

IN THE SUPREME COURT OF OHIO

07-0070

JOSEPH W. PETERSON,
:
Plaintiff-Appellee,
:
v.
:
PROGRESSIVE CORPORATION, et al.,
:
Defendants-Appellants.
:

Case No. _____
On Appeal from the Cuyahoga
County Court of Appeals
Eighth Appellate District
(Ct. App. No. 87676)

**MEMORANDUM OF AMICUS CURIAE OHIO INSURANCE INSTITUTE
IN SUPPORT OF JURISDICTION**

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Ohio Insurance Institute ("OII") is a professional trade association representing property and casualty insurance companies throughout Ohio. Its members include approximately 50 domestic property and casualty insurance companies, foreign insurers and reinsurers, insurance trade groups, and other insurance organizations, who collectively account for approximately one-half of the property and casualty insurance business written in the State of Ohio. OII provides a wide range of insurance-related services to its members and to Ohio consumers, media, and legislators in three primary areas: education and research; legislative and regulatory affairs; and public information. In connection with those services, OII and its members monitor insurance litigation and judicial decisions that raise novel theories of law or otherwise upset the expectations of insureds and insurers, as expressed in the language of their insurance policies.

Insurance is the fourth largest industry in the State of Ohio and an important pillar of Ohio's economy. Many major insurance companies have domiciled here, creating jobs and generating economic activity that benefits all Ohio citizens and all levels of state and local government. In turn, Ohio provides a stable legal environment in which the courts predictably enforce the expectations of insureds and insurers alike.

Amicus curiae OII and its members are extremely interested in this case because the Court of Appeals' ruling changes existing Ohio law in two undesirable ways. First, the Court of Appeals reversed the trial court and held that enormous classes with members in 48 states should be certified pursuant to Civil Rule 23(B), even though the putative class representative had not conducted an analysis of the relevant law of each

of the 48 jurisdictions showing that common issues of law predominate and that a class action would be manageable, superior, and desirable. Second, the Court of Appeals reversed the trial court on a separate issue, based on an unambiguous provision in the insurance policy, and held that an insurer cannot take the pre-loss condition of insured property into account in determining the cost of repairing the property, even though the policy so provides, if a separate provision of the policy allows the insurer to make the repairs with either new or used replacement parts.

If they are not reviewed and reversed by this Court, both aspects of the Court of Appeals' ruling will adversely affect Ohio insureds and insurers. The trial court properly applied long-standing principles of Ohio law when it refused to certify multi-state classes and enforced the plain language of the insurance policy. In the opinion of the Court of Appeals, an insured who resides in a distant state and has a simple coverage dispute with an insurer in that state will be able to launch a complex nationwide class action in an Ohio trial court against dozens of insurance companies, without establishing that applicable state laws are the same for all class members, and without establishing that the policies of all class members have the same language. Accordingly, this appeal is extremely important to OII and its members, and they urge the Court to accept jurisdiction.

JURISDICTIONAL STATEMENT

The ruling by the Court of Appeals in this case raises two issues of public and great general interest that affect all Ohio insureds and insurers. The Court of Appeals disregarded the strict proof requirements of Civil Rule 23 and held that a 48-state class action can be certified without any positive showing that differences in state law are

unimportant, that common legal issues predominate over those differences, and that a class action is superior, desirable, and manageable despite those differences. Ohio insurers can then be forced to litigate a complex class action filed in Ohio by a resident of another state even if they had no involvement in the underlying dispute and never insured the plaintiff, and their insureds will be forced to pay the exorbitant expenses of that litigation through increases in premiums. If it is not reviewed and reversed by this Court, the ruling below will open up Ohio trial courts to litigation that has little to do with Ohio but will be filed here because it cannot meet class action requirements in other jurisdictions.

The Court of Appeals' ruling is also of public and great general interest because it holds that an insurer cannot limit insurance coverage to the actual loss in value of damaged insured property if the repairs involve replacement parts that are in better condition than the property was in before it was damaged. There is no basis in Ohio law for ignoring the terms of a contractual limit on liability merely because it was not repeated in other provisions of the policy. More importantly, the ruling below allows insureds to benefit financially from a loss -- despite policy language to the contrary -- and thereby encourages insurance claims, fraudulent or otherwise.

The ruling below changes long-standing Ohio requirements for class actions and principles of Ohio insurance law. Amicus curiae OII urges the Court to accept jurisdiction in this appeal.

STATEMENT OF THE CASE AND FACTS

A. Nature of the case

This is contract case involving the amount of coverage provided by a Utah watercraft insurance policy, which the Court of Appeals certified as a class action involving nearly 700,000 policyholders in 48 states and including claims against the plaintiff's insurer and 21 other insurers who have no involvement in the underlying dispute. Appellee Joseph Peterson claims that he has a contractual right to receive insurance payments for the full cost of repairs to his boat, even though the repairs put his boat into better condition than it had been in before it was damaged and, thus, increased its market value. Appellant Casualty, his insurer, paid him for only the portion of the repairs that reflected the cost of restoring the boat to its pre-loss condition.

The trial court agreed with Casualty that this case should not be certified as a class action and that the express terms of Peterson's insurance policy limit his coverage to the actual reduction in value of the boat that resulted from the accident. The Court of Appeals disagreed. It decided that Casualty could not adjust insurance payments for the boat repairs even though the repairs increased the value of the boat above the value it had prior to the accident, and entered summary judgment for Peterson on that basis. It then declared that there are no material differences in the language of the individual class members' watercraft policies or in the laws of the 48 states that govern their claims, and certified a nationwide damages class and a nationwide injunctive class pursuant to Civil Rule 23(B).

B. Relevant facts

Appellee Joseph W. Peterson is a resident of Utah. In November, 2000, he purchased a Utah comprehensive watercraft insurance policy from a Utah insurance agent for his eight-year-old boat. The policy was issued in Utah by one of the 22 appellants in this action, Progressive Casualty Insurance Company ("Casualty"), and it expressly stated that all coverage disputes would be governed by Utah law. Peterson declared that the fair market value of his boat was approximately \$15,000 at that time.

The insurance agent offered Peterson various types of watercraft insurance coverage that are available from Casualty. Peterson selected the least expensive coverage, which limited property damage coverage to "the amount necessary to repair the damaged property to its pre-loss condition." He acknowledged in writing that he was also offered more expensive coverage under which no adjustments would be made for pre-loss depreciation in the value of the insured property in calculating the amount of insurance coverage.

Six months after he purchased the insurance policy, Peterson notified Casualty that the motor of the boat had been damaged when the propeller struck something underwater. An insurance adjustor determined that the boat was not a total loss and that it could be repaired by replacing the motor and related parts. There were no boat motors available that were similar in condition and value to the pre-loss condition and value of Peterson's eight-year-old motor. Accordingly, the adjustor calculated the amount of the loss by determining the cost of a new remanufactured motor -- \$6,382.90 -- and then reducing that amount by \$852.51 to reflect the fact that the value of the new replacement motor that Peterson would receive was higher than the depreciated value

of Peterson's original motor prior to the accident, resulting in an increase in the value of the boat. Casualty thus paid Peterson the actual cash value of his loss, less a \$500 deductible provided by the insurance policy.

Peterson did not renew the Casualty insurance policy when it expired in November, 2001. Instead, he purchased insurance for his boat from another company, Allstate. Peterson declared at that time that the fair market value of the boat, with the new remanufactured motor, was thousands of dollars higher than it had been one year earlier, when it still had the original eight-year-old motor.

Peterson filed this putative class action in the Court of Common Pleas of Cuyahoga County, Ohio, almost two years later, on September 12, 2003. The 22 named defendants include Casualty; its parent corporation, The Progressive Corporation; and 20 other subsidiaries of Progressive. Peterson claims that the terms of Casualty's watercraft insurance policy did not allow it to adjust a claim to reflect increases in the condition and value of the insured property that result from repairs with newer and better replacement parts. His Complaint includes causes of action for breach of contract, bad faith, and unjust enrichment.

Peterson also purports to represent the interests of two classes, each containing nearly 700,000 people in 48 different states who purchased watercraft insurance policies from any one of the 22 named defendants. It is undisputed that the insurance policies are subject to regulation by the individual states and that they do not contain the same coverage language.

C. The course of proceedings

Peterson moved for certification of the two putative classes -- one seeking damages under Civil Rule 23(B)(3) and one seeking injunctive relief under Civil Rule 23(B)(2) -- and all parties moved for summary judgment. The trial court denied class certification and entered summary judgment on all three causes of action in favor of Casualty and the other 21 appellants. The Court of Appeals held that summary judgment should have been entered in favor of Peterson with respect to the cause of action for breach of contract, on the grounds that the insurance policy precludes any consideration of the extent to which the repairs increased the original value of the boat. It also held that the trial court abused its discretion by denying class certification; the Court of Appeals dismissed differences in the laws of the 48 states governing class members' claims as minor and "irrelevant," and it dismissed differences in the language used in class members' insurance policies because none of the policies "specifically" permit deductions for "betterment."

Amicus curiae Ohio Insurance Institute supports appellants' request that this Court exercise its jurisdiction to review the Court of Appeals' decision.

ARGUMENT:

- I. The plaintiff in a proposed multi-state class action must establish that common issues of law predominate over differences in the states' laws and that a class action will be superior, desirable, and manageable despite those differences.

Amicus curiae Ohio Insurance Institute is especially interested in this case because the Court of Appeals' decision instructs other courts that a nationwide class action may properly be certified in Ohio under Civil Rule 23(B) without a showing that there are no significant differences in applicable state laws. Without such a showing, a

court cannot reasonably find that common issues of law predominate, or that class adjudication will be superior, desirable, and manageable. The trial court properly held that this case should not be certified as a class action in these circumstances. The Court of Appeals reversed after a discussion of the issue that consists of three sentences:

[T]here is but one question of law that predominates in this case. Moreover, the question of law presented involves a straight-forward 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. Even for those few Progressive policies that, unlike Peterson's Utah [Casualty] policy . . . 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

(Decision, at 12-13.)

The Court of Appeals had no reasoned basis for its conclusion. "The burden of establishing the right to a class action rests upon the plaintiff." *Shaver v. Standard Oil Co.* (1990), 68 Ohio App.3d 783, 793. See also *State ex rel. Ogan v. Teater* (1978) 54 Ohio St.2d 235, 247 (same). Peterson had not met his burden of proof on this issue; he presented only a broad survey of state laws regarding the elements of a breach of contract action. Class certification is improper where differences in state laws compound factual differences in class members' claims. *Amchem Products, Inc. v. Windsor* (1997), 521 U.S. 591, 624. "[L]egal variations prevent common issues from predominating." *Duncan v. Northwest Airlines, Inc.* (W.D. Wash. 2001), 203 F.R.D. 601, 613. As set forth in Appellants' Memorandum in Support of Jurisdiction, Peterson was required to make an "extensive analysis of the applicable law of each pertinent state" to

show that common questions of law predominate over individual questions unique to each class member, and that class adjudication will be superior to other methods, desirable, and manageable in this case. "A cursory review is not sufficient" to meet those legal requirements. *Stirman v. Exxon Corp.* (5th Cir. 2002), 280 F.3d 554, 564. "A proper review would [analyze] the relevant law of each state and the variations among states." *Compaq Computer Corp. v. Lapray* (Tex. 2004), 135 S.W.3d 657, 671-73.

Because it failed to conduct any meaningful analysis of the differences in 48 states' laws, the Court of Appeals did not recognize that those differences are significant to the claims of putative class members. For example, the Court was mistaken about the only legal principle it specifically addressed: under the laws of some of the states where class members reside, the courts do not interpret ambiguities in insurance policy provisions against insurers. See, e.g., *American States Insurance Company v. C&G Construction Company* (Ariz. App. 1996), 924 P.2d 111, 114; *Nationwide Insurance Co. v. Rhodes* (1999), 127 Md. App. 231, 732 A.2d 388, 390-91. Moreover, the legal standard for determining whether contract language is "ambiguous" varies among the other states. See, e.g., *Saleh v. Farmers Insurance Exchange* (Utah 2006), 133 P.3d 428, 433, which applies a definition of ambiguity that is restricted to "plausible" interpretations of policy language and does not consider all "etymologically-based" interpretations of the words.

These are the precise types of individual variations in state law that make certification of a 48-state class inappropriate in the present case. A judge faces "an impossible task of instructing a jury on the relevant law" in a multi-state class action if

the laws of the states differ in relevant ways. *In re American Medical Systems, Inc.* (6th Cir. 1996), 75 F.3d 1069, 1085 (holding that differences in the law of negligence among the states is enough to defeat class certification). This is the reason that Civil Rule 23 imposes the burden of proof on plaintiffs to establish that class certification requirements are satisfied. Peterson did not seriously attempt to satisfy that burden here, and the Court of Appeals appears to have assumed -- without meaningfully analyzing the question -- that the differences are irrelevant. No previous Ohio appellate decision has so trivialized the Civil Rule 23 burden of proof for class actions. The ruling below opens up Ohio trial courts to hopelessly complicated class actions by residents of other states that will require separate mini-trials of the claims from each separate jurisdiction. It should be reviewed and reversed by this Court.

II. A provision of an insurance policy that limits coverage to the actual loss sustained, i.e., to the difference between the value of the insured property before and after it is damaged, is not negated by other provisions allowing repairs with new or used replacement parts.

Amicus curiae Ohio Insurance Institute is also alarmed by the portion of the Court of Appeals' ruling that addresses the insurance coverage provided by the Casualty watercraft policy. The trial court held that the limits of liability provisions of the policy entitled Casualty to limit coverage to the actual loss in the value of the boat, i.e., the amount it would cost to restore the boat to the same condition and value that it had before the damage to the motor occurred. In reversing that holding, the Court of Appeals ignored the policy language and created unwise legal precedent that ignores the intentions and expectations of the contracting parties.

The language of Peterson's watercraft policy could not be clearer. The "Limit of Liability" section of Part IV, "Physical Damage Coverage," explains that:

1. Our limit of liability for loss to a covered watercraft shall be the lowest of:
 - a. the actual cash value of the stolen or damaged property at the time of the loss, reduced by the applicable [\$500] deductible. . . ;
 - b. the amount necessary to replace the stolen or damaged property, reduced by the applicable deductible. . . ;
 - c. the amount necessary to repair the damaged property to its pre-loss condition, reduced by the applicable deductible. . . ; or
 - d. the rating base for the covered watercraft. . . .

(Policy, Part IV, Limit of Liability, Section 1; emphasis added.) Section 2 of the Limit of Liability for Part IV also provides:

2. Payments for loss under this 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;
- 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 . . . and
 - ii. the cost of repair or replacement parts and equipment which may be new, refurbished, restored, or used . . . ;
- d. the actual cash value is determined by the market value, age, and condition of the covered watercraft at the time of the loss. . . .

(Emphasis added.)

The trial court applied these provisions according to their express terms and held that the limit of Casualty's liability for the damage to Peterson's boat is the amount necessary to restore the boat "to its pre-loss condition" (Section 1(c)), which properly reflects an "adjustment for depreciation and physical condition" of the boat motor prior to the damage (Section 2(b)). The Court of Appeals acknowledged that Casualty's liability cannot be greater than "the amount necessary to repair the damaged property to its pre-loss condition," pursuant to Sections 1(c) and 2(b) of the Part IV Limit of Liability. However, it then concluded that this "does not apply" when the insurer elects to repair the damage to the insured property. The Court of Appeals relied upon the language in Section 2(c) that permits Casualty to make repairs with "new, refurbished, restored, or used" parts. According to the Court of Appeals:

Progressive is expressly obligated . . . 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 . . . must bear.

(Decision, at 6.)

The Court of Appeals thereby ignored the plain mandate contained in the Limit of Liability of the policy, which limits insurance benefits to "the amount necessary to repair the damaged property to its pre-loss condition." (Section 1(c), *supra*.) The separate provision that the Court of Appeals relied upon, Section 2(c), allows the insurer to make repairs with either new or used parts, but it does not qualify Section 1(c), which expressly limits the amount of coverage based on the boat's pre-loss condition, or Section 2(b), which expressly allows an adjustment for the actual physical condition of the boat in determining the amount of the loss. See, e.g., *Farmers Insurance Exchange*

v. *Versaw* (Utah 2004), 99 P.3d 796, 800 (unambiguous provisions of an insurance policy must be enforced as written).

The ruling by the Court of Appeals on this issue is not only wrong; it improperly suggests to other courts that they can ignore plainly expressed limits of liability of an insurance policy unless those limits are repeated in all related clauses of the policy. Here, the insurer referenced the "pre-loss condition" to define the limit of liability in Section 1(c), and then reiterated in Section 2(b) that an adjustment would be made for depreciation and the physical condition of the property. The provision in Section 2(c) that permits the insurer to utilize new or used parts to make necessary repairs does not contradict or overrule the provisions in Sections 1(c) and 2(b), and it should not be interpreted in a way that reduces them to meaningless verbiage whenever insured property is repaired instead of replaced.

There are two important reasons that this insurance policy should not be judicially rewritten to provide insurance coverage in excess of the reduction in value of the boat that was actually caused by the accident. First, premium rates are based upon the extent of the losses that are expected under the policy, and the premiums are no longer reasonable compensation for the risk assumed by the insurer if courts retroactively increase the risk assumed by, *inter alia*, negating the express limits of liability contained in the policy. The insured gets more than he or she bargained for -- and paid for -- and the insurer is stuck with paying for losses it never agreed to pay. Second, the assumptions underlying insurance law are no longer true if an insured profits financially from a loss. Insureds have an economic incentive to sustain a loss in that situation, which encourages insurance claims, fraudulent or otherwise.

There is no statute, case law, or public policy of the State of Ohio that forbids insurers from limiting insurance coverage to the actual cash value of damage to insured property. The insurance policy at issue in this case clearly and repeatedly disclaimed coverage for any claimed losses in excess of that amount. The Court of Appeals erred when it failed to enforce the plain language of the Casualty policy and held that Peterson is entitled to a windfall -- a new remanufactured motor -- that makes his boat more valuable than it was before it was damaged.

CONCLUSION

This case presents two issues of great public and general interest. The first concerns the burden of proof that a plaintiff must meet to establish that common issues of law predominate over individual issues under applicable state laws, and that a class action is desirable, manageable, and superior to other methods of adjudication. As set forth above, the Court of Appeals' ruling subverts the requirements of Civil Rule 23 by authorizing trial courts to assume that variations in state laws are unimportant. The second issue concerns the enforceability of contractual provisions that limit an insurer's liability to the actual cash value of the insured's loss. Here, the Court of Appeals failed to apply and enforce express provisions of the insurance policy that prevent the insured from profiting financially from a "loss." This Court should review both holdings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Memorandum of Amicus Curiae Ohio Insurance Institute in Support of Jurisdiction was served this 12~~th~~ day of January, 2007, by First Class, U.S. Mail, postage prepaid, upon the following:

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