

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-0535

**MICHAEL E. CULLEN, et al.,
Plaintiff-Appellees,**

-vs-

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant-Appellant.**

**ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO, CASE NO. 95925**

**MERIT BRIEF OF
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INTRODUCTION

Defendant-Appellant, State Farm Mutual Insurance Company ("State Farm") has displayed a ceaseless penchant for misdirection throughout the course of this nearly eight-year old class action lawsuit. As both of the lower courts recognized, this lawsuit involves far more than just "1/10th of an inch wide" crack in a windshield. Plaintiff-Appellee, Michael E. Cullen, is seeking, on behalf of himself and similarly situated policyholders, to recover insurance benefits that should have been paid during the relevant period once any windshield damage claim was approved by the insurer. At least half a dozen senior State Farm managers, who were responsible for organizing and overseeing the State Farm Glass program, have confirmed that the policyholders were entitled to receive payment for the cash value of a windshield replacement, less the applicable deductible. This entitlement has been described as the "cash-out" option. Rather than tendering that sum, which would have ranged between \$300 and \$500 depending upon the make of the vehicle, State Farm only paid for the chips and cracks to be "repaired" with a chemical compound at a cost of about \$30.

State Farm had formulated a national campaign that was designed to pressure the insureds into accepting the cheap, quick-fix windshield repairs, instead of cash payment on the claim. Every National Claims Manager has corroborated that the scripted conversations and claims handling that was conducted by State Farm's administrative agent, Lynx Services ("Lynx"), was improper and violative of the insurer's internal rules and standards. According to company statistics, a one percent increase in repairs resulted in a savings of \$5,000,000.00, which otherwise would have been paid to the claimants. In order to induce acceptance of the glass patches, State Farm even waived the insureds' deductibles. The insurer still came out far ahead.

During carefully-scripted discussions with the customer service representatives (CSRs), none of the State Farm policyholders were advised by Lynx of the cash-out

option as required by Ohio Department of Insurance regulations and the fiduciary obligation of full disclosure. Indeed, the insurer now insists – incorrectly and contrary to their own managers – that the policies do not provide policyholders with the choice of receiving cash payment. *Merit Brief of Appellant State Farm Mutual Automobile Insurance Company (“Defendant’s Brief”), pp. 20-21.* Nor were the insureds warned of the studies and reports indicating that the glass patching process produced blemished windshields that would deteriorate over time.

Throughout the proceedings below, State Farm adhered to a simple strategy designed to thwart any recovery of the cash-out payments. Thousands of pages of highly-probative internal records were withheld during discovery, while the insurer simultaneously demanded that Judge David T. Matia grant summary judgment as a result of the supposed lack of proof of any policy violations. When that effort failed, the Motion for Class Certification that had been submitted early in the proceedings was opposed on largely the same grounds. As depositions were conducted, it became apparent that damaging records had never been produced. Not just one, but two, Motions to Compel were eventually granted by the trial court. Sanctions were even imposed against State Farm, but the discovery abuses continued.

Although never mentioned in the State Farm’s Merit Brief, Judge Matia devoted roughly a ten hour day to conducting an oral hearing upon the Motion for Class Certification. Portions of key depositions were presented through videotape and the parties were allowed to argue their respective positions at length. Following these presentations, the court issued a comprehensive order detailing the grounds that justified the entry of class certification in accordance with Civ.R. 23(B)(2) & (3). As a majority of the Eighth District Court of Appeals justifiably found, the trial judge properly exercised his discretion in determining that State Farm’s positions lacked credence and a manageable class could indeed be established, based upon the internal

information that had been grudgingly divulged to that point.

STATEMENT OF THE CASE

Defendant's Merit Brief never mentions the procedural history of this nearly eight-year old class action lawsuit, which is undoubtedly no accident. The events that have transpired thoroughly undermine the insurer's seemingly endless criticisms of the trial judge's and appellate court's rulings. Far from engaging in just a perfunctory examination of the issues as has been represented, a thorough and even-handed review was performed both upon the merits of the claims for relief and the appropriateness of a class-wide recovery, before certification was granted and affirmed.

I. THE SUMMARY JUDGMENT PROCEEDINGS.

Plaintiff's Class Action Complaint was filed on February 18, 2005 and raised separate claims for Breach of Contract (Count I), Bad Faith/Breach of Fiduciary Duties (Count II), and Declaratory Relief (Count III). *R. 1.* In accordance with Civ.R. 23(C)(1), Plaintiff submitted his Motion for Class Certification on August 23, 2005. *R. 10.* He requested an order certifying a class of Ohio residents who had submitted property damage claims to State Farm for cracked, chipped, or damaged windshields and were provided with only a chemical patch, instead of an indemnity payment for (1) the actual cash value of the windshield or (2) the full cost of windshield replacement, less the deductible.

During a Scheduling Conference that was held on July 18, 2005, State Farm's counsel requested that the court postpone ruling upon the application for class certification so that a motion for summary judgment could be filed. The insurer confidently assured the court four days later that "summary judgment will likely bring this case to an early end, foreclosing years of litigation ***." *R. 7. Memorandum Regarding Timing of Consideration of Dispositive Motion and Class Certification dated July 18, 2005, p. 3.* An Order was issued on August 26, 2005, granting State

Farm's request, over Plaintiff's opposition. *R. 11.*

It took State Farm over a year to prepare its Motion for Summary Judgment, which was finally filed on September 20, 2006 *R. 25.* ("Defendant's Summary Judgment Motion"). Relying heavily upon the affidavit of a State Farm Underwriting Section Manager and the testimony of a LYNX Vice President of Operations, the insurer insisted that full disclosure had been made to each of the claimants and no violations of the policy requirements could have possibly occurred. Plaintiff submitted his Memorandum in Opposition on November 6, 2006 *R. 35.* ("Plaintiff's Summary Judgment Memorandum"), which was supported by exhibits and deposition transcripts. The compelling evidence confirmed that the insurer and its third-party administrator, LYNX, had been consistently discouraging the insureds from exercising their full benefit options and had been pressuring them to accept the cheap, quick-fix repairs, once their windshield damage claims were approved.

Once Plaintiff's Memorandum had been submitted, State Farm was granted extensions totaling almost three months in which to conduct additional discovery. *See Journal Entries dated November 22, 2006, December 26, 2006, and January 22, 2007.* The insurer's Reply Brief was finally tendered on February 7, 2007, which was supported with additional evidentiary materials.

In a ruling dated March 29, 2007, the trial judge denied the demand for summary judgment *in toto.* *R. 59.* The parties then proceeded with the class certification phase of the lawsuit.

II. THE TWO MOTIONS TO COMPEL.

Early in the litigation, on July 5, 2005, Plaintiff had submitted his First Set of Interrogatories and First Request for Production of Documents. Rudimentary information was sought with regard to State Farm's glass claims operations and practices during the relevant period. The insurer did not respond until September 23,

2005. *Exhibits B & C, appended to R. 120, Plaintiff's Second Motion for Discovery Sanctions dated February 18, 2010 ("Plaintiff's Second Motion for Sanctions").* Virtually every request was met with a lengthy boilerplate objection, most of which complained that the inquiry was "overly broad and unduly burdensome." *Id.*

Plaintiff's counsel was unable to amicably resolve the objections with defense counsel and proceeded with his first Motion to Compel Discovery, which was granted in an Entry, dated April 26, 2006. *R. 120, Plaintiff's Second Motion for Sanctions, Exhibit E.* All of the objections to the straightforward discovery requests were thus overruled.

After summary judgment was denied and class discovery was allowed to proceed (see Journal Entry dated April 16, 2007), Plaintiff served his Second Request for Production of Documents and Second Set of Interrogatories on June 4, 2007. *R. 120, Plaintiff's Second Motion for Sanctions, Exhibits G & H.* Even though the Class Action Complaint raised serious allegations of wrongdoing involving potentially tens of thousands of State Farm's insureds across Ohio, all that the insurer was willing to produce was slightly over 1,800 pages of somewhat duplicative documents that fit easily into a standard 9.5" x 11" stationery box.

When Plaintiff's efforts to resolve the new impasse proved to be fruitless, he was forced to file his Second Motion to Compel Discovery on November 19, 2007. *R. 63.* In response, the insurer refused to withdraw a single objection or produce any further materials. Instead, the Brief in Opposition/Motion to Strike was devoted to lambasting Plaintiff for having the temerity to insinuate that there could possibly be anything left for State Farm to turn over. *R. 65.* Judge Matia was assured that: "In response to that first set of discovery, defendant produced every document having anything to do with Plaintiff or his insurance claim." *R. 65, Defendant's Brief in Opposition and Motion to Strike dated December 6, 2007, p. 6.*

In a Journal Entry dated April 25, 2008, the trial judge nevertheless granted the

Second Motion to Compel in its entirety. *R. 70*. Despite the prior promises that “every document having anything to do with Plaintiff or his insurance claim” had already been divulged, State Farm proceeded to produce thousands of pages of new records in the following weeks. By all outward appearances, the insurer’s responses were then, at long last, complete.

III. THE FIRST MOTION FOR SANCTIONS.

Throughout the remainder of 2008, numerous depositions were conducted in Illinois and Virginia. Questioning of various officials and managers revealed that a considerable number of documents that had previously been requested years earlier still had not been produced by State Farm. Defense counsel nevertheless insisted that this could not possibly be the case. During the videotaped deposition of Senior Glass Manager David Williams (“Williams”), State Farm’s attorney represented no less than four times that the insurer’s responses were complete, and that nothing was being withheld. *R. 120, Plaintiff’s Second Motion for Sanctions, Exhibit N, pp. 154-158*.

Between February 26, 2009, and March 20, 2009, approximately 11,802 more records were released to Plaintiff’s counsel. *R. 120, Plaintiff’s Second Motion for Discovery Sanctions, p. 10*. Some of these documents were created in 1996 and had been sitting in State Farm’s files for roughly thirteen years. *Id.* They included e-mails of key managers within Glass Claim Central, spreadsheets bearing important Ohio glass repair numbers, and a recording involving William Hardt (“Hardt”), then Glass Central Claim Manager, in a 1997 video of a mock Glass Central windshield damage claim. *Id.*

Since it was evident that nearly 14,000 documents and items had been concealed for years, despite two Journal Entries overruling all objections and ordering their production, Plaintiff filed his First Motion for Discovery Sanctions on May 12, 2009. *R. 91*. He observed that roughly a dozen depositions had been conducted in distant states, without the benefit of these materials. State Farm’s Memorandum in Opposition

followed on June 2, 2009. *R. 94*. As in the past, the court was advised that: "State Farm engaged in a good faith, non-negligent, and extensive efforts to comply with the Court's order and has now fully complied." *Id.*, p. 34 (emphasis added).

In a Journal Entry dated July 27, 2009, Judge Matia granted discovery sanctions against State Farm. *R. 103*. While the court declined to impose some of the more onerous penalties that been proposed by Plaintiff, State Farm was ordered to pay the expenses and attorney fees that had been generated by its abusive discovery tactics. *Id.* The exact amount due remains undetermined. Plaintiff then proceeded to re-open discovery and re-depose witnesses based upon the newly-disclosed materials.

IV. THE CONTINUED CONCEALMENT OF REQUESTED DISCOVERY.

As set forth in the extended scheduling order, discovery regarding class certification closed on October 30, 2009. *R. 103*. Plaintiff's opportunity to amend their complaint expired on November 6, 2009. *Id.*

Roughly a month later, Plaintiff's counsel received a stack of documents in excess of 700 pages on December 7 and 9, 2009. *See Exhibits U & W appended to R. 120, Plaintiff's Second Motion for Sanctions*. Included with this belated submission were several CD's containing countless electronic files. *Id.* Sample pages revealed that State Farm had been keeping careful track in 2002 of "Repair Versus Replace" benefit payouts by agent. *Id.*, *Exhibit U*, p. *CULLENM00074813PROD*.¹ The "POTENTIAL SAVINGS" had been computed to the dollar for each agent. *Id.* (emphasis original).

On December 21, 2009, which was one day before Plaintiff was required to submit an important supplemental brief in support of class certification, State Farm mailed 659 pages of previously undisclosed records to his counsel. *R. 120, Plaintiff's Second Motion for Sanctions, Exhibit X*. Included within these extremely probative

¹ The page numbers which begin with "CULLENM" that appear in the lower left hand corner of the exhibits were added to them by State Farm. Defense counsel's cover letters (Exhibits U through AA, appended to Plaintiff's Second Motion for Sanctions) indicate through these page numbers which documents were produced at which time.

materials was a memorandum that explained how State Farm representatives were to respond to “**Failed Repairs.**” *Id.*, *Exhibit U*, p. *CULLENM00075439PROD* (emphasis in original). This internal document confirmed that the insurer had fully appreciated that the quick-fix chemical patches were prone to deterioration.

Exactly one week later, on December 28, 2009, defense counsel produced 588 pages of additional materials. *R. 120, Plaintiff's Second Motion for Sanctions, Exhibit Y*. Buried in these long sought records was a copy of an e-mail message that had been issued by former Department Head, Wendy S. Rogers (“Rogers”), on October 19, 2005. *Id.*, *Exhibit Y*, p. *CULLENM00075950PROD*. The Director of Glass Claims Services had detailed the highlights of the “Auto Glass Replacement Safety Standards Conference” she had attended in Las Vegas. *Id.* She acknowledged that: “The issues of safety with replacement and repair are long overdue.” *Id.* (emphasis added). Plaintiff was successfully precluded from questioning her about these windshield safety issues during her deposition of December 11, 2009, which was just seventeen days before the suspiciously-timed disclosure of the October 2005 e-mail message. *Id.*, *Exhibit CC*.

At that same time, State Farm also produced a 43-page outline of the presentation that Manager of Glass Claims Services, Robert Bischoff (“Bischoff”), had provided to the Auto Glass Replacement Safety Standards Conference in October 2005. *R. 120, Plaintiff's Second Motion for Sanctions, Exhibit Y, pp. CULLENM00075953PROD - CULLENM00075996PROD*. Bischoff had been deposed on July 14, 2006, and thus was never required to answer any questions about the representations and acknowledgements set forth in the outline. This was also true with regard to an e-mail message he had issued on November 17, 2004, in which he addressed the cost savings that would be realized by the insurer if the policy was changed to waive deductibles for windshield repairs. *Id.*, p. *CULLENM00076042PROD*. The high-level manager also could not be asked about the

e-mail message he had issued on November 30, 2004, which disclosed a number of figures that supported his belief that encouraging windshield repairs would furnish a substantial financial benefit to State Farm. *Id.*, p. CULLENM00076045PROD.

As if that were not enough, 256 pages of new materials were released to Plaintiff's counsel on January 11 and 12, 2010, once again without any suggestion that some valid reason existed for their delayed production. *R. 120, Plaintiff's Second Motion for Sanctions, Exhibits Z & AA.* One of the pages consisted of a portion of the LYNX Participant Guide that had never been disclosed previously. *Id.*, p. CULLENM00076706PROD. The document furnished more details about the Offer and Acceptance (O&A) program that would have prompted additional questioning during depositions. *Id.*

As a result of State Farm's long overdue disclosure of thousands of pages of internal records, Plaintiff filed his Second Motion for Discovery Sanctions on February 18, 2010. *R. 120.* He argued *inter alia* that his "ability to establish the merits of his claims and justify class certification [had] been impaired by the insurer's penchant for releasing relevant records only after depositions have been conducted and critical filings have been submitted." *Id.*, p. 1. After securing a lengthy extension of time, State Farm's Memorandum in Opposition was finally submitted on April 30, 2010. *R. 143.*

V. THE CLASS CERTIFICATION PROCEEDINGS.

While the Second Motion for Discovery Sanctions was pending, Judge Matia conducted a nearly ten-hour hearing upon the nearly five-year old Motion for Class Certification on April 14, 2010. Significantly for purposes of this appeal, at the outset State Farm's counsel announced that neither "numerosity" nor "commonality" were being challenged by the insurer. *Transcript of Hearing dated April 14, 2010, p.8.* The parties then proceeded to present deposition testimony and numerous exhibits in support of their positions on the remaining elements for certification. *Id.*, pp. 9-249. At

the conclusion of the proceedings, the trial judge directed both parties to submit proposed Findings of Fact and Conclusions of Law in accordance with Civ. R. 52. *See R. 141, Journal Entry, dated April 21, 2010.*

In a ruling dated September 29, 2010, the Common Pleas Judge granted the Motion for Class Certification. *Defendant's Brief, Appendix, Exhibit E.* A comprehensive explanation was furnished of the court's resolution of the disputed issues of fact and a lengthy discussion of the controlling legal standards followed. *Id.*, pp. 2-8. Each of the essential elements for class certification was dutifully analyzed and a concise class definition was adopted. *Id.*, p. 9-13.

VI. STATE FARM'S APPEAL

State Farm responded with a Notice of Appeal on October 27, 2010. *R. 151.* Review was sought only of the class certification order, and no challenges were raised to the denial of summary judgment or the discovery orders. At this point in time, a ruling has not been rendered upon the pending Second Motion for Discovery Sanctions. *R. 120.* According to correspondences that have been received from defense counsel, thousands of additional pages of records and messages will be produced in response to the 2005 and 2007 discovery requests once the appeal has been concluded.

On December 22, 2011, the Eighth District upheld the most significant aspects of the class certification order. *Cullen v. State Farm Mut. Auto. Ins. Co.*, ___ Ohio App.3d ___, 2011-Ohio-6621, 970 N.E.2d 1043 (8th Dist. 2011). The majority modified the ruling only to (1) eliminate findings upon the merits of the claims and (2) narrow the class to exclude claimants whose windshields were replaced after a repair. *Id.*, ¶56. The case was "remanded to the trial court to redefine the class." *Id.* Judge Melody J. Stewart dissented on the grounds that commonality purportedly had not been established as required by Civ. R. 23(A)(2) and State Farm had successfully demonstrated that a class would not be manageable. *Id.*, ¶59-70. No explanation was

offered for why she was reviving the commonality argument that State Farm had voluntarily waived at the beginning of the hearing. *Id.*

State Farm responded with an Application for Reconsideration and Consideration *En Banc* that challenged virtually every significant aspect of the majority's ruling. After Plaintiff submitted his Memorandum in Opposition, the Eighth District denied the request on February 16, 2012. *Defendant's Brief, Apx. Exhibit C.* Not one of the twelve members of the appellate court accepted any of the insurer's positions, including Judge Stewart. *Id.*

State Farm is now seeking further review of the trial court's discretionary ruling in the Supreme Court of Ohio.

STATEMENT OF THE FACTS

State Farm continues to predicate its "Statement of Facts" largely upon the affidavits that were prepared by defense counsel and executed by loyal company representatives. Neither of the courts below was obligated to blindly accept these unlikely assertions, few of which were substantiated with credible records or data. The inescapable reality is that several significant factual issues remain in dispute and can be resolved most expediently and efficiently on a class-wide basis.

I. THE STANDARDIZED POLICY BENEFITS

In this action, Plaintiff is seeking to enforce the terms of State Farm's standardized Ohio insuring agreement in connection with every qualified windshield damage claim that the insurer approved for coverage during the relevant period. In plain and unmistakable terms, every policy that has been introduced in these proceedings furnishes indemnity coverage. In each instance, the insured was entitled to payment for the covered loss. Section IV (Physical Damage Coverage) of the uniform contract provided with respect to Comprehensive Coverage (Coverage D) that:

1. Loss to Your Car. We will pay for **loss** to **your car** EXCEPT **LOSS** CAUSED BY **COLLISION** but only for the

amount of each such *loss* in excess of the deductible amount, if any. *** [underlining added, remaining emphasis original].

Plaintiff's Supp. 00017.² Inadvertent (accidental) windshield damage was included within the Physical Damage Coverage under Section IV. *R. 31 & 79, Deposition of Brian Karol, taken June 6, 2006, pp. 32-33*. Significantly, for purposes of the instant action, State Farm insureds were entitled to the cost to have the entire windshield replaced, less the deductible, when any covered damage was sustained to the glass. *R. 113, Plaintiff's Supplemental Motion for Class Certification, Exhibit G, p. 110; Id., Exhibit I, pp. 103-104*.

Showing little interest in the unequivocal “[w]e will pay” commitment, State Farm maintains that the “Loss Settlement” provision “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).” *Defendant’s Brief, p. 20 (citations omitted)*. During the previous effort to secure Supreme Court review of its appeal, State Farm had adopted exactly the opposite position:

*** Under the program, it is the policyholder’s choice whether to have a damaged windshield repaired or replaced, and policyholders are free to choose any glass shop, participating or non-participating. *** [emphasis added].

Defendant-Appellant’s Memorandum in Support of Jurisdiction, p. 5. Identical representations had been made to the Eighth District. *Defendant’s Court of Appeals Brief, pp. 5-6*. Rather obviously, the insurer is willing to take whatever position is necessary to subvert a class-wide recovery, no matter how contradictory.

What separates State Farm’s standard-form motor vehicle insurance policy from

² The copy of the State Farm Car Policy that was issued to the Named Plaintiff, Michael Cullen, and included in the Supplement of Plaintiff-Appellee (“Plaintiff’s Supp.”) that is being filed contemporaneously with this Merit Brief was originally included as Exhibit A to R. 25, Appendix of Evidentiary Materials in Support of Defendant’s Motion for Summary Judgment dated September 20, 2006 (“Defendant’s Summary Judgment Appendix”).

those that are offered by its vocal army of *amici* is that there is actually no provision that requires a policyholder to accept a repair instead of a check for replacement value. It was indeed the “policyholder’s choice[.]” *Defendant-Appellant’s Memorandum in Support of Jurisdiction*, p. 5. The “Settlement of Loss” provision that is being touted applies provides merely that:

We have the right to settle a **loss** with **you** or the owner of the property in one of the following ways:

1. pay the agreed upon actual cash value of the property at the time of the **loss** in exchange for the damaged property. If the owner and we cannot agree on the actual cash value, either party may demand an appraisal as described below. If the owner keeps the damaged property, we will deduct its value after the **loss** from our payment. The damaged property cannot be abandoned to up;
2. pay to:
 - a. repair the damaged property or part, or
 - b. replace the property or part.
3. return the stolen property and pay for any damage due to the theft. *** [underlining added, bold italics original].

Plaintiff’s Supp., p. 00020. The parties have long been in agreement that subsection 1 has no application to the class as defined, since “actual cash value” is relevant only when the vehicle is a total loss. *Defendant’s Brief*, p. 8. Subsection 3 deals with “theft[s]” and is also immaterial.

That just leaves subsection 2 of the “Settlement of Loss” clause which plainly indicates that the claim may be “settle[d]” with the policyholder through a payment for the cost of either repair or replacement. *Plaintiff’s Supp.*, p. 00020. Nowhere does the policy afford a “unilateral right” to the insurer. To the contrary, the commitment “to settle a **loss** with **you**” conveys that the right is mutual. *Id.*

State Farm’s “unilateral right” interpretation is completely inconsistent with the “Limit of Liability” clause that applies to Comprehensive Coverage and provides 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. The cost of repair or replacement does not include any reduction in the value of the property after it has been repaired, as compared to its value before it was damaged. ***

Plaintiff's Supp., p. 00020. Again, "actual cash value" is irrelevant to windshield damage claims, which means that "the cost of repair or replacement" will be the limit of liability for the class. The standardized policy further provides that:

The cost of repair or replacement is based upon one of the following:

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. The prevailing competitive price means prices charged by a majority of the repair market in the area where the **car** is to be repaired as determined by a survey made by us. If **you** ask, we will identify some facilities that will perform the repairs at the prevailing competitive price. We will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition. Such parts may include either parts furnished by the vehicle's manufacturer or parts from other sources including non-original equipment manufacturers. [underlining added].

Id. Subsections 2 and 3 will apply only when a "competitive bid" or an "estimate" had been prepared. In the latter situation, the policyholder will be entitled to a restoration to "pre-loss condition." *Id.* But, in the absence of a competitive bid or written estimate, subsection 1 controls. The "cost of repair or replacement" must be established by agreement, and not unilaterally dictated by the insurer. *Id.*

Perhaps the most striking feature of State Farm's Physical Damage Coverages is that the obligation to "pay" for the loss is repeatedly emphasized. *Plaintiff's Supp.*, p.

00019-23. Despite defense counsel's fervent protests to the contrary, cash payments were required for all claims. While many motor vehicles policies contain a provision allowing the insurer to arrange for repairs instead, at its own election, the applicable State Farm insuring agreement does not.

II. THE CASH-OUT OPTION

During their depositions, State Farm's officers and agents all uniformly agreed that Section IV's use of the word "pay" meant precisely what one would have thought it meant. Director Rogers, who had been employed by State Farm for 36 years and oversaw the Glass Claims Services Department, acknowledged that the company was not "in the repair business[.]" *R. 125, Plaintiff's Reply Class Cert., Exhibit P, p. 110*. Former National Glass Manager Williams confirmed that "the insured is entitled to get the check for the cost of repair, and they have no obligation to perform those repairs[.]" *Id., Exhibit Q, pp. 56-57 & 114*. State Farm Agent Brian Karol ("Karol") testified that:

Q. Well, you recognize as an agent that if my car is damaged and I turn in a claim, I don't have to have it repaired?

A. Yes.

Q. It's, State Farm has a duty under their policy to indemnify, not a duty to repair; correct?

A. That's my understanding.

Q. And you've been selling these products 21-and-a-half years. You've got a pretty good understanding, right?

A. Yes.

Q. State Farm's obligation isn't to repair my car, it's to pay me for the cost of repairing my car, correct?

A. Yes. [emphasis added].

R. 31 & 79, Brian Karol Deposition, p. 37; Plaintiff's Supp., 00048-49.

With respect to damaged windshields in particular, National Glass Manager Robert Bischoff ("Bischoff") has acknowledged that a policyholder could elect to receive

a check for the replacement cost less the deductible – which would average \$342.00. *R. 113. Plaintiff's Supp. To Motion for Class Cert., Exhibit B, p. 91.* As a matter of simple mathematics, it made no sense for any insured to ever forego cash-out payment of the replacement cost. Electing for the check would result on average in a payment of \$342.00 after the deductible was applied, and a portion of that could be spent on the repair if the insured so desired.³ *Id., Exhibit I, p. 104.* Agent Karol acknowledged the following during his deposition:

Q. Under my example, though, for instance, if you have a \$500 windshield and a \$250 deductible, the insured is much better off submitting the loss and taking a check and having their repair done on their own if they want to, correct?

A. From an economic standpoint?

Q. Yes.

A. Yes.

R. 31 & 79, Brian Karol Depo., Exhibit D, p. 39; Plaintiff's Supp., 00050.

The advantage was even more dramatic for those insureds who had purchased coverage without deductibles, which accounted for approximately fifty-one percent of State Farm's policies from 1991 to 2007. *R. 31 & 70, Brian Karol Depo., Exhibit D, pp. 41-42; Plaintiff's Class Action Hearing, Exhibit 71.* Agent Karol conceded that:

Q. If someone has no deductible, they would be far better off taking a replacement and not a repair, correct, no matter what's the cost of the windshield?

A. Yes.

R. 31 & 79, Brian Karol Depo., Exhibit D, p. 39; Plaintiff's Supp., 00050. As even Manager Bischoff recognized, a policyholder who had purchased a no deductible policy would be entitled to have the windshield replaced (not just "repaired") for free. *R. 113,*

³ To be sure, the insureds would not be receiving some sort of undeserved windfall. Because the chemical filler was incapable of properly restoring the glass, the left-over funds from the State Farm indemnity payment would represent compensation for the inadequate repair effort, which left every windshield visibly blemished, if not scarred.

Plaintiff's Supp. Motion for Class Certification, Exhibit B, p. 138 (emphasis added). It made no sense for such an insured to ever accept a glass patch or chemical filler, when they were entitled to be paid for the value of the windshield. Nevertheless, the Participant Guide warned the CSRs to "refrain" from disclosing this benefit option to the insureds who had paid the additional premiums for no-deductible policies. *Plaintiff's Supp., 00073*.

The end result was that State Farm saved money from the glass patch repairs and conversely the policyholders received less. *R. 113, Plaintiff's Supp. To Motion for Class Cert., Exhibit B, p. 93; Exhibit D, pp. 57-58*. During his deposition, Manager Bischoff conceded that the training guide had specifically instructed (as if it was not obvious already) that State Farm benefitted financially by arranging for LYNX to convince the policyholders accepted repairs. *Id., Exhibit B, p. 93*.

III. THE NATIONWIDE REPAIR CAMPAIGN

Because it was indeed the "policyholder's choice" to opt between payment for a repair or replacement, State Farm devised and implemented a "National Repair Campaign" that was designed to ensure wide-scale acquiescence to the glass patches. The concerted effort would have been unnecessary if the insurer really did possess the "unilateral right" to dictate the selection.

The "Overview" to the Leader's Guide that State Farm approved, instructed the Customer Service Representatives (CSRs) as follows:

*** The more repairs that LYNX dispatches, the greater cost savings to State Farm. **Be proactive in qualifying windshield damage to ensure that each and every opportunity to qualify damage is pursued to its fullest extent.** [underlining added, bold original].

Plaintiff's Supp., 00070. Rather than being encouraged just to provide critical information, the CSRs were exhorted to:

Sell! Sell! Sell!

Id., 00072 (emphasis in original). They were even furnished with “**Selling Tips**,” such as varying their voice tone and stressing “key points” while talking to the policyholders. *Id.*, 00076 (emphasis in original). The CSRs were expected to use a “sense of enthusiasm regarding a qualified repair and trying to have the policyholder understand the benefits of a repair.” *R. 113, Plaintiff’s Supplemental Class Certification, Exhibit C, p. 75.* The “sell, sell, sell” directive had been promulgated by State Farm, not LYNX. *Id.*, p. 76.

LYNX Vice President, Peter Cole (“Cole”), explained that the “repair ratios” were important to his company. *R. 113, Plaintiff’s Supp. Class Cert., Exhibit C, pp. 119-120.* A higher ratio “lowers the overall cost of indemnity” to the insurer. *Id.*, p. 120. Not surprisingly Lynx’s objective, based upon State Farm’s instructions, was to maximize the repair ratios. *Id.*, pp. 120-121. The Participant Guide specifically directed that:

Each CSR is required to adhere to the qualifying process and make every effort to keep the “repair ratio” at a high level. Team leaders will receive a daily report on the team’s repair statistics.

Plaintiff’s Supp., 00073.

Even Director Rogers, who was responsible for the program, was highly critical of the State Farm/LYNX efforts to “sell” the repairs:

Q. But in terms of the processing of a claim, it wouldn’t be appropriate for State Farm employees to sell anything, right?

MR. FARRELL: Objection.

A. A State Farm employee should be explaining, in claims should be explaining the benefit of the policy.

Q. And not selling anything, correct?

A. Correct. [emphasis added].

R. 113, Plaintiff’s Supp. Class Cert., Exhibit H, p. 81. Doing anything more than explaining that which the policy offers would be improper in her view. *Id.*, pp. 86-87.

Rogers was not alone. Each National Manager responsible for the glass program found the LYNX script to be highly inappropriate. Manager Williams was in full agreement with Rogers. *Id.*, *Exhibit G*, pp. 108-109. Team Manager Steven Burk ("Burk") also acknowledged that attempting to influence a claimant to accept less in benefits was improper. *Id.*, *Exhibit I*, pp. 50-51. Estimatic Section Manager Anthony N. Ferrara ("Ferrara") understood that knowingly making misrepresentations to claimants violated the Unfair Claims Settlement Practices Act. *Id.*, *Exhibit J*, p. 81. He conceded during his deposition that:

Q. And the script that went out the door and down to LYNX that they were to follow is one that met your approval, correct?

A. Yes, sir.

Q. You expected them to follow it, correct?

A. Yes, sir.

Q. *** Now, you personally knew that it would be inappropriate to tell LYNX to sell the repair, correct? That's - that violates the philosophy you had been trained in, correct?

A. I guess you could say that, yes.

Id., pp. 85-86; *Plaintiff's Supp.*, 00055-56. Not to be left out, State Farm Agent Karol recognized that trying "to talk someone into a choice without disclosing [to] them the full facts" was "misleading" and "inappropriate." *Id.*, *Exhibit D*, p. 19.

Every State Farm manager responsible for the glass program confirmed the inappropriate activities that were being conducted by LYNX at the insurer's directive. The trial court was thus entitled to conclude that a class-wide issue uniformly existed (as one-sided as it was), over whether State Farm had systematically duped thousands of Ohio policyholders into unwittingly foregoing payment of the full replacement cost of the windshield.

Reasonable minds could conclude that the cost of replacing the windshield was the only option actually available to the class members, since the glass patches were incapable of ever “repairing” the damage under any plausible understanding of the term. During the summary judgment proceedings, Plaintiff had submitted the affidavit and reports of Ceramic Engineer Craig Carmody (“Carmody”), who was a longtime member of the American Ceramic Society. *Plaintiff's Supp.*, 00078-99. When he was deposed by defense counsel, he confirmed that a chipped windshield remains permanently damaged, notwithstanding the “repair” efforts. *Plaintiff's Supp.*, 00060-61. It is inevitable that the filler material will ultimately fail at some point. *Id.*, 00058-59. Carmody explained that “you cannot restore a windshield to its original condition by any method other than remelting the glass[.]” *Id.*, 00067.

Plaintiff also presented the affidavit and report of Gary Derian (“Derian”), who is a mechanical engineer with substantial experience in automotive design and testing. *Plaintiff's Consolidated Memo. Opp. to Motions to Exclude Expert Witnesses dated April 20, 2010, Exhibit B*. At the request of Plaintiff’s counsel, he reviewed much of the discovery which had been furnished during this lawsuit, Carmody’s report, and Federal Motor Vehicle Safety Standards. *Id.*, p. 2, *appended hereto*. He concluded that repaired windshields do not possess the same structural strength as the original glass and could potentially violate federal safety standards. *Id.*, pp. 3-4.

These compelling findings and opinions are fully supported by State Farm’s internal records and representatives. According to Glass Manager Bischoff, there will always be a “blemish” left in the glass following the patching process. *Plaintiff's Supp.*, 00035-36. During her deposition, Department Head Rogers acknowledged that a State Farm/LYNX participant guide warned that “a repair will never restore 100 percent of the optical clarity nor the truly invisible.” *Rogers Depo.*, p. 61. Bischoff has confirmed that in January 1994 State Farm received a report that had been prepared by

the National Glass Association (NGA) Windshield Repair Work Group Technical Subcommittee. *Deposition of Bob Bischoff taken July 14, 2006, pp. 96-97 & 99, pertinent portions appended to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment as Exhibit B.* The NGA is a conglomerate of glass companies and Manager Bischoff had attended their conferences and educational programs in the past. *Id., pp. 10-11.* He was aware of "the concerns expressed by the NGA in that report of windshield repairs." *Id., p. 100.* Prior to this lawsuit being filed, he knew of the test results indicating that repaired glass was "not as strong" as the original glass. *Id., p. 101.* The NGA report reflected that:

The test data does not demonstrate that a repaired windshield would be equivalent in performance to the one that was undamaged.

Id., Exhibit B, p. 105.

It was further acknowledged in the Leader's Guide that State Farm had approved for training purposes that:⁴

[Repairs] will never restore 100% of the optical clarity nor be truly invisible. There will always be a "blemish" which looks like a small water spot (in the case of a chip) or a hairline mark (in the case of a crack).

Plaintiff's Appendix to Memorandum in Opposition filed November 6, 2006, Exhibit 3, p. 3. Manager Bischoff appreciated that unless the cracks and chips were "repaired" quickly, they would become contaminated with dirt, salt, and other elements thereby decreasing the likelihood of a successful patch. *Id., Exhibit B, pp. 37-38, 48 & 128-129.*

Manager Bischoff probably overstated the obvious when he described the importance that windshields play in protecting vehicle occupants:

*** The windshield plays an important role, it keeps a passenger from being ejected and from the roof from [sic]

⁴ The Leader's Guide was prepared based upon criteria furnished by State Farm for handling windshield damage claims. *Deposition of Peter Cole taken February 10, 2006, p.72, pertinent portions appended to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment as Exhibit C.*

caving in on the vehicle should it flip over. ***

Id., Exhibit B, p. 47. The windshield “clearly” was critical, in his view, to the vehicle’s “structural integrity.” *Id.*, p. 154.

Concerns over whether a patched windshield adequately protected the occupants had been identified by the NGA and the 1994 report warned that:

Test results demonstrated that moisture which penetrates a defect in laminated glass light and reaches the inner layer can adversely affect the glass inner layer adhesion. This condition could result in excessive fragments dislodging from the glass on the side opposite impact. This raises a concern that a motor vehicle’s driver and their passengers could be subjected to excessive flying pieces of glass should an impact occur on the exterior side of the windshield in the area of the defect. [emphasis added].

Id., Exhibit B, p. 102. Manager Bischoff agreed that excessive flying glass was “definitely” (his own word) a safety concern. *Id.*

On March 9, 1998 State Farm’s research lab produced a report titled “Evaluation of Windshield Long Crack Repair.” *Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment, Exhibit B, pp. 122-123.* As acknowledged by Manager Bischoff, some of the problems identified therein with the “repairs” were also “common with cracks less than six inches.” *Id.*, p. 120. The report observed that:

Repair processes, resins, basic technical knowledge and final repair quality were very inconsistent between the different glass repair companies we met with.

Id., p. 121; Manager Bischoff understood that a glass repairman’s experience and skill was an important factor with regard to the lifespan of the patch. *Id.*, pp. 49 & 107.

Even State Farm’s own expert, Dennis McGarry, Ph. D., P.E., acknowledged the following while reviewing Carmody’s report:

Q. *** [Carmody] says in his report that the repair technique does not restore the windshield to its original condition. In referencing the damaged area only that is a true statement, is it not?

A. That is correct.

Deposition of Dennis McGarry, Ph.D., P.E., taken February 4, 2010, pp. 72-73, pertinent portions appended hereto as Exhibit H.

State Farm's assertions that individualized determinations will be necessary with regard to whether the "repairs" were effective are thus groundless. *Defendant's Brief, p. 29.* The evidence in the record establishes that the chemical patches will always produce an inferior windshield which will deteriorate over time. The inherent flaws and limitations in the process are the same for everyone. Since a true "repair" of cracked or chipped glass is a scientific impossibility, regardless of how generously one construes that term in favor of the insurer, all of the class members were entitled to a payment for the cost of windshield replacement under their policies.

ARGUMENT

The seven Propositions of Law that have been devised by Defendant State Farm will be separately addressed in the remainder of this Memorandum. None of them possess merit.

PROPOSITION OF LAW NO. 1: IN RULING ON CLASS CERTIFICATION, COURTS MAY AND SHOULD EXAMINE MERITS ISSUES THAT ARE RELEVANT TO THE CIV.R. 23 REQUIREMENTS.

A. THE TRIAL COURT'S REVIEW OF THE MERITS

As odd as it seems, this first Proposition of Law seeks to overturn an aspect of the Eighth District's ruling that had been favorable to State Farm. During the trial court proceedings, the insurer had urged the trial judge to consider the "merits" of the underlying claims, while deciding whether to certify a class. *Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification served February 2, 2010, pp. 29-30.* Judge Matia proceeded to oblige the insurer, although the findings he reached were not what State Farm had been expecting. For example, he evaluated the evidence that had been produced in support of the Named Plaintiff's individual claim and

analyzed the applicable terms of the State Farm property damage coverage, including the amendments. *Defendant's Brief, Appendix Exhibit E, pp. 1-3*. He concluded from the policy terms, as he apparently had during the summary judgment proceedings, that the indemnity provision did indeed furnish a cash-out payment option once a windshield damage claim was approved. *Id., pp. 2-3, & 6-7*. The State Farm "repair campaign" was also considered, which had been established through the depositions that had been taken of several high-ranking officials and the internal records that the insurer had been willing to produce. *Id., pp. 4-7*. The repeated assertions that Plaintiff had "tied the judge's hands" with the pleadings are preposterous, as his comprehensive ruling reflects that he was carefully assessing the testimony and exhibits that had been furnished by both parties during the lengthy class action proceedings. *Defendant's Brief, pp. 18 & 24*.

State Farm has neglected to mention in its Merit Brief that its attorneys had successfully convinced the trial judge early in the proceedings to entertain dispositive motions before class certification was broached. *See Journal Entry, dated August 26, 2005*. Following the presentation of deposition transcripts, affidavits, expert reports, and hundreds of pages of records, the court denied State Farm's Motion for Summary Judgment *in toto*. *See Journal Entry dated March 29, 2007*. The evidentiary sufficiency of Plaintiff's claims for relief had thus been thoroughly tested before class certification was even broached.

In State Farm's ensuing appeal, the Eighth District found that Judge Matia went "too far into the merits of the case." *Cullen, 2011-Ohio-6621, ¶55*. The majority specifically cited the finding that "cash-pay-out option was available and that State Farm failed to disclose that option." *Id.* Since the excursion into the merits had been demanded by State Farm, the invited error doctrine should have precluded any interference with this aspect with the trial court's ruling. *Lester v. Leuck, 142 Ohio St.*

91, 92, 50 N.E.2d 145, 146 (1943).

In any event, acceptance of this Proposition of Law would logically require the trial judge's merit determinations to be reinstated. Following the hearing, he applied the standard that State Farm had been championing, but he apparently exercised his prerogative to reject the self-serving and unsubstantiated assertions that had been furnished in the insurer's carefully crafted affidavits. Given his superior vantage over the proceedings, the order granting class certification should be afforded substantial deference. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 487, 2000-Ohio-397 727 N.E.2d 1265; *Lowe v. Sun Refining & Marketing Co.*, 73 Ohio App.3d 563, 568, 597 N.E.2d 1189, 1192 (6th Dist. 1992).

B. APPROPRIATENESS OF A MERITS REVIEW

While Plaintiff has never disagreed that a trial judge should confirm that at least a "colorable" claim exists before certification is ordered, anything more than that will run afoul of Civ. R. 23(C)(1), which requires certifiability to be resolved "[a]s soon as practicable after the commencement of [the] action[.]" Upon examination of the corresponding federal provision, the United States Supreme Court declared that:

We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such '(a)s soon as practicable after the commencement of (the) action ***' [emphasis added].

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732 (1974); see also, *American Pipe & Constr. Co. v. State of Utah*, 414 U.S. 538, 547, 94 S.Ct. 756, 763, 38 L.Ed.2d 713 (1974); *City of Bedford v. City of Cleveland*, 8th Dist. No.

33787, 1975 W.L. 182695 (Apr. 3, 1975). Ohio courts have long recognized that the merits of the action may not be adjudicated during class certification proceedings. *Ojalvo v. Board of Trustees of Ohio State Univ.*, 12 Ohio St. 3d 230, 233 466 N.E. 2d 875 (1984); *Nagel v. Huntington Natl. Bank*, 179 Ohio App. 3d 126, 132, 2008-Ohio-5741, 900 N.E. 2d 1060, 1064 (8th Dist. 2008); *Dubin v. Security Union Title Ins. Co.*, 162 Ohio App.3d 97, 102, 2005-Ohio-3482, 832 N.E.2d 815, 819 ¶ 21-25 (8th Dist. 2005).

The United States Supreme Court clarified in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S.Ct. 2541, 2551-2552, 180 L.Ed.2d 374 (2011), that *Eisen* does not necessarily preclude a trial court from probing into the factual underpinnings for the claims in appropriate instances. Ohio law has never been to the contrary, as the trial judge's denial of certification was overturned in *Ojalvo*, 12 Ohio St.3d at 233, because "certainty" had been required. State Farm's staunch position below had been that "to be a valid basis for class certification, a claim must be at least 'colorable.'" *State Farm's Court of Appeals Reply Brief*, p. 1, citing *Argent Mtg. Co. v. Ciemins*, 8th Dist. No. 90698, 2008-Ohio-5994, 2008 W.L. 4949848 (Nov. 20, 2008). It is now far too late in the proceedings for the insurer to suggest that something more is required.

And, given the procedural posture of the instant action, it is unrealistic to insist upon anything more than the establishment of a colorable claim. Through no fault of either Plaintiff or the trial court, State Farm has yet to produce thousands of pages of internal records and communications that had been sought in written discovery requests that were served in 2005 and 2007. The Second Motion for Sanctions was still pending, moreover, when this interlocutory appeal was commenced. *R. 120*. These materials are expected to bear directly upon pivotal issues that remain in dispute, such as State Farm's own interpretation and application of the pertinent policy provisions and the representations that were made to the policyholders with regard to their rights

under the insuring agreements.

There can be no serious disagreement that whenever a legitimate dispute exists over whether certification is warranted, “the parties must be afforded the opportunity to discover and present documentary evidence on the issue.” *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91, 98, 521 N.E.2d 1091, 1098 (1988), quoting *Walker v. World Tire Corp., Inc.*, 563 F.2d 918, 921 (8th Cir. 1977). The full-blown merits determination that State Farm seems to be seeking would have been appropriate, if at all, only if the insurer had complied with its discovery obligations in a timely fashion. If State Farm continues to believe upon remand that certification is unjustified once Plaintiff has been furnished with all of the relevant records and data, reconsideration can always be requested from the trial judge. *Baughman*, 88 Ohio St.3d 480, 487; *Ritt v. Billy Blanks Ents.*, 171 Ohio App.3d 204, 212, 2007-Ohio-1695, 870 N.E.2d 212, 218, ¶ 34 (8th Dist. 2007).

C. THE PURPORTED “EXTRINSIC” EVIDENCE

To the extent that a merits review is appropriate, all the relevant and admissible evidence in the record should be considered and not just the carefully crafted affidavits that State Farm has submitted. Fully recognizing the implications of the admissions that were furnished by candid company officials and representatives, the insurer now insists that this compelling testimony should be discarded as “extrinsic.” *Defendant’s Brief*, pp. 22-25.

Ohio law has long recognized that it is entirely appropriate for a court to consider the parties’ practical application of a contract when attempting to discern its meaning. *Cleveland Concession Co. v. City of Cleveland*, 84 Ohio App. 193, 83 N.E. 2d 818, 821 (8th Dist. 1948); *National City Bank of Cleveland v. Citizens Bldg. Co. of Cleveland*, 48 Ohio Law Abs. 325, 74 N.E.2d 273, 279 (8th Dist. 1947). And, as State Farm has acknowledged, extrinsic evidence is always admissible when a contract is ambiguous. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 219-220, 2003-Ohio-5849, 797 N.E.2d

1256, 1261. While Plaintiff's position remains that the applicable policies provide only for indemnity payments and contain no "unilateral right" to repair language, an ambiguity will arise if State Farm's own contrived construction is afforded any credence. *Copelin-Mohn, Inc. v. Buckeye Union Cas. Co.*, 135 Ohio St. 287, 291, 20 N.E.2d 713, 714 (1939) (finding that insurance policy was susceptible to two reasonable interpretations, was thus ambiguous, and had to be construed most favorably to the insured). State Farm is thus in no position to argue that an alternative meaning can be gleaned that is flatly contradicted by the candid admissions of its own high-ranking managers and officers.

D. THE COMMONALITY REQUIREMENT

1. Waiver of Commonality

Based upon its misguided belief that the merits should be adjudicated before discovery has been completed, State Farm insists that "Plaintiff's and the class members' transactions do not present a common factual situation." *Defendant's Brief*, p. 31. Indeed, the Eighth District majority has been berated for supposedly failing "to analyze the impact on commonality[.]" *Id.*, p. 2. Perhaps more than any other, this element for certification has received substantial attention in the insurer's argumentation to this Court. *Id.*, pp. 2-3, 24-25, 29-32, 43, 46.

State Farm appears to have forgotten that the issue of commonality, as well as numerosity, was conceded quite some time ago. Defense counsel represented to the trial judge at the commencement at the certification hearing that:

MR. JOHNSON: Your Honor, Mark Johnson for State Farm.

There's no item that we were stipulating to, but in our class certification brief, we do not argue numerosity, 23(A)(1), nor the commonality test that a common issue or fact or law exists, Rule 23(A)(2). [emphasis added].

Transcript of Proceedings of April 14, 2010, p. 8. As one would expect, Plaintiff's

counsel proceeded to offer little evidence or analysis with regard to these two unopposed elements. The trial judge noted the concession in his Final Order and held that numerosity and commonality had been satisfied. *Defendant's Brief, Appendix Exhibit E, p. 9, ¶ 6-7.*

Inexplicably, Judge Stewart proceeded in her dissenting opinion to criticize the trial judge for finding that Plaintiff had fulfilled the requirement for commonality set forth in Civ.R. 23(A)(2). *Cullen, 2011-Ohio-6621, ¶ 59-62 (Stewart, J., dissenting).* Although no attempt has been made to explain why the insurer should be allowed to “unwaive” the issue, commonality has now blossomed into a dominant theme in State Farm’s Merit Brief. Neither the dissenting judge, nor State Farm, appears to be the least bit concerned that Plaintiff and the trial judge had been duped into affording only a cursory treatment to the issues that had been conceded. Since detrimental reliance is evident, State Farm should be estopped from challenging either numerosity or commonality for the remainder of these proceedings. *Greer-Burger v. Temesi, 116 Ohio St. 3d 324, 330, 2007-Ohio-6442, 879 N.E. 2d 174, 183, ¶ 25, quoting Griffith v. Wal-Mart Stores, Inc., 135 F. 3d 376, 380 (6th Cir. 1998).*

2. State Farm’s “Unilateral Right”

State Farm’s purported “unilateral right” to determine repair or replacement is the centerpiece of the discussion of commonality. *Defendant's Brief, pp. 20-21.* Although the standardized policies in use in Ohio during the relevant period actually preserved the “policyholder’s choice” to make the election, as the insurer had been openly acknowledging earlier in these proceedings, this Court’s attention has been directed to a number of decisions that were issued in other jurisdictions. *Id.* Markedly different policies were examined in each instance. For example, in *Rickerl v. Farmers Ins. Exch., 277 Neb. 446, 450, 763 N.W. 2d 86, 90 (2009)*, the insurance policy provided that: “At our option, loss or damage shall be paid as interest may appear to the

policyholder and lien holder shown in the Declarations, or by repair of the damaged vehicle.” Since “our” meant the insurer, there could be no disagreement over who possessed the “option.” *Id.* State Farm’s foreign authorities confirm only that insurers do know how to establish “unilateral rights” for themselves and preclude certain benefits, when that is their intention. *See Pritchett v. State Farm Mut. Auto Ins. Co.*, 834 So. 2d 785, 790-791 (Ala. Civ. App. 2002) (holding merely that while State Farm was required to restore the vehicle to their pre-loss condition, the term “repair” did not include a restoration of full value); *Mockmore v. Stone*, 143 Ill. App. 3d 916, 918-919, 97 Ill. Dec. 939, 940, 493 N.E.2d 746, 747-748 (1986) (holding that where insurer had been afforded the option to “repair or replace the property or part with like kind and quality[,]” the carrier could be held liable for a negligent repair); *O’Brien v. Progressive Northern Ins. Co.*, 785 A. 2d 281 (Del. Super. 2001) (holding that where insurer was obligated to “repair or replace” a damaged vehicle, an additional payment for diminished value was not required). Given their inability to locate any authorities adopting their strained construction of the policy terms that were actually in force in Ohio, defense counsel’s decision to abandon commonality is perfectly understandable.

E. THE DUTIES OF AFFIRMATIVE DISCLOSURE

1. Department of Insurance Regulations

A careful consideration of the legal obligations that were owed by State Farm will also be essential to any evaluation of the merits. Setting aside the misrepresentations and half-truths that were extended during the scripted conversations with the claimants, State Farm was not entitled to conceal the cash-out option once the claims were approved for coverage. For sound reasons, Ohio law requires motorist insurers to affirmatively disclose all available benefits and not just the one that is more profitable for the carrier. For example, Ohio Admin. Code 3901-1-54(E) directs 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. [emphasis added].

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). *R. 113, Plaintiff's Supp. To Motion for Class Cert., Exhibit F, p. 36*. As was recognized by former Assistant Vice President Hardt, State Farm's duty of good faith also includes sharing pertinent information with the insureds. *Id., pp. 41 & 46-47*.

State Farm contends that an insured has a duty to read the insurance policy and is charged with knowledge of its contents. *Defendant's Brief, p. 26*. The decisions that have been cited in support of this contention established only a general rule and did not involve a Department of Insurance regulation that required affirmative disclosure of policy benefits once the claim was approved. *Id.* Even State Farm's own insurance expert, J. Lee Covington, II, Esq. ("Covington"), confirmed the obligation that had been imposed upon insurers doing business in Ohio to disclose all pertinent benefits and coverages. *R. 130, Deposition of J. Lee Covington, II, Esq., taken February 25, 2010 ("Covington Depo."), pp. 108-109*. If the insuring agreement provides a right to a cash-out, that is one of the benefits that must be discussed. *Id., p. 212*. Disclosure would only be unnecessary if the insured already knew about the benefit. *Id., at 215*. This regulatory requirement exists because few (if any) insureds actually read and understand their policies. *Id., pp. 103-106*.

Plaintiff is mindful that at least one court has held that these Department of Insurance regulations do not establish independent causes of action upon which damages may be recovered. *Furr v. State Farm Mut. Auto. Ins. Co.*, 128 Ohio App.3d 607, 616-617, 716 N.E.2d 250 (6th Dist. 1998). In recognition of this, they have predicated their demands for relief against State Farm instead upon the well-recognized theories of Breach of Contract (Count I), Bad Faith (Count II), and Declaratory Relief

(Count III). *R.1, Class Action Complaint, pp. 10-13.* State Farm remains obligated to abide by the mandates of the Department of Insurance and evidence of noncompliance will be admissible during these proceedings. *See generally, Chambers v. St. Mary's Sch.*, 82 Ohio St.3d 563, 1998-Ohio-184, 697 N.E.2d 198, syllabus (“The violation of an administrative rule does not constitute negligence *per se*; however, such a violation may be admissible as evidence of negligence.”); *Rak v. Safeco Ins. Co. of Am.*, 8th Dist. No. 84318, 2004-Ohio-6284, 2004 W.L. 2676740, p. *4, ¶ 27 (Nov. 24, 2004) (citing Ohio Admin. Code 3901-1-54(G)(2) in justifying reversal of summary judgment upon breach of insurance contract claim); *Banks v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 99 AP-1413, 2000 W.L. 1742064, p. *3 (Nov. 28, 2000) (overturning trial judge’s dismissal of breach of contract claim based, in part, upon Ohio Admin. Code 3901-1-54); *Piersoll v. Keaton*, 10th Dist. No. 00 AP-392, 2000 W.L. 1617780, p. *1 (Oct. 31, 2000) (motorist insurer cites Ohio Admin. Code 3901-1-54(G)(5) in support of its motion for summary judgment); *Laibson v. CNA Ins. Cos.*, 1st Dist. No. C-980736, 1999 W.L. 299899, p. *2 (May 14, 1999) (Ohio Admin. Code 3901-1-54(G)(5) is cited in support of affirming summary judgment entered in favor of motorist insurer).

The notion that noncompliance with an administrative regulation is immaterial in a class action lawsuit is contrary to established precedent. In *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 1998-Ohio-405, 696 N.E.2d 1001, a life insurer had been charged with neglecting, among other things, to furnish notifications required by Ohio Admin. Code 3901-1-36. *Id.*, 82 Ohio St.3d at 427. “The gravamen of [plaintiffs’] complaint is that MetLife engaged in a scheme to collect larger commissions and front-end load charges by intentionally omitting the state-mandated written disclosure warning when issuing replacement life insurance.” *Id.* at 433. In permitting the plaintiffs to proceed with the class action lawsuit, the high court explained that:

In light of all the foregoing, we conclude that the trial court abused its discretion in denying class certification. Indeed,

we cannot imagine a case more suited for class action treatment than this one. This case involves the use of form documents, standardized practices and procedures, common omissions spelled out in written contracts, and allegations of a widespread scheme to circumvent statutory and regulatory disclosure requirements, any one of which has been held to warrant class action treatment. [emphasis added].

Id. at 438. State Farm's brazen indifference to Ohio Admin. Code 3901-1-54(E)(1) should be treated no differently.

2. Fiduciary Responsibilities

To be sure, State Farm's obligation to disclose all the pertinent benefits to the successful claimants was not limited to the Ohio Administrative Code. As a result of the special trust that is created by the relationship between the insurer and insured, fiduciary responsibilities are owed. *Buemi v. Mutual of Omaha Ins. Co.*, 37 Ohio App.3d 113, 116, 524 N.E.2d 183, 186 (8th Dist. 1987); *Heekin v. Mutual of Omaha Ins. Co.*, 1989 W.L. 4157, p. *3 (8th Dist. 1989). As was observed in *Baughman v. State Farm Mut. Auto. Ins. Co.*, 9th Dist. No. 22204, 2005-Ohio-6980, 2005 W.L. 3556406 (Dec. 30, 2005), State Farm has worked tirelessly to convince the general public, as well as its insureds, that it is a "Good Neighbor" that can be trusted to provide assistance when there has been a loss. *Id.* at ¶ 21; *see also, Red Head Brass, Inc. v. Buckeye Union Ins. Co.*, 135 Ohio App.3d 616, 632, 735 N.E.2d 48, 59 (9th Dist. 1999); *Jokic v. State Auto. Mut. Ins. Co.*, 11th Dist. No. 2004-L-135, 2005-Ohio-7044, 2005 W.L. 3610428, ¶ 34 (Dec. 29, 2005).

"The fiduciary owes a duty of the most perfect and scrupulous good faith ('*uberrima fides*') to his principal." *Myer v. Preferred Credit, Inc.*, 117 Ohio Misc.2d 8, 22, 2001-Ohio-4190, 766 N.E.2d 612, 622, ¶ 15 (Harrison C.P. 2001); *see also, Thompson v. Central Ohio Cellular, Inc.*, 93 Ohio App.3d 530, 540, 639 N.E.2d 462, 468 (8th Dist. 1994); *see also Spalding v. Coulson*, 104 Ohio App.3d 62, 80, 661 N.E.2d 197, 209 (8th Dist. 1995). One of the hallmarks of this special relationship is the

fiduciary's obligation of full and complete disclosure. *Nagy v. Jackson*, 8 Ohio Law Abs. 670, 1930 W.L. 2226 (8th Dist. 1930); *Foust v. Valleybrook Realty Co.*, 4 Ohio App.3d 164, 165, 446 N.E.2d 1122, 1125 (6th Dist. 1981).

Former Assistant Vice President Hardt acknowledged that State Farm was bound by both a legal and "philosophical requirement" of full disclosure. *Plaintiff's Supp. Class Cert., Exhibit F, pp. 46-47*. The company's documentation promised that all claims would be handled with "the utmost good faith." *Id.*, p. 38. He agreed that pursuant to the insurance contract State Farm was obligated "to encourage the insureds to avail themselves of all the benefits they are entitled to when a loss occurs[.]" *Id.*, p. 40 (*emphasis added*). The scripted conversations confirm beyond all dispute that the claimants were not being advised either (1) of the cash-out option or (2) the known deficiencies and dangers in the glass-patching process.

F. THE DEDUCTIBLE WAIVER PROVISIONS

Much ado has been made over the short-lived adoption of the provision that waived the deductible if the insured "agreed" to the repair. *Defendant's Brief, p. 9 & 25*. That clause had been included in both Comprehensive Coverage (Coverage D), and stated merely 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.

R. 25, Defendant's Summary Judgment Appendix, p. 17. The "deductible waiver" provision furnishes further confirmation that State Farm never possessed the "unilateral right" to dictate a repair. There would have been no reason to adopt this language, and waive the deductibles, unless the policyholder's approval was required.

The "deductible waiver" language was offered strictly as a further (and powerful) "enticement to accept the glass-patch repairs," and discourage any inquiries about other benefits. Requiring the deductibles to be paid for a full glass replacement, or cash-out,

made those options seemingly less attractive.

Indeed, one of the documents that was disclosed only after sanctions had been imposed and depositions concluded revealed that Director Rogers had reported that the ultimate expectation was that "about 33% of 1.4[million] claims will disappear due to the repair costs being less than the deductible and the repair paid by the insured." *R. 120, Plaintiff's Second Motion for Discovery Sanctions, Exhibit Y, p. CULLENM00076359PROD*. The insureds were never told by the CSRs during the scripted conversations that, even when the deductibles were applied, the cash-out payment averaged approximately \$342.00. *Bischoff Depo., pp. 90-91*. Even with the deductibles waived, cash-out was always the superior benefit option.

Given that the glass patching process cost the insurer as little as \$19.00, State Farm still came out way ahead even when deductibles were waived. A "Repair Versus Replace" savings report for 2002 that was disclosed late in the proceedings confirmed not only that State Farm was profiting substantially from the windshield patches, but also that the operations were being closely monitored and recorded. *R. 120, Plaintiff's Second Motion for Discovery Sanctions, Exhibit U, p. CULLENM00074813PROD*. It is undoubtedly no coincidence that the deductible waiver clauses were removed from the Ohio policies effective September 1, 2005, roughly half a year after the instant action was commenced. *Defendant's Brief, p.9*.

Accordingly, State Farm's representation that the policyholders were advised "in at least five separate documents" of their "contractual right to agree or not to agree to a windshield repair under the policies issued after March 31, 1998" is a red-herring. *Defendant's Brief, p. 26*. First, this dubious contention has been supported with affidavits of questionable validity. *Id., pp. 9-10*. Second, none of the purported notices mentioned either the cash-option or the known disadvantages to the chemical patches. *Id.* No real "choice" at all was thus being offered, in direct contravention of the

requirements of full disclosure imposed by the Department of Insurance and the fiduciary responsibilities that were owed. Instead, company profits were being maximized as the LYNX CSRs were aggressively selling the quick-fix "repairs."

G. RESTORATION TO PRE-LOSS CONDITION

There is simply no truth to State Farm's emphatic promise that: "There is no policy provision requiring State Farm to ensure that a car is returned to its pre-loss condition." *Defendant's Brief*, p. 9. As previously noted, the "Limit of Liability" clause does indeed promise that when a written estimate is utilized to establish the cost of repair or replacement, State Farm "will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition." *Plaintiff's Supp.*, 00020. The only other two methods for determining the "cost of repair or replacement" is either through an agreement with the insured or a "competitive bid" approved by the insurer. *Id.* The policy does not define the word "repair" for these purposes or establish the degree of restoration that a policyholder is entitled to expect following a covered collision.

While the insurer has ridiculed Plaintiff's view that a proper "repair" must return the automobile to its pre-loss condition in all instances, no other sensible interpretation has been offered. Instead, the insurer appears to believe that an ineffective or token effort can be made to "fix" the damage to the vehicles while remaining true to the policies. No suggestion has been made that the "Good Neighbor" has publicly disclosed in its considerable advertising that there are no guarantees of a full and complete vehicle restoration when one purchases coverage from State Farm.

The testimony of former Assistant Vice President Hardt has been cited repeatedly throughout Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification (*pp. 10, 15, 17, 18, 34 fn. 22*). This loyal State Farm witness has thoroughly debunked, however, the insurer's position with regard to the policy requirement for a restoration to pre-loss condition:

Q. *** Do you agree with me that the obligation of State Farm in its repairs is to put a vehicle back as good as it was when a repair is done?

MR. JOHNSON: Objection; foundation.

THE WITNESS: Well, our obligation, under the policy, is to restore the car to its pre-loss condition relative to its structural integrity and retention characteristics, and that's what we aim to do. If a repair is undertaken, and it is not successful, then, certainly, we will replace the windshield. That's the insured's option. [emphasis added].

Exhibit F, pp. 23-24. A 1998 General Claims Memorandum directed that, regardless of which method was employed, "the resulting estimate should reflect the repair operations necessary to restore the damaged vehicle to its pre-loss condition relative to safety, function, and appearance." *Id.*, p. 32. Rather obviously, this contractual obligation included windshield damage claims. *Id.*, p. 33.

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 was entered with the contractors that were approved to perform windshield repairs and replacements. *Plaintiff's Reply in Support of Class Certification, Exhibit G, p. 7.* 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. [emphasis added].

Id., p. 7. The "pre-loss condition" obligation is hardly some figment of Plaintiff's imagination.

Contrary to State Farm's dire warnings, there will be no need for the trial court to ever engage in a case-by-case determination of whether each windshield repair was successful. Only one trial will be necessary, during which two of the issues to be

determined on a class-wide basis will be (1) what is the degree of restoration that is required once a vehicle damage claim has been approved and (2) were the chemical fillers capable of restoring the windshields as required by the standardized policies. The more significant fact, over which there will be no dispute, is that the script used by State Farm and LYNX did not disclose that numerous studies and reports, as well as the National Windshield Repair Association itself, had concluded that the quick-fix process would always leave scarring with visual distortion and reduce the structural integrity of the glass. *Plaintiff's Supplement filed December 22, 2009, pp. 7-9.* State Farm's calculated and systematic violation of the fundamental fiduciary obligation of full disclosure is thus readily susceptible to a class wide resolution.

The instant dispute is thus distinguishable from *Augustus v. The Progressive Corp.*, 8th Dist. No. 81308, 2003-Ohio-296, 2003 W.L. 155267 (Jan. 23, 2003). The crux of the plaintiffs' theory of recovery was that repairing vehicles with "imitation parts" could not restore them to their pre-accident condition. *Id.* at ¶ 2. The standardized policies provided, however, that payment could be based upon "the cost of repair or replacement parts and equipment which may be new, refurbished, restored, or used, including but not limited to: a) original manufacturer parts or equipment; and b) non-original manufacturer parts or equipment * * *." *Id.* at ¶ 5. In the opinion, the court criticized the plaintiffs for "fail[ing] to address the specific policy language which authorized the use of non-OEM parts." *Id.* at ¶ 25. Since the insurer's practices were specifically permitted by the agreement, no common question of fact existed on that critical point. Class members could only prevail if they could show that their particular vehicle had been fully restored to its pre-loss condition, and thus the "highly individualized" nature of the claims precluded class certification. *Id.* at ¶ 26-27. Simply using a non-OEM part, as specifically permitted by the policies, was not enough to establish that damages were owed. *Id.* at ¶ 27.

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The ruling in *Hall v. State Farm Mut. Auto. Ins. Co.*, 215 Fed. Appx. 423 (6th Cir. 2007), is similarly inapposite. That action had been dismissed under Rule 12(b)(6) on the pleadings, and thus no evidence was considered. *Id.* at 428. The instant dispute, in contrast, has survived summary judgment. The plaintiff had alleged that damages were owed because the insurer had purportedly failed to ensure that the repair shops were properly performing seatbelt inspections and repairs. *Id.* at 429. His pleading was fatally flawed, however, because the policy required him to secure an estimate based upon the prevailing market price, and he had never done so. *Id.*, at 429-430. Not even his own individual claim could therefore succeed under the terms of the policies which had been issued by State Farm in Michigan. *Id.*, at 429-430.

In the case *sub judice*, the class members' entitlement to a recovery does not hinge upon their ability to demonstrate that their particular windshield repair was faulty. All that will matter is that he/she was furnished with the glass patch without being advised of the cash-out benefit as required by law and the fiduciary obligations, owed in Ohio. The only point to be made from State Farm's obligation to restore the vehicles to their pre-loss condition is that – according to the experts – the chemical fillers were inherently incapable of achieving such a result in any case. *Plaintiff's Supp.*, 00078-99. State Farm thus will be unable to claim that no real harm was ever sustained because the windshields were "good as new." Rather than force such a decision to be rendered on a case-by-case basis, a consolidated class-action trial will allow this issue to be conclusively resolved once.

H. SUPERIORITY OF CLASS-WIDE RELIEF

Civ.R. 23(B)(3)'s requirement of superiority has been readily satisfied given the demonstration of claims for relief that are, to say the least, "colorable." As the trial court justifiably determined, resolving the class members' largely identical claims against State Farm in a single proceeding will be far more expedient and efficient than forcing

them to be pursued individually. *Defendant's Brief, Appendix Exhibit E, pp. 10-11.* Substantial judicial resources would be wasted if such a cumbersome approach were followed. As previously established, the legal standards will be the same for each class member with respect to their requests for monetary and declaratory relief. The fact patterns will all be identical, given that each class member – by definition – acquiesced to a superficial chemical patch that State Farm promoted and arranged through LYNX, instead of payment of the cost of replacing the glass.

Relying upon the testimony of its own faithful officials, State Farm insisted during the proceedings below that “policyholders have a faster, cheaper method to obtain a replacement windshield, if they wish.” *Defendant's Court of Appeals Brief, pp. 36-37.* But all that was identified was the “warranty” which the “glass shops” are required to provide under their O & A contracts. *Id., pp. 54-55.* How anyone could believe for a moment that tens of thousands of individual warranty claims could be a more efficient alternative to a single class-wide proceeding is mystifying. And, the end result to State Farm would still be the same, which would be paying the windshield replacement cost for every insured who had been duped into accepting the temporary glass repair.

Notably, State Farm has not suggested that the supposed “warranty” can be found anywhere in the standardized Ohio motor vehicle insurance policies. *Defendant's Court of Appeals Brief, pp. 36-37.* Nor is there any credible proof in the record that some form of notice was furnished to the policyholders alerting them to the “warranty” option, explaining how to invoke it, or warning of the limited one-year duration. By all appearances, only those who knew to affirmatively, and quickly, complain to State Farm's Glass Claims Services Department received payment for a windshield replacement. This undoubtedly explains why only a paltry 990 post-repair windshield replacements were performed over the eleven-year period which extended from 1997

through 2008. *R. 118, Defendant's Memorandum in Opp. Class Cert.*, pp. 6 & 55.

State Farm insists that it will continue to pay for full windshield replacements whenever any policyholder complains about the patch (*Defendant's Brief*, pp. 12-13), while simultaneously representing that there is simply no way that anyone will ever be able to determine the payments that remain due to the class members. *Id.*, pp. 15-16 & 24-25. An affidavit has even been produced that purportedly confirms, if the defense witness is to be believed, that there were 11 different windshields available for the Named Plaintiff's particular vehicle. *Id.*, pp. 12 & 25. The contradiction in the insurer's positions could not be more stark. State Farm has been covering full windshield replacements for every conceivable make and model of vehicle throughout the United States for decades, which necessarily requires a determination of the usual, customary, and reasonable amount to be paid to the body shops. The dissenting judge's concerns for the trial court's ability to manage a class are thus unfounded, as identifying a fair and reliable pricing database will be one of the tasks that can be readily conducted on a class-wide basis. *Cullen*, 2011-Ohio-6621, ¶63-70 (Stewart J., dissenting).

In the end, there is a simple answer to any concerns that may remain over whether a class of State Farm policyholders can be identified, managed, and awarded the policy benefits that remain due to them in a fair and efficient manner. Having developed an intimate familiarity with the issues in dispute over the last five years, the trial judge remains best suited for responding to any difficulties that may surface in this regard. *See, Stammco, L.L.C. v. United Tel. Co. of Ohio*, 125 Ohio St. 3d 91, 95, 2010-Ohio-1042, 926 N.E. 2d 292, 296, ¶12, citing *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St. 3d 200, 201, 509 N.E. 2d 1249 (1987); *Baughman*, 88 Ohio St. 3d 480, 487; *North Shore Auto Finan., Inc. v. Block*, 8th Dist. No. 82226, 2003-Ohio-3964, 2003 W.L. 21714583, ¶13 (July 24, 2003); *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 8th Dist. No. 86596, 2007-Ohio-4013, 2007 W.L. 2269471, ¶62 (Aug. 9, 2007). Effectively

terminating this litigation by overturning the lower court's decision would be particularly unjust, given that Plaintiff is still entitled to significant discovery from State Farm. Given the compelling evidence that has been presented thus far, particularly management's admissions of improper misconduct, substantially more than just "colorable" claims have been established.

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.

This Proposition of Law is apparently predicated upon the Motion to Exclude the Testimony and Reports of Craig Carmody and Gary Derian and Motion to Exclude Testimony and Report of Peter J. Hildebrand that were filed by State Farm on February 24, 2010. Plaintiff timely opposed both applications. As was developed in that Memorandum, Craig Carmody, P.E. and Gary A. Derian, P.E. were both engineers who had confirmed that the glass patching process always leaves a blemish in the windshield, always deteriorates over time, and is always incapable of restoring the vehicle to its pre-loss condition. *Plaintiff's Supp. 00078-98*. Peter J. Hildebrand was a former claims manager and insurance industry expert who had been retained to address whether State Farm's internal practices were consistent with industry regulations and the insurer's own policies. *Id.*, 00099-134.

Defense counsel had deposed both Carmody and Derian in January 2007, during the summary judgment stage of the proceedings. State Farm's challenges to the reliability of their opinions were not raised until over three years later. Despite the troubling procrastination, Plaintiff certainly agrees that the insurer is entitled to a ruling upon the *Daubert* motion. Plaintiff's Second Motion for Discovery Sanctions must be resolved as well. State Farm elected to proceed with the instant appeal, however, before the trial judge could do so.

It is extremely doubtful that the ruling upon the *Daubert* Motion will have any bearing upon the appropriateness of the court's certification order. The only expert who was cited by the trial judge had actually been retained and presented by State Farm. *Defendant's Brief, Appendix Exhibit E, p. 4, paragraph 12.* Despite State Farm's criticism of Judge Matia for purportedly adopting Plaintiff's Proposed Findings of Fact and Conclusions of Law "largely verbatim[.]" a discussion of Carmody's findings was one of many that had been omitted from the final opinion. *Defendant's Brief, p. 3.* Consequently, State Farm never argued in the forty-page brief that was submitted to the Eighth District that the trial judge had somehow erred by failing to grant its "*Daubert* Motions." This Proposition of Law is therefore not just legally incorrect, and not just irrelevant to the decision on appeal, but is also being asserted for the first time in these proceedings.

**PROPOSITION OF LAW NO. III: A CLASS DEFINITION
MAY NOT CONDITION CLASS MEMBERSHIP ON
DISPUTED, INDIVIDUAL ELEMENTS OF LIABILITY.**

The third Proposition of Law does not seek to establish some new legal principle or resolve a conflict among the appellate courts. This Court is being asked instead to re-examine the evidence and analysis that was furnished during the class certification proceedings and "correct" the lower courts' determinations that common issues of law and fact predominate. *Defendant's Brief, pp. 35-41.* But, class action status cannot be defeated simply by identifying some differences in the particularized fact patterns, as this Court has explained that:

The mere existence of different facts associated with the various members of a proposed class is not by itself a bar to certification of that class. If it were, then a great majority of motions for class certification would be denied. Civ.R. 23(B)(3) gives leeway in this regard and permits class certification where there are facts common to the class members.

In re Consolidated Mortgage Satisfaction Cases, 97 Ohio St.3d 465, 468, 2002-Ohio-

6720, 780 N.E.2d 556, 560, ¶ 10. 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., Inc. v. Reynolds & Reynolds, Inc.*, 148 Ohio App. 3d 635, 650, 2002-Ohio-2912, 775 N.E.2d 531, ¶62 (2nd Dist. 2002) (“*** [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 v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 81, 1998-Ohio-365, 694 N.E.2d 442). Indeed, virtually every class action settlement or judgment includes payments of varying amounts of damages to the class members.

In anticipation of the class certification hearing, an affidavit was submitted from Autobody Repair Shop Owner Thomas Uhl (“Uhl”). *Plaintiff's Supp.*, pp. 000135-140. Uhl's testimony established the cost of Plaintiff's replacement windshield on the date of loss, based upon available pricing sources (including Mitchell's and NAGS, which are routinely used by State Farm and the industry). The trial court could therefore find that the cost of windshield replacement at the time of the Named Plaintiff's claim in 2003 was well above his \$250 deductible amount (\$435.71 for an original equipment manufacturer (OEM) replacement and \$329.89 for an after-market windshield). *Id.* There is thus no merit to the notion that State Farm should be allowed to keep the benefits that remain due to the policyholders because calculating the amount that is owed would simply be too difficult to even attempt.

Because a class wide injury is both identifiable and readily calculable, State Farm's reliance upon *Hoang v. E*Trade Grp., Inc.*, 151 Ohio App. 3d 363, 2003-Ohio-301, 784 N.E. 2d 151 (8th Dist. 2003), and *Linn v. Roto-Rooter, Inc.*, 8th Dist. No. 82657, 2004-Ohio-2559, 2004 W.L. 1119619 (May 20, 2004), is misplaced. In both cases, complicated classes had been proposed that would have included substantial numbers of members who had suffered no damages at all. A class-wide injury did not exist in

either instance. That cannot be a concern in the case *sub judice*, because the trial judge has defined the class in a manner that will eliminate the prospects for “undamaged” members. *Defendant’s Memorandum, Exhibit D, p. 8*. This Court should reject this Proposition of Law, which seeks nothing more than a re-evaluation of a discretionary determination before discovery can be completed.

PROPOSITION OF LAW NO. IV: PLAINTIFF’S ASSURANCE THAT UNSPECIFIED, HYPOTHETICAL COMPUTER ALGORITHMS CAN BE USED TO IDENTIFY CLASS MEMBERS DOES NOT SATISFY THE REQUIREMENTS THAT CLASS MEMBERS CAN BE IDENTIFIED WITH REASONABLE EFFORT.

As with the prior Propositions of Law, this one simply criticizes the lower courts’ evaluation of the testimony and exhibits that had been available during the class certification proceedings. Once again, there is no truth to the notion that the courts’ findings were drawn out of thin air. As long required by Ohio Admin. Code 3901-1-54(D)(1) & (2), all of the information needed to identify the class members and locate them has been securely maintained in State Farm’s databases. All were, and many still are, State Farm policyholders who were required to submit their names, addresses, vehicle make, model, year, VIN number, and other personal information in order to obtain coverage. Through the VIN number alone, the precise vehicle model and options, including the type of windshield installed, can be readily identified. State Farm Director Rogers confirmed that her company has maintained all this rudimentary claim data for the last twenty-five years. *Deposition of Wendy Rogers, p. 165*.

A substantial portion of the internal records that State Farm will be disclosing upon remand are expected to bear directly upon the insurer’s record retention practices, replacement cost databases, and cash-out payment procedures. One would have thought that this information would have been quickly produced years ago if the materials supported the newly devised position that no practical method exists for identifying the class members and determining the replacement costs payments that

remain due to them. The evidentiary record is already decidedly to the contrary. But, even in that unlikely event, the trial judge can either adjust or even decertify the class. "A trial court which routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in a litigation of class actions." *North Shore Auto Finan., Inc.*, 2003-Ohio-3964, p. *3. For that reason, all doubts should be resolved in favor of certification, particularly before discovery is complete. *Baughman*, 88 Ohio St.3d 480, 487; *see also Ritt v. Billy Blanks Ents.*, 171 Ohio App. 3d 204, 212, 2007-Ohio-1695, 870 N.E. 2d 212, 218, ¶ 34 (8th Dist. 2007); *In re Rogers Litigation*, 6th Dist. No. S-02-042, 2003-Ohio-5976, 2003 W.L. 22533670, ¶ 36 (Nov. 7, 2003); *Helman v. EPL Prolong, Inc.*, 7th Dist. No. 2001 CO 43, 2002-Ohio-5249, 2002 W.L. 31170363, ¶ 20 (Sept. 26, 2002). No sound justification therefore exists for this Court to "correct" the trial judge's discretionary decision through this Proposition of Law.

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.

In yet another case-specific Proposition of Law, State Farm is asking this Court to forget about the considerable discovery that is still owed, accept the unsubstantiated assertions of its loyal officials and managers as true, and find an abuse of discretion.

When he was deposed, Vice President, Peter Cole, conceded that the LYNX CSRs were not supposed to ad-lib anything during their conversations with State Farm windshield damage claimants. *Deposition of Peter Cole, taken February 10, 2006, p. 66.* They were expected to adhere to the scripts that had been approved by State Farm and were monitored and graded on their performance. *Id., p. 66.* There has never been any evidence that the policyholders were ever advised, even by a "Maverick" CSR, of the shortcomings inherent in the glass patching processing. And, the cash-out option certainly was never disclosed by anyone under any circumstances. Even though half a

dozen company officials and managers have testified to the contrary, State Farm's attorneys continue to insist that no such right ever existed under the policies. *Defendant's Brief*, p. 20. The trial judge's findings with regard to the insurer's reliance upon scripted conversations that were designed to produce a desired response are thus entirely justified by the record. *Defendant's Brief, Appendix Exhibit E*, p. 5-6.

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.

This Proposition of Law addresses the requirement that the Named Plaintiff must have standing in the action. *Piro v. National City Bank*, 8th Dist. No. 82885, 2004-Ohio-356, 2004 W.L. 170335, ¶ 17 (Jan. 29, 2004); *Pyles v. Johnson*, 143 Ohio App.3d 720, 732, 2001-Ohio-2478, 758 N.E.2d 1182 (4th Dist. 2001); *Hoban v. National City Bank*, 8th Dist. No. 84321, 2004-Ohio-6115, 2004 W.L. 2610543, ¶ 10-11 (Nov. 18, 2004). It has been confirmed from Lynx's data that one of the CSRs spoke to Plaintiff about his windshield claim, but she is no longer with the company. *R. 30 & 80, Deposition of Peter Cole taken February 10, 2006*, pp. 9 & 92-93. Her job would have been to follow the script and training that had been provided by State Farm. *Id.*, p. 93. Vice President, Peter Cole, was thus able to recreate the conversation which he described as follows:

She would have tried to use the scripting that was available to her at the time and would have said it sounds as though your windshield can be repaired and may not need to be replaced. Repairs are less expensive, are a less expensive way to correct the problem, would you like to have your windshield repaired? And waited for his response after asking his permission.

Id., p. 94. Plaintiff has confirmed that only the repair was discussed and he was never given the choice of a windshield replacement. *R. 76, Deposition of Michael Cullen, taken February 13, 2006*, pp. 32-33 & 45. State Farm's assertion that Plaintiff "did not agree to the repair of his windshield," is simply false, as no one has ever suggested that

the glass-patches were forced upon claimants who somehow appreciated the flaws inherent in the chemical process. *Defendant's Brief*, p. 26.

There will thus be no need for any individual determinations of whether class members agreed or disagreed to have their windshields patched. By definition, they all acquiesce to the carefully scripted sales pitches. As the Eighth Districted has directed, anyone who later had their windshield replaced is to be removed from class membership. *Cullen*, 2011-Ohio-6621, ¶56.

Although there can be no serious disagreement that Plaintiff possessed standing to represent the class as a whole, State Farm nevertheless insists that the establishment of subclasses was precluded, unless he was also a member of both of them. The insurer has cited *Stammco*, 125 Ohio St. 3d 95, ¶16, in support of the emphatic contention that "a subclass must meet the requirements for class certification, including the requirement that 'the named representatives must be members of the class.'" *Defendant's Brief*, p. 45. Paragraph 6 actually just references the long accepted standards for certification of an entire class, and the *Stammco* decision stops well short adopting any standing requirements for subclasses. The appropriate standard has been explained instead as follows:

***[O]nce the requirements of Civ. R. 23 have been met and a class has been properly certified, standing is determined in reference to the class as a whole, not simply in reference to individual named plaintiffs. *Payton v. County of Kane*, 308 F. 3d 673, 680 (7th Cir. 2002); see also *Sosna v. Iowa*, 419 U.S. 393, 399 (1975); *Fallick v. Nationwide*, 162 F. 3d 410, 423 (6th Cir. 1998) (a plaintiff with standing to sue at least one named defendant "has standing to challenge a practice even if the injury is of a sort shared by a large class of possible litigants," and it is not necessary for named plaintiff to have individual standing to sue each named defendant). [emphasis added].

Peterson v. Progressive Corp., 8th Dist. No. 87676, 2006-Ohio-6175, 2006 W.L. 3378424, ¶ 29, *fn. 4* (Nov. 22, 2006).

The subclasses were established for purposes of administrative convenience.

Regardless of whether or not the LYNX CSRs were involved, none of the claimants were ever advised at any time (at least prior to the filing of this lawsuit) of the cash-out option or the inherent flaws in the glass patching process. Since State Farm has failed to explain, let alone establish, how any meaningful prejudice will be suffered, the lower courts justifiably determined that Plaintiff could represent the class as a whole.

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.

The final Proposition of Law focuses upon the certification of the class for purposes of awarding appropriate declaratory and injunctive relief. Since it will be undisputed that State Farm underpaid each of the class members in largely the same manner (and continues to threaten to do so), certification is appropriate under Civ. R. 23(B)(2), which provides that:

***[T]he 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; ***

This subsection permits class certification for purposes of injunctive or declaratory relief when each of the claimants has been victimized by the same policy or practice. *Gottlieb v. City of S. Euclid*, 157 Ohio App.3d 250, 257-258, 2004-Ohio-2705, 810 N.E.2d 970 (6th Dist. 2004).

In the case *sub judice*, State Farm has treated each of the class members the same. While the policies uniformly entitled them to payment of the cost of windshield replacement less the deductible (if any), the insurer refused to disclose the benefits and paid for the inferior chemical patches instead. In accordance with R.C. Chapter 2721, a declaration should be issued establishing the class members' rights under the insuring agreement and Ohio law. Once the merits have been resolved, the trial court will be

entitled to direct that the pertinent motor vehicle policies require that each class member receive benefits sufficient to replace the damaged windshields (less appropriate deductibles) and not just an inadequate filler.

CONCLUSION

Because the Eighth Judicial District Court of Appeals justifiably concluded that the trial judge had not abused his discretion in certifying a class, each of the seven Propositions of Law should be overruled. This action should then be remanded to the trial court for the redefinition of the class as ordered by the appellate court, a ruling upon the Second Motion for Sanctions, the completion of discovery, and a trial upon the merits.

Respectfully Submitted,



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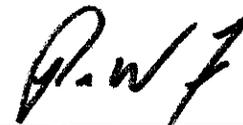
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