

IN THE SUPREME COURT OF OHIO

Case No. \_\_\_\_\_

07-0070

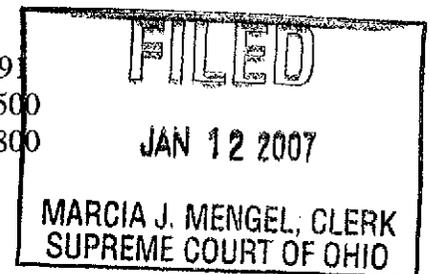
<b>Joseph W. Peterson,</b>	)	
	)	
Appellee,	)	On Appeal from the Cuyahoga County
	)	Court of Appeals, Eighth Appellate
vs.	)	District
	)	
	)	Court of Appeals
<b>Progressive Corporation, et al.,</b>	)	Case No. CA-06-087676
	)	
Appellants.	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS\*

**\*Appellants:** Progressive Corporation, Progressive Casualty Insurance Co., Progressive Specialty Insurance Co., Progressive Preferred Insurance Co., Progressive Classic Insurance Co., Mountain Laurel Assurance Co., Halcyon Insurance Co., Progressive Northeastern Insurance Co., Progressive Northern Insurance Co., Progressive Gulf Insurance Co., Progressive Northwestern Insurance Co., Progressive Premier Insurance Co., Progressive Southeastern Insurance Co., Progressive Bayside Insurance Co., Progressive Security Insurance Co., Progressive Michigan Insurance Co., Progressive Express Insurance Co., Progressive American Insurance Co., Progressive Mountain Insurance Co., Progressive Paloverde Insurance Co., Progressive Max Insurance Co., and Progressive Home Insurance Co.

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**THIS CASE PRESENTS SUBSTANTIAL CONSTITUTIONAL QUESTIONS  
AND IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This Court has yet to address the propriety of certification of a *nationwide* class in an action based on the law of *multiple states*. This issue is highly controversial and raises substantial constitutional questions and other issues impacting the national economy.<sup>1</sup> As a result, several state courts and most federal appellate courts have addressed the propriety of such nationwide, state-law class actions.<sup>2</sup>

Going against a veritable tide of decisions denying certification of nationwide state-law class actions, the court of appeals in this case reversed the trial court's denial of class certification and itself certified *two nationwide* plaintiff classes under Civ.R. 23(B)(3).<sup>3</sup> The court further held that plaintiff had standing to sue for breach of contract twenty-one other defendants with which he had no contract.

The foregoing holdings raise the following critical questions regarding certification of nationwide state-law class actions:

1. In a case where the plaintiff class members reside in many states and the applicable law is the law of each class member's state, can a court, consistent with the Due Process Clause and Full Faith and Credit Clause of the U.S. Constitution, certify a class action without an extensive analysis of the applicable law of each pertinent state to determine

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<sup>1</sup> 7AA C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* § 1780.1, at 204-13 (3d ed. 2005); Comment, "Uncertifiable?: The Current Status of Nationwide State-Law Class Actions," 54 *Baylor L. Rev.* 467, 468, 470 & fn. 5, 471 & fn. 6, 501 (2002).

<sup>2</sup> *Id.* See, e.g., *Ferrell v. Allstate Ins. Co.* (Nov. 29, 2006), N.M. App. No. 26,058, slip op.; *Compaq Computer Corp. v. Lapray* (Tex. 2004), 135 S.W.3d 657; *Ex parte Green Tree Fin. Corp.* (Ala. 1998), 723 So.2d 6; *In re Bridgestone/Firestone, Inc.* (C.A. 7, 2002), 288 F.3d 1012; *Stirman v. Exxon Corp.* (C.A. 5, 2002); *Zinser v. Accufix Research Inst. Inc.* (C.A. 9, 2001), 253 F.3d 1180; *In re Life USA Holdings, Inc.* (C.A. 3, 2001), 242 F.3d 136; *In re Am. Med. Sys., Inc. v. Pfizer* (C.A. 6, 1996), 75 F.3d 1069.

<sup>3</sup> *Id.*

whether, in light of any variations in the applicable law of each state, there are questions of law common to the class as required by Civ.R. 23(A)(2)?

2. In such a case, can a court, consistent with the Due Process Clause and Full Faith and Credit Clause, certify a class action under Civil Rule 23(B)(3) without an extensive analysis of the applicable law of each pertinent state to determine whether, in light of any variations in the applicable law of each state: (a) common questions of law predominate; (b) a multi-state class action is superior; (c) it is desirable to concentrate the claims of the multi-state class in a single action; and (d) a multi-state class action is manageable?

3. In a case in which the plaintiff seeks certification of a multi-state class action, does the plaintiff have the burden of establishing through an extensive state-by-state analysis of the applicable law of each pertinent state that any variations in such law do not preclude or limit certification of a multi-state class?

4. In a case where the plaintiff seeks certification of a multi-state class action, do the trial and reviewing court have a constitutional duty to determine whether variations in the applicable law of each pertinent state preclude or limit certification of a multi-state class?

5. Where the record does not contain an extensive state-by-state analysis of the applicable law of each pertinent state that establishes that variations in such law do not preclude or limit certification of a multi-state class, must certification of the case as a class action be reversed?

6. Does a court of appeals err in reversing the trial court's denial of class certification for abuse of discretion when the court of appeals fails to consider and apply the applicable subsection of Civ.R. 23(B)?

7. Does a court of appeals err in reversing the trial court's denial of class certification for abuse of discretion when the court of appeals misreads the record and erroneously finds that the plaintiff is a member of the class he seeks to represent?

8. Does a plaintiff who does not have individual standing to bring a breach of contract action against a defendant have standing to maintain a class action against that defendant?

This Court has not previously addressed these questions; but it is critical that this Court answer them. The answers will affect not only Progressive, twenty-one of its insurance subsidiaries, and 664,948 of their boat policyholders but also other insurance policyholders, insurance companies, insurance regulators, consumers, citizens, and businesses across Ohio and the United States. The insurance industry is a major part of the Ohio economy.

Class actions have become a familiar feature of the legal landscape. They have a huge impact on the affairs of consumers, businesses, and government regulators, and on the economy. If the decision below is allowed to stand, Ohio could become a center for *nationwide* state-law class actions since Ohio would be almost alone in its willingness to certify such class actions.

As a result, these questions are of public or great general interest and, given the limitations of the Due Process and Full Faith and Credit Clauses of the U.S. Constitution, raise substantial constitutional questions. See *Phillips Petroleum Co. v. Shutts* (1985), 472 U.S. 797, 821-23; *Allstate Ins. Co. v. Hague* (1981), 449 U.S. 302, 312-13; *Compaq Computer Corp. v. Lapray* (Tex. 2004), 135 S.W.3d 657, 680; *Duvall v. TRW, Inc.* (1991), 63 Ohio App.3d 271, 274-76, 578 N.E.2d 556.

On the merits, this case also raises the question: whether an insurer that is contractually obligated to pay only that amount necessary to repair an insured's damaged eight-year-old boat motor to its *pre-loss condition* may adjust its payment to account for the pre-loss depreciation of the motor when the insured's policy unambiguously states that the insurer's payment is subject to "an adjustment for depreciation and physical condition?" The court of appeals held that an insurer may not take such pre-loss depreciation into account in the context of a repair, despite the unambiguous policy language to the contrary. This question is of public or great general interest because it affects Progressive, twenty-one of its insurance subsidiaries, and 664,948 of their boat policyholders as well as other policyholders, insurers, regulators, consumers, and businesses in Ohio and across the United States.

#### **STATEMENT OF THE CASE AND FACTS**

This is a *nationwide*, state-law class action brought by a Utah resident against an Ohio insurance company, its parent company, and twenty-one other insurance subsidiaries of the parent. The action challenged the right of the Ohio insurance company to take *pre-loss depreciation* into account in estimating the cost to repair a damaged eight-year-old boat motor to its pre-loss condition. The motor was insured under a Utah policy that expressly limited the insurer's liability to "the amount necessary to repair the damaged property to its pre-loss condition, reduced by the applicable deductible," subject to "an adjustment for depreciation and physical condition."

The trial court denied plaintiff's motion for summary judgment, granted defendants summary judgment on all of plaintiff's claims, and denied plaintiff's motion for certification of two nationwide plaintiff classes. The court of appeals affirmed the summary judgment for defendants on two of plaintiff's claims but reversed the summary judgment for defendants on

plaintiff's contract claim and granted plaintiff summary judgment on that claim. The court also reversed the denial of class certification as an abuse of discretion and itself certified under Civ.R. 23(B)(3) *two nationwide* plaintiff classes—a damages class and an injunctive relief class.

In granting summary judgment to plaintiff on his contract claim, despite the unambiguous contract language discussed above, the court of appeals held that the depreciation adjustment does not apply when an insurer elects to repair rather than to replace or pay the actual cash value of the damaged property. In so holding, the court, in effect, converted plaintiff's indemnity policy into one for replacement cost coverage.

In reversing the denial of class certification, the court of appeals held that the case could be maintained as a class action on behalf of two nationwide plaintiff classes under Civ.R. 23(B)(3). The court further held that the plaintiff had standing to bring a class action against the twenty-one other defendants from which he had not purchased insurance on the theory that once "a class has been properly certified, standing is determined in reference to the class as a whole, and not simply in reference to the individual named plaintiffs."

The facts are as follows. Plaintiff is a Utah resident. He purchased a Utah boat insurance policy from Progressive Casualty Insurance Company ("Casualty"), an Ohio corporation, through an insurance agent in Utah. The policy insured plaintiff's boat, which was located in Utah, against property damage. Plaintiff declared the fair market value of his boat to be approximately \$15,000 at the time and paid a premium of \$452.

On May 27, 2001, plaintiff's boat motor was damaged when the propeller struck an underwater object. The motor was eight years old at the time. Plaintiff reported the damage to Casualty. An adjuster prepared a written estimate of the cost to repair the damage. The

estimate stated a total repair cost of \$6,382.90. Casualty deducted from this amount \$500 for plaintiff's deductible and \$852.51 for pre-loss depreciation (described as "betterment") of the engine and certain other parts, and issued plaintiff a check for \$5,030.39. Plaintiff used this payment to install a larger, upgraded new motor in his boat.

On November 28, 2001, plaintiff's policy with Casualty expired, and plaintiff purchased a new policy from Allstate. At that time, plaintiff declared the fair market value of the boat—with the new motor—to be \$22,000; that is, \$7,000 more than when he insured it with Casualty.

On September 12, 2003, plaintiff brought this action as a *nationwide* class action against The Progressive Corporation, an Ohio company, and twenty-one of its insurance subsidiaries. Plaintiff sought to represent 664,948 policyholders from forty-eight states who had boat insurance policies issued by any of the twenty-one subsidiaries, even though plaintiff himself had never dealt with The Progressive Corporation or any of its subsidiaries other than Casualty. Plaintiff sought certification of two *nationwide* classes: a damages class under Civ.R. 23(B)(3) and an injunctive relief class under Civ.R. 23(B)(2).

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

### Proposition of Law No. 1

**In a putative class action in which the law of multiple states must be applied, the trial court initially, and the court of appeals upon review, must make an *extensive* state-by-state analysis of the applicable law of each pertinent state in order to determine whether there are variations in such law that preclude a finding that there are questions of law common to the class. In addition, where the class action is to be certified under Civ.R. 23(B)(3), the trial court and the court of appeals must determine whether due to any variations in the applicable law of each pertinent state: (a) common questions of law predominate; (b) a class action on behalf of residents of multiple states is superior to other alternatives; (c) the concentration of the claims of residents of multiple states in a single action is desirable; and (d) a multi-state class action is manageable.**

Because the insurance policy in this case provides that "[a]ny disputes as to the coverage provided or the provisions of this policy shall be governed by the law of the state

listed on your application as your residence,” the applicable law is the law of each class member’s state of residence. See *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.* (1983), 6 Ohio St.3d 436, syllabus, 453 N.E.2d 683; see Restatement (Second) of Conflict of Laws § 187 (1988 revn). The plaintiff and the court of appeals proceeded on this basis.

As a result, before certifying this case as a class action, the court of appeals was required by Civ.R. 23(A)(2) to make an *extensive* analysis of the applicable law of each pertinent state to determine whether variations precluded a finding that there were questions of law common to the two nationwide classes to be certified. In addition, because the court of appeals certified the two nationwide classes under Civ.R. 23(B)(3), that court was further required to make an *extensive* analysis of the applicable law of each pertinent state to determine whether due to any variations in such law: (a) common questions of law predominated; (b) a single multi-state class action was superior to other alternatives; (c) it was desirable to concentrate the claims of a multi-state class in a single action; and (d) a multi-state class action was manageable. Civ.R. 23(A)(2), (B)(3); see *State ex rel. Davis v. Public Employees Retirement Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444, ¶¶20, 21, 27, 28; *Compaq Computer*, 135 S.W.3d at 671, 672-73; *Simmons v. Am. Gen. Life & Acc. Ins. Co.* (2000), 140 Ohio App.3d 503, 507, 511-12, 748 N.E.2d 122; *Duvall*, 63 Ohio App.3d at 276, 578 N.E.2d 556. “A cursory review is not sufficient.” *Stirman v. Exxon Corp.* (C.A. 5, 2002), 280 F.3d 554, 564. “A proper review would [analyze] the relevant law of each state and the variations among states.” *Compaq Computer*, 135 S.W.3d at 673; see *Stirman*, 280 F.3d at 564-66. The review must be *extensive*. *Id.*

The court of appeals here made no such review. While the court said that “the law regarding the interpretation of ambiguities in an insurance contract is virtually uniform

nationwide,” it did so without *any* analysis of the law of the forty-eight states involved, and without *any* analysis of any other elements of insurance contract law applicable to this case in any of those forty-eight states. Moreover, the appellate court’s conclusion on even that narrow point is not correct. For example, Arizona and Maryland—two states covered by this action—do not construe ambiguities against the insurer. *Am. States Ins. Co. v. C & G Contr.* (Ariz. App. 1996), 186 Ariz. 421, 424, 924 P.2d 111, 114; *Nationwide Ins. Co. v. Rhodes* (1999), 127 Md. App. 231, 246, 732 A.2d 388, 390-91.

Further, all forty-eight states may not apply the same test of ambiguity. Under Utah law, which applies to plaintiff’s claim, the test is not “an etymologically-based test,” but whether the proffered alternative interpretation is “plausible and reasonable in light of the language used,” is “based upon the usual and natural meaning of the language used,” and is not “the result of a forced or strained construction.” *Saleh v. Farmers Ins. Exch.* (Utah 2006), 133 P.3d 428, 433.

Additionally, the court of appeals ignored the fact that eight different statutes of limitations—ranging from two to fifteen years—applied to the contract claims in the forty-eight states involved; that a number of states’ insurance regulations, including Ohio’s, recognize the propriety of depreciation adjustments under analogous automobile policies<sup>4</sup>; and that Arizona and Florida courts have specifically upheld depreciation adjustments under analogous automobile policies. *Whitson v. Western Agric. Ins. Co.*, 1995 Ariz. App. LEXIS 66 (depublished); *Rodriguez v. Amstar Ins. Co.* (Fla. App. 2004), 888 So.2d 760. By certifying two nationwide classes, the court of appeals effectively reversed these holdings for Arizona and Florida insureds.

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<sup>4</sup> E.g., Cal. Code Regs. tit. 10, § 2695.8(i) (2004); N.J. Admin. Code tit. 11, § 11:2-17.10(a)2 (2004); Ohio Admin. Code § 3901-1-54(H).

The court of appeals also ignored the strong trend against certification of multi-state class actions due to variations in state contract law. See, e.g., *Ferrell v. Allstate Ins. Co.* (Nov. 29, 2006), N.M. App. No. 26,058, slip op; *Snell v. The Geico Corp.* (Md. Cir. Ct.), 2001 WL 1085237 at \*8-10; *Hammett v. Am. Bankers Ins. Co.* (S.D. Fla. 2001), 203 F.R.D. 690, 701; *Greenberg v. G/E Life & Annuity* (Feb. 16, 2000), S.D. Ohio No. C-1-97-416, slip op. at 11, 16; *Ex parte Green Tree Fin. Corp.* (Ala. 1998), 723 So.2d 6, 9.

Because the court of appeals did not make the required, extensive analysis, its judgment should be reversed and the judgment of the trial court should be reinstated.

### **Proposition of Law No. 2**

**Because the plaintiff bears the burden of establishing that all of the prerequisites for class certification are met, the plaintiff in a putative class action in which the law of multiple states will apply must present an extensive state-by-state analysis of the applicable law of each state in order for the trial court to determine whether there are any variations in the applicable law that preclude or limit class certification. The failure of the plaintiff to present such an analysis is a sufficient basis for denying class certification.**

The plaintiff in a putative class action bears the burden of establishing that all prerequisites for class certification are met. *Compaq Computer*, 135 S.W.3d at 672; *State ex rel. Ogan v. Teater* (1978), 54 Ohio St.2d 235, 247, 375 N.E.2d 1233; *Duvall*, 63 Ohio App.3d at 276, 578 N.E.2d 556. Therefore, the plaintiff must present an *extensive* analysis of the applicable law of each pertinent state and any variations therein. *Compaq Computer*, 135 S.W.3d at 672; *Duvall*, 63 Ohio App.3d at 276, 578 N.E.2d 556. The court may deny class certification if the plaintiff fails to do so. *Simmons*, 140 Ohio App.3d at 507, 511-12, 748 N.E.2d 122; *Duvall*, 63 Ohio App.3d at 276, 578 N.E.2d 556.

The plaintiff here failed to submit such an analysis of the pertinent states' applicable insurance law. He submitted only a superficial statement of the basic elements of a contract claim in each state but no analysis of the variations or similarities among the laws of the

various states regarding: tests for ambiguity; rules of construction with or without ambiguity; specific cases addressing analogous depreciation provisions; insurance regulations regarding depreciation or betterment deductions; statutes of limitations; discovery rules; measure of damages; etc. As a result, the trial court did not abuse its discretion in denying plaintiff's motion for class certification, and the appellate court should have affirmed. *Duvall*, 63 Ohio App.3d at 276, 578 N.E.2d 556; *Simmons*, 140 Ohio App.3d at 507, 511-12, 748 N.E.2d 122.

If the appellate court thought there was an abuse of discretion, it should not have proceeded to formulate the class and the issue itself. See *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (reversing same appellate court as present case—Nahra, J.); *Begala v. PNC Bank, Ohio, N.A.* (Ohio App.), 1999 WL 1264187, \*6; *Hanson v. Titan Tiger, Inc.* (Ohio App.), 1988 WL 3752, \*3 (Nahra, J.). Instead, the appellate court should have remanded the case for the trial court to make an extensive analysis or to order the plaintiff to do so. *Simmons*, 140 Ohio App.3d at 507, 511-12, 748 N.E.2d 122. As a result, the appellate court's judgment should be reversed.

### **Proposition of Law No. 3**

**Courts ruling on class certification where the law of multiple states will apply have an independent duty under the Due Process Clause and the Full Faith and Credit Clause of the U.S. Constitution to determine whether variations in the applicable law of each state preclude or limit class certification.**

Courts are guardians of absent class members' rights. *Compaq Computer*, 135 S.W.3d at 673; *Stirman*, 280 F.3d at 563 fn. 7; see *Fine v. Am. Online, Inc.* (2000), 139 Ohio App.3d 133, 140, 743 N.E.2d 416. As a result, courts considering class certification have an independent duty to determine whether there is sufficient uniformity in the applicable law of each pertinent state to permit certification as a multi-state class action or to limit class certification to residents of states whose law is sufficiently uniform. See *Compaq Computer*,

135 S.W.3d at 673; *Stirman*, 280 F.3d at 563 fn. 7; *Spence v. Glock GmbH* (C.A. 5, 2000), 227 F.3d 308, 312-13; see, also, *Castano v. Am. Tobacco Co.* (C.A. 5, 1996), 84 F.3d 734, 741; *Walsh v. Ford Motor Co.* (C.A. D.C., 1986), 807 F.2d 1000, 1016-17. Otherwise, the constitutional rights under the Due Process Clause and the Full Faith and Credit Clause of insureds and insurers to have the law of the states they selected applied to their contract disputes will be violated. See *Phillips Petroleum*, 472 U.S. at 821-23; *Allstate Ins.*, 449 U.S. at 312-13; *Compaq Computer*, 135 S.W.3d at 680; *Duvall*, 63 Ohio App.3d at 274-76, 578 N.E.2d 556.

Although the court of appeals apparently recognized its duty to make such an analysis, it failed to do so here. The court also violated the Due Process right of insureds and insurers in Arizona and Florida to have the law they selected apply to their contract disputes by effectively overruling *Whitson* and *Rodriguez*. See discussion at pp. 6-7 above. The judgment of the court of appeals should be reversed and the judgment of the trial court should be reinstated.

#### **Proposition of Law No. 4**

**Where the record does not contain an extensive state-by-state analysis of the applicable law of each state that supports certification of a multi-state class, the trial court does not abuse its discretion in denying class certification.**

The plaintiff here did not submit an extensive analysis of the applicable insurance law of the pertinent states, and the trial court denied class certification without opinion, presumably because the issue was moot once the trial court granted summary judgment to defendants on plaintiff's claims. Yet, the court of appeals reversed the trial court's denial and certified two nationwide classes without remanding to the trial court to make the required analysis and without making its own analysis of the applicable state law.

Consequently, there is nothing in the record to establish as required by Civ.R. 23(A)(2) and (B)(3) that the law of the forty-eight states to be applied in this case is sufficiently uniform

that there are common questions of law, that the common questions of law predominate, that it is desirable to concentrate the claims under the law of forty-eight states in a single action in Ohio, and that the trial court can manageably instruct the jury on the applicable law of forty-eight states. See *State ex rel. Davis*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444, ¶¶20, 21, 27, 28; *Compaq Computer*, 135 S.W.3d at 671, 672-73; *Simmons*, 140 Ohio App.3d at 507, 511-12, 748 N.E.2d 122; *Duvall*, 63 Ohio App.3d at 276, 578 N.E.2d 556; Miller & Crump, “Jurisdiction and Choice of Law in Multistate Class Actions After *Phillips Petroleum Co. v. Shutts*,” 96 Yale Law J. 1, 64 (1986). Accordingly, the judgment of the court of appeals should be reversed and the judgment of the trial court should be reinstated.

#### **Proposition of Law No. 5**

**A court of appeals errs in reversing the trial court’s denial of class certification for abuse of discretion when the court of appeals fails to consider and apply the applicable subsection of Civ.R. 23(B).**

Plaintiff sought to certify two nationwide classes: a damages class under Civ.R. 23(B)(3) and an injunctive relief class under Civ.R. 23(B)(2). Under an abuse of discretion standard, the court of appeals reversed the trial court’s denial of certification and held that both nationwide classes should be certified under Civ.R. 23(B)(3), ignoring Civ.R. 23(B)(2) altogether.

In so holding, the court of appeals failed to consider and apply the requirements of Civ.R. 23(B)(2), the sole subsection under which plaintiff sought certification of the injunctive relief class. Because the court of appeals applied the wrong legal standard to its review of the trial court’s decision, the court of appeals erroneously concluded that the trial court abused its discretion. The judgment of the court of appeals should be reversed. See, e.g., *Wheeling Corp. v. Columbus & Ohio River R.R. Co.* (2001), 147 Ohio App.3d 460, 479-80, 771 N.E.2d 263.

### Proposition of Law No. 6

**A court of appeals errs in reversing the trial court's denial of class certification for abuse of discretion when the court of appeals misreads the record and erroneously finds that the plaintiff is a member of a class he seeks to represent.**

The court of appeals' finding that plaintiff was a member of both classes, as required by *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, 96-97, 521 N.E.2d 1091, was clearly erroneous. The record was unequivocal that plaintiff's policy with Casualty expired on November 28, 2001, and plaintiff purchased a new policy from Allstate in late November 2001. Consequently, plaintiff did not have a policy with any defendant when he brought this action in 2003 and, therefore, was not a member of the injunctive relief class because he did not stand to incur a depreciation adjustment by any defendant in the future. The appellate court simply misread the record. Its judgment certifying an injunctive relief class should be reversed.

### Proposition of Law No. 7

**A plaintiff who does not have individual standing to bring a breach of contract action against a defendant does not have standing to maintain a class action for breach of contract against that defendant.**

In order to have standing to sue for breach of contract, the plaintiff must be a party to the contract with the defendant—or must derive his rights from such a party. See *U.S. Fid. & Guaranty Co. v. Truck & Concrete Equip. Co.* (1970), 21 Ohio St.2d 244, syllabus 1, 250, 257 N.E.2d 380. A plaintiff who does not have a contract with a defendant (or derive his rights through someone who does) cannot sue that defendant for breach of contract. *Id.* Furthermore, a plaintiff may join other defendants in an action only "if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or succession or series of transactions or occurrences." Civ.R. 20.

In this case, plaintiff did not have an insurance contract with any of the twenty-two defendants except Casualty, and plaintiff's purported claims against the other defendants did

not arise out of the same transaction or occurrence as plaintiff's claims against Casualty. Accordingly, plaintiff lacked standing to sue any of the defendants except Casualty and could not properly join them as defendants in this action. See *Fernandez v. Takata Seat Belts, Inc.* (2005), 210 Ariz. 138, 140-41, 108 P.3d 917.

The decision of the court of appeals to the contrary, citing federal cases relying on the so-called "juridical link" doctrine, was erroneous as a matter of law. "The fact that a plaintiff seeks to bring a class action does not change this standing requirement. Individual standing is a threshold to all actions, including class actions." *Woods v. Oak Hill Community Med. Ctr., Inc.* (1999), 134 Ohio App.3d 261, 269, 730 N.E.2d 1037; *Fernandez*, 210 Ariz. at 141-42, 108 P.3d 917. The court of appeals put the cart before the horse, holding that once "a class has been properly certified, standing is determined in reference to the class as a whole, and not simply in reference to the individual named plaintiffs." This conclusion eliminates the critical element of standing in class actions. The court of appeals, at least, should have affirmed the summary judgment to all defendants other than Casualty. *Id.*

### **Proposition of Law No. 8**

**When an insurance policy requires payment sufficient to repair damaged property to its pre-loss condition, the insurer in determining this payment amount may take pre-loss depreciation of the damaged property into account where the policy expressly and unambiguously authorizes an adjustment for depreciation and physical condition of the damaged property.**

Utah law applies to plaintiff's contract claim. See discussion at pp. 5, 6-7 above. Under Utah law, "an insurer may include in a policy any number or kind of exceptions and limitations to which an insured will agree unless contrary to statute or public policy." *Farmers Ins. Exch. v. Call* (Utah 1985), 712 P.2d 231, 233. Such limitations will be enforced in accordance with their plain terms. See, e.g., *Nielsen v. O'Reilly* (Utah 1992), 848 P.2d 664, 666. In addition, the policy "should be read as a whole, in an attempt to harmonize and give

effect to all of the contract provisions.” *Nielsen*, 848 P.2d at 665. If the “policy is not ambiguous, no presumption in favor of the insured arises and the policy language is construed according to its usual and ordinary meaning.” *Alf v. State Farm Fire & Cas. Co.* (Utah 1993), 850 P.2d 1272, 1274. “[A] court may not rewrite an insurance contract for the parties if the language is clear and unambiguous.” *Alf*, 850 P.2d at 1275.

The Utah policy here unambiguously provides that an “adjustment for depreciation and physical condition” will be made when the insurer elects to pay “to repair the damaged property to its pre-loss condition.” In holding this adjustment “does not apply when Progressive elects . . . ‘to repair the damaged property to its pre-loss condition,’” the court of appeals failed to apply the foregoing principles of Utah law. The court also converted the indemnity policy into one for full replacement cost. This ruling creates an incentive for insureds to incur damage to their depreciated property because their insurers will be required to pay full replacement cost. Accordingly, such judgment should be reversed and the judgment of the trial court should be reinstated.

### CONCLUSION

For the reasons discussed above, this Court should accept jurisdiction in this case so that the important questions presented will be reviewed on the merits.

Respectfully submitted,



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Counsel for Appellants

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 87676

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**JOSEPH W. PETERSON**

PLAINTIFF-APPELLANT

vs.

**PROGRESSIVE CORPORATION, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
AFFIRMED IN PART, REVERSED IN PART  
AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-510154

**BEFORE:** Nahra, J., Gallagher, P.J., and Calabrese, J.

**RELEASED:** November 22, 2006

**JOURNALIZED:** DEC - 4 2006

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FILED IN \_\_\_\_\_ JOURNALIZED  
PER APP. R. 22(E)

DEC - 4 2006

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.

ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED

NOV 22 2006

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

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NAHRA, J.:

Plaintiff Joseph Peterson ("Peterson") appeals the judgment of the trial court which denied his summary judgment motion and his motion for class certification, and granted summary judgment in favor of defendant Progressive Corporation, et al. ("Progressive").<sup>1</sup> For the reasons that follow, we reverse, in part, the trial court's decision granting summary judgment to Progressive; reverse, in part, the denial of Peterson's motion for summary judgment; and reverse the denial of the motion for class certification.

The instant case arises from a dispute over the terms of Progressive's watercraft insurance policies. Peterson purchased Progressive's comprehensive and collision watercraft insurance policy for his 1992 watercraft.<sup>2</sup> He submitted a claim to Progressive after the motor on his watercraft was damaged by an underwater hazard. Progressive elected, under the terms of the contract, to repair the damage to the motor and restore it to its pre-loss condition. When calculating the amount to be paid to Peterson, however, Progressive, in addition to the standard reduction for the policy deductible, reduced the payment by an additional \$852.51 for what it called "betterment": the difference between the

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<sup>1</sup>Plaintiff named Progressive Corporation and 21 additional and separately incorporated Progressive insurance companies as defendants in the action.

<sup>2</sup>Peterson purchased the policy from Progressive Casualty Insurance Company.

fair market value of the motor at the time of the loss and the increased value of the motor once the repairs were completed.

Peterson, on behalf of himself and others, filed a class action complaint against Progressive and asserted claims for breach of contract, unjust enrichment, bad faith, declaratory judgment and injunctive relief. Both parties filed motions for summary judgment and Peterson filed a motion for class certification in order to nationally challenge Progressive's "betterment policy." The trial court granted summary judgment for Progressive and denied Peterson's motions. This timely appeal followed.

### Summary Judgment

Peterson's first two assignments of error assert:

1. The trial court erroneously granted summary judgment in favor of Progressive because the policy language drafted by Progressive in plaintiff's watercraft insurance policy does not clearly and unmistakably permit Progressive to exclude coverage for expenses that it deems are "betterment" when it elects to restore a watercraft to its pre-loss condition.
2. The trial court erroneously denied plaintiff's motion for summary judgment on his breach of contract claim because the policy language, which must be construed against the insurer and in a manner that favors coverage, demonstrated that Progressive breached the insurance contract with plaintiff when it failed to pay for that portion of the repair that it deems to be "betterment" when electing to repair plaintiff's watercraft to its pre-loss condition.

We review a trial court's decision on a summary judgment motion de novo.

*Hillyer v. State Farm Mut. Auto Ins. Co.* (1996), 131 Ohio App.3d 172, 175. Pursuant to Civ.R. 56(C), summary judgment may be granted when 1) no genuine issue of material fact remains to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) reasonable minds, after reviewing the evidence in a light most favorable to the nonmoving party, can reach but one conclusion, which is adverse to the nonmoving party. *Temple v. Wean* (1977), 50 Ohio St.2d 317, 327.

The question presently before us involves the interpretation of an insurance contract between the parties. A contract with clear and unambiguous terms leaves no issue of fact and must be interpreted as a matter of law. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322. Under Ohio law, when an insurance contract contains ambiguous terms, such terms must be strictly construed against the drafter and in favor of coverage. *Rushdan v. Baringer* (Aug. 30, 2001), Cuyahoga App. No. 78478, 2001 Ohio App. LEXIS 3827, citing *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271 at 282, 744 N.E.2d 719. The law of insurance contract interpretation is no different in Utah, the state in which Peterson's policy was issued. See *Farmers Ins. Exchange v. Versaw* (Utah 2004), 99 P.3d 796, 800 (if language in an insurance policy is ambiguous, the ambiguities must be construed in favor of the insured).

In the present case, under Progressive's Utah watercraft policy, Progressive limits its liability for loss to the lowest of three alternatives: 1) the actual cash value of the stolen or damaged property at the time of the loss; 2) the amount necessary to replace the stolen or damaged property; or 3) "*the amount necessary to repair the damaged property to its pre-loss condition, reduced by the applicable deductible shown on the Declarations Page \*\*\*.*" (Plaintiff's Motion for Summary Judgment, Ex. A, No. 1, p.25, emphasis added.)

Peterson submitted a claim to Progressive after his 8-year-old boat motor was damaged by an underwater object. Progressive elected, under the terms of the policy, to repair the boat to its pre-loss condition by replacing the motor and related parts. Unable to find a used motor and available parts comparable to Peterson's motor, Progressive's adjuster computed his estimate based upon the cost of a new remanufactured motor. The cost of repair, however, was reduced not only by the applicable \$500 deductible, but also by an additional \$852.51, which was the difference between the value of Peterson's pre-loss depreciated motor and the value of the remanufactured motor. The adjuster referred to this amount as "betterment."

Progressive asserts that it was entitled to deduct from the repair payment any amount by which the repair improved the property above and beyond its

pre-loss condition. Progressive explains that its adjusters refer to such deductions interchangeably as either "depreciation" or "betterment." Progressive argues that such deductions are permitted under the Utah policy, and that its liability is limited by the following provision:

2. Payments for loss covered under the Part IV are subject to the following provisions:

\*\*\*

b. an adjustment for depreciation and physical condition will be made in determining the Limit of Liability at the time of the loss;

Id. at 25.

We agree with Peterson, however, that the above provision does not apply when Progressive elects, under Part IV.1.c. of the policy, "to repair the damaged property to its pre-loss condition." Instead, Progressive's liability for repairs is unambiguously explained and expressly limited by the provision immediately following 2.b.:

*c. in determining the amount necessary to repair damaged property to its pre-loss condition, our estimate will be based on:*

- i. the prevailing competitive labor rates charged in the area where the property is to be repaired, as reasonable determined by us; and
- ii. *the cost of repair or replacement parts and equipment which may be new, refurbished, restored, or used*, including, but not limited to:

- (a) original manufacturer parts or equipment; and
- (b) nonoriginal manufacturer parts or equipment;

Id. at 26 (emphasis added).

Nowhere in the aforementioned provision, nor anywhere else in the Progressive Utah watercraft policy that Peterson purchased, does it specify or explain that Progressive, upon electing to repair a watercraft to its pre-loss condition, is permitted to take an additional deduction from the repair costs for “betterment,” “depreciation,” or for any increase in the value of the watercraft that may result from the repair. Instead, Progressive is expressly obligated, pursuant to Part IV, section 2.c. of the policy, to repair the watercraft to its pre-loss condition using whatever parts and equipment it deems appropriate. If the only parts available to make the repair necessarily increase the fair market value of the watercraft, this is a cost that Progressive, under the unambiguous terms of the Utah policy, must bear. See *Roberts v. Allied Group Ins. Co.* (Wash.Ct.App. 1995), 901 P.2d 317, 318 (interpreting “replacement cost” as “the cost, at the time of loss, to repair or replace the damaged property with new materials of like kind and quality, without deduction for depreciation”).

Notably, in its South Dakota watercraft policy, Progressive expressly notifies the insured it may make adjustments “for depreciation and betterment,” and defines betterment as “a deduction from the cost of repair of your vehicle in

an amount based upon some portion of *the difference between the fair market value of the vehicle after repairs are made and its fair market value immediately before it was damaged.*" (Plaintiff's Motion for Summary Judgment, Ex. A, No. 2, p.21, emphasis added). The absence of this provision from the Utah policy further supports our conclusion that the policy in this case does not allow for such deductions.

Progressive suggests that paying the entire repair amount deprives it of the opportunity to make any adjustment to account for the pre-loss condition or the depreciation and physical condition of the old motor. This is simply not the case. As the policy expressly states, Progressive is not required to repair the damaged watercraft to its original, new condition; it is instead only obligated to repair it to its pre-loss condition using its choice of new, remanufactured, refurbished or used parts. Again, however, if the repair part that most closely resembles the determined pre-loss condition nonetheless increases the value of the watercraft, absent express language to the contrary, Progressive bears the burden of this cost differential under the terms of its Utah watercraft policy.

Finally, Progressive points to an exclusion in the watercraft policy which explains that coverage under the policy does not apply to "any loss" due to "wear and tear" or "gradual deterioration of any kind." *Id.* at 23. This section, however, is clearly intended to notify the insured that any damage to a

watercraft that is the result of the aging and wear and tear of the boat will not be covered, thus its inclusion under the heading "EXCLUSIONS." *Id.* Once Progressive determines that the reported loss is not due to wear and tear but, rather, due to some other *covered* event, this section of the contract is irrelevant and has no bearing on the question of the specific amount of coverage to which the insured is entitled.

In sum, Progressive's watercraft policy does not allow it to take a deduction for betterment or depreciation to account for any increase in value over the pre-loss value that may result from the repairs it is obligated to make. Progressive thus breached its contract with Peterson when, after electing to repair his boat to its pre-loss condition, it deducted from the repair cost the amount it determined the repair would increase the value of the motor above and beyond its pre-loss value. We therefore reverse the trial court's order granting summary judgment to Progressive on the breach of contract claim, and we grant summary judgment in favor of Peterson on this question.

We agree with Progressive, however, that the trial court correctly granted its summary judgment motion on Peterson's bad faith and unjust enrichment claims. Nothing in the record before us establishes that Progressive's interpretation and application of the policy terms were in bad faith. *Brown v. Moore* (Utah 1998), 973 P.2d 950, 954, quoting *St. Benedict's Dev. Co. v. St.*

*Benedict's Hosp.* (Utah 1991), 811 P.2d 194, 199. Peterson thus cannot sustain a bad faith claim. In the absence of bad faith on the part of Progressive, Peterson's unjust enrichment claim likewise fails. *Howland v. Lyons*, Cuyahoga App. No. 77870, 2002-Ohio-982; see also *Am. Towers Owners Assoc., Inc. v. CCI Mechanical, Inc.* (Utah 1996), 930 P.2d 1182. We therefore affirm the trial court's rulings on the summary judgment motions as to the unjust enrichment and bad faith claims.

### **Class Certification**

Peterson's third assignment of error asserts:

THE TRIAL COURT ERRONEOUSLY DENIED PLAINTIFF'S MOTION FOR CLASS CERTIFICATION BECAUSE THE RECORD ESTABLISHED ALL NECESSARY ELEMENTS FOR CERTIFICATION AND BECAUSE THE TRIAL COURT DID NOT PROVIDE THE REQUISITE ANALYSIS.

Peterson sought to represent two classes of people ("Class A" and "Class B") directly affected by Progressive's policy of taking betterment deductions from its payment for repairs to damaged watercraft. Class A was defined as follows:

All persons in the United States who, during the relevant periods of limitations, were insured or covered under a watercraft insurance policy issued by a Progressive company that provided for comprehensive or collision coverage, and who

- a. Owned a watercraft that was damaged in a covered accident;
- b. Submitted a claim for repair to Progressive wherein Progressive elected to pay the amount necessary to repair the damaged

watercraft to its pre-loss condition; and

c. Had their payment from Progressive reduced based upon a deduction for depreciation or betterment.

Specifically excluded from Class A are those individuals with policies issued in the state of Washington or whose policies specifically contain and define the term "betterment."

Appellant's Brief, p.21.

Class B was defined as an injunctive and declaratory relief class as follows:

All persons who, during the relevant periods of limitations, paid a premium for a policy of insurance issued by a Progressive company which provided for collision or comprehensive coverage, excluding those individuals with policies issued in the state of Washington or whose policies specifically contain and define the term "betterment" [see, e.g., Progressive's South Dakota watercraft policy].

Appellant's Brief, p.21. The trial court denied Peterson's motion for class certification without opinion.

Because a trial court is afforded broad discretion in its determination of whether a class action may be maintained, we review a court's decision on class certification for abuse of discretion. *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St. 3d 67, 70. A trial court's discretion on the question of class certification is not unlimited, however, "and must be exercised within the framework of Civ.R. 23. The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied. \*\*\* [T]he failure to provide an articulated

rationale greatly hampers an appellate inquiry into whether the relevant Civ.R. 23 factors were properly applied by the trial court and given appropriate weight, and such an unarticulated decision is less likely to convince the reviewing court that the ruling was consistent with the sound exercise of discretion." *Id.*

Per the Ohio Supreme Court, "the following seven requirements must be satisfied before an action may be maintained as a class action under Civ.R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met." *Id.* at 71 (citations omitted).

The critical Civ.R. 23(B) requirement at issue in the present case is 23(B)(3), pursuant to which a court must determine whether:

the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

*Id.* at 79-80. When determining whether common questions of law or fact

predominate over individual issues, "it is not sufficient that common questions merely exist; rather, the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication." *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 313.

Applying the Civ.R. 23 requirements to the case at bar, we find that Peterson met his burden of demonstrating the factual and legal prerequisites for class certification. First, two clearly identifiable classes exist: those persons with Progressive watercraft policies who suffered a loss and whose repair payment from Progressive was reduced due to betterment or depreciation; and those persons with Progressive watercraft policies who might be subjected to a betterment or depreciation deduction in the future. Second, Peterson, as the named representative, is clearly a member of both classes in that his payment for a covered repair was reduced for betterment (Class A), and he stands to suffer a betterment deduction in the future should his watercraft be damaged in another covered accident (Class B). Third, it is undisputed that both classes are numerous and would render joinder impracticable.

As to the fourth and seventh requirements of Civ.R. 23 – that there be questions of law or fact common to the class and that such questions predominate over individualized legal issues – there is but one question of law that clearly predominates in this case. Moreover, the question of law presented

involves a straightforward interpretation of Progressive's watercraft policies to determine whether the language of the policies entitles Progressive to take deductions for betterment or depreciation when it elects to repair a watercraft to its pre-loss condition.<sup>3</sup> Even for those few Progressive policies that, unlike Peterson's Utah policy and the majority of Progressive's identically worded policies, contain ambiguous language regarding the amount that Progressive is required to pay for repairs, the law regarding the interpretation of ambiguities in an insurance contract is virtually uniform nationwide: ambiguities in the language and terms of the policy are construed in favor of the insured and coverage. Contrary to Progressive's argument, the differing insurance regulations and laws of the states are irrelevant to this determination.

Moreover, contrary to Progressive's assertions, there are no questions of fact presented by this case. Thus, Progressive's argument that the trial court will be forced to review all of Progressive's policies and the policy choices of the class members is without merit. As discussed above, Progressive's watercraft policies are materially identical, and none of the members of either class, as defined, purchased policies that specifically allowed for betterment deductions.

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<sup>3</sup>Peterson's definition of the two classes excludes watercraft policies issued in the state of Washington and those that specifically contain and define the term "betterment."

That the class members could have opted for policies that provided more coverage is irrelevant to Progressive's contractual obligations under the policies the class members did purchase.

The fifth requirement of Civ.R. 23 is satisfied because Peterson's claim – that Progressive was prohibited from taking betterment deductions from the cost of repairs – is not only typical of the class members' claims, it is identical to the claims of all members of the class. Moreover, the watercraft policy that Peterson purchased is materially the same as those policies purchased by other class members. Because "there is no express conflict between the representative[ ] and the class," the typicality requirement of Civ.R. 23 has been satisfied. *Warner v. Waste Management* (1988), 36 Ohio St.3d 91, 98.

As to the requirement that Peterson fairly and adequately protect the interests of the class, Progressive's arguments to the contrary are unpersuasive. "A representative is deemed adequate so long as his interest is not antagonistic to that of other class members." *Id.* Progressive's challenge to Peterson rests upon his failure to discuss matters in his past relating to, among other things, traffic tickets and divorce proceedings. There is no evidence, however, that Peterson provided false or misleading testimony as to any matters relating to the instant lawsuit or that his interests conflict with other class members. Nor is there any allegation that Peterson's counsel is ill-equipped to pursue the lawsuit.

We therefore find that Peterson is qualified to fairly and adequately protect the interests of the class.<sup>4</sup>

Accordingly, under Civ.R. 23, we find that Peterson has clearly defined two identifiable and manageable classes, and that a question of law common to all members of both classes predominates over any individual legal issues that may arise. A single adjudication as a class action is therefore the most efficient and fair manner by which to resolve the matter. *Schmidt v. Avco Corp.*, supra, at 313.

For all of the foregoing reasons, we reverse, in part, the trial court's decision granting summary judgment to Progressive and grant summary judgment to Peterson on his claim for breach of contract; we affirm the trial court's rulings on the summary judgment motions on the claims for bad faith and unjust enrichment; we reverse the trial court's denial of the motion for class certification; and we remand the case for further proceedings consistent with

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<sup>4</sup>Progressive argues that Peterson does not have standing to bring a claim against any entity other than Progressive Casualty since he did not purchase an insurance policy from the other 21 defendants. However, once the requirements of Civ.R. 23 have been met and a class has been properly certified, standing is determined in reference to the class as a whole, not simply in reference to individual named plaintiffs. *Payton v. County of Kane*, 308 F.3d 673, 680 (7<sup>th</sup> Cir. 2002); see also *Sosna v. Iowa*, 419 U.S. 393, 399 (1975); *Fallick v. Nationwide*, 162 F.3d 410, 423 (6<sup>th</sup> Cir. 1998) (a plaintiff with standing to sue at least one named defendant "has standing to challenge a practice even if the injury is of a sort shared by a large class of possible litigants," and it is not necessary for each named plaintiff to have individual standing to sue each named defendant).

this opinion.

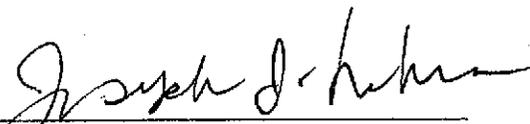
Judgment accordingly.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



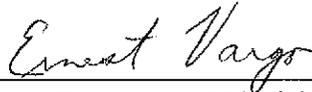
JOSEPH J. NAHRA, JUDGE\*

SEAN C. GALLAGHER, P.J., and  
ANTHONY O. CALABRESE, JR., J., CONCUR

(\*SITTING BY ASSIGNMENT: JOSEPH J. NAHRA,  
RETIRED, OF THE EIGHTH DISTRICT COURT OF  
APPEALS.)

### Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by first-class U.S. mail, postage prepaid, to counsel for appellee, Steven S. Kaufman, Esq., Thomas L Feher, Esq., Tracy A. Hannan, Esq., Thompson Hine LLP, 3900 Key Center, 127 Public Square, Cleveland, Ohio 44114-1291, on January 12, 2007.



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