thus requiring payment of GCOP. This is not a question capable of classwide resolution, however, because it depends on the facts of each class member's loss. Things might be different if FFM refused to pay GCOP in every case, or was required to apply the three-trade rule, but these are not the facts.

1. The Legal Authority Is Uniform: Predominance Is Lacking When an Insurer Evaluates GCOP on a Case-by-Case Basis.

It is well settled in other jurisdictions that, when an insurer evaluates the necessity of a general contractor on a case-by-case basis, class certification of GCOP claims is not appropriate. For example, in *National Security Fire & Casualty Company v. DeWitt*, 85 So.3d 355, 357 (Ala. 2011), the Alabama Supreme Court reversed class certification where the plaintiff argued the insurer should apply the three-trade rule. *Id*. at 385-86. The plaintiff alleged the defendants breached his policy of insurance when they did not include 20% GCOP in their ACV payment, arguing it was "industry standard" that "when three or more trade skills (e.g., roofing, sheetrocking, painting) will be needed to repair property, then it is reasonably foreseeable that a general contractor will be employed." *Id*. at 357.

The insurer presented evidence—just as FFM has in this case—that it does not apply the three-trade rule and no statute, insurance regulation, or insurance standard requires application of the three-trade rule. *Id*. at 359-62. The insurer explained the mere presence of three trades is not adequate information to determine if a general contractor is reasonably necessary. *Id*. Instead, "input was needed from someone with the experience to look at the complexity and value of the job to determine if a general contractor's services are needed." *Id*. The insurer presented expert testimony that "attempting to apply a bright-line rule was a problem because it was artificial and no two jobs are alike," and that the consideration of a variety of factors was required, including the complexity of the project, technical difficulty, number of subcontractors or trades required, value of the contract, and the length of time the project would take. *Id*.

The Alabama Supreme Court surveyed the law across the country and determined predominance was lacking:

> . . . [T]he overriding common issue in this case is whether it was reasonably foreseeable that a general contractor was necessary to complete the repairs in each of the putative class members' claims so that National Security breached its contract by not paying GCOP. Finally, the next common issue is whether the three-trade rule should be applied to determine whether it was reasonably foreseeable that a general contractor was necessary to complete the repairs. . . .
>
> This case will likely involve the introduction of evidence regarding many of the individual claims of the class members. The three-trade rule is simple and can be applied in this case mechanically. However, DeWitt has not cited, and we have not found, any Alabama statutes,

> regulations, or caselaw that requires the application of a three-trade rule. Also, he has not cited any statute, rule, or caselaw that would prevent National Security from presenting evidence to show that the three-trade rule is not a valid indicator of whether it is reasonably foreseeable that a general contractor will be necessary to make the repairs; from presenting evidence in individual cases to show that it was not reasonably foreseeable that general contractors would have been necessary to make the repairs reflected on the estimates and to show that those particular insureds were not entitled to GCOP; and from presenting evidence in individual cases to show that, even if the three-trade rule applied, those particular estimates did not actually reflect that three or more trades would be involved in the repairs. . . .
>
> . . . Although this case will involve issues that are common to all class members, it is highly likely that it will also involve individualized evidence regarding whether it was reasonably foreseeable that the services of a general contractor would be necessary in each of those claims. Also, it is likely that the case will also involve evidence as to whether some of the estimates actually indicate that three or more trades would be involved in the repairs. . .

Id. at 372-84 (citing cases from Louisiana, Oklahoma, Pennsylvania and Florida).

The same conclusion was reached by the federal district court in *Nguyen v. St. Paul Travelers Insurance Co.*, 2008 U.S. Dist. LEXIS 87706 (E.D. La. 2008). There, the plaintiffs argued the insurer breached the insurance contract because it determined the repair of their property would require more than three trades, but did not include GCOP. *Id*. at *5-6. The court determined predominance was lacking under Rule 23(b)(3):

> Plaintiffs allege that every time Standard Fire determines that an insured's damages require the services of three or more trades to repair, the insured is entitled to GCOP, and therefore individual issues

> of law or fact do not predominate. . . . Although plaintiffs' proof might be simple and compelling, they fail to point out any law that would permit the Court to then foreclose the defendant from showing in an individual case that the insured was not reasonably likely to require the services of a general contractor, and therefore was not underpaid its ACV payment.
>
> Whether the nature of an insured's damages indicates that he or she is reasonably likely to require the services of a general contractor is a factual question, requiring individualized assessments. Accordingly, there is no class-wide proof available to decide whether the nature of each insured's damages were such that the insured was reasonably likely to require the services of a general contractor. . .

Id. at *28-29 (emphasis added) (internal citations and quotation marks omitted). *See also Mee v. Safeco Ins. Co. of Am.*, 908 A.2d 344, 345 (Pa. Super. 2006) (finding class certification improper because whether a general contractor's services were reasonably necessary was not resolvable by way of a "bright line rule," but required consideration of a number of factors in each individual case); *John v. National Security Fire & Casualty Co.*, 2008 U.S. Dist. LEXIS 10266 (W.D. La. 2008) ("[A] case by case factual inquiry would have to be made regarding the type, nature and complexity of the necessary repairs before it can be determined if a general contractor is warranted. Such an individualized inquiry would necessarily prevent this type of claim from being certified as a class.").

In the District Court, the Kramers failed to cite a single case in which a class was certified where the insurer evaluated GCOP on a case-by-case basis. Indeed, the Kramers' own legal authority cut against their position. In *Mills v. Foremost*

Insurance Co., 511 F.3d 1300, 1309-10 (11th Cir. 2008), for instance, the Eleventh Circuit reversed the district court's premature denial of class certification under Rule 23(b)(3). However, the reversal was not based on any disagreement that predominance was lacking, a finding the district court again issued on remand. *Id*. The initial denial was premature because the plaintiff had also sought certification under Rule 23(b)(1) and (b)(2), which the district court failed to address. *Id*. at 1309-10. On remand, the district court determined class certification was inappropriate under any subsection of Rule 23(b), and again concluded there was a lack of predominance under 23(b)(3):

> On appeal in *Mills*, the Eleventh Circuit established a clear standard in which GCOP was to be paid, that is, in circumstances where the policyholder would be reasonably likely to need a general contractor in repairing or replacing of their damaged property. *Mills*, 511 F.3d at 1306. Thus, in order to determine whether or not a policy holder is entitled to the withheld payments, it is likely that the putative class plaintiffs will need to introduce evidence specific to their claim in order to argue that the use of a general contractor was indeed, reasonably likely. As the Eleventh Circuit has not established a "three-trade rule" standard as the Millses have averred, the likelihood that a putative class member plaintiff will need to argue what was reasonable under the circumstances given his or her specific claim, creates a lack of predominance in the present action as that argument may be different from a fellow putative class member.

Mills v. Foremost Ins. Co., 269 F.R.D. 663, 667-82 (M.D. Fla. 2010).

The pertinent legal authority is clear and uniform: When an insurer presents evidence it considers payment of GCOP on a case-by-case basis, common

questions of law and fact do not predominate over individual questions under Rule 23(b)(3), and class certification is improper.

2. The District Court Committed Clear Error in Finding FFM's Emails Evidenced Application of the Three-Trade Rule.

Of the above legal authority, the District Court addressed only *DeWitt*, concluding "the email communications make this case distinguishable from *DeWitt* as Plaintiffs here are not only arguing that the Defendant follows the 'three trade rule' when reviewing GCOP fee payments but has [sic] presented evidence to support that contention." (App. 19.) Respectfully, that is not at all what the subject emails say.

Because the District Court's finding regarding FFM's emails was a finding of fact, the clear error standard applies. *Jacobsen*, ¶ 25. This Court must reverse if the finding was not supported by substantial evidence, the District Court misapprehended the effect of the evidence, or if this Court's review of the record convinces it a mistake was made. *Sinram*, ¶ 10. That standard is easily met.

After determining a general contractor was not reasonably necessary, and thus not including GCOP as part of ACV payment, FFM sent emails to the Kramers stating it would still pay GCOP actually incurred as RCV, as long as invoices/receipts for three subcontracted trades were provided.[4] These emails,

[4] See emails dated October 11, 2018 and October 12, 2018 at CR 11, Ex. K and May 9, 2019 email at CR 7, Ex. 4.

though referencing "three trades," do not suggest FFM applies the three-trade rule. The emails have nothing to do with application of a three trade rule in issuing ACV payments, which the Kramers had already received. The purpose of the emails was to guard against fraud prior to paying GCOP as part of the final RCV payment.

Furthermore, to the extent the District Court cited the emails only to suggest the existence of a disputed fact, it misapprehended its obligations under Rule 23. This Court has expressly directed: "(1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; [and] (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. . . ." *Jacobsen*, ¶ 29 (emphasis added). Also, "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. . . ." *Id*.

The District Court was thus required to resolve the factual dispute it claims exist. If it is FFM's alleged application of the three-trade rule that distinguishes this case from *DeWitt* and establishes predominance under Rule 23(b), as the District Court seemed to suggest, that factual finding must be made because it is

relevant to a Rule 23 requirement. *Id*. In other words, the District Court was required to decide whether FFM's emails established—contrary to all other evidence—that FFM applies the three-trade rule. If such a finding was made, it was made in clear error, and it is contradicted within the District Court's Order. (App. 4.) If the finding was only that a factual dispute exists, the District Court did not fulfill its obligation under Rule 23 and committed clear error.

3. The District Court Committed Clear Error in Finding FFM's Practices May Not be in Accord With Other Insurers.

The District Court ultimately found a "predominate" question was "whether the Defendant's claim settlement practices with regard to GCOP fees are or are not in conformance with the practices of other Montana insurers as to be in violation of the Montana Unfair Trade Practices Act." (App. 20.) And yet, the District Court expressly acknowledged the "'reasonably necessary' standard is widely used in the insurance industry" (App. 4.), and FFM presented unrefuted evidence, in the form of affidavits and other documentation, that its practices conform to industry standard in Montana. There is no contrary evidence.

Although the Kramers attempted to create a dispute over industry standard by attaching materials from State Farm, Hartford and Safeco "which list GCOP as line items to include in ACV payments." (CR 14 (citing Ex. 7a-7e).), these materials do nothing more than confirm FFM's practices are consistent with industry standard. There is nothing in these insurers' materials that references the

three-trade rule or suggest a standard other than the reasonably necessary standard should apply. It was therefore clear error to determine a non-existent factual dispute created a common question—one not even posed by the Kramers—that predominates over the entire class.

4. The District Court Incorrectly Determined the Reasonably Necessary Standard Does Not Apply.

The District Court's finding of predominance was based in large part on *Young v. Farmers Ins. Exch.*, 2008 U.S. Dist. LEXIS 128613 (D. Mont. Oct. 8, 2008), a case which did not involve class certification, did not involve GCOP, did not involve ACV, and was addressed only minimally by the parties. Relying on *Young*, the District Court seemingly determined the "reasonably necessary" standard did not apply to the Kramers' claim. (App. 18.) This legal conclusion is reviewed *de novo*. *Jacobsen*, ¶ 25.

In *Young*, a section of the insured's fence was damaged by a hit-and-run driver. *Id*. at *2. Over the insurer's objection, the insured hired a contractor of his own choosing to repair the fence. *Id*. at *2-4. The contractor's final invoice included $236.68 for "Overhead, Profit, and Insurance." *Id*. at *5, 6. The insurer refused to pay this expense, arguing "only general contractors – as opposed to tradesmen such as fencing contractors – charge such fees and [the insurer] did not believe a general contractor was necessary for this fence repair." *Id*. The insurer argued it was only required to cover charges which are "reasonable or necessary."

Id. The federal district court (Hon. Richard F. Cebull) determined "Fire's arguments must fail because neither the word 'reasonable' or 'necessary' is mentioned in the policy language relevant to this dispute." *Id*. at *10.

Here, the District Court held, "[a]s in *Young*," FFM's policy language "does not include the words 'reasonable' or 'necessary.'" (App. 17.) For this reason, "it is reasonable that a consumer would read this claim settlement to include fees for GCOP when those fees are part of the 'cost to repair or replace the property'." (App. 17-18.) This misses the point. Unlike the insurer in *Young*, FFM has paid GCOP as part of RCV payments when it is incurred as "part of the 'cost to repair or replace the property'." The question is how to make that determination—particularly at the ACV stage, which *Young* did not consider. If not the "reasonably necessary" standard in the case of ACV, and if not upon receipt of documentation showing GCOP was actually incurred in the case of RCV, then what is the alternative reasonable interpretation? The District Court does not say.

Fundamentally, *Young* involved an insurer's refusal to pay regular contractor profit and overhead (<u>not</u> GCOP) because the insurer erroneously determined the

contractor was seeking compensation as a general contractor. *Id*.[5] There was no such erroneous determination in this case, and there was no refusal to pay.

Furthermore, *Young* did not address ACV, which is the only context in which the "reasonably necessary" standard applies in this case. Again, because ACV is paid in advance, some standard must govern whether GCOP is likely to be part of the cost to repair. *Young* simply cannot be read for the idea that GCOP is payable in advance on every claim. The District Court erred in finding the Policy does not support application of the "reasonably necessary" standard.

5. The District Court Incorrectly Deemed the Policy Ambiguous.

The District Court's finding of predominance was also based on something not argued or addressed by the parties: an alleged ambiguity in FFM's Policy. With respect, this legal conclusion was based on a misreading of the Policy, and on provisions that do not apply.

The District Court found the Policy ambiguous in two ways. The first relates to the Policy's Expanded Replacement Cost Terms Endorsement. (App. 18.) That endorsement only applies to one of the Kramers' structures (the residence), and only applies "[w]hen the covered loss exceeds the Coverage A

[5] The briefing in *Young* leaves no doubt GCOP was not at issue. The insureds' brief stated: "[T]he overhead and profit Farmers refused to reimburse to Youngs was not for supervision of subcontractors. It was of the second type, administrative overhead, and normal profit, both perfectly legitimate components of normal construction business operations." (App. 30) The underlying briefing is not part of the District Court record, but a Court may take judicial notice of court records. Mont. R. Evid. 201(b), 202(b)(6).

'limit' shown on the 'declarations' and 'you' elect to repair or replace the 'residence.'" (CR 11, Ex. A at 207.) Here, the repairs on the residence fell well below the Kramers' Coverage A limit of $164,000, so the endorsement was not applicable. (CR 11, Ex. A at 167.)

Nevertheless, the District Court found an ambiguity because the endorsement set RCV as the lesser of the actual cost to repair or "the amount actually and necessarily spent to repair or replace the damage," whereas the "Actual Cash Value Terms" (a provision that only applied to coverage for the shed in this case) did not contain the same "actually and necessarily spent" language. (App. 18.) Not only did this alleged inconsistency create an ambiguity in the Kramers' Policy, according to the District Court, but it created an ambiguity subject to classwide resolution.

Even if an ambiguity existed—and, frankly, it is not clear how these provisions, which apply to calculating limits for different kinds of coverages, are in any way inconsistent—it existed in provisions that do not apply in this case. While it is conceivable the same limits language may be pertinent to some putative class members' claims, it is not relevant to the Kramers. The alleged ambiguity does not create a common question of law or fact, much less a predominate one.

The District Court's second ground for ambiguity is another endorsement, but an endorsement that did not exist when the Kramers' loss was adjusted. FFM

recently made a business decision to no longer cover GCOP in wind or hail claims. It issued an endorsement, effective May 22, 2019, which specifically excludes coverage for GCOP in these kinds of claims. (CR 14, Ex. 6 at 251.) The District Court concluded this new document "evidence[s]" ambiguity because it "makes clear to this Court that the Defendant was capable of defining its settlement duties to reflect the 'reasonably necessary' standard the insurer allegedly employs when considering GCOP fees." (App. 18.)

The new endorsement, however, says nothing about a "reasonably necessary" standard. It does away with GCOP in wind and hail claims altogether, whether reasonably necessary or not. Furthermore, FFM is aware of no legal authority suggesting a policy provision that was not in existence at the pertinent time can retroactively create an ambiguity in an insurance policy. Needless to say, such a rule would impose an impossible burden on insurers.[6]

B. Superiority is Lacking.

Certification under Rule 23(b)(3) is only proper if "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

[6] The District Court also appeared to suggest references to three trades in FFM's emails (addressed above) somehow demonstrated an ambiguity in the Policy. (App. 19.) While evidence of extrinsic communications may be considered when an ambiguity is present to discern a contract's meaning, such extrinsic evidence does not create an ambiguity in the first instance. *Mary J. Baker Revocable Tr. v. Cenex Harvest States, Coops., Inc.*, 2007 MT 159, ¶ 55, 338 Mont. 41, 164 P.3d 851.

Mont. R. Civ. P. 23(b); *Ascencio*, ¶ 20. This inquiry boils down to "a comparison of the burdens of a class-action suit with those that would obtain if the court required class-members to pursue their claims individually." *Mills*, 269 F.R.D. at 678. Factors pertinent to the analysis include (1) class members' interests in individually controlling the prosecution of separate actions; (2) the extent and nature of litigation regarding the issue already begun by class members; (3) the desirability of concentrating the litigation in a particular forum; and (4) the likely difficulties in managing a class action. *Knudsen*, ¶ 17; Mont. R. Civ. P. 23(b)(3)(A)-(D).

If this case were to go forward as a class action, a trial would involve the adjudication of many hundreds of distinct disputes, each primarily focused on whether a general contractor was "reasonably necessary" under the specific facts of each case. This would necessarily involve the presentation of evidence on the complexity of each project, technical difficulty, number of subcontractors or trades required, value of the contract, the length of time the project would take, and the specific coverage(s) involved.[7] Even if the class members were permitted to argue FFM was required in every case to pay GCOP when three or more trades were or

[7] In addition to different underlying facts, class members would have different coverages with different policy language. As set forth above, of the three buildings owned by the Kramers, different coverages, loss settlement provisions and limits applied to each. Which policy provisions apply often depends on the replacement cost in relation to the insured's limits on the structure.

were likely to be involved, FFM would still present contrary evidence demonstrating in any individual case that such services were not reasonably necessary and the insured, therefore, was not underpaid.

Additionally, FFM would inevitably have different affirmative defenses to litigate as to different class members. Many of the putative class members, for instance, have fully settled their claims. Others would be subject to a statute of limitations defense. The evaluation and calculation of damages would also vary widely between class members.[8]

Even if the trial boiled down to a mechanical application of the three-trade rule, class resolution would remain unworkable. In the District Court, FFM presented evidence it would have to conduct an individual file review for each claim to determine if three trades were or were likely to be involved. (CR 11, Ex. G, ¶ 11.) The number of claims received by FFM during the certified 10-year time period (2008-2018) was 3,435. (CR 11, Ex. G, ¶ 12.) Each file review would take approximately 30 minutes, and would potentially require the assistance of independent adjusters because FFM's practice is to hire an independent adjuster to go to the insured's property to complete an estimate. (CR 11, Ex. G, ¶ 11.) The estimated time to review all claims, therefore, would be 1,717.5 hours. (CR 11,

[8] To be clear, FFM is not arguing individualized damages inquiries would alone preclude certification, *see Jacobsen*, ¶ 49, but these inquiries further underscore the dissimilarity of the putative class members' claims.

Ex. G, ¶ 12.) FFM is a small company with a single internal claims representative. (CR 11, Ex. G, ¶ 13.) It does not have the resources to review all past claim files while continuing to conduct its business as a farm mutual insurance company. (CR 11, Ex. G, ¶ 13.)

All of this points to the inevitable conclusion that a class action would not be manageable and would not be the superior method for resolution. "The likely difficulties in managing a class action" are alone sufficient to deny certification. Mont. R. Civ. P. 23(b)(3)(D). Nevertheless, the District Court concluded, "[w]hile a class action presents management difficulties for Defendant in regards to the time and costs required to review each claim, this difficulty is not enough to overcome the Court's determinations concerning the other three factors provided under Rule 23(b)(3)." (App. 21-22.)

The other factors pertinent to superiority, however, weigh against certification. Because an individualized assessment would have to be made in each case to determine whether GCOP was owed, class members have a strong interest in controlling the prosecution of separate actions. Mont. R. Civ. P. 23(b)(3)(A); *DeWitt,* 85 So. 3d at 385 ("[T]he necessity for such individualized inquiry [of GCOP claims] outweighs the superiority of the class-wide resolution of disputes."); *Mills*, 269 F.R.D. at 681 ("Given the individualized inquiries and proof

that will be necessary to litigate the class members' claims [for GCOP], the interest of individually controlling the litigation in separate actions is found.").

Furthermore, there is no evidence class members would be precluded from pursuing their individual claims in the absence of certification. In the District Court, the Kramers argued "it is reasonable to expect that the class members are better off pooling their resources" (CR 7, p. 16), but such bald declarations are insufficient. *See Morrow*, ¶ 17 ("Having raised the argument that limitations on their financial resources prevent them from litigating their claims outside of a class action, Plaintiffs have nonetheless failed to offer facts supporting their argument." (Emphasis added.).)

In summary, a comparison of the burdens of a class-action suit with those of individual lawsuits strongly militates against a finding of superiority. The District Court abused its discretion finding otherwise.

II. THE REQUIREMENTS OF RULE 23(a) ARE NOT MET.

Class certification is improper for the additional reason it does not satisfy all of the threshold elements of Rule 23(a). Under that rule, one or more members of a class may sue 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.

Mont. R. Civ. P. 23(a); *Diaz*, ¶ 27.

A. Commonality is Lacking.

Commonality requires the plaintiff to demonstrate the class members "have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011). This means "[t]heir claims must depend upon a common contention of such a nature that it is capable of class wide 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." *Id.* (emphasis added). This is not such a case. Tellingly, the common questions alleged in this case were changed by the Kramers over the course of their briefing and then changed again by the District Court. No answer to any alleged common question would resolve an issue central to the validity of each class member's claim "in one stroke." *See id*.

On the question of commonality, the District Court relied on *Chipman v. Northwest Healthcare Corp*., 2012 MT 242, ¶ 47, 366 Mont. 450, 288 P.3d 193. In *Chipman*, this Court affirmed class certification in an action filed by employees of Kalispell Regional Medical Center. *Id*., ¶ 1. The dispute involved the discontinuation of a sick leave buy-back program. *Id*., ¶¶ 6-10. Importantly, class certification was based on the fact that the "[e]mployers implemented the exact

same CIB buy-back policy," the "employee handbook and policy and procedures manual contained uniform language," and "[e]mployers operated under a company-wide policy that applies equally to all members of the class." *Id*., ¶ 52 (emphasis added). By contrast, the Court noted certification would not have been appropriate where differences would frustrate the search for common answers:

> The U.S. Supreme Court's *Wal-Mart* decision significantly tightened the commonality requirement. . . . [It] recognized that the language requiring "questions of law or fact common to the class" could easily be misread since any competently crafted complaint literally raises the requisite common questions. . . . Instead, the class members' claims must depend on a common contention that 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." The Court further explained the commonality requirement as follows:
>
> > What matters to class certification . . . is not the raising of common "questions"—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.
>
> . . . We agree with the District Court that the questions of fact and law raised by Employees are sufficient to satisfy the commonality requirement and support class certification. . . . Unlike *Wal-Mart*, where individuals in the class were treated differently and local personnel had wide discretion, Employers operated under a company-wide policy that applies equally to all members of the class. . . .

Id., ¶¶ 47-52 (emphasis added) (internal citations omitted); *but see Jacobsen*, ¶ 33 (suggesting the extent to which *Wal-Mart* applies in Montana is unsettled).

This case is far more akin to *Wal-Mart* than *Chipman*. Unlike the "exact same" buy-back program that was either available to employees or not, payment of GCOP depends on the individual circumstances of each loss and the specific coverages applicable to the insured. And yet, citing *Chipman*, the District Court held, "[s]imilarly here, a standard and uniform insurance policy applies to all members of the would-be classes." (App. 11.) It is unclear how the District Court reached this conclusion, as the evidence demonstrates its falsity.

More importantly, while it is true FFM's policies do not explicitly address GCOP—like almost every property insurance policy of which FFM is aware—whether GCOP is payable as part of the "cost to repair" will vary in every case because every loss and every repair is different. Thus, unlike the situation in *Chipman*, each class member's treatment will be different depending on the facts of the loss, coverages and limits.

The evolution of the Kramers' "common questions" is set forth in the Background Section of this brief. Ultimately, the District Court charted a different path and found the questions capable of class-wide resolution were:

1. [W]hether the Defendant's policy language regarding the insurer's duty to tender GCOP payments at both the ACV and RCV stages is so ambiguous as to be unfair; and

2. [W]hether the Defendant's claim settlement practices with regard to GCOP fees are or are not in conformance with the practices of other Montana insurers as to be in violation of the Montana Unfair Trade Practices Act.

(App. 20.)

FFM was denied the opportunity to brief these matters because they were not the questions proposed for certification. This is particularly unfair because, now, FFM finds itself briefing these questions for the first time under a potentially heightened standard of review.

Without repeating the entirety of FFM's prior discussion, there is good reason these were not the questions presented by the Kramers for certification. As to the first question, the District Court's finding of ambiguity is based on a misreading of the Policy and provisions that played no role in adjusting the Kramers' loss. As to the second question, FFM presented unrefuted evidence its practices conform to industry standards. Even if the issue was legitimately disputed, however, it would never generate an answer "in one stroke" as to whether FFM breached the class members' insurance contracts or violated the UTPA.

There is no escaping the fact that application of the "reasonably necessary" standard lies at the heart of this case, and courts considering the question, besides the District Court, have correctly found it is not a question capable of class-wide determination. *E.g.*, *Mills*, 269 F.R.D. at 667-82.

B. Typicality is Lacking.

To satisfy the typicality requirement, a plaintiff must demonstrate "the claims or defenses of the representative parties are typical of the claims and

defenses of the class." Mont. R. Civ. P. 23(a)(3). The commonality and typicality requirements of Rule 23(a) thus tend to merge. *Gen. Tel. Co. Southwest v. Falcon*, 457 U.S. 147, 158 (1982).

Each prospective class member's claim is unique, atypical and incapable of adjudication on a class basis. A trial of this action would inevitably devolve into hundreds of mini trials over whether a general contractor was "reasonably necessary," the different affirmative defenses asserted as to each class member, and the evaluation and calculation of damages in each claim.

In finding typicality, the District Court cited *Jacobsen's* holding 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." (App. 12 (citing *Jacobsen*, ¶ 56).) In *Jacobsen*, however, "the Court's finding that the proposed class satisfied the commonality requirement" was not challenged, so it is no surprise typicality was also found. *Id*., ¶ 31. The issue in *Jacobsen* was whether an undisputed systematic practice by Allstate Insurance Company was a *per se* violation of the UTPA. *Id*., ¶ 55. The Court found "[t]his 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." *Id*., ¶ 40.

There is no such practice at issue in this case. FFM pays GCOP in advance whenever a general contractor is reasonably necessary. There is no claim this industry-wide practice is a *per se* violation of the UTPA. FFM pays RCV when an insured actually incurs GCOP charges, but requires the submission of subcontractor receipts. To the extent this is claimed to be a *per se* violation of the UTPA, the Kramers are one of, at most, a handful of insureds to have suffered the violation. Moreover, the Kramers are the only insured to have arguably suffered any damages, as the others submitted subcontractor invoices and were paid GCOP.

C. Adequacy of Representation is Lacking.

The fourth prerequisite of Rule 23(a) allows certification only where the representative parties will fairly and adequately protect the interests of the class. Mont. R. Civ. P. 23(a)(4). "This requires that the named representative's interests not be antagonistic to the interests of the class." *Jacobsen*, ¶ 58; *see also Amchem Prods.*, 521 U.S. at 625-26 (the question of typicality overlaps with the adequate representation question: "both look to the potential conflicts to the class").

Given the highly-individualized analysis for each class member's claim, it is not difficult to envision that conflicts. For example, the Kramers may argue that, irrespective of the three-trade rule, a general contractor was reasonably necessary for their job because it involved damage to the siding of three separate buildings. This argument would tend to run against those insureds who did not sustain siding

damage, or who sustained damage to just one building, for example. Contrarywise, an insured who conducted more extensive repairs than the Kramers—a larger contract, more complex work, or more subcontractors—may distinguish his case from the Kramers, or insureds like the Kramers, to prove a general contractor was reasonably necessary for his loss. Also, the class members' coverages and policy language would not be identical. In summary, because the adjudication of each individual class member's claim would be individual and fact-specific, conflicts between class members would inevitably arise.

CONCLUSION

The Kramers' claims do not give rise to any common questions that would predominate over individual ones, and class resolution would be far from a superior method. The District Court abused its discretion by basing its certification decision on clearly erroneous findings of fact and incorrect conclusions of law. The grant of class certification should be reversed, and the case remanded for resolution of the Kramers' individual claims.

Dated this 16th day of March, 2020.

BOONE KARLBERG P.C.

\s\ Christopher L. Decker
Christopher L. Decker

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rules of Appellate Procedure 11 and 14(9), I certify that this brief is printed with a proportionally spaced Times New Roman text typeface of 14 points; is double-spaced, except for footnotes and for quoted an indented material; and the word count calculated by Microsoft Word is not more than 10,000 words pursuant to Montana Rule of Appellate Procedure 11(4)(a), being 9955 words, excluding the caption, Table of Contents, Table of Authorities, Signature Block, Certificate of Compliance, Certificate of Service, and Exhibits.

Dated this 16th day of March, 2020.

BOONE KARLBERG P.C.

\s\ Christopher L. Decker
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