

IN THE SUPREME COURT OF OHIO

MICHAEL E. CULLEN	:	Case No. 12-0535
	:	
Plaintiff-Appellee	:	
	:	On Appeal From the
v.	:	Cuyahoga County Court
	:	of Appeals, Eighth
STATE FARM MUTUAL	:	Appellate District,
AUTOMOBILE INSURANCE	:	Case No. 10-095925
COMPANY	:	
	:	
Defendant-Appellant	:	

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**MERITS BRIEF OF APPELLANT STATE FARM
MUTUAL AUTOMOBILE INSURANCE COMPANY**

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INTRODUCTION AND SUMMARY OF ARGUMENT

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 he had his windshield 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 preloss condition, as he contends is required by State Farm's policies. The Eighth District, in a 2-1 decision, affirmed certification of a class of approximately 100,000 Ohio State Farm policyholders whose windshields were repaired over a twenty-year period,¹ on the basis of Plaintiff's allegations and "theory of the case." (Op. ¶¶21, 32, 56 (Appx. D).) The Eighth District declined to examine the legal and factual premises underlying Plaintiff's claims, holding that such determinations were inappropriate because they went to the merits of the case. (Op. ¶55.) The Eighth District's refusal to look beyond the pleadings resulted in a profoundly incorrect analysis of the issues raised by Plaintiff's motion for class certification.

In *Wal-Mart Stores, Inc. v. Dukes*, the United States Supreme Court, applying the federal analog to Civ.R. 23, made clear that class certification "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action" and that "Rule 23 does not set forth a mere pleading standard." (Citation omitted.) 131 S.Ct. 2541, 2251-52, 180 L. Ed.2d 374 (2011). Rather, 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" and that the other requirements of Rule 23 are met. *Id.* at 2551.

Under the principles enunciated in *Dukes*, no class should have been certified in this case. Nearly every aspect of the Eighth District's analysis reflects a failure to resolve legal and factual

¹ The class period is from January 1, 1991 to the present. (Op. ¶8.)

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 terms of State Farm's policies to determine what factual issues arose thereunder and would need to be proven at trial. Instead, stating that "[c]lass certification does not address the merits of the claim" (Op. ¶55), the Eighth District 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 an issue of law for the court, which, under *Dukes*, a court may and should resolve in identifying the elements of a plaintiff's claim and analyzing whether those elements can be established class-wide or will require individual proof.

The Eighth District majority further failed to analyze the impact on commonality and predominance of other "equally important" issues raised by Plaintiff's claims. (Op. ¶60 (Stewart, J. dissenting).) For example, the majority provides no analysis of the individual factual issues of consent that are 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*. Likewise, in holding that the use of a script or wordtrack "offer[ed] evidence of class-wide treatment" (Op. ¶31), the Eighth District majority failed to analyze or even mention State Farm's evidence that (1) policyholders did not all hear all the same portions of the word track and (2) as part of their transactions, policyholders had material individual unscripted discussions with their glass shops and often with their State Farm Agents. The majority also refused to examine other factual and legal issues relevant to Plaintiff's bad faith and fiduciary duty claims, improperly accepting Plaintiff's claim that Ohio Adm.Code 3901-1-54 created an actionable duty to disclose

despite the fact that Ohio Adm.Code 3901-1-54(B) expressly states that it does not. In short, in finding that predominance was satisfied, the Eighth District accepted Plaintiff's legal and factual contentions without examination and largely ignored State Farm's arguments and evidence.

The class definition affirmed by the Eighth District improperly conditions class membership on whether a class member sustained injury, which, as defined by Plaintiff, depends upon 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 from historical list prices for windshields and thus cannot be proven on a class-wide basis. Incorporating the individual issue of actual injury into the class definition skewed the Eighth District's analysis of commonality and predominance and impermissibly removes from the contemplated class trial disputed issues of liability that State Farm would be 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 show which of the approximately 100,000 policyholders had purportedly sustained injury and 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. ¶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, 1998-Ohio-365, 694 N.E.2d 442 (1998).

The Eighth District also simply accepted the proffered opinions of Plaintiff's experts that windshield repair could never return a windshield to its preloss condition as establishing a com-

mon issue. Those opinions were (and are) the subject of an undecided challenge by State Farm under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). In *Dukes*, the United States Supreme Court expressed "doubt" that *Daubert* does not apply at class certification, 131 S.Ct. at 2553-54, and federal courts following *Dukes* have held that courts must evaluate the admissibility of expert opinions and 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). Unlike the Eighth District majority here, other courts have recognized that preloss condition claims would require an individual examination of each class member's car, overwhelming any common question(s) and precluding class certification. See, e.g., *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 138, 835 N.E.2d 801 (2005); *Augustus v. Progressive Corp.*, 8th Dist. No. 81308, 2003-Ohio-296, ¶¶25-27.

The Eighth District majority also erred in affirming the certification of a class for declaratory relief under Civ.R. 23(B)(2). The declaration 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 damages award and is not "appropriate final injunctive relief or corresponding declaratory relief" under Civ.R. 23(B)(2). Furthermore, to the extent (if any), Plaintiff's declaration purports to seek prospective relief, Plaintiff, who is no longer insured by State Farm, lacks standing to pursue that claim.

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. *Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1984) (per curiam). Here, the Eighth District affirmed class certification based upon an analysis that avoided issues enmeshed in the merits of Plaintiff's

claims and predicated class certification on the premise that State Farm will not be entitled to litigate individual issues raised by those claims, in violation of State Farm's due process rights. As Justice Stewart opined in her dissent, the "difficulties likely to be encountered in the management of the class" are "so numerous" as to preclude confidence "that the case can be tried fairly." (Op. ¶70.) State Farm respectfully submits that this Court should reverse class certification and, as the United States Supreme Court did in *Dukes*, clarify that the required "rigorous analysis" means one that ensures actual conformance with Civ.R. 23 by proceeding beyond a plaintiff's allegations and theory of his case to identify and examine the legal and factual issues that would be involved in a class trial of the plaintiff's claims.

STATEMENT OF FACTS

I. State Farm's Administration of Windshield Claims During the Class Period.

Post-August 1997 Windshield Claims. Plaintiff's windshield claim (like most post-1997 windshield claims by State Farm insureds) was administered by a third-party administrator, Lynx Services, LLC, under State Farm's O&A (Offer and Acceptance) program. Lynx operates call centers, makes appointments with glass shops for policyholders, and processes invoices and payments electronically. (Supp. 351 ¶27.) Under the program, it is the policyholder's choice whether to have a damaged windshield repaired or replaced (Supp. 353 ¶34.), although State Farm may sometimes recommend replacement (for example, for a long crack). Policyholders are free to choose any glass shop, whether or not the shop participates in the O&A program. (Supp. 350 ¶25.) Most policyholders still initiate their claims by calling their State Farm Agent (as Plaintiff did) or a glass shop, although they may also call Lynx directly. (Supp. 351 ¶28.)

When a policyholder calls or is transferred by his Agent to a Lynx operator (as Plaintiff was), the operator asks questions about the extent of the windshield damage, provides the policyholder with names of participating glass shops (if the policyholder has not already chosen a

shop) and joins the glass shop onto the call to schedule the repair or replacement of the windshield. (Supp. 372-73 ¶9.) A "wordtrack" (not a script) provides Lynx telephone operators with initial questions to ask regarding the policyholder's windshield damage, as well as informational statements that the operator may or may not give depending on what the policyholder says or asks. If a policyholder indicates that the damage is in the driver's direct line of vision, is larger than a driver's license, or is a crack longer than a dollar bill, repair is not suggested or mentioned by the operator (although it could be by the policyholder).² (Supp. 352 ¶31-32.) At the time of Plaintiff's windshield claim, if the damage described by the policyholder 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 asked "[w]ould you like to have your windshield repaired?" (Supp. 359 ¶64, 434.) If a policyholder wanted a replacement, the claim was dispatched as a replacement. (Supp. 352 ¶32.)

After the initial communications described above, what more a policyholder was told by the Lynx operator depended on what questions, if any, an individual policyholder asked. Unless a policyholder had a question, no other information about repairs was provided. (Supp. 354 ¶41.) If the policyholder had questions, the wordtrack operated as a computer-generated "decision tree" that prompted the operator what to ask or say depending on what the policyholder said or

² State Farm does not recommend windshield repair for such damage. *See Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1121-25 (10th Cir.2008). In *Campfield*, State Farm was sued by a glass repairer who objected to State Farm's policy of not recommending long crack repairs. The *Campfield* opinion describes State Farm's practices regarding windshield claims, its use of Lynx's services, and a conversation between a policyholder and a Lynx operator, in which the operator advises a new replacement windshield, rather than repair. *See id.* The Tenth Circuit rejected the plaintiff's claims that the Lynx operators made knowing misrepresentations or concealments and described State Farm's concerns as to the durability and appearance of repairs to long cracks and as to customer satisfaction. *Id.* at 1121-22.

asked. (Supp. 352 ¶¶31, 432-35.) The wordtrack gave operators access to information about windshield repair and its benefits that at the option of the operator could be given to the policyholder. (*Id.*)

Each policyholder also talked to personnel at a glass shop, and a glass shop technician inspected and evaluated the damage to the policyholder's windshield. Policyholders could and frequently did change their minds about repair or replacement after speaking to their glass shops and having their windshields examined. (Supp. 352-53 ¶¶33.) Glass shops that participated in the program warranted the quality of their work. (Supp. 350 ¶¶24, 467.) As the Eighth District acknowledged (Op. ¶¶35), if a policyholder changed his mind after a repair or was not satisfied with the repair, participating shops were required to install a new replacement windshield at State Farm's expense. (Supp. 350 ¶¶24, 467, 478.) Although the Lynx operators used a wordtrack, neither State Farm Agents nor glass shop personnel used a script or wordtrack. (Supp. 350-51 ¶¶26.) Agents used their own experience, training, and understanding of a policyholder's individual circumstances in discussing windshield claims with policyholders. (*Id.*) Glass shop personnel were not instructed on what to say to policyholders, but were expected to use independent judgment in evaluating whether a windshield should be repaired. (Supp. 352-53 ¶¶33.)

Under the O&A program, approximately 95% of post-August 1997 glass-only claims went through Lynx. (Supp. 355 ¶ 43.) The other 5% (more complex claims or claims presenting coverage questions) were handled by State Farm's Glass Claims Services (*id.*), without the Lynx wordtrack coming into play at all. (Supp. 481.) Those claims can be identified only by individual review of claim files. (Supp. 355 ¶¶43.)

Pre-August 1997 Windshield Claims. From January 1, 1991 (the beginning of the class period) to August 1997, Ohio policyholders' windshield claims were handled without a wordtrack

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. (Supp. 349 ¶ 16-17.) During that time, State Farm generally permitted policyholders to choose between repair or replacement, although not contractually obligated to do so. (See Supp. 349 ¶19, 464.) Agents sometimes waived a policyholder's deductible if the policyholder had his or her windshield repaired. (Supp. 349 ¶19.)

II. Relevant Policy Provisions

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 policy states that State Farm "will pay for *loss*" to the policyholder's car. (Supp. 48 (Emphasis sic.)) The policy's "Settlement of Loss" provision gives State Farm "the right to settle a *loss* * * * in one of the following ways:" (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." (Supp. 49.)

Under the policy's "Limit of Liability," actual cash value is payable only if it is less than the cost of repair or replacement (*i.e.*, when a car is a total loss). That provision states:

Limit of Liability – Comprehensive and Collision Coverages

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. (Supp. 48 (Emphasis sic).)³

Plaintiff has conceded that actual cash value does not apply to windshield claims.⁴ Thus, with regard to windshield claims, State Farm's obligation is either to *pay to repair* the damaged prop-

³ The language of the Limit of Liability provision in Ohio policies was substantially the same during the class period. (Compare Supp. 20 with Supp. 48.)

⁴ Br. of Plaintiff-Appellee at 36, *Cullen v. State Farm Mut. Auto. Ins. Co.*, 8th Dist. No. 95925, filed Mar. 11, 2011 ("Pl. 3/11/2011 Br."); see also Tr. 4/14/2010 at 16-17.

erty or part or to *pay to replace* the property or part.

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 * * * . (Supp. 48 (Emphasis sic).)

The only use of the term "pre-loss condition" in the policies occurs in the provision quoted above. The plain language of the provision requires only that when the cost of repair or replacement is based upon "an estimate written based upon the prevailing competitive price," the estimate must include "parts sufficient to restore the vehicle to its pre-loss condition." (Supp. 48.) There is no policy provision requiring State Farm to ensure that a car is returned to its pre-loss condition.

State Farm's Ohio policies issued between April 1, 1998 and August 31, 2005, included the provisions quoted above, but added a new provision that gave the policyholder the choice to agree (or not) to windshield repair and waived the deductible for windshield repair:

1. Loss to Your Car. We will pay for *loss to your car* * * * but only for the amount of each such *loss* in excess of the deductible amount, if any. **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.

(Supp. 19 (italics in original, bold added); *see also* Supp. 356 ¶50.) A notice explaining the new policy provision was sent to Ohio policyholders, including Plaintiff, in March 1998, with the policy endorsement containing the provision. (Supp. 62.) In 1999 and 2000, State Farm mailed additional endorsements to policyholders that repeated this language. (Supp. 79 ¶4.) In October 2001, new policy booklets and declarations pages were sent to Ohio policyholders. (Supp. 79 ¶5.) In 2006, the deductible waiver was discontinued, but the policy still required policyholder

agreement for windshield repair, stating: "if you and we agree, windshield glass will be repaired instead of replaced." (Supp. 356 ¶52.)

III. Windshield Replacement Costs.

The amount payable by State Farm in Ohio for replacing damaged windshields varied widely during the class period, depending upon individual factors including the year, make and model of the car, the replacement windshields available to the glass shop, and the features of the particular windshield. Not only did the cost of windshields and labor paid by State Farm vary throughout the class period, but those costs varied from county to county and glass shop to glass shop at any point in time. Policyholders had a wide range of deductibles, creating further individual variations in the amount payable by State Farm for windshield replacements.

From 1990 to 1997, the amount payable by State Farm for a windshield replacement was generally based upon an estimate or invoice issued by the glass shop chosen by the policyholder. (Supp. 349 ¶17.) Beginning in August 1997, under the O&A Program, if a policyholder chose an O&A shop, the replacement cost paid by State Farm consisted of: (1) the cost of the windshield, (2) a flat amount for other materials, such as adhesive, and (3) a flat amount for labor. (Supp. 363 ¶6.) All of these costs varied widely over time. (*Id.*) If a policyholder chose a non-O&A shop, the replacement cost could be the O&A price, if the particular non-O&A shop agreed to that price for that particular replacement, or could be set by a competitive bid process (and could be higher than the O&A price). (Supp. 363 ¶7.) The amount payable by State Farm also differed with: (1) vehicle make, model and year⁵ and the features of the windshield; (2) which of multiple possible replacement windshields a glass shop had available or chose to use; (3) the county or market in which the shop was located; and (4) the date of the replacement. (Supp. 363

⁵ In 2009, for example, State Farm paid claims on 8,770 different years, makes and models of vehicles. (Supp. 368 ¶18.)

¶8.) No written estimates were issued by State Farm for the vast majority of glass-only claims administered under the O&A program. (Supp. 359 ¶¶61-62.)

Under the O&A Program, if a participating glass shop submits a price for a dealer windshield that is within certain parameters, State Farm will pay that price, but might require verification. (Supp. 364 ¶10.) The price paid by State Farm for non-dealer windshields is a percentage discount or increase to the benchmark "NAGS" list price⁶ for the particular windshield as of the date of replacement. (Supp. 365 ¶11.) Since 1997, the discount or increase varied based on the county where the work was done and which of five (or, after February 2005, three) "market designations" was given to that county by State Farm based on market conditions, local costs, and other factors. (Supp. 365 ¶¶12-13.) State Farm adjusts market designations periodically, resulting in 119 changes to county market designations since June 1998, including three changes to the designation for Summit County, where Plaintiff's windshield was repaired. (Supp. 366 ¶14.) Since 1997, State Farm has also changed the percentage rates for the various market designations 23 times. (*Id.*) These changes have resulted in significant variations in replacement costs. For example, in March 2003 when Plaintiff made his claim, the applicable adjustments ranged from a 19% discount in counties designated as Market A to a 60% discount in Market E counties. (Supp. 365 ¶13.) Furthermore, since 1997, the labor rate for windshield replacements has changed four times, ranging from \$27.50 to \$120. (Supp. 367 ¶17.) The materials allowance changed twice, and since early 2005, the labor rate has also varied by county. (*Id.*)

For each make, model and year of a given vehicle, multiple replacement windshields were almost always available at widely varying prices. (Supp. 364 ¶9.) These can include "dealer" windshields, "non-dealer" windshields, and "interchange" windshields (compatible windshields

⁶ "NAGS" means National Auto Glass Specifications, an independent listing of windshield prices. (Supp. 365 ¶11.) NAGS adjusts and reissues its price listings four times each year. (*Id.*)

from another year or model). (*Id.*) Often, each of the possible replacements was available in multiple variants at different prices. (*Id.*) As of March 2003, when Plaintiff made his claim, there were 11 possible replacement windshields (not including interchange windshields) for Plaintiff's 2001 Volkswagen Jetta 4-door, with possible costs to State Farm ranging between \$206.38 and \$663.19. (Supp. 366-67 ¶15.) Similar numbers of possible replacement windshields and ranges of prices exist for virtually all other makes and models of cars. (Supp. 367 ¶16.) Deductibles varied during the class period from \$0 to \$2,000. (Supp. 430.)

IV. Facts About Plaintiff's Claims.

Plaintiff had State Farm auto insurance from 1988 through April 2006. (Supp. 79 ¶7, 96 ¶5, 483-87.) In March 2003, a rock hit Plaintiff's windshield, causing a chip roughly 1/10th of an inch wide in the lower-driver's-side corner. (Supp. 316, 335, 492-93.) Plaintiff called the office of his State Farm Agent to report the damage. (Supp. 494.) Plaintiff did not remember speaking to a Lynx operator (Supp. 494-96), but Lynx records establish that he did. (Supp. 470-71.) Plaintiff recalled only being asked to describe the size and location of the chip and whether he had a preferred glass repair shop. (Supp. 495-97.) The Lynx wordtrack then in use would have prompted the operator to say to Plaintiff, "It sounds as though your windshield can be repaired and may not need to be replaced * * * . Would you like to have your windshield repaired?" (Supp. 359 ¶64, 434, 475.)

Plaintiff took his car to his chosen glass shop and had the windshield repaired while he waited. His \$250 deductible was waived, and Plaintiff paid nothing for the repair. (Supp. 498.) Afterward, Plaintiff asked how the repair was done, the shop owner explained, and Plaintiff left. (Supp. 500-02.) Plaintiff never complained about the repair to the glass shop and never notified State Farm that he was dissatisfied or that he wanted a replacement or a cash payment prior to filing suit in 2005. (Supp. 500-03.) Had Plaintiff complained, State Farm would have paid to

replace his windshield as it has for hundreds of other policyholders. (Supp. 355 ¶¶45-47, 478.) As of September 2009, when his vehicle was inspected for this litigation, Plaintiff was still driving with the repaired windshield. (Supp. 316.)

V. Handling of Requests for Cash Payments for Windshield Claims.

During the class period, only rarely would a policyholder indicate (either to a State Farm Agent or to Lynx) that he or she wanted a cash payment for windshield damage. (Supp. 358 ¶¶59, 359 ¶¶61, 458.) State Farm would generally honor those requests to facilitate customer service. (Supp. 358 ¶¶60, 458.) Such a payment was generally understood to mean that the policyholder had already paid or contracted for a replacement windshield and that a check or draft would be made payable solely to the policyholder, instead of to the policyholder and a shop or solely to the shop. (Supp. 358 ¶¶60.) In the event of such a request, the amount of the payment was generally based on the amount already paid by the policyholder or on an estimate of replacement cost obtained by State Farm, less deductible. (Supp. 359 ¶¶62.) During the O&A program, requests for cash payments were usually referred to Glass Claims Services and were not administered by Lynx. (Supp. 358 ¶¶60.)

VI. The Court of Appeals Affirms the Trial Court's Grant of Class Certification.

The trial court granted class certification under Civ.R. 23(B)(2) and (B)(3), of a class of State Farm policyholders who had their windshields repaired on or after January 1, 1991, with two subclasses consisting of policyholders whose claims were administered by Lynx and policyholders whose claims were not administered by Lynx. (Appx. 46 ¶3.) Under the class definition, for a policyholder to be a member of the class, the hypothetical cost of replacing the policyholder's windshield must have exceeded the policyholder's deductible (if any). The trial court's findings of fact and conclusions of law were adopted largely verbatim from Plaintiff's proposed findings and conclusions. (*Compare* Appx. E with Pl. Proposed Findings, filed 10/26/2010, Dkt. no. 149.)

The Eighth District affirmed class certification, with Judge Stewart dissenting. In her dissent, Judge Stewart stated that 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.) Judge Stewart concluded 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. ¶¶62, 70.)

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

This Court reviews a grant of class certification under an abuse of discretion standard. *See State ex rel. Davis v. Public Employees Retirement Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444, ¶18 (2006). The trial court's discretion, however, "is not unlimited," but "is bounded by and must be exercised within the framework of Civ.R. 23," and the trial court "is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied." (Citation omitted.) *Id.* ¶20. The lower courts' resolution of questions of law that are part of a decision whether to certify a class is reviewed de novo. *See Searles v. Germain Ford of Columbus, L.L.C.*, 174 Ohio App.3d 555, 2007-Ohio-7140, 883 N.E. 480, ¶8 (10th Dist.2007) (de novo standard of review applies to issues of law raised in appeal of denial of class certification); *Miller v. Painters Supply & Equip.*

Co., 8th Dist. No. 95614, 2011-Ohio-3976, ¶10 ("Insofar as the trial court's decision [on class certification] involves statutory interpretation, our review of issues of law is de novo."); *see also Arnott v. Arnott*, S.Ct. No. 2010-2180, 2012-Ohio-3208 (questions of law in a declaratory judgment action are reviewed de novo).

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.

A. Consistent with *Dukes*, Ohio Courts Should Examine and Resolve Merits Issues as Necessary to Ensure that the Requirements of Civ.R. 23 Are Met Before Certifying a Class.

This Court has long held that the burden of showing that a class should be certified "rests squarely on" the movant. *State ex rel. Ogan v. Teater*, 54 Ohio St.2d 235, 247, 375 N.E.2d 1233 (1978). To meet this burden, the movant must show that all the applicable requirements of Civ.R. 23 are satisfied. *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91, 94, 97-98, 521 N.E.2d 1091 (1988). To assure that the principles of fairness and due process that underlie the requirements of Rule 23 are met, "actual, not presumed, conformance" with Rule 23 is "indispensable." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L. Ed.2d 40 (1982).⁷ Accordingly, as this Court has held, a court must "conduct a rigorous analysis" in determining whether to certify a class. (Citation omitted.) *Davis*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 44, at ¶20.

In *Ojalvo v. Board of Trustees of Ohio State Univ.*, 12 Ohio St.3d 230, 233, 466 N.E.2d 875 (1984), this Court cited *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L. E.2d 732 (1974), for the proposition that "class certification does not go to the merits," i.e., class certification should not be denied simply because the plaintiffs are unlikely ultimately to prevail.

⁷ As this Court has held, 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).

Nonetheless, the Court acknowledged that an inquiry into the merits may be necessary to "establish[] the validity of certification under Civ.R. 23." *Ojalvo* at 233.

Ojalvo has been wrongly interpreted by many Ohio courts, including the Eighth District, as prohibiting *any* inquiry into the merits of a plaintiff's claims and allegations on class certification and requiring that courts accept a plaintiff's allegations as true for purposes of 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.); *Nagel v. Huntington Natl. Bank*, 179 Ohio App.3d 126, 2008-Ohio-5741, 900 N.E.2d 1060, ¶10 (8th Dist.) (similar).⁸

In *Dukes*, the United States Supreme Court stated emphatically that *Eisen* does not preclude courts from considering and resolving merits issues in determining class certification. See *Dukes*, 131 S.Ct. at 2551-52 & n.6. 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 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." (Emphasis added.) *Id.* at 2552 n.6. See also *Coop-*

⁸ Other Ohio courts, however, have recognized that "[s]ometimes 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.1984), *aff'd*, 15 Ohio St.3d 310, 473 N.E.2d 822 (1984).

ers & Lybrand v. Livesay, 437 U.S. 463, 469 n.12, 98 S.Ct. 2454, 57 L. Ed.2d 351 (1978) ("[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims," with the "presence of common questions of law or fact" being an "obvious example."). Accordingly, to perform the required "rigorous analysis," a court must "'look beyond the pleadings to 'understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination" of whether the alleged questions of law [and fact] are capable of classwide resolution.'" (Citations omitted.) *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 842 (5th Cir.2012); *see also Marcus v. BMW of N. Am., L.L.C.*, 3d Cir. Nos. 11-1193, 11-1192, 2012 WL 3171560, at *4 (Aug. 7, 2012) (courts "'must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits – including disputes touching on elements of the cause of action'" (Citation omitted.).

A rigorous analysis protects both the courts and the parties, ensuring that a class action is both fair and efficient and will justify the expenditure of judicial time and energy involved therein. *Schmidt*, 15 Ohio St.3d at 313, 473 N.E.2d 822; *see also Pipefitters Local 636 Ins. Fund v. Blue Cross, Blue Shield*, 654 F.3d 618, 630 (6th Cir.2011) ("Given the huge amount of judicial resources expended by class actions, particular care in their issuance is required."). In certifying a class, it is necessary to ensure fairness and due process for both defendants and class members. Absent class members cannot be bound without procedural protections that satisfy due process. *See Dukes* at 2557-59. Likewise, class action procedures may not gloss over or ignore individual issues that a defendant is entitled to litigate as a matter of due process, *id.* at 2561, nor may class procedures change or dispense with the substantive elements of a plaintiff's claim and the proof required to establish those elements. *See, e.g., In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir.1990) (relying on due process principles in rejecting a class action trial plan that would have

eliminated "the requirement that a plaintiff prove both causation and damage"). These protections are particularly important because "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Livesay* at 476.

The approach to class certification taken by the Eighth District in this case effectively prevents the "rigorous analysis" that this Court has held is required on class certification. It permits a plaintiff to "tie the judge's hands" on class certification by the allegations in his Complaint and by his theory of his case. *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir.2001). As the United States Supreme Court observed, "any competently crafted class complaint literally raises common 'questions.'" *Dukes* at 2551, quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 131-132 (2009). Simply accepting the allegations of a complaint for purposes of class certification subverts the principle that there must be actual, not presumed, conformance with the requirements of the rule and undermines the underlying principles of fairness and due process that inform those requirements.

Here, the Eighth District erroneously based its class certification analysis on Plaintiff's "theory of the case" (*e.g.*, Op. ¶21) and held that it was improper to examine the validity of the factual and legal premises underlying Plaintiff's claims. (*See id.* ¶55.) As shown below, a resolution of legal and factual issues enmeshed in Plaintiff's claims was necessary in order to identify the required elements of those claims and to determine whether the issues raised by those claims could be resolved through class-wide evidence or only on an individual basis.

B. The Purported "Cash-Out Option" Claimed by Plaintiff Does Not Satisfy the Requirement of a Predominance of Common Issues.

The Eighth District erroneously held it was inappropriate to examine State Farm's policies to determine whether they actually provided the "cash-out option" claimed by Plaintiff. (*See Op.*

¶23-24, 55.) The Eighth District acknowledged that this issue was "hotly contested" by the parties, stating that "the contract may provide for a cash payment option, as Cullen argues, but that may be discretionary to be decided exclusively by State Farm" and that "[a] court should not create an obligation not found in the contract's terms." (Citation omitted.) (*Id.* ¶24.) Nevertheless, the court held that "none of these issues need to be decided at this time because class certification is not akin to a motion for summary judgment." (*Id.*)⁹ Thus, for purposes of determining predominance the Eighth District simply accepted "Cullen's theory of the case" that cash payments for the cost of replacement were a "benefit under the policy" that "were never disclosed" (*id.* ¶32), and predicated its ruling that common issues predominated on the presumed existence of that supposed policy benefit. (*See id.* ¶21 ("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.").)

Contrary to the Eighth District's ruling, an examination of the contracts was necessary to determine "what the parties would be required to prove at trial" (Citation omitted.) *Cox v. Zurn Pex, Inc.*, 644 F.3d 604, 611 (8th Cir.2011), and whether the proof required to show a breach of contract would be class-wide or individual. "An insurance policy is a contract whose interpretation is a matter of law," *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666, ¶15 (2008), and the resolution of the meaning of the basic policy provisions governing the parties' rights and obligations was needed to "understand the claims, defenses, relevant facts, and applicable substantive law." *Stukenberg*, 675 F.3d at 837; *see also Avery*, 216 Ill.2d at 127-28, 835 N.E.2d 801 (trial court "was incorrect in concluding" that issues of "uniform con-

⁹ (*See also* Op. ¶55 (holding that the trial court had gone "too far into the merits of the case" in finding that "a cash pay-out option was available").) In fact, the trial court's error was in failing to rule as a matter of law based on the plain meaning of the policy language, read as a whole.

tractual interpretation could be decided at trial rather than at the class certification stage" because predominance of common issues depended upon answer to those issues); Nagareda, *Class Certification in the Age of Aggregate Proof*, *supra*, 84 N.Y.U.L.Rev. at 164 ("[c]ourts should stand ready to 'say what the law is' when its content will determine whether dissimilarities exist within a proposed class").¹⁰

When the language of an insurance policy is clear, "a court may look no further than the writing itself to find the intent of the parties." *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, 875 N.E.2d 31, ¶7. Under the plain meaning of the policy language at issue, there is no "cash-out option" entitling a policyholder to the amount it would cost to replace a damaged windshield, even if the policyholder does not have the windshield replaced but has it repaired at a much lower cost (or does nothing). The policies provide that State Farm "will pay for loss" to the policyholder's car, in excess of the deductible amount (if any). (Supp. 19, 48.) That payment obligation is specifically defined in the policy's "Loss Settlement" provision, which gives *State Farm* – not the policyholder – "the *right* to settle a loss with [the policyholder] in one of the following ways:" (i) "pay the agreed upon actual cash value of the property at the time of loss," (ii) "pay to * * * repair the damaged property or part," or (iii) "pay to * * * replace the property or part." (Supp. 20, 49.) Such policy language gives the insurer the "unilateral right" to decide whether to repair or replace (although later policies added language requiring the policyholder's agreement for windshield repair). *Rickerl v. Farmers Ins. Exchange*, 763 N.W.2d 86, 88-89 (Neb.2009); *accord Pritchett v. State Farm Mut. Auto. Ins. Co.*, 834 So.2d 785, 793

¹⁰ It is well-settled that courts need not accept legal conclusions in a complaint. *See Miller*, 2011-Ohio-3976, ¶36. This rule also properly applies on class certification. *See id.* (holding that in determining class certification trial court properly rejected plaintiffs' legal conclusion that the Telephone Consumer Protection Act applied to all faxes and not just unsolicited faxes); *see also Dukes*, 131 S.Ct. at 2552 (necessity of touching aspects of the merits in order to resolve preliminary matters * * * is a familiar feature of litigation").

(Ala.Civ.App.2002); *Mockmore v. Stone*, 493 N.E.2d 746, 747 (Ill.App.1986); *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del.2001).

Furthermore, the only one of the three choices that contemplates a cash payment to the policyholder ("pay the actual cash value of the property at the time of loss") is not applicable to windshield damage. Plaintiff has conceded that the provision for paying actual cash value applies only when a vehicle is a total loss. In his brief before the Eighth District, Plaintiff stated that "the parties are in agreement that the concept of 'actual cash value' only applies when the vehicle is a total loss, which will never be the case with 'Glass Only' windshield damage claim." (Pl. 3/11/2011 Br. at 36; *see also* Tr. 4/14/2010 at 16-17.) This is so because the policies' Limit of Liability expressly limits "actual cash value" payments to claims where the actual cash value of the car is less than the cost of repair or replacement. (Supp. 20, 48.)

Plaintiff's theory is that the use of the word "pay" in the above-quoted policy language indicates that the insured is entitled to receive a cash payment, rather than have State Farm "pay to * * * replace" or "pay to * * * repair" the windshield. (Pl. 3/11/2011 Br. at 35-36.) However, the provision by its plain terms contemplates that a repair or replacement is actually done: State Farm may "pay to * * * repair" or "pay to * * * replace" the damaged property or part. (Emphasis added.) (Supp. 20.)¹¹ This language does not require State Farm to pay a policyholder *not* to

¹¹ Requiring State Farm to pay policyholders for windshield replacements that they do not have done is also inconsistent with fundamental principles of insurance. *See Baxter Internatl., Inc. v. Am. Guar. & Liab. Ins. Co.*, 369 Ill.App.3d 700, 709, 861 N.E.2d 263 (2006) (insurance is intended to "indemnify an insured for loss but not provide a windfall profit"). Plaintiff's claim that "indemnity coverage" somehow requires reimbursement of these non-incurred expenses (*see* Pl. 3/11/2011 Br. at 25) is manifestly incorrect. Under indemnity policies, the insurer's liability "arises *only after the insured has paid* the liability." (Emphasis added.) *Judd v. Queen City Metro*, 31 Ohio App.3d 88, 89 n.1, 508 N.E.2d 1034 (1st Dist.1986); *see also, e.g., Combs v. Internatl. Ins. Co.*, 354 F.3d 568, 598 (6th Cir.2004) ("In an indemnity contract, * * * the insurer agrees to *reimburse* expenses to the insure[d] that the insured is liable to pay and *has paid*."). (Emphasis added.) (Citation omitted.). Moreover, windfall payments such as Plaintiff's "cash-

replace a damaged windshield. Plaintiff has not cited a single case that adopts the interpretation of State Farm's policy or of similar policy language in other insurers' policies that he advocates. Furthermore, later policies, including Plaintiff's, added a specific provision for windshield damage, expressly permitting State Farm to pay for the cost of windshield repair, if the policyholder agreed. (Supp. 19, 62.) That provision is inconsistent with Plaintiff's assertion that the policy somehow entitles policyholders to a large cash payment in the amount of windshield replacement, even if the windshield is not replaced. Rather, the provision clearly contemplates that State Farm may satisfy its contractual obligation by paying for windshield repair.

C. There Is No Common Issue Regarding Extrinsic Evidence as to the Meaning of the Policy Provisions Governing Loss Settlement.

This Court has held that a court may consider extrinsic evidence to ascertain the parties' intent only if a contract is ambiguous. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶12. Here, the Eighth District erroneously suggested that State Farm's "practical construction" of the contracts and the testimony of a few State Farm employees as to the meaning of the contracts may present common issues for trial. (Op. ¶25 & n.7.) Such evidence is irrelevant and inadmissible unless "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." *City of St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶39. The determination of whether a contract is ambiguous is an issue of law for the court, *see Oden v. Associated Materials, Inc.*, 191 Ohio App.3d 314, 2010-Ohio-5981, 945 N.E.2d 1123, ¶13 (9th Dist.), which requires resolution before purported common issues of extrinsic evidence can be weighed in the

out option" would detrimentally affect the cost and availability of car insurance in Ohio, raising significant public policy concerns. (See Supp. 384.)

predominance balance. Plaintiff never argued below that the policy was ambiguous, and the trial court made no such finding.

Moreover, contrary to the Eighth District's opinion (Op. ¶25 & n.7), the principle that evidence of "practical construction" may be considered "when a dispute has arisen between the parties after a period of operation under the contract" applies to a course of dealings or performance between the two parties to the contract, not to an insurer's separate, individual, single transactions with policyholders.¹² In any case, even assuming *arguendo* that some class members had more than one windshield claim under their policies and thus had a prior course of dealing with State Farm, the questions regarding their course of dealing would be individual, not common, and would preclude class certification. *See Parks Auto. Group, Inc. v. General Motors Corp.*, 237 F.R.D. 567, 571 (D.S.C.2006) (where individual analysis was required of "course of dealing" pursuant to class members' contracts with defendant, common issues did not predominate); *Brooks v. S. Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 57 (S.D.Fla.1990) (denying class certification; course of dealing was individual issue); *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*, 95 F.R.D. 168, 178 (D.Del.1982) (denying class certification; common facts would be submerged by the facts surrounding course of dealing under each individual contract).

In addition, because the policy language is unambiguous, the deposition testimony of State Farm employees also is irrelevant and inadmissible and does not raise a class-wide issue. *See*

¹² All three cases cited by the Eighth District for this point, *City of St. Marys v. Auglaize Cty. Bd. of Comms.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, *Consolidated Mgt., Inc. v. Handee Marts, Inc.*, 109 Ohio App.3d 185, 191, 671 N.E.2d 1304 (8th Dist.1996), and *National City Bank of Cleveland v. Citizens Building Co. of Cleveland*, 74 N.E.2d 273, 279 (8th Dist.1947), involved contracts with a course of dealing or performance between the same two parties. The Ohio Uniform Commercial Code defines "course of dealing" as "a sequence of conduct concerning previous transactions *between the parties to a particular transaction* that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." (Emphasis added.) R.C. 1301.303(B).

Midwest Specialties, Inc. v. Westfield Ins. Co., 2d Dist. No. 14027, 1994 WL 107192, at *6-7 (Apr. 1, 1994) (trial court erred when it "seized upon the deposition testimony of [defendant insurer's] claims adjuster" in construing unambiguous policy language; stressing that "the interpretation of an insurance contract is a matter of law" and the courts were not "bound by [the adjuster's] admissions concerning the proper construction of the policy"); *see also Ruschel v. Nestle Holdings, Inc.*, 8th Dist. Nos. 89977, 90500, 2008-Ohio-2035, ¶26 ("[T]he construction of unambiguous contract terms is strictly a judicial function; the opinions of percipient or expert witnesses regarding the meaning(s) of contractual provisions are irrelevant and hence inadmissible.") (Citation omitted.).

In sum, because Plaintiff's purported contractual right to a cash payment is not colorable, it does not provide a basis for finding common issues. *See, e.g., Argent Mtge. Co. v. Ciemins*, 8th Dist. No. 90698, 2008-Ohio-5994, ¶24-29 (class certification properly denied because plaintiffs "failed to present a colorable claim"); *see also McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 228 (2d Cir.2008) ("when a claim cannot succeed as a matter of law, the Court should not certify a class on that issue") (Citation omitted.).

Here, by simply accepting Plaintiff's legal conclusions as to the meaning of State Farm's policy, the Eighth District precluded any meaningful determination that common issues actually predominated. Courts should not be compelled to base class certification upon allegations by a party that a contract says something it does not say or upon incorrect characterizations of the required elements of a cause of action. A plaintiff should not be allowed to "tie the judge's hands" on class certification by the allegations in his Complaint and by his theory of his case. *See Szabo*, 249 F.3d at 677. Issues of contract interpretation are matters of law that courts may competently address and should address, where, as here, they are necessary to class certification de-

terminations on commonality and predominance.

Moreover, as shown below, even assuming *arguendo* that the policies provided a "cash-out option", the other individual issues raised by Plaintiff's claims would predominate. As Judge Stewart opined in her dissent, "[w]hile 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." (Op. ¶62; *see also id.* ¶¶61-62, 68.)¹³

D. The Policies Expressly Permit State Farm to Pay for Windshield Repair If the Policyholder Agrees, Raising Individual Issues.

The Eighth District majority also failed to consider in its analysis the impact on class certification of the policy provision (in effect for much of the class period) that expressly permitted State Farm to pay for windshield repair, rather than replacement, *if the policyholder agreed*. (Supp. 19; *see also supra* at 9.) The evidence submitted by State Farm in opposing class certification demonstrated that, both before and after the provision took effect, State Farm sent notices to policyholders informing them of the provision. (Supp. 78-79 ¶¶3-5.) 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.

The individual nature of the issue of agreement is shown by Plaintiff's own case. Plaintiff remembered almost nothing about his conversation with a Lynx operator. (*See supra* at 12.) Plaintiff also claims that he did not receive, or did not remember, the notices sent to him by State Farm regarding the policy provision on agreement to repair, that he did not know he had the op-

¹³ Indeed, as Justice Stewart observed, any purported "commonality is so general in nature that it fails to distill into a concrete legal issue." (Op. ¶58.) Thus, Plaintiff's claims do not meet the requirement under *Dukes* that commonality be based on a "common contention" such 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." *Dukes*, 131 S.Ct. at 2551. (*See Op.* ¶60.)

tion of replacement, and/or that he was misled into accepting the repair by something that Lynx did or did not tell him, although he cannot remember what. (Supp. 488-91.) Even if a jury were to accept Plaintiff's claim that he did not agree to the repair of his windshield, that would not prove that any other class member did not agree. Also, each policyholder's individual prior knowledge of, or experience with, windshield repair and individual considerations (such as the speed and convenience of repair, the deductible waiver if applicable, a preference to maintain the original windshield's factory seal) are all individual factors relevant to agreement. (Supp. 132.)

The policyholder's contractual right to agree or not to agree to windshield repair under policies issued after March 31, 1998, was conveyed to policyholders in at least five separate documents. (*See supra* at 9-10.) Plaintiff's testimony that he did not receive or read his policy or the notices and endorsements that were mailed to him does not prove that any other class member did not receive, read and understand those documents. As a matter of law, insureds are "charged with knowledge of the contents of [their] insurance contracts." *Nickschinski v. Sentry Ins. Co.*, 88 Ohio App.3d 185, 195, 623 N.E.2d 660 (8th Dist.1993); *see also Baughman v. State Farm Mut. Auto. Ins. Co.*, 9th Dist. No. 22204, 2005-Ohio-6980, ¶14-21 (insurer has no general duty to inform policyholders of the terms of insurance contract). Likewise, before agreeing to repair, a class member may have spoken with her State Farm Agent and/or with the technician at her glass shop. It is undisputed that if, after talking with glass shop personnel (or for other reasons), a policyholder changed her mind and asked to have her windshield replaced, State Farm would pay for replacement. (Supp. 352-53 ¶33.) All these individual circumstances are relevant to the issue of whether a particular policyholder agreed or did not agree to repair and demonstrate the impropriety of class certification. *See Cicero v. U.S. Four, Inc.*, 10th Dist. No. 07AP-310, 2007-Ohio-6600, ¶42 (whether class members consented to receiving faxes was individual issue).

E. The Policies Do Not Require that Windshield Repair Return the Windshield to Its Pre-loss Condition.

The Eighth District also failed to identify and address the issues of law and fact enmeshed in Plaintiff's preloss condition claims for purposes of determining predominance. Rather, the court simply accepted Plaintiff's argument "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." (Op. ¶33.) The Eighth District accordingly concluded that "[t]he use of generalized evidence found in the common contract" 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." (*Id.*) The Eighth District's failure to examine the policy language and the reliability of the contentions of Plaintiff's experts (despite State Farm's unresolved *Daubert* challenge to those experts), resulted in a fundamentally flawed determination that common issues predominated. That error was compounded by the Eighth District's failure to acknowledge State Farm's right to defend against Plaintiff's "generalized" expert testimony with individual evidence regarding the preloss condition of class members' vehicles and the success of each class member's repair in returning his or her car to substantially the same condition.

Contrary to the Eighth District's analysis, the meaning of the policies and whether they entitle policyholders to have their windshields returned to their preloss condition is not an issue of "generalized evidence." (Op. ¶33.) Rather, the meaning of the policies is an issue of law for the court. *See Lager*, 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666, ¶15. As State Farm argued, the policies do not require that windshield repair return a vehicle to its preloss condition. 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." (Supp. 20, 48.) 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) (preloss condition inapplicable because repair and parts costs were not based on written estimate by State Farm, but on bid from plaintiff's car dealer). Because Plaintiff's and the class members' windshields were repaired, not replaced, parts (*i.e.*, new windshields) were not required. Moreover, no written estimate was involved in Plaintiff's claim or for the vast majority of windshield repairs under State Farm's glass program.¹⁴ Thus, under the policies, Plaintiff's preloss condition claim is not merely "dubious" as the Eighth District termed it. (Op. ¶56.) Rather, it cannot support a colorable breach of contract claim and does not raise common issues for trial. *See Argent Mtge. Co.*, 8th Dist. No. 906098, 2008-Ohio-5994, ¶24-29 (class certification denied because plaintiffs "failed to present a colorable claim"); *McLaughlin*, 522 F.3d at 228 ("when a claim cannot succeed as a matter of law, the Court should not certify a class on that issue") (Citation omitted.).

Moreover, even if State Farm had a contractual obligation to return a windshield to substantially the same condition as before the damage, the issue of preloss condition would be overwhelmingly individual, precluding class certification.¹⁵ *See Augustus*, 8th Dist. No. 81308, 2003-Ohio-296, at ¶25-27 ("preloss condition" claims require "individually examining each and every putative class member's vehicle"). As the Illinois Supreme Court has held, "[a] necessary

¹⁴ The vast majority of repairs were paid pursuant to agreed upon formulas and prices established under the O&A contract or a competitive bid from the glass shop. (Supp. 362-63 ¶4-7.)

¹⁵ "Pre-loss condition" means substantially the same appearance and function as before the loss. *See Samuels v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 78AP-842, 1979 Ohio App. LEXIS 10942, at *4 (May 1, 1979); *O'Brien*, 785 A.2d at 287; *Gonzales v. Farmers Ins. Co.*, 345 Ore. 383, 96 P.3d 1, 4 (2008); *Blakely v. State Farm Mut. Auto Ins. Co.*, 406 F.3d 747, 753 (5th Cir.2005).

first step" in showing that a vehicle was not restored to its preloss condition "would be to examine each class member's vehicle to determine its preloss condition," and "these examinations would overwhelm any question common to the subclass, rendering it impossible for such questions to predominate." *Avery*, 216 Ill.2d at 138, 835 N.E.2d 801. "For this reason, a claim for breach of the preloss condition promise cannot be maintained as a class action." *Id.*, citing *Augustus*, ¶25; see also *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn.App. 9, 22-23, 65 P.3d 1 (2003); *Snell v. Geico Corp.*, Md.Cit.Ct. No. Civ. 202160, 2001 WL 1085237, at *6 (Aug. 14, 2001); *Greenberger v. Geico Gen. Ins. Co.*, 631 F.3d 392, 397 (7th Cir.2011).

Issues of preloss condition are necessarily individualized when it comes to windshield repair. Like other parts of a vehicle, windshields are subject to wear and tear. They can be scraped or abraded, whether by sand, road salt, or worn wiper blades and may lose clarity. A windshield may have had earlier chips, cracks or repairs. The preloss condition of a one-year-old windshield may be very different from a 19-year-old windshield. In addition, the extent of the damage repaired may affect whether a windshield is returned to substantially the same condition as before the damage. In short, contrary to the Eighth District's opinion (Op. ¶33, 56), Plaintiff's proposal to offer generalized expert evidence (the admissibility of which was not resolved by the trial court (*see infra* at 32-34), does not change the inherently individual nature of the inquiry.

F. The Eighth District Failed to Resolve Legal and Factual Issues Affecting Commonality and Predominance With Respect to Plaintiff's Bad Faith Claim.

In holding that there was a predominance of common issues, the Eighth District majority 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 Eighth District majority simply accepted Plaintiff's theory that Ohio Adm.Code 3901-1-54(E)(1) supports a cause of action for bad faith if an insurer does not "fully disclose to the first party claimants all pertinent

benefits, coverages or other provisions * * *." (Op. ¶22.)¹⁶ In fact, Ohio Adm.Code 3901-1-54(B) expressly states that "[n]othing in this rule shall be construed to create or imply a private cause of action for violation of this rule," 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 School, Inc. v. Motorists Ins. Co.*, 8th Dist. No. 81727, 2003-Ohio-1737, ¶38. Accordingly, courts have consistently held that Ohio's unfair claims practices regulations do not create a private cause of action for insureds. *See Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 518 (6th Cir.2010); *McLynas v. Karr*, 10th Dist. No. 03AP-1075, 2004-Ohio-3597, ¶29; *Strack v. Westfield Cos.*, 33 Ohio App.3d 336, 337, 515 N.E.2d 1005 (9th Dist.1986).¹⁷

Ohio Adm.Code 3901-1-54, therefore, does not provide a common question of non-disclosure, and an actionable duty of disclosure would have to rest on Plaintiff's alternate theory that State Farm was in a fiduciary relationship with Plaintiff and the class members. Such a fiduciary relationship cannot be established classwide in the circumstances of this case. Under Ohio law, "the relationship between the insured and the insurer is purely contractual in nature." *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 663, 710 N.E.2d 1116 (1999); *Nationwide Mut. Ins. Co. v. Marsh*, 15 Ohio St.3d 107, 109, 472 N.E.2d 1061 (1984). A fiduciary duty on the part of an insurer arises only in special circumstances where a reasonable person "would repose special confidence and trust" in the insurer. *See Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 437, 1998-Ohio-405, 696 N.E.2d 1001.

¹⁶ Furthermore, as shown above, to the extent Plaintiff's bad faith claim is premised upon State Farm's purported nondisclosure of the cash payment option, no common issues are raised because that option does not exist under the contractual language.

¹⁷ *See also Furr v. State Farm Mut. Auto. Ins. Co.*, 128 Ohio App.3d 607, 617, 716 N.E.2d 250 (6th Dist.1998) (holding that Ohio Adm.Code 3901-1-54 could not be "considered evidence of the applicable standard of bad faith"); *Retail Ventures, Inc. v. Natl. Union Fire Ins. Co.*, S.D. Ohio No. 2:06-CV-00443, 2007 WL 943011, at *3 (Mar. 27, 2007) (alleged violations of Ohio insurance regulations are "immaterial" to bad faith claim).

Where the "circumstances surrounding each transaction present a common fact situation," the question of whether a fiduciary duty has been created may be answered class-wide. *Cope* at 437. In *Cope*, a class-wide determination on the issue of fiduciary duty was possible because the class members were sold replacement life insurance in substantially similar or identical transactions in which the only participants were class members and life insurance agents, who uniformly failed to disclose material information to the class members. *Id.* at 427-28, 435-36.

Here, Plaintiff's and the class members' transactions do not present a common factual situation. As described in more detail below, each repair transaction involved communications not only between each policyholder and Lynx, but also between the policyholder and often the policyholder's State Farm Agent and almost always the glass shop personnel. (*See infra* at 43-45.) The differing individual communications and the multiple sources of information readily available to policyholders would necessitate an individual inquiry into the existence of a fiduciary duty, rendering that issue individual, not common. *See Pipefitters*, 654 F.3d at 631 (defendant's fiduciary status was "a 'crucial * * * threshold factual issue specific to' each and every class member, requiring the court 'to make so many individualized determinations' * * * that a class action could not be a superior form of adjudication"). The Eighth District entirely failed to address or acknowledge the individual questions as to fiduciary relationship raised by Plaintiff's claim for breach of fiduciary duty.

The Eighth District also failed to analyze the impact on predominance of other aspects of Plaintiff's bad faith claims, including issues of agreement and whether the class members failed to notify State Farm of dissatisfaction with the windshield repairs that were performed on their cars. Such issues are individual and would be relevant to the determination of whether State Farm had "reasonable justification" for the way it handled each class member's claim. *Zoppo v.*

Homestead Ins. Co., 71 Ohio St.3d 552, 555, 1994-Ohio-461, 644 N.E.2d 397; *Ho v. State Farm Fire & Cas. Co.*, 8th Dist. No. 86217, 2005-Ohio-5452, ¶ 18; *see also Johnson v. State Farm Ins. Co.*, 8th Dist. No. 75497, 1999 WL 1206603, at *3 (Dec. 16, 1999) (insureds who do not notify the insurer that they are unhappy with repairs cannot recover for bad faith).

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 an action that cannot be tried on a class basis 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.)

Proposition of Law No. II: 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 class certification, the Eighth District 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. (Op. ¶33.) That testimony was the subject of an undecided *Daubert*-type challenge by State Farm in the trial court.¹⁸ The Eighth District's reliance on this expert testimony, without any independent assessment of its admissibility, was an abuse of discretion and warrants reversal of class certification.

The United States Supreme Court in *Dukes*, without deciding the issue, strongly suggested that courts cannot conclude that Rule 23 requirements have been met on the basis of expert opinions unless those opinions are admissible under *Daubert*. *See* 131 S. Ct. at 2553-54 (expressing

¹⁸ State Farm's motion was subsequently denied as moot. *See* Trial Court's 12/16/10 Journal Entry.

"doubt" that district court was correct in concluding that *Daubert* does not apply at the class certification stage). Federal courts following *Dukes* have held that courts must evaluate the admissibility under *Daubert* of expert opinions 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*, 657 F.3d at 982-83; *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 812 (7th Cir.2012); *see also Sher v. Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir.2011). Thus, where "an expert's report or testimony is 'critical to class certification,' * * * a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification." *Messner* at 812, quoting *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir.2010). Plaintiff's experts' opinions in this case were clearly critical to the Eighth District's holding (Op. ¶33) that Plaintiff's preloss condition claim presented common issues. *See Messner* at 812 (a "critical" expert opinion is construed "broadly" to encompass any opinion "important to an issue decisive for the motion for class certification.").¹⁹

The application of *Daubert* on class certification is required as part of the "rigorous analysis" that this Court has held must be undertaken to ensure that the requirements for Civ.R. 23 have been met. *Davis*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444, at ¶20. Where a court certifies a class (or affirms class certification) based on evidence that may not withstand full

¹⁹ Absent adjudication of their admissibility under *Daubert* and of their persuasiveness, Plaintiff's experts' opinions are not the "significant proof" required to support class certification. *See Ellis*, 657 F.3d at 983, quoting *Dukes* at 2553. As State Farm showed in its undecided motion to exclude their testimony and reports, Plaintiff's experts lack the requisite experience and expertise, and their speculative opinions are unreliable and are not based on any accepted methodology or any relevant, objective standard applicable to windshield repair. (*See Mem. in Support of Mot. of Defendant to Exclude the Testimony and Reports of Craig Carmody and Gary Derian*, filed 2/24/2010, Dkt. no. 123 (showing inter alia that 1993 test data relied upon by Carmody have been discredited by a 2007 ANSI (American National Standards Institute) windshield standard and that Derian's conclusions were unsupported by any test data).).

Daubert scrutiny, it effectively allows certification based on something less than full compliance with the requirements of Civ.R. 23. The practical effect is substantially to lower the threshold for class certification by "hand[ing] off to experts" – who have been retained and are compensated by the parties – the task of ensuring compliance with the requirements for class certification. Kermit Roosevelt III, *Defeating Class Certification in Securities Fraud Actions*, 22 Rev.Litig. 405, 425 (2003); *see also West v. Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir.2002) (failure to evaluate expert opinions would "amount[] to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert").

Here, in simply accepting and relying on Plaintiff's proffer of expert opinion as a means of resolving en masse Plaintiff's and the class members' claims that their vehicles were not returned to preloss condition by windshield repair, the Eighth District failed to conduct the requisite rigorous analysis. If Plaintiff's experts' testimony is ultimately excluded at or before trial, decertification of the class will be necessary as individual evidence of preloss condition would be needed.²⁰ Moreover, Plaintiff's reliance on generalized expert testimony cannot as a matter of due process preclude State Farm from offering individual evidence that class members' windshields were restored to their preloss condition. *See McLaughlin*, 522 F.3d at 232. Class certification of Plaintiff's preloss condition claims should be reversed.

²⁰ Indeed, even if the Plaintiff's experts survive a *Daubert*-type challenge down the road, their testimony will not necessarily "generate common answers" so as to resolve the class members' claims. *See Dukes*, 131 S.Ct. at 2551. Rejection of Plaintiff's experts' testimony by the jury would not resolve the merits of the class members' preloss condition claims. It would merely mean that individual evidence would be necessary to resolve preloss condition issues – which could not be accomplished in a class action trial. *See, e.g., Gawry v. Countrywide Home Loans, Inc.*, 640 F.Supp.2d 942, 953 (N.D. Ohio 2009) (denying class certification where if issue were "resolved in favor of Defendants, the Court w[ould] necessarily have to delve into the specific details of each individual transaction"), *aff'd*, 395 F. App'x 152 (6th Cir.2010).

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. Actual injury is a required element of Plaintiff's and the class members' claims and would require individual evidence and factfinding. It was error to incorporate that individual, disputed element of liability into the class definition. *See* 5 Moore, *Federal Practice*, Paragraph 23.21[3][c] (3d Ed.2012) ("A class definition is inadequate if a court must make a determination of the merits of the individual claims to determine whether a particular person is a member of the class."); *Randleman v. Fid. Natl. Title Ins. Co.*, 646 F.3d 347, 353 (6th Cir.2011) (rejecting class definition that defined class as persons "entitled to relief" and required "substantial, individual inquiries"); *Stewart v. Cheek & Zeehandelaar, LLP*, 252 F.R.D. 387, 391 (S.D.Ohio 2008) (where "individualized assessments" or "extensive factual inquiries" are necessary to determine class membership, class certification is improper) (Citation omitted).²¹

It is Plaintiff's theory of injury and damages that he and the class members were contractually entitled to receive a cash payment for the cost of a windshield replacement minus the amount of the applicable deductible (if any). Plaintiff conceded below that the cost of windshield replacement must be measured as of the time of each class member's windshield claim, not as of today. (*See* Tr. 4/14/2010 at 109:23-110:5.) It must also be measured by what *State Farm* would have had to pay for replacement, not merely on prices available in the market place. *See Greenberger*,

²¹ Courts have uniformly rejected class definitions that incorporate an element of liability. *See, e.g., Adashunas v. Negley*, 626 F.2d 600, 603-04 (7th Cir.1980); *Genenbacher v. CenturyTel Fiber Co. II, LLC*, 244 F.R.D. 485, 487-88 (C.D.Ill.2007); *Dunn v. Midwest Buslines, Inc.*, 94 F.R.D. 170, 171-72 (E.D.Ark.1982); *Dafforn v. Rousseau Assocs., Inc.*, N.D.Ind. No. F 75-74, 1976 WL 1358, at *1 (N.D.Ind.July 27, 1976).

631 F.3d at 398 ("the amount necessary to repair a vehicle under an insurance contract 'refers to the amount the *insurer* must spend to repair the vehicle'" (Emphasis in original; citation omitted.)). Plaintiff has claimed that the historical cost of a replacement windshield for each class member can be determined from historical list prices for windshields and by applying the various adjustments that State Farm would have made. The Eighth District adopted Plaintiff's view, erroneously holding that fact of injury was a "straight forward, mechanical" matter of applying "a mathematical calculation to determine whether a given windshield replacement is more expensive than a given deductible." (Op. ¶34.)

Contrary to the Eighth District's opinion, there is no "given" windshield for a class member's car. As noted above, Plaintiff has repeatedly conceded that he does not seek, and is not entitled to, the actual cash value of the windshield on his car before it was damaged. (*See* Pl. 3/11/2011 Br. at 36 (The "precondition for [class] membership is actually simpler than it may seem, since the parties are in agreement that the concept of 'actual cash value' only applies when the vehicle is a total loss, which will never be the case with 'Glass Only' windshield damage claim[s].").²²) Rather, Plaintiff seeks the amount that State Farm would have been required to pay under the policy for the installment of a replacement windshield on his car. (*Id.*) That amount depends not on the value or cost of the windshield already on a class member's car at the time of damage, but upon the cost of whatever replacement windshield would have been used by the glass shop.

Plaintiff has provided no method of identifying for each class member the relevant replace-

²² The class definition requires for each class member that "[t]he 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." (Op. ¶8.) In any event, under the policies, "actual cash value" would not depend on the historical list price of a windshield, but on the "market value, age and condition" of the windshield "at the time the loss occurred." (Supp. 20, 48.) Thus, even if "actual cash value" of the original windshield were the applicable standard, as the Eighth District appears to have believed (*see* Op. ¶21 (incorrectly characterizing Plaintiff's claim as one for "a cash payment for the value of the glass")), individual questions would predominate.

ment windshield and its historical cost for State Farm. Multiple replacement windshields from various sources were often available for a damaged windshield at significantly varying prices, some of which might exceed the policyholder's deductible (resulting in a purported injury) while others would not (resulting in no injury). (*See supra* at 11-12.) The factual question of what particular windshield would have been used on a class member's car if the class member had had a replacement instead of repair can only be answered by individual factual inquiries, not from State Farm's records or industry data. When an insured's windshield was *repaired*, State Farm did not determine (and did not record) what replacement windshield(s) could or would have been used on that vehicle if the insured had chosen replacement. Nor, presumably, did glass shops or class members determine or record what windshield they hypothetically would have chosen if they had decided to replace rather than repair. Moreover, State Farm's records do not reveal what particular features a class member's windshield might have had (such as tinting or heating), which could be ascertained only by examining each windshield.²³ (*See Supp.* 369 ¶20.)

State Farm presented evidence that at the time of the repair of Plaintiff's windshield, 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 \$250 deductible. (*See supra* at 12.) Plaintiff's purported witness identified two possible replacement windshields, at two different costs, for Plaintiff's car and did not dispute the availability of the windshields identified by State Farm. (*See Uhl Aff.* ¶ 6-7, Ex. N. to Pl. Reply in Support of Mot. for Class Cert., Dkt. no. 125.) If Plaintiff's claims were tried on an individual basis, the parties would be entitled to present evi-

²³ Plaintiff has claimed that all the required information as to a car's original windshield can be obtained from the car's VIN number. Notably, federal regulations require VINs to include decipherable information as to a car's "make, line, series, body type, engine type, and all restraint devices and their location." *See* 49 CFR § 565.15 & Table I. The regulations do not require that a VIN provide decipherable information as to the car's windshield and its features.

dence on the issue, including the brands, models and prices of windshields customarily stocked at or available to Plaintiff's glass shop. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187-90 (3d Cir.2001) (affirming denial of class certification; predominance not satisfied where determination of injury and damages required individual inquiry). Without a preliminary determination as to which of the available windshields his glass shop would have used, there can be no determination whether Plaintiff himself sustained actual injury. Moreover, even if the jury were to find that Plaintiff's hypothetical windshield replacement would have cost more than his deductible, thus finding that Plaintiff sustained actual injury, that finding would not establish that any other class member sustained an actual injury. *See id.* at 191-92 ("[A]ctual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member."). Therefore, the factual question of what particular year, make and model of replacement windshield would have been used for a particular car at a particular time at a particular glass shop could only be resolved on an individual basis.

Once the individual factual determinations were made as to what replacement windshield would likely have been used for each class member's hypothetical windshield replacement, the price to State Farm would have to be individually determined, depending on the date and location of a class member's windshield claim. 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. (Supp. 364 ¶10.)

Actual injury is an element of Plaintiff's and the class members' claims, and it is Plaintiff's burden to establish that element of liability by a preponderance of the evidence. *Shimola v. Nationwide Ins. Co.*, 25 Ohio St.3d 84, 86, 495 N.E.2d 391 (1986). Contrary to the Eighth District's holding that "a reasonable estimation of damages" could be made for each putative class member

to determine class membership (Op. ¶37), proof of injury does not merely relate to the *amount* of damages, but to the very *existence* of damages. "No recovery can be had in cases where it is not certain that plaintiff suffered any damage." *Blank v. Snyder*, 33 Ohio Misc. 67, 69, 291 N.E.2d 796 (M.C.1972); *see also Allied Erecting & Dismantling Co. v. City of Youngstown*, 151 Ohio App.3d 16, 2002-Ohio-5179, 783 N.E.2d 523, ¶65 (7th Dist.) (uncertainty as to the existence of damages (not as to their amount) precludes recovery). Thus, in ruling on class certification, courts "distinguish between the amount of damages," variations in which will not ordinarily defeat class certification, and "the fact of injury and causation, which are liability elements of a claim." *Hoang v. E*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301, 704 N.E.2d 151, ¶20 (8th Dist.). In this case, the Eighth District improperly disregarded evidence establishing that actual injury was an individual factual issue that could not be incorporated into the class definition and that overwhelmed any purported common issues. Moreover, the inclusion of actual injury in the class definition also results in an impermissible fail-safe class. *See Randleman*, 646 F.3d at 352 (affirming denial of certification of fail-safe class where "by virtue of losing" putative class members would no longer be in the class); *Roe v. Bridgestone Corp.*, 492 F.Supp.2d 988, 992 n.1 (S.D.Ind.2007) ("plaintiffs' definitions of the proposed classes incorporate elements of the merits of their claims and thus have an improper 'fail-safe' character.") (Citations omitted.). Here, policyholders who are found to not have sustained injury as defined by Plaintiff would not be bound by an adverse verdict, but would merely be excluded from the class.

The incorporation of the element of actual injury into the class definition and the proposal to determine actual injury through computer programs and list prices, without any determination of how much State Farm actually would have had to spend on a replacement windshield in any particular case, would eliminate State Farm's right to try individual liability issues that are central to

this case, depriving State Farm of its due process rights. Civ.R. 23, the Ohio Constitution, and federal due process do not permit class certification of "an action that refuses to lend itself to proper judicial determination as a class action" where, as here, "[t]o do so would work an injustice" on the plaintiff or defendant. See *Gilmore v. Gen. Motors Corp.*, 8th Dist. No. 32726, 1974 WL 184823, at *6 (Dec. 19, 1974); *Dukes*, 131 S.Ct. at 1561 (a class cannot be certified on the premise that the defendant will not be entitled to litigate defenses to individual claims). State Farm has a "substantive right to pay damages reflective of [its] actual liability" and to "challenge the allegations of individual plaintiffs." *McLaughlin*, 522 F.3d at 231-32. As a matter of due process and the Ohio Constitution, class action procedures may not be used to alter the substance of what Plaintiff must prove or to abridge State Farm's right to defend itself. See Ohio Constitution, Article IV, Section 5(B); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir.1998); *Lindsey v. Normet*, 405 U.S. 56, 66, 92 S.Ct. 862, 31 L. Ed.2d 36 (1972) (a defendant must be given "an opportunity to present every available defense"); *United States v. Armour & Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 29 L. Ed.2d 256 (1971) (the "right to litigate the issues raised" in a case is "a right guaranteed * * * by the Due Process Clause").

In short, contrary to the Eighth District's opinion, "State Farm's records, in conjunction with available industry data," do **not** "contain the necessary information to arrive at a reasonable estimation of damages for each putative class member and to determine class membership." (Op. ¶37.) Without an individual inquiry, there is no "given windshield" (*id.* ¶34) that would permit the existence of injury to be established for any class member. Before any calculation could be done, there would have to be a factual determination as to which replacement windshield was available and would have been used in the hypothetical replacement of a class member's windshield. That the damages claimed for each class member are relatively small does not mean that

individual factual issues as to whether class members actually sustained injury can be glossed over or disregarded. Actual injury is an element of liability and an individual issue that should not have been incorporated into the class definition. Properly considered in the predominance analysis, the issue of actual injury overwhelms any common issues. *See Hoang*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151, at ¶19 (8th Dist.); *Newton*, 259 F.3d at 188 (if "fact of damage requires evidence concerning individual class members," common questions do not predominate), quoting *In re Merrill Lynch*, 191 F.R.D. 391, 396 (D.N.J.1999).

Proposition of Law No. IV: 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 individual calculations required to determine class membership for approximately for 100,000 class members would not be simple, manageable or administratively feasible, as required for class certification. This requirement "serves the important objectives" of "eliminat[ing] 'serious administrative burdens that are incongruous with the efficiencies expected in a class action' by insisting on the easy identification of class members," facilitates class notice, and "protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable." (Citation omitted.) *Marcus*, 3d Cir. Nos. 11-1193, 11-1192, 2012 WL 3171560, at *6.

As discussed above (*see supra* at 10-12), under the O&A program, State Farm's cost for replacement varied not only with the particular windshield, but also based upon a system of adjustments to windshield prices that differed from county to county and changed frequently and significantly over time. In some instances, the amount State Farm paid for a windshield was the price paid by the glass shop. In the earlier years of the class period, before the O&A program, State Farm's windshield replacement cost was generally based upon an estimate or invoice issued by the glass shop chosen by the policyholder. (*See supra* at 10.) Thus, even accepting *arguendo*

the Eighth District's erroneous assumption that, for purposes of injury and damages, the relevant windshield make and model was the windshield on a class member's car at the time of damage, there are, as Judge Stewart stated, "too many damages variables" among class members over the twenty-year class period for the class to be manageable. (Op. ¶68.)

The Eighth District majority's ruling that class members could be identified by unspecified hypothetical "computerized algorithms" that would "calculate" damages (Op. ¶36) was not supported by evidence, expert or otherwise, as to the feasibility of devising such a computer program, the availability of the information required for such a program, and how much such a program would cost, or how long it would take. Rather, the majority simply relied upon Plaintiff's unsupported assurances that a computer program would be forthcoming. *See Newton*, 259 F.3d at 191-92 (plaintiff's "assurance" that an "expert can devise a formula for calculating injury and damages" did not allay manageability concerns).

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, 1998-Ohio-365, 694 N.E.2d 642. Plaintiff's mere assurances that the needed information must be available in State Farm databases and that a "simple" computer program could be devised²⁴ did not meet that burden.

²⁴ *See, e.g.*, Pl.'s Opp. to Appellant's Application for Reconsideration at 6 (claiming that "[f]urther discovery will undoubtedly confirm that State Farm possesses sufficient information, as required by law, that will allow each class member's recovery to be calculated through a simple computer program."). No law or regulation "requires" State Farm to determine and record what it would have paid for hypothetical windshield replacements or of the precise windshield on an insured's car. State Farm has no database of such information, and without it, Plaintiff's hypothetical

Proposition of Law No. V: 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. (Op. ¶26.) The Eighth District's analysis disregarded and did not mention evidence of the individual circumstances of each class member's transaction, which were directly relevant to a policyholder's decision to repair or replace.

As State Farm's evidence showed, 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. (Supp. 344-45.) Individual evidence regarding these unscripted discussions would be directly relevant to Plaintiff's claim that class members were improperly "dissuad[ed]" from having their windshields replaced or "steer[ed]" towards repair or "improperly prompted" to elect repair. (Op. ¶4, 30, 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. (*See supra* at 6.)

Moreover, after the initial exchange between a Lynx operator and a policyholder (in which the policyholder was asked to describe the extent of his or her windshield damage and, if appropriate, told that it sounded as though the windshield could be repaired), what else, if anything, was said to a policyholder by the Lynx operator varied with the questions, if any, asked by the individual policyholder. (Supp. 352 ¶32.) For example, Plaintiff has stated that "part of the sales

"simple computer program," even if it existed, would not be able to perform the needed calculations to determine actual injury class wide and to identify class members with reasonable effort.

pitch" for windshield repair included advising the policyholders that windshields (which are made out of laminated glass with an inner layer of plastic) could not be recycled, claiming that that statement was untrue. (Pl. 3/11/2011 Br. at 35.) However, it is indisputable that only some class members would have heard that statement from the Lynx operator and that Plaintiff himself did not – or if he did, did not remember it. (*See supra* at 6-7, 12.)

Significantly, neither State Farm nor Lynx actually inspected a policyholder's damaged windshield. The ultimate decision as to repair or replacement was left to the individual policyholder after inspection of the damage by his glass shop and unscripted conversation with a glass shop technician. (Supp. 353 ¶34.) After policyholders spoke with their glass shops and had their windshields inspected, they not infrequently changed their minds and had the windshield replaced. (Supp. 353 ¶33.) The evidence also showed that policyholders were influenced by individual considerations such as deductible waiver, time and convenience and a desire to maintain the original factory seal. (Supp. 132.) Likewise, policyholders were repeatedly notified of their right to choose between repair and replacement in multiple mailings between 1997 and 2001. Although Plaintiff claims he did not receive, read or understand those mailings or his policy (Supp. 488-91), his testimony does not resolve that issue as to other policyholders.

In short, the evidence in this case demonstrated that the communications involved in Plaintiff's and the class members' transactions were far from identical. Thus, this case is not analogous to cases such as *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 1998-Ohio-405, 696 N.E.2d 1001, or *Amato v. General Motors Corp.*, 11 Ohio App.3d 124, 463 N.E.2d 625 (1982), where class certification was held appropriate because essentially identical transactions and communications were at issue and a causal connection between the communications and the transaction could be presumed. Here, there was no showing that the relevant communications

were substantially identical. Only the initial exchange with the Lynx operator was shown to be the same, and that exchange was only a small part of the communications a policyholder might have had regarding his windshield repair. In contrast to *Cope*, here, whether policyholders chose repair because they were "improperly prompted" to do so (Op. ¶30) is an issue that can be resolved only on an individual basis and cannot be determined classwide.

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, the numerous potential bases for their decisions, and the extent of their reliance, if any, on what was told to them by 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 and used only for part of the twenty-year class period.

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 preloss condition claims only. (*See* Op. ¶29, 33.) In upholding certification of the non-Lynx subclass, the Eighth District failed entirely to address the need for a class representative who was a member of the subclass.

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 accordingly." Thus, a subclass must meet the requirements for class certification, including the requirement that "the named representatives must be members of the class." *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶6; *see also Sosna v. Iowa*, 419 U.S. 393, 403, 95 S.Ct. 553, 42 L. Ed.2d 532 (1975) ("A litigant must be a member of the class which he or she seeks to represent

at the time the class action is certified by the district court."); *Avery*, 216 Ill.2d at 139, 835 N.E.2d 801 (subclass improper because none of the named plaintiffs were members).

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 claims of the sole named Plaintiff were administered by Lynx and he is therefore not a member of the non-Lynx subclass. *See Gawry*, 640 F.Supp.2d at 950 (named plaintiffs could not represent subclass "because they are not and have never been members of this class").

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.

A. Plaintiff Lacks Standing to Represent a (B)(2) Class.

The Eighth District also failed to address State Farm's contention that certification of a Rule 23(B)(2) class for injunctive and declaratory relief was improper because Plaintiff, who is no longer a State Farm policyholder, lacked standing to enjoin State Farm's future practices.

"Individual standing is a threshold to all actions, including class actions," and to represent a (B)(2) class, Plaintiff "must have a basis for injunctive relief in his own right." *Woods v. Oak Hill Community Med. Ctr., Inc.*, 134 Ohio App.3d 261, 268-69, 730 N.E.2d 1037 (4th Dist.1999); *see also McNair v. Synapse Group Inc.*, 672 F.3d 213, 223-24 (3d Cir.2012) (former customer cannot represent (b)(2) class seeking injunctive relief); *Dukes*, 131 S.Ct. at 2559-60 ("plaintiffs no longer employed by Wal-Mart lack standing to seek injunctive or declaratory relief against its employment practices").²⁵ Plaintiff is no longer a State Farm insured (*see supra* at

²⁵ *See also Bertulli v. Indep. Assn. of Continental Pilots*, 242 F.3d 290, 294 (5th Cir.2001) ("Standing is an inherent prerequisite to the class certification inquiry"); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279-80 (11th Cir.2000) ("prior to the certification of a class and technically speaking before undertaking any formal typicality or commonality review," the court must determine that the named plaintiff has standing to bring his or her individual claim.).

12) and has no standing to enjoin State Farm's future practices or to seek declaratory relief as to the contractual propriety of State Farm's ongoing and future practices.

Moreover, unnamed class members who, like Plaintiff, are no longer insured by State Farm also "have no more need for prospective relief." *Dukes*, 131 S.Ct. at 2560. As a consequence, injunctive or declaratory relief is not appropriate for "the class *as a whole*," *id.*, as required by Civ.R. 23(B)(2), and the class lacks the necessary "cohesiveness." *See Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶13. Furthermore, cohesiveness is lacking because of the disparate factual circumstances of the class members as to actual injury, agreement, individual communications, fiduciary relationship – *i.e.*, for the same reasons that the requirement of predominance is not met. *See id.* at ¶24-31 (upholding trial court's determination that class members' "disparate factual circumstances" and "multiple individual questions of fact requiring examination for different plaintiffs within the proposed class," which precluded a finding of predominance, also precluded a Rule 23(B)(2) class action).

In addition, Plaintiff has not met the requirements under Ohio law that declaratory relief provide a "serviceable" remedy and that "speedy relief is necessary to preserve the rights of the parties." *Haig v. Ohio State Bd. of Edn.*, 62 Ohio St.3d 507, 511, 584 N.E.2d 704 (1992); *Satterfield v. Adams Cty. Ohio Valley School Dist.*, 4th Dist. No. 95CA611, 1996 WL 655789, at *8 (Nov. 6, 1996) (declaratory relief not available when breach of contract claim was equally serviceable remedy). Plaintiff cannot demonstrate the need for immediate declaratory relief for the handling of his windshield claim over nine years ago, and his contract claim provides a serviceable remedy. *See, e.g., Rocky River City School Dist. v. Ohio Dept. of Edn.*, 8th Dist. No. 71444, 1997 WL 380074, at *2 (July 3, 1997); *Fox v. City of Lakewood*, 84 Ohio App.3d 202, 206, 616 N.E.2d 588 (8th Dist.1992). Indeed, as a matter of Ohio law, Plaintiff's claims for declaratory

relief are "subsumed" within plaintiff's contract claims. See *Cynergies Consulting, Inc. v. Wheeler*, 8th Dist. No. 90225, 2008-Ohio-3362, ¶ 9.

B. The Declaratory and Injunctive Relief Sought By Plaintiff Is Not "Appropriate Final Injunctive Relief or Corresponding Declaratory Relief."

Like Federal Rule 23(b)(2), Ohio Civ.R.23(B)(2) authorizes certification of a (B)(2) class when "final injunctive relief or corresponding declaratory relief" is appropriate with respect to the class as a whole. This requirement is not met in this case.

Under Civ.R. 23(B)(2), the issue is not simply whether the declaratory relief sought by a Plaintiff would be permissible declaratory relief in an individual action. Rather, Civ.R. 23(B)(2) requires that the relief sought be in itself appropriate *final* relief. Thus, as this Court has held, a Civ.R.23(B)(2) action "must seek primarily injunctive relief." *Wilson*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶13; see also *Marks*, 31 Ohio St.3d at 2003, 509 N.E.2d 1249. A (B)(2) class action "cannot be used where final relief relates exclusively or predominately to money damages" or where "it appears clear that monetary damages are, at the very least, a very substantial, essential element of the plaintiff's claim." *Paoletti v. Travelers Indem. Co.*, 6th Dist. No. L-75-196, 1997 WL 198462, at *5 (May 6, 1977). In addition, injunctive or declaratory relief is not final if it "is designed simply to lay the basis for a damage award." 7AA Charles A. Wright et al., *Federal Practice and Procedure*, Section 1775, at 60 (3d Ed.2005); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir.2000); *Gawry*, 640 F.Supp.2d at 961 (denying (b)(2) certification because "primary goal" was to recover allegedly usurious prepayment penalty); *In re Jackson Natl. Life Ins. Co. Premium Litigation*, 193 F.R.D. 505, 508-09 (W.D.Mich.2000) (rejecting (b)(2) class; equitable relief was designed primarily to facilitate monetary relief).

As the United States Supreme Court held in *Dukes*, Rule 23(b)(2) "does not authorize class certification" when (as here) "each class member would be entitled to an individualized award of

monetary damages." *Dukes*, 131 S.Ct. at 2557; *see also id.* at 2558 ("[I]ndividualized monetary claims belong in Rule 23(b)(3)."). The Court also held that there was a "serious possibility" that permitting a (B)(2) class even where money damages do not predominate might also be unconstitutional, *id.*, and that "combin[ing] monetary claims with a request – even a 'predominating request' – for an injunction" did "obvious violence to the Rule's structural features." *Id.*

Here, Plaintiff seeks a declaration that State Farm "violat[ed] the terms" of its policies and breached its fiduciary obligations. (Compl. ¶¶ 40-41.) That declaration is designed to lay the basis for individualized money damages under Plaintiff's breach of contract and bad faith claims and does not support a (B)(2) class. *See* 7AA Wright, *Federal Practice and Procedure, supra*, Section 1775 (action seeking declaration that certain conduct constitutes a breach of conduct does not qualify under Rule 23(b)(2)); *accord Goldberg v. Winston & Morrone, P.C.*, No. 95 Civ. 9282, 1997 WL 139526, at *3 n.4 (S.D.N.Y. Mar. 26, 1997); *Gawry*, 640 F.Supp.2d at 961.

Neither *Hamilton*, 82 Ohio St.3d 67, 1998-Ohio-365, 694 N.E.2d 442, nor the federal Declaratory Judgment Act, 28 U.S.C. § 2201, both of which were relied upon by the Eighth District majority (Op. ¶¶ 44, 49), support certification of a (B)(2) class in this case. In *Hamilton*, (B)(2) certification was affirmed as to two subclasses that sought primarily injunctive relief by barring the defendant from continuing to overcharge interest rates on subclass members' outstanding loans. As the court noted, "[w]ithout such relief, [the subclass members] would achieve only the recoupment of overpaid interest to date," which would not "prevent further overcharges of interest." *Hamilton* at 86. Only subclasses consisting of persons with outstanding loans were included in the (B)(2) class. *Id.* Class members with retired loans, whose claims related solely to past interest charges, were not included. Moreover, two of the named plaintiffs had an outstanding loan, such that the (B)(2) subclasses were properly represented. *Id.* at 74. Here, the only named

Plaintiff is no longer a State Farm policyholder and has no interest in, or standing to seek, future relief. *See Searles v. Germain Ford of Columbus, L.L.C.*, 10th Dist. No. 08AP-728, 2009-Ohio-1323, ¶16 (affirming denial of (B)(2) class; stating that "[w]hen a request for injunctive relief is based upon a past wrong, a plaintiff must show a real or immediate threat that the plaintiff again will be wronged;" otherwise injunction would be no more than an order that the defendant "obey the law"). Further, in contrast to the ongoing interest charges in *Hamilton*, in this case, even class members who are still State Farm policyholders will not be affected by the alleged "ongoing" practices unless they have future windshield damage – a contingency that is too remote to support declaratory or injunctive relief. *See Arnott*, S.Ct. No. 2010-2180, 2012-Ohio-3208, at ¶10 (declaratory relief not appropriate where claim is "contingent on the happening of hypothetical future events"). In addition, under the federal Declaratory Judgment Act, courts have repeatedly dismissed declaratory judgment claims that, like Plaintiff's claims here, are based on alleged past breaches of contract or other past conduct. *See, e.g., Del. State Univ. Student Hous. Found. v. Ambling Mgt. Co.*, 556 F.Supp.2d 367, 374 (D.Del.2008) (declaratory judgment is improper "solely to adjudicate past conduct" under terminated contract (Citation omitted.)). Certification of a (B)(2) class was an abuse of discretion and should be reversed.

CONCLUSION

For all the foregoing reasons, State Farm respectfully submits that the Court should reverse certification of the class in this case.

Respectfully submitted,



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Counsel of Record for Appellant State Farm
Mutual Automobile Insurance Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merits Brief of Appellant State Farm Mutual Automobile Insurance Company was served upon the following by first class U. S. mail, postage prepaid, this 17th day of August, 2012:

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APPENDIX

A

ORIGINAL

IN THE SUPREME COURT OF OHIO

MICHAEL E. CULLEN,
Plaintiff-Appellee,

V.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
Defendant-Appellant.

CASE NO. 12-0535

On Appeal From the Cuyahoga County
Court of Appeals, Eighth Appellate
District, Case No. 10-095925.

NOTICE OF APPEAL OF APPELLANT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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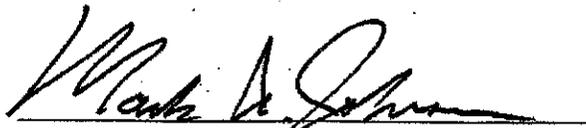
Attorneys for Appellee Michael E. Cullen

**NOTICE OF APPEAL OF APPELLANT STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

Pursuant to S.Ct.Prac.R. 2.1(A)(3) and 2.2(A)(5) and (6), Appellant State Farm Mutual Automobile Insurance Company ("State Farm") hereby appeals to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, in Court of Appeals Case No. 95925, which was journalized on December 22, 2011. State Farm timely filed a combined application for reconsideration and consideration en banc from that judgment on January 3, 2012, inasmuch as January 2, 2012 was a legal holiday pursuant to R.C. 1.14. State Farm's application for consideration en banc was denied by journal entry of February 16, 2012, and State Farm's application for reconsideration was denied by journal entry of February 27, 2012.

This case is one of public and great general interest.

Respectfully submitted,



Mark A. Johnson (0030768), Counsel of Record
for Appellant State Farm Mutual Automobile Ins. Co.

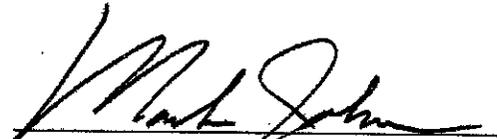
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Notice of Appeal was served upon the following by first class U. S. mail, postage prepaid, this 30th day of March, 2012:

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B

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

-vs-

COMMON PLEAS COURT

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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GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
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Presiding Judge MELODY J. STEWART,
Concurs

Judge JAMES J. SWEENEY, Concurs

Frank D. Celebrezze Jr.
Judge FRANK D. CELEBREZZE JR.

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COVER RETURN TO COUNSELOR
ALL PAYMENTS TO COUNTY CLERK



C

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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. 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.



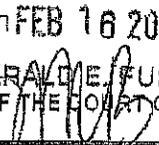
PATRICIA A. BLACKMON, ADMINISTRATIVE JUDGE

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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D

[Cite as *Cullen v. State Farm Mut. Auto. Ins. Co.*, 2011-Ohio-6621.]

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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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} 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

{¶ 2} 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.

{¶ 3} 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.

{¶ 4} 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 claims¹ to Lynx Services, L.L.C. ("Lynx"). According to Cullen, Lynx, in conjunction with State Farm, developed a script² that representatives would use to steer claimants to select windshield repair, even for claimants with no deductible.³ However, the repair

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.

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.

{¶ 5} 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 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.

{¶ 6} 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.

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

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

{¶ 8} “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.”

{¶ 9} 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)

{¶ 10} 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 an abuse of discretion. A trial court

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.

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.

{¶ 11} 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.

{¶ 12} 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.

{¶ 13} 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.

{¶ 14} 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).

{¶ 15} 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.

{¶ 16} 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

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

{¶ 18} 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.

{¶ 19} 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 * * *.”

{¶ 20} 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.

{¶ 21} 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.

{¶ 22} 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

{¶ 23} 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."

{¶ 24} 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

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

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.

{¶ 25} 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

{¶ 26} 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

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.

truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *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.

{¶ 27} 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”).

{¶ 28} 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.

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

{¶ 30} 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.

{¶ 31} 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.

{¶ 32} 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.

{¶ 33} 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.

{¶ 34} 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.

{¶ 35} 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

{¶ 36} 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.

{¶ 37} 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.

{¶ 38} 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

{¶ 39} 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.

{¶ 40} 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)

{¶ 41} 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[.]”

{¶ 42} 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.

{¶ 43} 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.”

{¶ 44} 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.

{¶ 45} State Farm argues that the declaratory relief sought is incidental to monetary damages.

{¶ 46} “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.

{¶ 47} 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.”

{¶ 48} 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

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.

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 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).

{¶ 49} 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.

{¶ 50} 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).

{¶ 51} Appellant’s second assignment of error is overruled.

C. Failure to Conduct a Rigorous Analysis

{¶ 52} 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.”

{¶ 53} 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.

{¶ 54} 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.

{¶ 55} 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

{¶ 56} 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.

{¶ 57} 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:

{¶ 58} 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

{¶ 59} 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.

{¶ 60} 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,

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.

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 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.*

{¶ 61} 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.

{¶ 62} 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

{¶ 63} I likewise find that the court erred by concluding that the class it defined was manageable.

{¶ 64} “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.

{¶ 65} 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.

{¶ 66} 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.

{¶ 67} 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.

{¶ 68} 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.

{¶ 69} 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.

{¶ 70} 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.

E

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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Filing 02/18/2005

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VS STATE FARM MUTUAL AUTO. INS. CO.

Disp 04:00

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65255347

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**



MICHAEL E. CULLEN
Plaintiff

Case No: CV-05-555183

Judge: DAVID T MATIA

STATE FARM MUTUAL AUTO. INS. CO.
Defendant

JOURNAL ENTRY

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

Judge Signature

OSJ

Date

G

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§ 4.05 Other powers of the Supreme Court

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(A)(1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the Supreme Court.

(2) The Supreme Court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the Supreme Court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

(Amended, effective Nov. 6, 1973; SJR No.30. Adopted May 7, 1968.)

Not analogous to former

§ 5 , repealed Oct. 9, 1883.

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H

RULE 23. Class Actions

(A) Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(B) Class actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) 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; or

(3) 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. The matters pertinent to the findings include: (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.

(C) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (B)(1) or (B)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (B)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (C)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (a) an action may be brought or maintained as a class action with respect to particular issues, or (b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(D) Orders in conduct of actions. In the conduct of actions to which this rules applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(E) Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(F) Aggregation of claims. The claims of the class shall be aggregated in determining the jurisdiction of the court.

[Effective: July 1, 1970.]



3901-1-54 Unfair property/casualty claims settlement practices.

(A) Authority

This rule is issued pursuant to the authority vested in the superintendent under sections 3901.19 to 3901.26 of the Revised Code.

(B) Purpose

The purpose of this rule is to set forth uniform minimum standards for the investigation and disposition of property and casualty claims arising under insurance contracts or certificates issued to residents of Ohio. It is not intended to cover claims involving workers' compensation, or fidelity, suretyship, and boiler and machinery insurance. The provisions of this rule are intended to define procedures and practices which constitute unfair claims practices. Nothing in this rule shall be construed to create or imply a private cause of action for violation of this rule.

(C) Definitions

As used in this rule:

- (1) "Agent" means any individual, corporation, association, partnership or other legal entity authorized to represent an insurer with respect to a claim;
- (2) "Claim file" means any retrievable electronic file, paper file, combination of both, or any other media;
- (3) "Claimant" means a first party claimant, a third party claimant.
- (4) "Contract" means any insurance policy or document containing the terms of the agreement wherein one party, the insurer, assumes certain obligations including financial obligations that arise as a result of a loss sustained by another party, the insured, or to any other party that has rights under the agreement.
- (5) "Days" means calendar days. However, when the last day of a time limit stated in this rule falls on a Saturday, Sunday, or holiday, the time limit is extended to the next immediate following day that is not a Saturday, Sunday, or holiday.
- (6) "Department" means the Ohio department of insurance
- (7) "Documentation" includes, but is not limited to, all communications, transactions, notes, work papers, claim forms, bills and explanation of benefits forms pertaining to the claim;
- (8) "First party claimant" means any individual, corporation, association, partnership or other legal entity asserting a right to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by the policy or contract;
- (9) "Insurer" shall be defined as set forth in division (D) of section 3901.32 of the Revised Code;
- (10) "Investigation" means all activities of an insurer directly or indirectly related to the determination of liability under an insurance contract which is in effect or alleged to be in effect;
- (11) "Like kind and quality part" means a salvage motor vehicle part equal to or better than the replaced part that is acquired from a licensed salvage motor dealer.
- (12) "Notification of claim" means any notification, under the terms of an insurance contract, to an insurer or its agent, by a claimant, which reasonably apprises the insurer of the facts pertinent to a claim;

(13) "Person" shall be defined as set forth in section 3901.19 of the Revised Code;

(14) "Practice" means a type of activity or conduct engaged in by an insurer with such frequency as to constitute a customary procedure or policy routinely followed in the settlement of insurance claims. A single act is not a business practice. However, an act that is malicious, deliberate, conscious and knowing may be the basis for corrective action ordered only by the superintendent without a showing that the conduct is a practice.

(15) "Replacement crash part" means sheet metal or any plastic parts which generally constitute the exterior of a motor vehicle, including inner and outer panels;

(16) "Superintendent" means the superintendent of insurance;

(17) "Third party claimant" means any individual, corporation, association, partnership or other legal entity asserting a claim against any other individual, corporation, association, partnership or legal entity;

(18) "Written communications" includes any correspondence, regardless of source or type, that is materially related to a claim;

(19) "Proof of loss" means a document from the claimant that provides sufficient information from which the insurer can determine the existence and the amount of the claim.

(D) File and record documentation

An insurer's claim files are subject to examination by the superintendent of insurance or by the superintendent's duly appointed designees. To aid in such examination:

(1) An insurer shall maintain claim data that is accessible and retrievable for examination. Such data shall include number, line of coverage, date of loss and date of payment or date of denial or date when claim is closed without payment. The data for closed claims shall be kept for no less than three years or until the completion of the next financial examination conducted by the state of domicile, whichever is greater. Data for claims where the claims payment is less than one thousand dollars, or for towing, labor, glass or rental reimbursement may be kept in summary form.

(2) An insurer must be able to reconstruct its activities in regard to any claim, by documentation appropriate for the type and size of the claim. If the claim is closed, the time period for retention is set forth in paragraph (D)(1) of this rule.

(3) If an insurer does not maintain hard copy files, claim files shall be accessible and be capable of duplication to hard copy.

(E) 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.

(2) No agent shall willfully conceal from first party claimants benefits, coverages or other provisions of any insurance contract when such benefits, coverages or other provisions are pertinent to a claim.

(3) No insurer shall deny a claim based on the first party claimant's failure to make available for inspection the property which is the subject of the claim unless there is documentation of breach of the policy provisions in the claim file.

(4) No insurer shall deny a claim based upon the failure of a first party claimant to give written notice of loss within a specified time limit unless the notice is required by a policy condition, or a first party claimant's failure

to give written notice after being requested to do so by the insurer is so unreasonable as to constitute a breach of the claimant's duty to cooperate with the insurer.

(5) No insurer shall indicate to a first party claimant on a payment draft, check or in any accompanying letter that the payment is final or a release of any claim unless the policy limit has been paid or the first party claimant and the insurer have agreed to a compromise settlement regarding coverage and the amount payable under the insurance contract.

(6) No insurer shall issue checks or drafts in partial settlement of a loss or claim under a specific coverage that contains language purporting to release the insurer or its insured from total liability.

(F) Response to acknowledge receipt of pertinent communications

(1) Notification of a claim given to an agent of an insurer shall be notification to the insurer.

(2) An insurer shall acknowledge the receipt of a claim within fifteen days of receiving such notification. An insurer may satisfy this requirement by making payment within this ten day period. An insurer may also satisfy this requirement by providing necessary claim forms and complete instructions to the claimant.

(3) An insurer shall respond within fifteen days to any communication from a claimant, when that communication suggests a response is appropriate. In the event that a complaint has been filed by a claimant in any court, an insurer is not obligated to respond within this time period and any communication between the claimant and the insurer will be subject to the appropriate rule of procedure for the court in which the lawsuit was filed.

(4) An insurer shall, within twenty-one days of receipt of an inquiry from the department regarding a claim, furnish the department with a reasonable response to the inquiry.

(G) General standards for settlement of claims

(1) An insurer shall within twenty-one days of the receipt of properly executed proof(s) of loss decide whether to accept or deny such claim(s). If more time is needed to investigate the claim than the twenty-one days allow, the insurer shall notify the claimant within the twenty-one day period, and provide an explanation of the need for more time. If an extension of time is needed, the insurer has a continuing obligation to notify the claimant in writing, at least every forty-five days of the status of the investigation and the continued time for the investigation.

If the form and execution of a proof of loss is material to an insurer, the insurer shall immediately provide the claimant with the specific documents and specific instructions so the claimant can submit the claim. An insurer shall not otherwise deny a claim solely on the basis the proof of loss is not on the insurer's usual form.

If an insurer reasonably believes, based upon information obtained and documented within the claim file, that a claimant has fraudulently caused or contributed to the loss as represented by a properly executed and documented proof of loss, such information shall be presented to the fraud division of the department within sixty days of receipt of the proof of loss. Any person making such report shall be afforded such immunity and the information submitted will be confidential as provided by sections 3901.44 and 3999.31 of the Revised Code.

(2) No insurer shall deny a claim on the grounds of a specific policy provision, condition or exclusion unless reference to such provision, condition, or exclusion is included in the denial. The claim file of the insurer shall contain documentation of the denial in accordance with paragraph (D) of this rule.

(3) Except as otherwise provided by policy provisions, an insurer shall settle first party claims upon request by the insured with no consideration given to whether the responsibility for payment should be assumed by others.

(4) No insurer shall require an insured to submit to a polygraph examination unless authorized under the applicable insurance contract.

(5) Notice shall be given to claimants at least sixty days, before the expiration of any statute of limitation or contractual limit, where the insurer has not been advised that the claimant is represented by legal counsel.

(6) An insurer shall tender payment to a first party claimant no later than ten days after acceptance of a claim if the amount of the claim is determined and is not in dispute, unless the settlement involves a structured settlement, action by a probate court, or other extraordinary circumstances as documented in the claim file.

(7) If a claim involves a non-negligent party's property loss and multiple liability insurers, the multiple liability insurers shall adjust the property loss within a reasonable time and pay the non-negligent party's loss in equal shares. After payment, the multiple liability insurers may then pursue available remedies to resolve the question of responsibility for the non-negligent party's loss.

(8) If a claim involves multiple coverages under any policy, no insurer shall withhold payment under any such coverage when the payment is known, the payment is not in dispute, and the payment would extinguish the insurer's liability under that coverage. No insurer shall withhold such payment for the purpose of forcing settlement on all other coverage to effect a single payment.

(9) An insurer must document the application of comparative negligence to any claim settlement. Such information shall be fully disclosed to the claimant upon the claimant's written request. An insurer shall not use pattern settlements as set forth in division (P) of section 3901.21 of the Revised Code.

(10) An insurer shall not use settlement practices that result in compelling first party claimants to litigate by offering substantially less than the amounts claimed compared to the amount ultimately recovered in actions brought by such claimants.

(H) Standards for prompt, fair and equitable settlements of automobile insurance claims

(1) When partial losses will be settled on the basis of a written estimate prepared by or for an insurer, the insurer shall supply the claimant a copy of the estimate upon which the proposed settlement is based. If the claimant subsequently claims that necessary repairs will exceed the written estimate, the insurer shall pay the difference between the written estimate and a higher estimate obtained by the claimant or promptly provide the claimant with the name of at least one repair shop that will make the repairs for the amount of the written estimate. If the insurer provides the name of only one repair shop, it shall ensure that the repairs are performed in a workmanlike manner. The insurer shall maintain documentation of all communications with the claimant pursuant to this paragraph.

(2) If an insurer reduces a claim amount because of betterment, depreciation or comparative negligence, it shall maintain all information pertaining to the reduction in the claim file. Such deductions shall be itemized and specified on the written estimate as to dollar amount and shall be appropriate for the amount of deductions.

(3) An insurer may reduce a claim amount because of betterment deductions only if the deductions reflect a measurable decrease in market value due to the poorer condition of, or prior damage to, the vehicle; or reflects the general overall condition of the vehicle, considering its age; or the wear and tear or rust, and/or; missing parts, limited to no more of a deduction than the replacement costs of part or parts.

- (4) When partial losses will be settled on the basis of a written estimate prepared by or for an insurer, the estimate must clearly indicate the use of the parts in compliance with section 1345.81 of the Revised Code. When "like kind and quality" parts are expected to be used in the repair, the estimate shall clearly indicate the location of the licensed salvage dealer where the "like kind and quality" parts are to be obtained.
- (5) An insurer which elects to repair and designates a specific repair shop for automobile repairs shall cause the damaged automobile to be restored to its condition prior to the loss. The insurer shall assess no additional cost against the claimant other than as stated in the policy, and the repairs should be effected within a reasonable period of time.
- (6) In settlement of claimants' automobile total losses on the basis of actual cash value or replacement of the automobile with another vehicle of like kind and quality, an insurer which elects to offer a replacement automobile shall:
- (a) Provide an automobile by the same manufacturer, of the same or newer year, of similar body style, with similar options and mileage as the claimant's vehicle and in as good or better overall condition than the first party automobile prior to loss;
 - (b) Ensure that the automobile is available for inspection within a reasonable distance of the claimant's residence;
 - (c) Pay all applicable taxes, license fees, and other fees incident to transfer of evidence of ownership of the automobile at no cost to claimant other than any deductible provided in the policy; and
 - (d) Document the offer of the replacement automobile and any rejection of the offer in the claim file.
- (7) In settlement of claimants' automobile total losses on the basis of actual cash value or replacement of the automobile with another of like kind and quality, an insurer which elects to offer a cash settlement to claimant, shall base the offer upon the actual cost to purchase a comparable automobile less any applicable deductible amount contained in the policy, and/or deduction for betterment as contained in paragraph (H)(2) of this rule. The settlement value may be derived from:
- (a) The average cost of two or more comparable automobiles in the local market area if comparable automobiles are or were available to consumers within the last ninety days; or
 - (b) The average cost of two or more comparable automobiles in areas proximate to the local market area, including the closest in-state or out-of-state major metropolitan areas. If comparable automobiles are or were available to consumers within the last ninety days when comparable automobiles are not available pursuant to paragraph (H)(7)(a) of this rule; or
 - (c) The average of two or more quotations obtained by the insurer from two or more licensed dealers located within the local market area if comparable automobiles are not available pursuant to paragraphs (H)(7)(a) and (H)(7)(b) of this rule; or
 - (d) The cost as determined from a generally recognized used motor vehicle industry source such as:
 - (i) An electronic database if the pertinent portions of the valuation documents generated by the database are provided by the insurer to the claimant upon request; or;
 - (ii) A guidebook that is generally available to the general public if the insurer identifies the guidebook used as the basis for the cost to the claimant upon request; and
 - (iii) to which appropriate adjustments for condition, mileage and major options are made and documented in the claim file.

(e) Any method or source chosen as specified in paragraph (H)(7)(d) of this rule shall be used consistently over a period of time by the insurer.

(f) If within thirty days of receipt by the claimant of a cash settlement for the total loss of an automobile, the claimant purchases a replacement automobile, the insurer shall reimburse the claimant for the applicable sales taxes incurred on account of the claimant's purchase of the automobile, but not to exceed the amount that would have been payable by the claimant for sales taxes on the purchase of an automobile with a market value equal to the amount of the cash settlement. If the claimant purchase an automobile with a market value less than the amount of the cash settlement, the insurer shall reimburse only the actual amount of the applicable sales taxes on the purchased automobile. If the claimant cannot substantiate such purchase and the payment of such sales taxes by submission to the insurer of appropriate documentation within thirty-three days after receipt of the cash settlement, the insurer shall not be required to reimburse the claimant for such sales taxes. In lieu of reimbursement, the insurer may pay directly the applicable sales taxes to the claimant at the time of the cash settlement.

An insurer that settles a total loss on a cash settlement basis must maintain in the claim file the documentation used to determine the loss. Such information shall be provided to the first party claimant upon request. An insurer shall notify the first party claimant of any rights to renegotiate the settlement if a comparable vehicle is not available for purchase within thirty-five days of receipt of the settlement.

When an insurer elects to offer a replacement vehicle available to the claimant, the insurer shall provide all the details where such vehicle is available including the vehicle identification number.

(g) An insurer that settles a total loss claim shall provide written notice to the claimant of the right to reimbursement of applicable sales tax as specified in paragraph (H)(7)(f) of this rule. The notice shall be issued to the claimant simultaneously with the conveyance of the settlement check to the claimant. If an insurer elects to pay the applicable sales taxes directly to the claimant at the time of the cash settlement in lieu of reimbursement as provided in paragraph (H)(7)(f) of this rule, the insurer is not required to provide written notice of the claimant's right to sales tax reimbursement.

(8) An insurer shall not require a claimant to travel an unreasonable distance to inspect a replacement automobile, to obtain a repair estimate, nor to have the automobile repaired at a specific repair shop.

(9) An insurer shall provide notice to a claimant prior to termination of payment for automobile storage charges. The insurer shall document all actions taken pursuant to this paragraph in accordance with paragraph (D) of this rule.

(10) An insurer shall include the first party claimant's deductible, if any, in subrogation demands. The insurer shall share any subrogations recovery received on a proportionate basis with the first party claimant, unless the first party claimant's deductible has been paid in advance or recovered. The insurer shall not deduct expenses from this amount except that an outside attorney or collection agency retained to collect such recovery may be paid a pro rata share of his expenses for collecting this amount.

(I) Standards for prompt, fair and equitable settlement of claims under fire and extended coverage insurance policies

(1) If a fire and extended coverage insurance policy provides for the adjustment and settlement of first party losses based on replacement cost, the following shall apply:

(a) When a loss requires replacement of an item or part, any consequential physical damages incurred in making such repair or replacement not otherwise excluded by the policy, shall be included in the loss.

(b) When an interior or exterior loss requires replacement of an item and the replaced item does not match the quality, color or size of the item suffering the loss, the insurer shall replace as much of the item as to result in a reasonably comparable appearance.

(c) When an insurer settles a loss that results in the insured paying a portion of the repair or replacement as betterment, the insurer shall maintain documentation of the basis for computing the betterment charge, and the insured's agreement to such charge prior to incurring the expense of the repair or replacement.

(2) If a fire and extended coverage insurance policy provides for the adjustment and settlement of losses on an actual cash value basis the following shall apply:

(a) The insurer shall determine actual cash value by determining the replacement cost of property at the time of loss, including sales tax, less any depreciation. Upon the insured's request, the insurer shall provide documentation detailing all depreciation deductions.

(b) If the insured's interest is limited because his property has nominal or no economic value, or a value disproportionate to replacement cost less depreciation, the insurer is not required to comply with paragraph (I)(2)(a) of this rule regarding the determination of actual cash value. However, the insurer shall provide upon the insured's request, a written explanation of the basis for limiting the amount of recovery along with the amount payable under the policy.

(J) Severability

If any provision of this rule or the application of this rule is held invalid, such invalidity shall not affect any other provision or application of the rule which can be given effect without the invalid provision or application and to this end, the provisions of this rule are declared to be severable.

(K) Applicability of rule 3901-1-07 of the Administrative Code

If any provisions of any section of this rule conflicts with any of the provisions contained in rule 3901-1-07 of the Administrative Code, the provisions of this rule will apply.

(L) Imposition of fine

Pursuant to section 3901.22 of the Revised Code and a consent agreement with the insurer, the superintendent may recover the cost of an investigation under this rule and/or a penalty from the insurer.

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