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THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The Eighth District Court of Appeals, in a 2-1 decision, affirmed class certification in this case on the basis of Plaintiff's allegations and "theory of the case" (Op. ¶21, 32, 56 (App. A)), without scrutinizing the legal and factual premises underlying Plaintiff's claims. The Eighth District's decision raises fundamental class certification issues as to the extent to which courts may and should scrutinize the evidence, facts, and law relevant to a plaintiff's assertions that common issues exist and predominate. These issues are especially urgent in light of the U.S. Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), in which the Court held that class certification "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action" and that a plaintiff "must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* * * * common questions of law or fact." *Id.* at 2551.

Dukes calls into question the correctness of the many decisions by Ohio appellate courts that interpret this Court's opinion in *Ojalvo v. Board of Trustees*, 12 Ohio St.3d 230, 466 N.E.2d 875 (1984), as requiring that courts ruling on class certification accept as true the allegations in the complaint, without any consideration of the merits. These decisions are not only contrary to *Dukes*, but also to other decisions by Ohio appellate courts that recognize the need to probe beyond the pleadings on class certification. Review and clarification by this Court of the proper scope and extent of the class certification analysis is of paramount importance to ensure fairness and consistency in class action litigation in this State and to avoid a widening divergence from federal class certification jurisprudence. These issues are not only of special interest to companies and employers doing business in Ohio, but also of public and great general interest.

The Eighth District's analysis in this case is incompatible with the principles articulated by

the U.S. Supreme Court in *Dukes* and warrants a grant of jurisdiction by this Court. The Eighth District affirmed certification of a class of approximately 100,000 State Farm policyholders who had windshield repairs under their State Farm policies over a period of twenty years. Nearly every aspect of the Eighth District's analysis reflects a failure to resolve legal and factual issues necessary to the determination of whether the requirements of Civ.R. 23 were met.

Thus, in analyzing whether Plaintiff's contract claims gave rise to common issues, the Eighth District declined to examine the unambiguous contractual terms of State Farm's policies to determine what factual issues arose thereunder. Instead, stating that "class certification does not address the merits of the claim" (Op. ¶55), the Eighth District, for purposes of class certification, simply accepted Plaintiff's assertions that the policies entitled policyholders to cash payments of the cost of windshield replacement even if they chose windshield repair and that the policies required that windshield repair return a car to its preloss condition. Construction of the policy language is a matter of law for the court – and if those purported obligations are not colorable (and they are not), then they do not give rise to common factual issues for trial. The Eighth District further failed to analyze the impact on commonality and predominance of individual issues of consent created by the policy provision (in effect for much of the twenty-year class period) that expressly allowed State Farm to pay for windshield repair if the policyholder agreed.

The Eighth District's decision also raises fundamental issues of class definition that warrant review. The class definition affirmed by the Eighth District improperly conditions class membership on whether a class member sustained injury as defined by Plaintiff, i.e, whether the cost of a windshield replacement would have exceeded the policyholder's deductible. Actual injury is a required element of liability and, as State Farm's evidence showed, cannot be determined mechanically from State Farm's records or proven on a classwide basis. Incorporating actual injury

into the class definition skewed the Eighth District's analysis of commonality and predominance and impermissibly removed from the contemplated class trial disputed liability issues that State Farm is entitled to litigate as a matter of due process.

Moreover, the Eighth District, like the trial court, accepted Plaintiff's assertions that hypothetical "computer algorithms" would be able to sort out which of the approximately 100,000 policyholders had purportedly sustained injury and thus were class members. As Judge Stewart opined in dissent, the "court's confidence in its ability to wade through the difficulties posed by variable issues relating to damages assessments based solely on the rather nebulous idea that computers can sort it out is * * * misplaced." Op. at ¶69. The Eighth District's reliance on non-existent "computer algorithms" improperly relieved Plaintiff of his burden of showing that class members can be identified with "reasonable effort" and by means "specified at the time of certification." *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 72-73, 694 N.E.2d 442 (1998).

The Eighth District also simply accepted the proposed testimony of Plaintiff's experts that windshield repair could never return a windshield to its preloss condition as establishing a common issue. That testimony was (and is) the subject of a still undecided challenge by State Farm under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 516 U.S. 869, 133 L.Ed.2d 126 (1995). In *Dukes*, the U.S. Supreme Court expressed "doubt" that *Daubert* does not apply at class certification, 131 S.Ct. at 2554, and some federal courts following *Dukes* have held that courts must evaluate the admissibility of expert testimony offered in support of class certification and must further determine whether there is "significant proof" supporting the existence of an asserted common question. *See, e.g., Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir.2011).

The rules governing class certification are meant to ensure that a class action is both fair and efficient and will justify the expenditure of judicial time and energy involved therein. *Schmidt v.*

Avco Corp., 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1984). Here, the "numerous" "difficulties likely to be encountered in the management of the class" preclude confidence that "the case can be tried fairly." Op. at ¶70 (Stewart, J. dissenting). Such fairness concerns are not unique to this case, but are likely to arise whenever class certification, as here, is based upon a truncated analysis that avoids issues that overlap the merits of the plaintiff's claims. This Court should grant jurisdiction to clarify that the "rigorous analysis" mandated by this Court in *Hamilton*, 82 Ohio St.3d at 72-73, 694 N.E.2d 442, means an analysis that ensures actual conformance with Civ.R. 23 by proceeding beyond a plaintiff's "theory of the case" to identify and examine the legal and factual issues that would be involved in the trial of the plaintiff's claims. Guidance by this Court is necessary for consistency in the application of Civ.R. 23 in the Ohio courts and to ensure that the goals of fairness and efficiency in class litigation are met.

STATEMENT OF THE CASE AND FACTS

Plaintiff Michael Cullen's claims against State Farm arise out of the March 2003 repair of a chip roughly 1/10th of an inch wide in the lower driver's side corner of the windshield of his 2001 Volkswagen Jetta. Plaintiff asserts that (i) even though his windshield was repaired, he was entitled under his policy to a cash payment in the amount that it would have cost to replace the windshield and (ii) windshield repair cannot return a windshield to its pre-loss condition, as he contends is required by State Farm's policies. The Eighth District affirmed certification of a class of approximately 100,000 State Farm policyholders whose windshields were repaired over a twenty-year period (beginning January 1991). Judge Stewart dissented, opining that "the many permutations of [Plaintiff's] underlying claim do not present common issues sufficient to justify certification into a single class of policyholders" and that "[t]he difficulties likely to be encountered in the management of the class as certified by the court are so numerous that [she] cannot

confidently conclude that the case can be fairly tried." Op. at ¶62, 70.

Plaintiff's windshield claim (like most post-1997 windshield claims by State Farm policyholders) was administered through a third-party administrator, Lynx Services, LLC. Lynx operates call centers, makes appointments with glass shops for policyholders, and processes glass shop invoices and payments electronically. Under the program, it is the policyholder's choice whether to have a damaged windshield repaired or replaced, and policyholders are free to choose any glass shop, participating or non-participating. Most policyholders still initiate their claims by calling their State Farm Agent or a glass shop, although they may also call Lynx directly.

When a policyholder calls or is transferred to a Lynx operator (as Plaintiff was), the operator asks questions about the extent of the windshield damage. At the time of Plaintiff's windshield claim, if the damage seemed to meet State Farm's repair criteria, the policyholder was told that "[i]t sounds as though your windshield can be repaired and may not need to be replaced" and that "[r]epairs are a less expensive way to correct the problem" and was then asked "[w]ould you like to have your windshield repaired?" If a policyholder wants a replacement, the claim is dispatched as a replacement. Policyholders can and do change their minds about repair or replacement after speaking to their glass shops and having their windshields examined.

Before August 1997, policyholders' windshield claims were handled without a script by individual State Farm Agents, who had authority to pay claims for windshield replacement or repair based on invoices or estimates from the glass shops chosen by the policyholders. During this time, State Farm generally permitted policyholders to choose between repair or replacement.

From 1991 to March 31, 1998, State Farm's Ohio policies did not have a specific provision for windshield claims, which were governed by the general provisions on loss settlement and limit of liability. The loss settlement provision gives State Farm "the right to settle a loss" (i) by

paying the "actual cash value" of the damaged property, (ii) by paying to "repair the damaged property or part," or (iii) by paying to "replace the property or part." "Actual cash value" is payable only if it is less than the "cost of repair or replacement" (i.e., when a vehicle is a total loss), and Plaintiff has conceded actual cash value is not applicable to windshield claims.

Under the policies, the "cost of repair or replacement" is based upon:

1. the cost of repair or replacement agreed upon by **you** and us;
2. a competitive bid approved by us; or
3. an estimate written based upon the prevailing competitive price * * * We will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition * * * .

State Farm's Ohio policies issued between April 1, 1998 and August 31, 2005, added a new provision that gave the policyholder the choice to agree (or not) to windshield repair and waived the deductible for windshield repair. The policies stated that "[i]f [State Farm] offer[ed] to pay for the repair of damaged windshield glass instead of the replacement of the windshield and [the policyholder] agree[d] to have such repair made [State Farm] will pay the full cost of repairing the windshield glass regardless of *your* deductible." In 2006, the deductible waiver was discontinued, but the provision requiring policyholder agreement for windshield repair remained.

As Judge Stewart stated in her dissent, over the twenty-year class period,

> [d]ifferent policyholders were at times covered under different versions of the State Farm automobile policy. * * * Some policyholders may have had their windshields immediately replaced while others had their windshields repaired. For those who had their windshields repaired, some had their deductibles waived while others did not. Some policyholders may have expressly given permission for repair while others may not have given permission. And, of course, some policyholders were advised under the Lynx word track while others were not. * * * Policyholders had different deductibles, which may have varied year-to-year as they renewed their policies. * * * The policyholders drove different automobiles, which required significantly different types of windshields, the value of which varied depending on the type of car, the size and type of the glass installed on the car, and the labor required to replace the windshield. Op. ¶62, 68.

State Farm timely applied for reconsideration and consideration en banc, which were denied on February 16 and 27, 2012 (Apps. B & C).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: In Ruling on Class Certification, Courts May and Should Examine Merits Issues that Are Relevant to the Civ. R. 23 Requirements.

In *Ojalvo*, this Court cited *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), for the proposition that "class certification does not go to the merits," but also acknowledged that some inquiry into the merits may be necessary to "establishing the validity of certification under Civ.R. 23." 12 Ohio St.3d at 233, 466 N.E.2d 875. *Ojalvo* has been interpreted by many Ohio courts as prohibiting *any* inquiry into the merits of a plaintiff's claims and allegations on class certification. *See, e.g., Lucio v. Safe Auto Ins. Co.*, 183 Ohio App.3d 849, 2009-Ohio-4816, 919 N.E.2d 260, ¶15 (7th Dist.) ("'When a trial court considers a motion to certify a class, it accepts as true the allegations in the complaint, without considering the merits of those allegations and claims'") (Citation omitted.). Other Ohio courts have recognized that "'sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.'" (Citation omitted.) *Schmidt v. Avco Corp.*, 15 Ohio App.3d 81, 87, 472 N.E.2d 721 (1st Dist.), *aff'd*, 15 Ohio St.3d 310, 473 N.E.2d 822 (1984).

In *Dukes*, the U.S. Supreme Court stated emphatically that *Eisen* does not preclude courts from considering and resolving merits issues in determining class certification.[1] *See Dukes*, 131 S.Ct. at 2551-52 & n.6, 180 L.Ed.2d 374. The Court explained that "Rule 23 does not set forth a mere pleading standard," and "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* at 2551. Therefore, the class certification analysis frequently "will entail some overlap with the merits of the plaintiff's

[1] Because Civ.R. 23 is patterned after Fed.R.Civ.P. 23, "federal authority is an appropriate aid to interpretation of the Ohio rule." *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987).

underlying claim" and "'generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" (Citation omitted.) *Id.* at 2551-52. Thus, parties seeking certification may have to prove an issue that "they will surely have to prove *again* at trial in order to make out their case on the merits." *Id.* at 2552 n.6.

The Eighth District in this case based its class certification analysis on Plaintiff's "theory of the case,"[2] and failed to examine the factual and legal premises underlying Plaintiff's claims. Plaintiff's primary theory is that his policy entitled him to a cash payment in the amount of the cost of windshield replacement even if he had his windshield repaired at State Farm's expense. Plaintiff's alleged common factual and legal issues depend upon the existence of that purported right, including whether State Farm failed to disclose the purported "cash option," whether State Farm's failure to pay the cash amount allegedly due breached the policyholders' contracts, and whether State Farm engaged in bad faith or breached the contracts by failing to disclose the purported "cash option." If Plaintiff's cash option claim is not colorable under the unambiguous language of the policies (and it is not), it does not give rise to common factual issues and cannot support class certification. *See Argent Mortg. Co. v. Ciemins,* 8th Dist. No. 90698, 2008-Ohio-5994, ¶24-29.[3] The construction of the policy is a threshold legal determination necessary to a meaningful evaluation of commonality and predominance.

The Eighth District also did not consider in its analysis the impact on class certification of

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[2] *E.g.*, Op. ¶21 ("Here, *if Cullen's theory of the case is believed*, the use of a common plan to steer claimants to opt for repair * * * is a significant class-wide issue.") (Emphasis added).

[3] The trial court incorrectly found that the policy's statement that "we will pay for loss to your car * * * in excess of the deductible amount, if any" provided a "cash out option." App. D at ¶6. The policies' settlement of loss and limit of liability provisions define and limit the obligation to "pay for loss" and make clear that there is no cash option. Plaintiff's cash option theory is also contrary to basic principles of indemnity, which contemplate payment or reimbursement of costs actually incurred, not windfall payments beyond actually incurred costs. *See, e.g., Baxter Int'l., Inc. v. Am. Guar. & Liab. Ins. Co.*, 369 Ill.App.3d 700, 861 N.E.2d 263, 269 (Ill.App.2006).

other significant policy provisions governing Plaintiff's claims. For much of the class period, the policies expressly permitted State Farm to pay for windshield repair, rather than replacement, *if the policyholder agreed.* Both the trial court and the Eighth District majority entirely failed to analyze whether policyholder agreement was a necessary issue for trial and, if so, whether the issue was individual or common. As Judge Stewart stated in her dissent, "[s]ome policyholders may have expressly given permission for repair while others may not have given permission," rendering the issue inherently individual. Op. ¶62.

The Eighth District also failed to address the issues of law and fact enmeshed in Plaintiff's preloss condition claims. As State Farm argued, the policies do not require that windshield repair return a vehicle to its pre-loss condition.[4] Accordingly, the purported failure to return a windshield to its preloss condition cannot support a colorable breach of contract claim and does not give rise to common issues for trial. Although the Eighth District termed Plaintiff's preloss condition theory "dubious" (Op. ¶56), it refused to rule on the meaning of the policy language.

Moreover, even if State Farm had a contractual obligation to return a car to its preloss condition, issues of preloss condition would be overwhelmingly individual, precluding class certification. *See Augustus v. Progressive Corp.*, 8th Dist. No. 81308, 2003-Ohio-296, ¶25-27 ("pre-loss condition" claims require "individually examining each and every putative class member's vehicle"); *see also, e.g., Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 835 N.E.2d 801, 826-27 (2005). Contrary to the opinion of the Eighth District (Op. ¶36, 56), Plaintiff's proposal to offer generalized expert evidence does not change the inherently individual nature of the in-

[4] In its sole reference to preloss condition, the policy states that when State Farm bases repair cost on an "estimate written based upon the prevailing competitive price," State Farm "will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition." Thus, the preloss condition standard applies only to written estimates and only to *parts* included in the estimate, and is not applicable to a windshield repair procedure. *See, e.g., Hall v. State Farm Mut. Auto. Ins. Co.*, 215 F. App'x 423, 429-30 (6th Cir.2007).

quiry and cannot as a matter of due process preclude State Farm from offering individual evidence that class members' windshields were restored to their preloss condition.

The Eighth District also failed to examine the purported legal and factual bases of Plaintiff's bad faith claim in light of the required elements for such a claim under Ohio law. Without analysis, the majority simply accepted Plaintiff's theory that Ohio Adm.Code 3901-154(E)(1) supports a cause of action for breach of contract and bad faith if an insurer does not "fully disclose to the first party claimants all pertinent benefits, coverages or other provisions * * *." Op. ¶22. In fact, Ohio Adm.Code 3901-1-54 expressly states that it does not provide a private cause of action, and Ohio law holds that an insured has a duty to read the insurance policy and is charged with knowledge of its contents. *See, e.g., Heights Driving Sch., Inc. v. Motorists Ins. Co.*, 8th Dist. No. 81727, 2003-Ohio-1737, ¶38. An examination of Ohio law was necessary to the analysis of whether Plaintiff's non-disclosure claims presented common issues for trial.

In short, the Eighth District did not base its determination of commonality and predominance on a reasoned analysis of the elements of Plaintiff's claims and the showings required to establish those elements, but simply accepted Plaintiff's "theory" of his case. The result is certification of a case that cannot be tried without sacrificing fairness and due process. As Judge Stewart stated in her dissent, "[t]he difficulties likely to be encountered in the management of the class as certified by the court are so numerous that [she could] not confidently conclude that the case can be fairly tried." Op. ¶70. This Court should accept jurisdiction to review and reverse class certification in this case and to clarify the analysis required under Civ.R. 23.

<u>Proposition of Law No. II</u>: The Lower Courts' Reliance on Plaintiff's Proposed Expert Testimony as a Basis for Class Certification Was an Abuse of Discretion in the Absence of an Adjudication of State Farm's *Daubert* Challenges.

In affirming certification, the Eighth District improperly relied on expert testimony offered

by Plaintiff that was the subject of an undecided *Daubert*-type challenge in the trial court. Op. ¶33. The Supreme Court in *Dukes*, while not deciding the issue, indicated strongly that *Daubert* should apply to expert testimony relied on for class certification. 131 S.Ct. at 2553, 180 L.Ed.2d 374. Following *Dukes*, several federal courts have held that it does. *See, e.g., Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982-83 (9th Cir.2011); *Messner v. Northshore Univ. Healthsystem*, 7th Cir. No. 2514, 2012 WL 129991 (Jan. 13, 2012). Whether *Daubert* applies on class certification is central to the proper scope of the Civ.R. 23 analysis and warrants this Court's review.

Proposition of Law No. III: A Class Definition May Not Condition Class Membership on Disputed, Individual Elements of Liability.

The Eighth District erroneously affirmed the trial court's adoption of a class definition that required that each class member sustained injury, i.e., that the cost of replacing the class member's windshield would have exceeded his or her deductible. As State Farm showed, the historical cost to State Farm of replacing a particular windshield is not easily or definitively determinable, but would be a matter of individual factual dispute. When an insured's windshield was *repaired*, State Farm did not determine what replacement windshield(s) could or would have been used on that vehicle if the insured had chosen replacement. Multiple replacement windshields from various sources were often available for a given windshield at significantly varying prices, some of which might exceed the policyholder's deductible (resulting in a purported injury) while others would not. State Farm presented evidence that at the time of Plaintiff's repair, there were eleven possible replacements for his windshield, with a cost to State Farm ranging from $206.38 to $663.19, some above and some below Plaintiff's deductible.[5]

Thus, contrary to the Eighth District's ruling, fact of injury was not a straightforward matter

[5] Plaintiff's own purported expert identified two possible replacement windshields for Plaintiff's car and did not dispute the availability of the replacement windshields identified by State Farm.

of applying "a mathematical calculation to determine whether a given windshield replacement is more expensive than a given deductible." Op. ¶34. Without an individual factual inquiry, there is no "given windshield." Before any calculation could be done, there would have to be a determination as to which of (in many cases) a variety of replacement windshields would have been used in the hypothetical replacement of each class member's windshield. Moreover, in some instances, the cost to State Farm for a windshield depended upon verification of the actual price paid by the glass shop (not a list price), again requiring an individual inquiry. If Plaintiff's claims were tried on an individual basis, the parties would be entitled to present evidence on the issue, including the brands, models and prices of windshields stocked at or available to Plaintiff's glass shop. *Compare Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir.2001). That the damages claimed are relatively small does not mean that individual factual issues as to whether each class member actually sustained injury can be glossed over or disregarded.[6] In short, actual injury is an individual issue that defeats predominance and renders class certification improper. *See Hoang v. E*Trade Group*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151, ¶19 (8th Dist.); *Newton* at 188 (if "'fact of damage requires evidence concerning individual class members,'" common questions do not predominate) (Citation omitted.).

<u>Proposition of Law No. IV</u>: Plaintiff's Assurance that Unspecified, Hypothetical Computer Algorithms Can Be Used to Identify Class Members Does Not Satisfy the Requirement that Class Members Can Be Identified with Reasonable Effort.

Even if there were no disputed individual issues of fact as to actual injury, the calculation of damages for 100,000 class members would be neither simple nor manageable. State Farm's cost for a replacement varied not only with the particular windshield, but also based upon a system of

[6] The inclusion of actual injury in the class definition also results in an impermissible fail-safe class. Policyholders who are determined to have no injury will not be bound by an adverse verdict, but will merely be excluded from the class.

adjustments to windshield prices that differed from county to county and changed frequently and significantly over time. As Judge Stewart stated, there are "too many damages variables" among class members over the 20-year class period for the class to be manageable. Op. ¶68.

The Eighth District's ruling that class members could be identified by unspecified hypothetical "computerized algorithms" that would determine actual injury and damages (Op. ¶36) was not supported by evidence, expert or otherwise, as to the feasibility of devising such a program, how much it would cost, or how long it would take. As Judge Stewart stated: "[t]he court's confidence in its ability to wade through the difficulties posed by variable issues relating to damages assessments based solely on the rather nebulous idea that computers can sort it out" was "misplaced." Op. ¶69. Plaintiff was required to show that class members were identifiable with "reasonable effort" and by "means specified at the time of class certification." *Hamilton*, 82 Ohio St.3d at 72-73, 694 N.E.2d 442. Plaintiff's assurance that a "simple computer program" could be devised did not meet that burden. *See Newton*, 259 F.3d at 191-92 ("assurance" that an "expert can devise a formula for calculating injury and damages" did not allay manageability concerns).

<u>Proposition of Law No. V</u>: Where Class Members Not Only Heard Allegedly Scripted Statements, But Had Individual Unscripted Discussions and Were Influenced by Other Individual Considerations, Individual Questions Predominate.

The Eighth District erroneously ruled that the use of a "script" by State Farm's third-party glass claims administrator Lynx gave rise to commonality and a predominance of common issues for policyholders with post-1997 claims. In its analysis, the Eighth District disregarded evidence of the individual circumstances of each class member's transaction, including the fact that the great majority of policyholders not only spoke to a Lynx operator, but also would have had unscripted oral discussions regarding their windshield claims with the personnel at their glass shops and, in many cases, their State Farm Agents, who continued to answer policyholder questions

regarding windshield claims after the Lynx program began. Individual evidence regarding these unscripted discussions would be directly relevant to Plaintiff's claim that class members were improperly "dissuaded" from having their windshields replaced or "steered" towards repair. Op. ¶4, 56. Those discussions are especially relevant because Lynx operators did not advise policyholders that a windshield actually could be repaired, but only that it "sound[ed] as though" it could be repaired, leaving the ultimate decision as to repair or replacement to be made by the individual policyholder after inspection of the damage by his glass shop and unscripted conversation with a glass shop technician. After policyholders spoke with their glass shops and had their windshields inspected, they not infrequently changed their minds and had the windshield replaced. The evidence also showed that policyholders were influenced by individual considerations such as deductible waiver, time and convenience. Policyholders were notified of their right to choose between repair and replacement in multiple mailings between 1997 and 2001.

Neither the trial court nor the Eighth District was willing to delve beyond the Plaintiff's "theory of the case" and examine the evidence demonstrating the individual nature of the class members' transactions, their decisions and the extent of their reliance, if any, on Lynx. It was error and an abuse of discretion to certify a class based upon a purported "common script" that was only one aspect of otherwise individual transactions.

Proposition of Law No. VI: It Is an Abuse of Discretion to Certify a Subclass Without a Representative Who Is a Member of the Subclass.

The Eighth District affirmed certification of a subclass of more than 34,000 policyholders whose claims were not administered by Lynx (including all pre-August 1997 claims and 5% of later claims), for pre-loss condition claims only. Under Civ.R. 23(C)(4)(b), "each subclass [must be] treated as a class, [and] the provisions of this rule shall then be construed and applied accord-

ingly." Thus, a subclass must meet the requirement that "the named representatives must be members of the class." *Stammco, LLC v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶6. Here, certification of the non-Lynx subclass was improper not only because of the overwhelmingly individual issues of preloss condition and differences in policy language, but also because the sole named Plaintiff is not a member of that subclass.

Proposition of Law No. VII: Rule 23(B)(2) Does Not Authorize Class Actions Where the Named Plaintiff Lacks Standing to Seek Declaratory or Injunctive Relief or Where the Relief Sought Merely Lays a Basis for Money Damages.

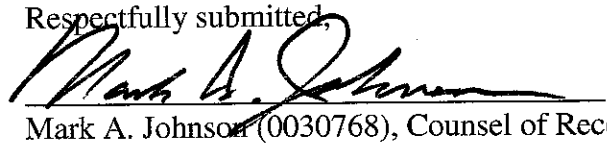
Certification of a Rule 23(B)(2) class for injunctive and declaratory relief was an abuse of discretion. To represent a (B)(2) class, Plaintiff "must have a basis for injunctive relief in his own right." *Woods v. Oak Hill Cmty. Med. Ctr., Inc.*, 134 Ohio App.3d 261, 268, 730 N.E.2d 1037 (4th Dist. 1999); *see also McNair v. Synapse Group Inc.*, 3d Cir. No. 11-1743, 2012 WL 695655 at *6-7 (Mar. 6, 2012) (former customer cannot represent (b)(2) class). Plaintiff is no longer a State Farm insured and has no standing to enjoin State Farm's future practices.

Moreover, the declaratory relief sought by Plaintiff (that State Farm "violat[ed] the terms" of its policies and breached its fiduciary obligations) is "designed simply to lay the basis for a damage award" and does not qualify under Rule 23(B)(2). 7AA Charles A. Wright et al., *Federal Practice and Procedure* § 1775 (3d Ed.2005); *Gawry v. Countrywide Home Loans*, 640 F.Supp.2d 942, 961 (N.D.Ohio 2009), *aff'd*, 395 F. App'x 152 (6th Cir.2010).

CONCLUSION

This Court should grant jurisdiction and review and reverse the decision below.

Respectfully submitted,



Mark A. Johnson (0030768), Counsel of Record
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Memorandum in Support of Jurisdiction of Appellant State Farm Mutual Automobile Insurance Company was served upon the following by first class U. S. mail, postage prepaid, this 30th day of March, 2012:

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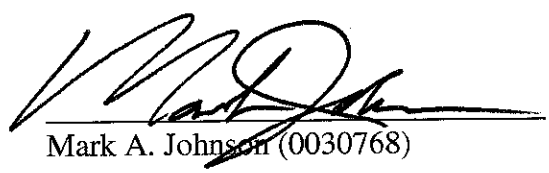

Mark A. Johnson (0030768)

DEC 22 2011

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95925

MICHAEL E. CULLEN

PLAINTIFF-APPELLEE

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.

DEFENDANT-APPELLANT

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

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-555183

BEFORE: Celebrezze, J., Stewart, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 22, 2011

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FILED AND JOURNALIZED
PER APP.R. 22(C)

DEC 22 2011

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

FRANK D. CELEBREZZE, JR., J.:

Appellant, State Farm Mutual Automobile Insurance Company ("State Farm"), challenges the trial court's September 29, 2010 order certifying a class of individuals and businesses allegedly harmed by State Farm when making "glass only" claims for damage to windshields that were repaired rather than replaced. State Farm argues that class certification is inappropriate. After a thorough review of the record and law, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Background

Appellee, Michael Cullen, filed suit against State Farm on February 18, 2005 raising claims of breach of contract, bad faith, and breach of fiduciary duty. He sought monetary and declaratory relief as well as class certification. He submitted his motion for class certification on August 23, 2005. However, State Farm requested that the trial court allow it to file a motion for summary judgment and that the court rule on that motion prior to ruling on questions regarding class certification.

On September 20, 2006, State Farm filed its motion for summary judgment. Due to several discovery irregularities, the proceedings dragged on until March 29, 2007, when the trial court denied State Farm's motion for summary judgment.

After that, the trial court took up the class certification question and held a hearing on that motion on April 14, 2010. In his complaint and class certification motion, Cullen alleged that State Farm implemented a program to encourage windshield repair rather than replacement for qualifying windshield claims and never disclosed to claimants a benefit option under their policies of insurance. Prior to 1991, State Farm had a program to use a repair procedure to fix chipped or cracked windshields rather than replace them. In 1997, State Farm subcontracted the handling of glass-only damage claims[1] to Lynx Services, L.L.C. ("Lynx"). According to Cullen, Lynx, in conjunction with State Farm, developed a script[2] that representatives would use to steer claimants to select windshield repair, even for claimants with no deductible.[3] However, the repair option was only available for windshields that qualified (having small chips or cracks that were not in the driver's immediate view) and only if the insured agreed to the repair.

In 2003, Cullen called State Farm to report damage to his windshield caused by a stone. He was transferred to a Lynx agent and agreed to have his

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[1] State Farm had a policy provision for claims where only damage to glass was involved during some of the class period. Damage to glass as a result of collision was handled separately.

[2] State Farm refers to this as a decision tree and adamantly argues it is not a script.

[3] Cullen argues that 51 percent of putative class members had no deductible.

windshield repaired rather than replaced. To encourage claimants to take the repair option, State Farm waived the deductible so that windshields were repaired at no charge to the insured. A policy provision to that effect was added in 1998.[4] Cullen alleges that the script used by Lynx did not set forth all the options claimants had, a violation of state insurance regulations. Specifically, he alleges that Lynx never disclosed a "pay-out" option where claimants could receive a check for the entire amount of the windshield, less the deductible, and then have the windshield repaired at their own expense. Cullen argues this is the only option that would have been chosen by an insured had their options been fully explained to them. He further alleges that State Farm saved a great deal of money by pushing repair rather than replacement for these claimants. State Farm's cost of a new windshield averaged $342, even after the deductible was subtracted; the cost of repair was often less than $50.

Cullen asserts that there are some 100,000 people who filed glass-only claims during the class period who may have been affected by State Farm's non-disclosure of all available options under the policy.

The trial court found that Cullen had satisfied all the requirements of class certification using the following definition:

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[4] After Cullen's suit was filed in 2005, State Farm removed that waiver.

"All persons and business entities covered under an Ohio motor vehicle insurance policy issued by [State Farm] who made a 'Glass Only' physical damage comprehensive coverage claim on or after January 1, 1991 for cracked, chipped or damaged windshields and received a chemical filler or patch repair, or payment thereof, instead of a higher amount for actual cash value or replacement cost of the windshield. The lesser of the amount of the actual cash value or the replacement cost of the windshield for each claim must exceed the insured's applicable deductible."

The definition also included two subclasses — those who had claims administered by Lynx and those who did not.[5] State Farm then timely filed the instant appeal, raising three errors.

II. Law and Analysis

A. Class Certification Under Civ.R. 23(B)(3)

State Farm first argues that "[t]he trial court erred and abused its discretion by granting the motion of plaintiff-appellee for class certification under Rule 23(B)(3)." In *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 2000-Ohio-397, 727 N.E.2d 1265, the Ohio Supreme Court reaffirmed that the standard of review to be applied for class action certification is that of

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[5] The definition also had three categories of excluded individuals, including those who have previously filed suit, officers or employees of State Farm or the parties in this case, and those who opt out of the class.

an abuse of discretion. A trial court possesses broad discretion in determining whether a class action may be maintained. That determination will not be disturbed absent a showing that the discretion was abused. Id. An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Beder v. Cleveland Browns, Inc.* (1998), 129 Ohio App.3d 188, 717 N.E.2d 716. The trial court's decision regarding the certification of a class should not be reversed on appeal because the appellate judges would have decided the issue differently had the initial determination been in their hands. *Hamilton v. Ohio Sav. Bank,* 82 Ohio St.3d 67, 1998-Ohio-365, 694 N.E.2d 442.

The class action is an invention of equity. Its purpose is to facilitate adjudication of disputes involving common issues between multiple parties in a single action. *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 62, 556 N.E.2d 157. The plaintiff bears the burden of establishing the right to a class action. *Shaver v. Standard Oil Co.* (1990), 68 Ohio App.3d 783, 589 N.E.2d 1348. Class certification in Ohio is based on Rule 23 of the Ohio Rules of Civil Procedure, which is identical to Rule 23 of the Federal Rules of Civil Procedure, so federal law is also useful in analyzing a given situation.

In *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, 521 N.E.2d 1091, the Ohio Supreme Court listed seven elements necessary for a class to be

certified. In determining whether a class action is properly certified, the first step is to ascertain whether the threshold requirements of Civ.R. 23(A) have been met. Once those requirements are established, the trial court must turn to Civ.R. 23(B) to discern whether the purported class comports with the factors specified therein. Accordingly, before a class may be certified as a class action, a trial court must make seven affirmative findings. *Warner* at paragraph one of the syllabus.

Four prerequisites are explicitly set forth in Civ.R. 23 and two are implicit in the rule. Id. The two implicit prerequisites are: (1) the class must be identifiable and unambiguously defined, and (2) the class representatives must be members of the class. Id. at 96.

The four delineated prerequisites in Civ.R. 23(A) include: "(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 and defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Id. at 97, quoting Civ.R. 23(A). Except as commonality relates to predominance, State Farm limits its arguments on appeal to the requirements in Civ.R. 23(B).

Finally, the trial court must also find that one of the three Civ.R. 23(B) requirements is met before the class may be certified. Id. at 94; see, also, *Hamilton*. If the class movant fails to meet one of these requirements, class certification must be denied.

Civ.R. 23(B)(3) requires that the questions of law or fact common to the members of the class predominate over any questions affecting individual members. As stated in *Hamilton*, "Civ.R. 23(B)(3) provides that an action may be maintained as a class action if, in addition to the prerequisites of subdivision (A), 'the court finds that 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.

i. Predominance

State Farm first argues that Cullen fails to meet the requirements for class certification under Civ.R. 23(B)(3), predominance.

In order to satisfy the predominance requirement, Cullen must show that the common questions of law and fact represent a significant aspect of the class and are capable of resolution for all members of the class in a single adjudication. *Shaver v. Standard Oil Co.* at 799; *Wal-Mart Stores, Inc. v. Dukes* (2011), 564 U.S. ___, 131 S.Ct. 2541, 180 L.Ed.2d 374.

The mere assertion that common issues of law or fact predominate does not satisfy the express requirements under the rule. In *Waldo v. N. Am. Van Lines, Inc.* (W.D.Pa. 1984), 102 F.R.D. 807, the court stated: "[It] is not simply a matter of numbering the questions in the case, [labeling] them as common or diverse, and then counting up. It involves a sophisticated and necessarily judgmental appraisal of the future course of the litigation * * *."

Where the circumstances of each proposed class member need to be analyzed to prove the elements of the claim or defense, then individual issues would predominate and class certification would be inappropriate. *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 314, 473 N.E.2d 822.

Here, if Cullen's theory of the case is believed, the use of a common plan to steer claimants to opt for repair rather than replacement or disclosure of a cash payment for the value of the glass, less deductible, is a significant class-wide issue.

According to Ohio Admin. Code 3901-1-54(E)(1), an insurer must "fully disclose to the first party claimants all pertinent benefits, coverages or other provisions of an insurance contract under which a claim is presented." Cullen argues this was not done because the Lynx representatives never disclosed the

payment option he seeks and steered claimants to repair rather than replacement of their windshields.[6]

State Farm argues that no such "pay-out" option exists in the insurance contract. Cullen argues that State Farm's policies provide that it will "pay loss to your car * * * but only for the amount of each such loss in excess of the deductible amount, if any." Cullen further alleges that loss is further defined to give State Farm the option to "settle a loss with [the claimant] in any of the following ways: * * * 'pay the actual cash value' of the property at the time of loss, 'pay to repair' the damaged property or part, or 'pay to replace' the property or part."

Although hotly contested by the parties, the contract may provide for a cash payment option, as Cullen argues, but that may be discretionary to be decided exclusively by State Farm. Further, "[a] court should not create an obligation not found in the contract's terms." *Werner v. Progressive Preferred Ins. Co.* (N.D.Ohio 2008), 533 F.Supp.2d 776, 781, citing *Leigh v. Crescent Square Ltd.* (1992), 80 Ohio App.3d 231, 235, 608 N.E.2d 1166. But none of these issues need be decided at this time because class certification is not akin to a motion for summary judgment.

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[6] Significant is State Farm's instruction to minimize replacement and encourage repair even to claimants with no deductible.

State Farm acknowledged that it never repaired a windshield without a claimant's consent. This would indicate that State Farm does not retain absolute discretion over this decision in practice. Further, State Farm employees acknowledged that this pay-out option has been utilized by customers in the past.[7]

The Supreme Court stated that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,' [*Gen. Telephone Co. of S.W. v. Falcon* (1982), 457 U.S. 147,] 157. This does not mean merely that they have all suffered a violation of the same provision of law. * * * Their claims must depend upon a common contention * * *. That common contention, moreover, must be 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."

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[7] "'[T]he practical construction made by the parties may be considered by the court as an aid to its construction when the contract is ambiguous, uncertain, doubtful, or where the words thereof are susceptible to more than one meaning, or when a dispute has arisen between the parties after a period of operation under the contract.'" *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶39, quoting *Consol. Mgt., Inc. v. Handee Marts, Inc.* (1996), 109 Ohio App.3d 185, 191, 671 N.E.2d 1304, quoting 18 Ohio Jurisprudence 3d (1980) 46, Contracts, Section 160. Also, "[w]here a dispute arises relating to an agreement under which the parties have been operating for some considerable period of time, the conduct of the parties may be examined in order to determine the construction which they themselves have placed upon the contract, and great weight will be given to such construction." *Natl. City Bank of Cleveland v. Citizens Bldg. Co. of Cleveland* (1947), 74 N.E.2d 273, 279.

Dukes at 2551. Here, the use of a common script creates such a common, class-wide contention making this case suitable for class litigation. The trial court examined these issues and determined that Cullen has raised a colorable claim sufficient to satisfy the Civ.R. 23 standards. That was not an abuse of discretion.

Part of State Farm's predominance argument boils down to difficulty in calculating damages and that some members of the class would have no damages. If included class members had no damages, this would be inappropriate because Cullen's cause of action for breach of contract requires a showing of damages-in-fact to succeed. *Estate of Mikulski v. Centerior Energy Corp.*, Cuyahoga App. No. 94536, 2011-Ohio-696, ¶14 ("appellants must demonstrate that they were actually damaged as an element of their breach of contract and fraud claims").

The trial court narrowed the class definition to only include damaged individuals, and difficulty in calculating damages should not stand as a reason to avoid class certification. If the fact of damages can be shown with certainty in a class-wide manner, difficulty in calculating the amount is insufficient to avoid certification. *Hoang v. E*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151, ¶20; *Estate of Mikulski* at ¶20.

The trial court broke down the class further into two subclasses — those who had their claims handled by Lynx and those who did not.

Addressing those with claims handled by Lynx, the trial court found the use of a common scripted conversation constituted a common issue where liability could be determined based on whether this conversation improperly prompted claimants to elect repair without having their options properly explained to them.

The existence of the Lynx script or "word track" offers evidence of class-wide treatment that can reasonably establish evidence of Cullen's claim. The trial court's certification of this subclass of putative class members was not an abuse of discretion.

However, Lynx was not involved in claims filed before August 1997, and its script cannot be used for claims made before this period. Cullen's theory of the case is that cash-out payments that were a benefit under the policy were never disclosed.

In *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 1998-Ohio-405, 696 N.E.2d 1001, the Ohio Supreme Court found that generalized evidence that proves or disproves an element of the claim obviates the need to examine individual issues of reliance. Id. at 436. In the case of claims submitted before 1997, Cullen argues that he only needs to show that State Farm had an

obligation to restore the claimant's vehicle to preloss condition, and he purports to offer expert testimony to show that a windshield can never be repaired to restore it to preloss condition. The use of generalized evidence found in the common contract between the entire subclass and the testimony and findings of Cullen's experts provides a means of resolving a significant question of breach of contract without the need to examine individual issues. Therefore, the trial court did not abuse its discretion in certifying this subclass.

State Farm argues that by placing a calculation of damages within the class definition, Cullen has created an impermissible "fail-safe class." This "refers to a class definition that is improper because the members of the class cannot be known until a determination has been made as to the merits of the claim or the liability of the opposing party. *Adashunas v. Negley* (C.A.7, 1980), 626 F.2d 600, 603. Thus, a fail-safe class 'put[s] the cart before the horse.'" *Mims v. Stewart Title Guar. Co.* (N.D.Tex. 2008), 254 F.R.D. 482, 486. Here, that is not the case because a mathematical calculation to determine whether a given windshield replacement is more expensive than a given deductible can be accomplished without trying the issues of the case and can be done in a straight forward, mechanical manner.

However, State Farm has identified a group of individuals whose inclusion in the class is inappropriate. It argues that approximately 990 putative class

members had their windshields repaired and then later replaced after complaining to State Farm about the quality of the repair. These individuals are included in the class under the current definition, but would have no damages similar to the claims of the class because their windshields were replaced. Therefore, the class definition should be amended to exclude these putative class members.

ii. Manageability

State Farm also argues that the class is not manageable. The trial court's handling of such a large class will be difficult, but its administration is facilitated by the careful records kept by State Farm and others and the ability to accurately calculate damages using computerized algorithms and State Farm's databases of information (including the make and model of each claimant's vehicle; the historic cost of windshield replacement, including labor, available in National Auto Glass Specification pricing guides; the percent difference from that cost as calculated through assigning various market designations to counties in Ohio, already done by State Farm; and the amount of individual deductibles at the time a claim was submitted). See *Stammco, L.L.C. v. United Tel. Co. of Ohio*, Fulton App. No. F-07-024, 2008-Ohio-3845, ¶59, reversed on other grounds by *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292.

State Farm's records, in conjunction with available industry data, contain the necessary information to arrive at a reasonable estimation of damages for each putative class member and to determine class membership. Therefore, manageability is not so insurmountable that class certification should be denied.

Further, while several iterations of insurance policies cover the class period, the language in those policies that impacts Cullen's claim is substantially similar. The existence of these different policies does not preclude class-wide treatment of the claims at issue.

iii. Superiority

State Farm also alleges that a class action is not the best form in which to litigate this issue. The Ohio Supreme Court has recognized that four factors listed by the drafters of Civ.R. 23(B)(3) may be of importance when addressing whether the class vehicle is superior to other methods of litigating claims: "'(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.'" *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 314, 473 N.E.2d 822.

Here, as in *Hamilton*, "[n]o individual has attempted to institute a parallel action or to intervene in this action, and it is unlikely that any new suits will be filed given the relatively small individual recoveries and the massive duplication of time, effort, and expense that would be involved. While the class is numerically substantial, it is certainly not so large as to be unwieldy. Class action treatment would eliminate any potential danger of varying or inconsistent judgments, while providing a forum for the vindication of rights of groups of people who individually would be without effective strength to litigate their claims." Id. at 80. Based on all these factors, class treatment is the superior method of resolving the present dispute.

B. Class Certification Under Civ.R. 23(B)(2)

State Farm next argues that "[t]he trial court erred and abused its discretion by granting plaintiff's motion for class certification under Rule 23(B)(2)." This provision states, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]"

Under this provision, a plaintiff must show that the defendant's actions impact the entire class and that final injunctive or declaratory relief is appropriate.

The trial court found, "it appears that the same practices which [Cullen] experienced are still ongoing. Declaratory and injunctive relief are thus potentially available remedies which can be issued on a class wide basis in the event that he prevails upon the merits of his claim."

Here, Cullen seeks declaratory relief under Civ.R. 23(B)(2). Under federal law, declaratory relief is proper under The Declaratory Judgment Act of 1934, now 28 U.S.C. 2201, either "'1) where the judgment will serve a useful purpose in clarifying and settling the legal relations in issue; or 2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceedings.'" *Sarafin v. Sears, Roebuck & Co., Inc.* (D.C. Ill., 1978), 446 F.Supp. 611, 615, quoting *Maryland Casualty Co. v. Rosen* (C.A.2, 1971), 445 F.2d 1012, 1014.

State Farm argues that the declaratory relief sought is incidental to monetary damages.

"Certification under Civ.R. 23(B)(2) depends upon what type of relief is primarily sought, so where the injunctive relief is merely incidental to the primary claim for money damages, Civ.R. 23(B)(2) certification is inappropriate." *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶17, citing *Zinser v. Accufix Research Inst., Inc.* (C.A.9, 2001), 253 F.3d 1180. The Seventh Circuit, in denying certification of a class action seeking injunctive

relief and money damages, has also stated that "[a]n injunction would not provide 'final' relief as required by Rule 23(B)(2). An injunction is not a final remedy if it would merely lay an evidentiary foundation for subsequent determinations of liability." *Kartman v. State Farm Mut. Auto. Ins. Co.* (C.A. 7, 2011), 634 F.3d 883, 893.

In *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, 203, 509 N.E.2d 1249, class certification was denied for individuals who had foam insulation with toxic formaldehyde levels sprayed into their homes. The plaintiffs sought future diagnostic testing for class members in addition to damages. The Ohio Supreme Court declined to certify the class under Civ.R. 23(B)(2) because the "provision is inapplicable where the primary relief requested is damages."

Recently, in *Dukes*, the Supreme Court found that Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." Id. at 2557.[8] The court went on to find that "individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class — predominance, superiority, mandatory notice, and the right to opt out — are missing from (b)(2) not because

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[8] The distinction is not a small one because significant notice and opt-out provisions are mandatory in Civ.R. 23(B)(3) classes that are absent from Civ.R. 23(B)(2). See *Dukes* at 2558-2559.

the Rule considers them unnecessary, but because it considers them unnecessary to a (b)(2) class. When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute." Id. at 2558. The court did not address the specific question here — whether a class should be certified under both Civ.R. 23(B)(2) and (B)(3).

However, "[a]s the Supreme Court of Ohio stated, '[d]isputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award neither promote the disposition of the case on the merits nor represent a useful expenditure of energy. Therefore, they should be avoided. If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2). * * * The court has the power under subdivision (c)(4)(A), which permits an action to be brought under Rule 23 "with respect to particular issues," to confine the class action aspects of a case to those issues pertaining to the injunction and to allow damage issues to be tried separately.'" *Asset Acceptance L.L.C. v. Caszatt*, Lake App No. 2009-L-090, 2010-Ohio-1449, ¶71, quoting *Hamilton* at 87, quoting Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure (2 Ed.1986) 470, Section 1775.

Here, the relief sought includes money damages that require individualized analyses as to the proper amount, but that relief flows from the declaratory judgment sought. This is the test developed by the Fifth Circuit in determining whether certification of such a class is proper. See *Allison v. Citgo Petroleum Corp.* (C.A.5, 1998), 151 F.3d 402. That court defined incidental to mean damages that "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." Id. at 415. Here, whether we engage in the more rigorous analysis of whether a class should be certified under both subsections or following the Ohio Supreme Court's guidance to avoid such an analysis, the result is the same. The class is maintainable under both Civ.R. 23(B)(2) and (B)(3).

Appellant's second assignment of error is overruled.

C. Failure to Conduct a Rigorous Analysis

Finally, State Farm alleges that "[t]he trial court abused its discretion by failing to conduct the rigorous analysis of the requirements for class certification under Rule 23 required by Ohio law."

State Farm claims the trial court did not undertake its own rigorous analysis of the Civ.R. 23 requirements, but merely adopted wholesale Cullen's proposed findings of facts and conclusions of law. Not only is this a good way to perturb the trial judge, it is also incorrect.

The trial court presided over a hearing where both sides presented evidence on whether the class should be certified in this case and asked salient questions of both sides. It used much of the language in Cullen's proposed findings of facts and conclusions of law, but its opinion was half the length as the proposed findings. Further, it narrowed the class definition to address State Farm's argument regarding potential class members without any injury. Appellant provides no evidence that the trial court did not undertake a reasoned analysis of the issues presented to arrive at a rational, logical conclusion.

However, the trial court's findings of fact and conclusions of law do go too far into the merits of the case. One statement in particular is possibly outcome determinative. The trial court states that a cash pay-out option was available and that State Farm failed to disclose that option. This goes to the heart of the merits of the case and is inappropriate at this point. Class certification does not address the merits of the claim. This is understandable given that both sides argued the merits during class certification and continue to do so in their briefs before this court.

III. Conclusion

For claims handled using a common script or word track, the trial court did not err in certifying the class in this case. Individual questions do not predominate because the script used by Lynx and developed by State Farm

establishes class-wide treatment under Cullen's theory that State Farm breached its contracts with insureds by dissuading individuals from replacing their windshields and not informing them of their option to receive a check for the value of the windshield less their deductible. For claims made prior to the use of a common script, Cullen argues that the policy language simplifies the case to a showing that the policy in question required State Farm to restore vehicles to their preloss condition and that a windshield repair cannot do so. The theory, while dubious, does provide a means to resolve the case on a class-wide basis for these members. Therefore, the trial court did not err in certifying this class. However, the class definition must be restricted to exclude those who had their windshields replaced after repair. Finally, State Farm has provided nothing to indicate that the trial court did not fulfill its duty to analyze the issues in this case when rendering its judgment.

This cause is affirmed as to certification of a class action, but reversed as to the class definition and remanded to the trial court to redefine the class.

It is ordered that appellant and appellee share the costs herein taxed.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

The court finds there were reasonable grounds for this appeal.

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

FRANK D. CELEBREZZE, JR., JUDGE

JAMES J. SWEENEY, J., CONCURS;
MELODY J. STEWART, P.J., DISSENTS (WITH SEPARATE OPINION)

MELODY J. STEWART, P.J., DISSENTING:

The class action complaint filed in this case presents three distinct groupings of State Farm policyholders whose claims for damaged windshields must be divided into numerous sub-groupings. To be sure, there is a "common" issue regarding whether State Farm had an obligation to make a cash payment available to its policyholders in lieu of a repair, but the commonality is so general in nature that it fails to distill into a concrete legal issue. When these varying groups are broken down into their constituent parts, I believe that any litigation going forward will be so unmanageable as to make class certification an abuse of the court's discretion.

I

Civ.R. 23(A)(2) defines "commonality" as "questions of law or fact common to the class." The court found that the common claim presented in this case was

whether State Farm was contractually obligated to make available to all glass-only claimants the cash value of a replacement windshield.

While I agree that Cullen's complaint presents a common question on the issue of whether State Farm had to offer glass-only claimants the cash value of a replacement windshield, that was merely a threshold question that did not resolve other, equally important, class-wide issues. In *Wal-Mart Stores, Inc. v. Dukes* (2011), 564 U.S. ___, 131 S.Ct. 2541, 180 L.Ed.2d 374,[9] the United States Supreme Court cautioned that it is "easy to misread" the commonality requirement of Fed.R.Civ.P. 23 (and by extension, Civ.R. 23) because "[a]ny competently crafted class complaint literally raises 'common questions.'" (Internal quotations omitted.) Id. at 2551, quoting Nagareda, Class Certification in the Age of Aggregate Proof (2009), 84 N.Y.U.L.Rev. 97, 131-132. Construing a Title VII gender discrimination claim for a class of 1.5 million female Wal-Mart workers, the Supreme Court acknowledged that these claims presented a "common" Title VII claim of gender discrimination, but noted that "[t]his does not mean merely that [the workers] have all suffered a violation of the same provision of law." Id. Given the separate nature of injury that can be asserted under Title VII (intentional discrimination or disparate impact), the court found

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[9] Because Civ.R. 23 is patterned after Fed.R.Civ.P. 23, "federal authority is an appropriate aid to interpretation of the Ohio rule." *Marks v. C.P. Chem. Co.* (1987), 31 Ohio St.3d 200, 201, 509 N.E.2d 1249.

that the mere claim of a Title VII injury "*** gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention — for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it 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." Id.

There is no dispute that the class certified by the court encompassed policyholders in three distinct time periods: (1) from 1991 to March 1998, State Farm had no windshield repair language in its automobile policies; (2) from April 1998 to August 2005, State Farm had policy language stating that it would waive any deductible for a glass-only claim if the policyholder agrees to have the windshield repaired; and (3) from September 2005 to present, State Farm no longer waived the deductible and would repair the windshield for glass-only claimants only if agreed to by the policyholder.

As in *Dukes*, this class encompassed far too many theories of recovery under a "common" question to present a unified class. Different policyholders were at times covered under different versions of the State Farm automobile policy. Over the 20-year period, policyholders could be determined to have suffered losses, if any, under multiple variations on the theme of "glass only"

claims. Some policyholders may have had their windshields immediately replaced while others had their windshields repaired. For those who had their windshields repaired, some had their deductibles waived while others did not. Some policyholders may have expressly given permission for repair while others may not have given permission. And, of course, some policyholders were advised under the Lynx word track while others were not. While there may be an initial common question of State Farm's obligation to offer a cash payment in lieu of repair, the many permutations of the underlying claim do not present common issues sufficient to justify certification into a single class of policyholders.

II

I likewise find that the court erred by concluding that the class it defined was manageable.

"Manageability" encompasses "the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen*, 417 U.S. at 164. In determining manageability, the court should consider the potential difficulties in notifying class members of the suit, calculation of individual damages, and distribution of damages. *Maguire v. Sandy Mac, Inc.* (D.N.J. 1992), 145 F.R.D. 50, 53-54. The courts must evaluate the costs and benefits of adjudicating plaintiffs' claims in a class action, as compared to the costs and benefits of proceeding through numerous separate actions.

The need for individualized damage assessments adversely affects the need for class certification. *Broussard v. Meineke Discount Muffler Shops, Inc.* (C.A.4, 1998), 155 F.3d 331, 342-343. However, individualized damages assessments are manageable when "variables are identifiable on a classwide basis and, when sorted, are capable of determining damages for individual policyowners ***." *In re Monumental Life Ins. Co.* (C.A.5, 2004), 365 F.3d 408, 419.

In Conclusion of Law No. 14, the court conceded that "the recovery due each class member will not be identical," but found that fact alone did not warrant a finding that the class would be unmanageable. The court found that State Farm had a computer database and "the ability to employ computer analysis of those records." See Conclusion of Law No. 12.

In *In re Bridgestone/Firestone, Inc.* (C.A.7, 2002), 288 F.3d 1012, 1018-1021, the court of appeals reversed class certification because the plaintiffs' alleged defective tire design class action would be unmanageable because tires were recalled at different times, they may have differed in their propensity to fail, some vehicles were resold, some owners alleged they were advised to underinflate their tires, and there were six tire models representing 67 different designs.

As in *Bridgestone,* there are too many damages variables present in this case to make the class manageable. There are 100,000 proposed class members who, over a 20-year period, made glass-only claims. Those policyholders were, during that period, covered under three distinct State Farm approaches to glass-only windshield claims. Some had their windshields repaired with no further complaint; some had their windshields replaced. Policyholders had different deductibles, which may have varied year-to-year as they renewed their policies. Some, but not all, policyholders had their deductibles waived after agreeing to accept a windshield repair. The policyholders drove different automobiles, which required significantly different types of windshields, the value of which varied depending on the type of car, the size and type of the glass installed on the car, and the labor required to replace the windshield. For example, the cost to replace the windshield of a 2009 luxury sports utility vehicle would likely be significantly higher than the replacement cost for a 1997 subcompact coupe. Even assuming the same make and model of car, the replacement cost would certainly vary over the 20-year period certified by the court due to various factors including inflation or the type and quality of glass used in the windshields.

The court's confidence in its ability to wade through the difficulties posed by variable issues relating to damages assessments based solely on the rather

nebulous idea that computers can sort it out is, I believe, misplaced. For trial purposes, it would be extraordinarily difficult to present damages issues as raised in this case. See *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (C.A.3, 2001), 259 F.3d 154, 191 (finding unmanageable class action that would require individualized inquiry into "hundreds of millions" of NASDAQ transactions). Not every member of the class will have suffered the same amount of damages. As noted, those damages will vary not only by the type of policy, but by the cost of repair for each particular model of car during a particular time frame.

A class action must represent the best "available method[] for the fair and efficient adjudication of the controversy." Civ.R. 23(B)(3). The difficulties likely to be encountered in the management of the class as certified by the court are so numerous that I cannot confidently conclude that the case can be fairly tried. I therefore dissent with the majority's decision.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

MICHAEL E. CULLEN

Appellee

-vs-

STATE FARM MUTUAL AUTO INS. CO.

Appellant

COA NO. 95925 | LOWER COURT NO. CP CV-555183

COMMON PLEAS COURT

MOTION NO. 450933

Date 02/16/2012

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

Appellant has not explained how the panel's decision conflicts with a prior panel's decision on a dispositive issue. Therefore, appellant's application is denied.

PATRICIA A. BLACKMON, ADMINISTRATIVE JUDGE

Concurring:

MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
EILEEN A. GALLAGHER, J.,
SEAN C. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

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FEB 16 2012
GERALDINE E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

MICHAEL E. CULLEN

Appellee

COA NO. 95925 | LOWER COURT NO. CP CV-555183

COMMON PLEAS COURT

-vs-

STATE FARM MUTUAL AUTO INS CO.

Appellant

MOTION NO. 450932

Date 02/27/12

Journal Entry

Motion by Appellant, State Farm Mutual Automobile Insurance Co., for reconsideration is denied.

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ALL PARTIES - COURT OF APPEALS

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BY _____ DEP.

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Presiding Judge MELODY J. STEWART, Concurs

Judge JAMES J. SWEENEY, Concurs

Judge FRANK D. CELEBREZZE, JR.

65255347

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL E. CULLEN
Plaintiff

STATE FARM MUTUAL AUTO. INS. CO.
Defendant

Case No: CV-05-555183

Judge: DAVID T MATIA

JOURNAL ENTRY

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION, FILED 08/23/2005, IS GRANTED. OSJ.

OSJ

Judge Signature Date

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL E. CULLEN, *et al.*	)	CASE NO. 555183
	)	
Plaintiff,	)	JUDGE DAVID T. MATIA
	)	
vs.	)	MEMORANDUM OF OPINION AND ORDER
	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	)	
	)	
Defendant.	)	

David T. Matia, J:

After full consideration of the parties' briefs and oral arguments regarding class certification, the Court hereby grants Plaintiffs' Motion for Class Certification.

Class certifications present significant issues such as efficient case management and allocation of judicial resources, simplifying complex litigation, monetary liability, and providing court access to class members. Accordingly, the Ohio Supreme Court has noted the importance of a trial court's detailed findings and specified reasoning with respect to its certification of a particular class. *See Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St. 67.

FINDINGS OF FACT

1. Plaintiff, Michael Cullen, has alleged on behalf of himself and all other similarly situated individuals, that they have been denied the full benefits due to them for "glass only" windshield damage claims which had been timely submitted to and approved by Defendant, State Farm Mutual Automobile Insurance Company ("State Farm"). As defined, Plaintiff and all of the proposed class members are State Farm policyholders and insureds.

2. On or about March 24, 2003, a flying rock chipped the windshield of Plaintiff

Michael Cullen's 2001 Volkswagen Jetta while he was driving on I-480. Shortly after, Plaintiff called his insurance agent. Plaintiff testified at his deposition that he had little recollection of the conversation with his agent regarding the chipped windshield. He does not remember talking with a representative of Lynx Services, L.L.C. ("Lynx"), the company Defendant State Farm contracted with to handle the majority of its windshield claims. However, State Farm's records show that Plaintiff did in fact speak with a Lynx representative.

3. Plaintiff did not recall whether the Lynx representative offered him a choice to receive a repair or a new windshield. He also did not remember whether he was offered a cash reimbursement for the cost of a new windshield minus his deductible to have the repair done on his own. Plaintiff decided to have the chip repaired at no cost, since Defendant waived the $250 deductible.

4. Under State Farm's property damage claim handling practices, "glass only" claims involve only those, which are limited to damage to the windshield. The most typical examples include cracks and chips from flying objects and debris. Claims involving other portions of the vehicle are not included. Damage caused by collision is also excluded.

5. State Farm managers have testified that the standardized policies, which had been issued by the insurer throughout the relevant class period, provided for indemnity payments. In other words, the insurer's contractual obligation was not to repair or restore the damage but to issue payment sufficient for such work to be performed. State Farm has referred to this benefit option as the "cash out" option.

6. The cash out option was explicitly provided in the standardized insuring agreements, which stated that: "We will pay for *loss* to *your* car EXCEPT *LOSS* CAUSED BY *COLLISION* but only for the amount for each such *loss* in excess of the deductible amount, if

any." At least five State Farm managers and agents confirmed during the depositions that a cash out payment equal to the cost of replacing the glass was indeed a benefit option available to the glass-only claimants.

7. Each of the Ohio policies contains a Limit of Liability section providing that:

> The limit of our liability for loss to property or any part of it is the lower of: 1. The actual cash value; or 2. The cost of repair or replacement.

A provision in the policies entitled "**Settlement of Loss – Comprehensive and Collision Coverages**" also contains language that requires the insurer to either pay the "actual cash value" for the covered damage, to "pay to repair or replace the property or part with like kind and quality", or to "pay to: (a) repair the damaged property or part, or (b) replace the property or part."

8. Prior to April 1, 1998, there was no wording in any of State Farm's Ohio policies or endorsements specific to windshield glass. There is no dispute, however, that a chipped or cracked "glass only" windshield claim was fully covered under the comprehensive coverage language, that stated as follows:

> Breakage of glass, or ***loss*** caused by missiles, falling objects, fire, theft, larceny, explosion, malicious mischief or vandalism, riot or civil commotion, is payable under this coverage.

9. Beginning with the policies and endorsements effective in Ohio on April 1, 1998, State Farm inserted wording in its insuring agreements stating that "If we offer to pay for the repair of damaged windshield glass instead of the replacement of the windshield and ***you*** agree to have such repair made, we will pay the full cost of repairing the windshield glass regardless of ***your*** deductible." All of the other material policy language, including the language cited above, was either the same or substantially identical throughout the class period.

10. At all times relevant to the proposed class, Ohio Department of Insurance regulations had imposed affirmative duties of disclosure upon insurers doing business in Ohio. For example, Ohio Admin. Code §3901-1-54(E) directed that:

> Misrepresentation of policy provisions
>
> (1) An insurer shall fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance contract under which a claim is presented.

11. There is no dispute in this case that any claim for windshield damage submitted by a proposed class member would qualify as "first party" under Ohio Admin. Code §3901-1-54(C)(8). As was recognized by former Assistant Vice President of Auto Claims William Hardt, State Farm's duty of good faith also includes sharing pertinent information with the insureds.

12. State Farm has retained the former Director of the Department of Insurance, Lee Covington, as an expert in this litigation. Although Plaintiff's counsel raised a number of concerns over the witness' credibility during the hearing, Covington did acknowledge that he was aware that the foregoing regulation existed because insureds do not always read and understand their policies.

13. State Farm adopted a nationwide policy of encouraging the claimants to accept "repairs" of the damaged glass. The repairs could be performed with chemical compounds for as little as $19.00. Replacing the glass, however, would cost the insurer on average $342.00, even after the deductibles were applied. In other words, a policyholder opting for payment of the replacement costs (instead of the repair) would on average receive a check for $342.00. If they so desired, they could then arrange for the repairs themselves for substantially less and keep the difference.

14. There is no dispute that during the relevant class period, State Farm agents and representatives never affirmatively disclosed the cash out option to the glass only windshield damage claimants. Scripts had been prepared which strictly controlled the discussions, which took place in connection with such claims.

15. In 1996, State Farm decided to start utilizing Lynx to administer its windshield damage claims. State Farm still prepared and approved the scripts which the Lynx Customer Service Representatives ("CSRs") followed while communicating with State Farm insureds.

16. Plaintiff has presented evidence that the scripts were misleading, and has argued that the Lynx CSR's provided inaccurate statements regarding the safety, environmental impact and success of repairs.

17. State Farm has argued that the script was only a "word track" and that some of the class members may have been read different portions or sections of the word track or script, depending upon what they asked the Lynx CSR's during their phone conversation. However, the script language provided standard and uniform answers to the questions and Lynx CSR's were instructed not to deviate from the text.

18. State Farm has argued that the discretion afforded to the State Farm agents and the variable questions asked by insureds, with potentially different script or word track responses that could be read by the Lynx CSR's, will result in thousands of "mini-trials" and preclude effective class wide relief. This Court rejects this contention. State Farm agents were uniformly instructed that they were not to handle "glass only" claims and their only role in the claim process was to gather some coverage information and "warm transfer" the insureds to a Lynx call representative. Plaintiffs have introduced all versions of the scripts used during the Lynx script sub-class period of April 1, 1998 to the present and have shown that the language in each version

of the script was either the same or substantially identical in all material wording discussing windshield repair and replacement.

19. To further encourage the claimants to accept the repairs, State Farm incorporated the aforementioned deductible waiver language in the insuring agreements effective April 1, 1998. After the filing of this lawsuit, the language was later removed effective in Ohio in March 2006.

20. Although the term "repair" was never defined in the standardized State Farm policies, evidence was submitted indicating that the insureds were entitled to have their vehicles restored to their pre-loss condition.

21. The obligation to fully restore the vehicles to their pre-loss condition has been memorialized in the State Farm National Offer and Acceptance Agreement, which were entered with the contractors that were approved to perform windshield repairs and replacements. Specifically, the standardized contracts directed that:

> **Glass Company agrees that it will:**
>
> ***
>
> B. Perform quality glass service using methods and materials that meet or exceed the vehicle manufacturer's original structural integrity and retention characteristics. Perform quality glass services in a workmanlike manner using parts that serve to return the vehicle to its pre-loss condition.

22. State Farm's claim systems tracked the use of the "savings" that resulted from convincing the insureds to accept a chemical patch repair instead of a replacement windshield, or the cost thereof. Management reports reflected a "savings" in Ohio of $342 on average, after applicable deductibles, in the claim payouts to insureds for motor vehicle claims during the Class Period.

23. State Farm's claim system contains all of the information about the insureds sufficient and necessary to identify the members of the proposed Class, including their names, addresses and comprehensive coverage deductibles. In addition, Allstate tracked vehicle identification information including VIN numbers, which can be used to identify the precise windshield that was on each insured vehicle; information that is available for each claim and insured.

CONCLUSION OF LAW

1. Class actions are intended to facilitate the adjudication of disputes involving common issues between multiple parties. *Beder vs. Cleveland Browns, Inc.* (8th Dist. 1998), 129 Ohio App.3d 188, 199, 717 N.E.2d 716, 723. Certification is particularly appropriate when modest individual recoveries are being sought, since bringing thousands of separate lawsuits is both undesirable and impractical. *Amchem Products v. Windsor* (1997), 521 U.S. 591, 617, 117 S.Ct. 2231, 2246, 138 L.Ed.2d 689, quoting *Mace v. Van Ru Credit Corp.* (7th Cir. 1997), 109 F.3d 338, 344; see also *Blumenthal v. Medina Supply Co.* (8th Dist. 2000), 139 Ohio App.3d 283, 294, 743 N.E.2d 923, 931.

2. Pursuant to Civ.R. 23, this Court must consider seven factors in determining whether class certification is appropriate:

(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.

Hamilton, 82 Ohio St.3d at 71 (citing Civ.R. 23(A) (emphasis added). The first two requirements are implicit in the certification analysis. Requirements (3) through (7) are expressed in the statute. If a requirement is not met, the trial court may deny class certification. *Hamilton vs. Ohio Savings Bank* (1998), 82 Ohio St.3d 67, 71, 694 N.E.2d 442, 448; see also *Blumenthal*, 139 Ohio App.3d at 293-294.

3. This Court concludes that Plaintiffs have furnished a manageable and identifiable class definition, which is as follows:

> All persons and business entities covered under an Ohio motor vehicle insurance policy issued by Defendant, State Farm Mutual Automobile Insurance Company, who made a "Glass Only" physical damage comprehensive coverage claim on or after January 1, 1991 for cracked, chipped or damaged windshields and received a chemical filler or patch repair, or payment thereof, instead of a higher amount for actual cash value or replacement cost of the windshield. The lesser of the amount of the actual cash value or the replacement cost of the windshield for each claim must exceed the insured's applicable deductible.
>
> Subclasses:
>
> A. Insureds who made covered claims defined above that were administered, handled, processed, and/or paid by Lynx Services
>
> B. Insureds who made covered claims defined above that were not administered, handled, processed and/or paid by Lynx Services
>
> Exclusions:
>
> A. Any insured who filed a lawsuit involving any of the claims included in the class;
>
> B. Present and former officers, directors and management employees of Defendant, employees of Bashein & Bashein Co. L.P.A., and Paul W. Flowers Co. L.P.A., Plaintiff's Class Counsel in the case, any judge assigned to this case and their staff, Defendants' counsel of record, and their immediate families;
>
> C. All persons who make a timely and proper election to be excluded from the Class.

4. A class definition is not ambiguous when its members are "readily discovered through *** business records[.]" *In re Rogers Litigation*, 2003-Ohio-5976, ¶ 13 (certifying a class of all people who have been secretly videotaped or recorded without their knowledge or consent between 1980 and 2000 at defendant's residential and commercial properties). The proposed classes in this case are easily identifiable through State Farm's business records and databases. The Court notes that Department of Insurance regulations have required the necessary claim data to be maintained. *Ohio Admin. Code 3901-1-54(D)(1) & (2).*

5. Because he is a State Farm insured who successfully submitted a claim for glass-only windshield damage but was never offered the cash out option and was encouraged instead to accept the repair, the Named Plaintiff, Michael Cullen, is a suitable class representative for purposes of these proceedings. *Piro,* 2004-Ohio-356, ¶ 17; *Pyles v. Johnson,* (4th Dist. 2001), 143 Ohio App.3d, 720 732, 758 N.E.2d 1182; *Hoban v. National City Bank* (November 18, 2004), 8th Dist. No. 84321, 2004-Ohio-6115, 2004 W.L. 2610543 ¶ 10-11. He is a member of the class and possesses sufficient standing to pursue the claims that have been raised. *Peterson v. Progressive Corp.*, 8th Dist. No. 87676, 2006-Ohio-6175, 2006 W.L. 3378424 ¶29 fn. 4.

6. There is no dispute in this case that the numerosity requirement has been satisfied in accordance with Civ.R. 23(A)(1).

7. State Farm also is not challenging commonality. Consistent with Civ.R. 23(A)(2) this Court nevertheless finds that there exists a common nucleus of operative facts and common liability issues. *Hamilton*, 82 Ohio St.3d at 77; *Burns v. Prudential Securities* (3rd Dist. 2001), 145 Ohio App.3d 424, 430, 2001-Ohio-2254, 763 N.E.2d 234.

8. As required by Civ.R. 23(A)(3), the Named Plaintiff's claims and defenses are typical of the class as a whole. *Planned Parenthood Assn. of Cincinnati, Inc. vs. Project Jericho*

(1990), 52 Ohio St.3d 56, 64, 556 N.E.2d 157, 166; *Washington v. Spitzer Mgt., Inc.* (April 3, 2003), 8th Dist. No. 81612, 2003-Ohio-1735, 2003 W.L. 1759617 ¶ 24. No evidence has been presented, and there is no reason to believe, that any conflict may exist between the representative parties and the class members. Furthermore, the Named Plaintiff's claims are virtually identical to those of the class.

9. The Named Plaintiff is a suitable representative of the class for purposes of Civ.R. 23(A)(4). This Court has been furnished with no reason to find that his interests are antagonistic in some manner to those of the class members. *Pyles,* 143 Ohio App.3d at 735 (citation omitted); *Piro,* 2004-Ohio-356 ¶ 27; *Farrenholz v. Mad Crab, Inc.* (September 28, 2000), 8th Dist. No. 76456, 2000 W.L. 1433956 *5. This Court is also familiar with Plaintiff's counsel and concludes that they can adequately and competently represent the class as a whole.

10. Certification is warranted under Civ. R. 23(B)(2) since it appears that the same practices which the Named Plaintiff experienced are still ongoing. Declaratory and injunctive relief are thus potentially available remedies which can be issued on a class wide basis in the event that he prevails upon the merits of his claim.

11. Additionally, all of the requirements for class certification under Civ.R. 23(B)(3) have been satisfied. The Court is sufficiently convinced that Plaintiffs' claims for relief are founded squarely upon standardized policies and practices which had been adopted and employed by State Farm throughout Ohio on a systematic basis during the Class Period. Given that the maximum individual recoveries will be relatively modest, separate lawsuits are not realistic. And it is doubtful that the Ohio judicial system could afford full and fair relief to thousands of aggrieved insureds on a case-by-case basis. A class action is thus the most preferable and superior method for adjudicating the common questions of law and fact, which the

Court concludes, predominate over any individual questions which may exist. See *Peterson*, 2006-Ohio-6175, ¶ 26-27; *Brandow v. Washington Mut. Bank*, 8th Dist. No. 88816, 2008-Ohio-1714, 2008 W.L. 963132 ¶ 29-30; *Stammco, L.L.C. v. Untied Tele. Co. Ohio*, 6th Dist. No. F-07-024, 2008-Ohio-3845, 2008 W.L. 2939455 ¶ 34-36.

12. Manageability is generally not an obstacle where, as here, "the trial court is capable of managing this action as a class action in large part due to the availability of computer database billing records and the ability to employ computer analysis of those records." *Stammco*, 2008-Ohio-3845 ¶59. Here, all of the information needed to identify the class members and the amounts they are owed should be readily available in State Farm's databases. *Ohio Admin. Code 3901-1-54(D)(1) & (2).*

13. If Plaintiff's claims are meritorious, then an identifiable class-wide injury has been sustained in this instance. Calculating the amounts due will involve nothing more than determining the cost of the windshield replacement and subtracting the applicable deductible (if any). Plaintiff demonstrated that pricing data for windshield replacements (including labor) is readily available, and State Farm must possess such capabilities if non-repairable windshield damage claims are still being paid today.

14. Although the recovery due each class member will not be identical, varying amounts of damages is not an adequate ground for finding that a class action would be unmanageable. *Carder Buick-Olds Co. v. Reynolds & Reynolds, Inc.* (2nd Dist. 2002), 148 Ohio App. 3d 635, 650, 2002-Ohio-2912, 775 N.E.2d 531 ¶62 ('*** [T]he overwhelming weight of authority has held that 'a trial court should not dispose of a class certification solely on the basis of disparate damages.'" quoting *Hamilton*, 82 Ohio St.3d at 81).

15. The use of standardized scripting by Defendant is an additional factor that this

Court must consider in weighing the predominance of common issues and the appropriateness of certification. In *Ritt,* 171 Ohio App.3d 204, the Eighth District Court of Appeals held that a class of telemarketing buyer/victims of consumer fraud involving a deceptive and misleading script used by the defendant, was properly certified despite the claims by the defendants that individual issues predominate, including "reliance" arguments. The 8th District Court rejected the defendant's arguments that an individual inquiry of each class member's reliance on the defendant's misrepresentations or omissions is required. In doing so, the court specifically concluded that common liability issues existed as to "whether the upsell scripts and membership kits used by defendants were deceptive; whether defendants knew that they were deceptive and purposefully designed them to be so; whether defendants acted willfully, negligently, or recklessly; and whether defendants' alleged acts violated state and/or federal consumer laws." *Id.*, at 214-215. The Court also held that Plaintiffs satisfied the "superiority" requirement as amount of recovery by individual was relatively paltry, and without class certification, defendants would be rewarded for indulging in fraudulent business practices. *Id.*, at 220.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that class certification is hereby granted in accordance with Civ.R. 23(B)(2) & (3); the class will be defined as previously provided herein and to be modified as necessary; the Named Plaintiff, Michael Cullen, shall serve as the class representative; and Plaintiffs' current counsel will be designated as class counsel. This order is final and appealable.

IT IS SO ORDERED.

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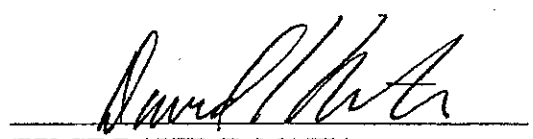

JUDGE DAVID T. MATIA

Dated: 9/28, 2010.

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PLAINTIFF'S MOTION FOR CLASS CERTIFICATION, FILED 08/23/2005, IS GRANTED. OSJ.

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