

IN THE SUPREME COURT OF OHIO

Case No. 2014-0451

JERRY & NANCY DILLON,
Plaintiffs-Appellees,

vs.

FARMERS INSURANCE OF COLUMBUS, Inc.,
Defendant-Appellant.

**BRIEF OF AMICI CURIAE AUTOMOTIVE EDUCATION POLICY INSTITUTE AND
CHOICE AUTO BODY REPAIR ASSOCIATION, IN SUPPORT OF THE APPELLEES**

On Appeal from the Fifth District Court of Appeals, Coshocton County Ohio
Case No. CA 2013-CA-0014

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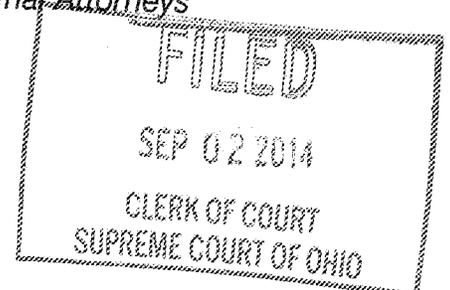
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STATEMENT OF INTEREST

Amicus Automotive Education and Policy Institute (AEPi) is a non-profit industry organization dedicated to educating the public, collision repair shops, the insurance industry, and insurance regulators about safety and crashworthiness issues connected to automobile collision repairs.

Amicus Choice Autobody Repair Association (CARA) is a professional organization, mainly comprised of automobile collision repair professionals, who seek to promote consumers' awareness of their rights in the collision repair process, through the education of consumers and collision repair shop personnel.

These Amici share interests similar to those of the Amicus Alliance of Automobile Manufacturers. Modern automobiles are technological marvels. Every inch of every vehicle sold in the United States has been engineered and built with crashworthiness at the fore. Vehicles are now designed to minimize injury and prevent death, to a degree that could not be imagined a few decades ago. But a vehicle's safety systems are only as good as its component parts.

Ohio has only one statutory consumer protection governing the installation of non-OEM parts, R.C. § 1345.81. This statute simply requires particular disclosures, whether the consumer receives a repair estimate in writing, verbally, or does not receive it until the work is completed. The only necessary disclosures are that the repair is proposed to include non-OEM parts, and that these parts will be warrantied by their manufacturer, not the vehicle's manufacturer.

Whether this one statute is sufficient to keep a repaired vehicle's safety systems operating is not an issue presented by this case. Whether the statute is good policy is

also not an issue presented by this case. The issue that *is* presented is whether a statute that says it applies to insurers, applies to insurers.

Thus the interests of automobile consumers, collision repairers, and automobile manufacturers are all aligned in this case. Standing in opposition to them are an insurance company, and the association of trial lawyers funded by insurance companies. The insurance company's interests are straightforward: Farmers wants to make repairs as cheaply as possible, and eliminate exposure for noncompliance with the statute. But Farmers is, in this case, penny wise and pound foolish.

STATEMENT OF THE CASE AND FACTS

On the first page of its brief, Appellant Farmers states, "'Non-OEM parts' are aftermarket vehicle parts built in accordance with OEM standards and procedures, but manufactured by third-parties." Farmers cites *nothing* to support this statement. As the Amicus Alliance of Automobile Manufacturers shows, this statement is categorically false. Farmers tries to assure this Court that knockoff parts have "standards and procedures" behind them. This assurance is fashioned from whole cloth.

In the 1980s insurers began promoting the use of unauthorized, copied auto-maker parts for the use in motor vehicle repairs because these parts could be obtained cheaply from Asia and through a supply channel that did not involve the auto-makers. (*See, Motor Vehicle Safety: NHTSA's Ability to Detect and Recall Defective Replacement Crash Parts is Limited, Government Accountability Office, January 2001, GAO-01-225 ("GAO Aftermarket Parts Report"), p. 6, <http://www.gao.gov/assets/240/231055.pdf>*) Collision repairers and auto-makers have long been concerned by the safety problems and risks associated with using these parts in vehicle repairs. (*Id.* at 3.)

They are not crash tested as their OEM counterparts are; they are not necessarily made of the same metal or material as the OEM parts; and the entity designated to recall defective auto components, NHTSA, has little, if any, ability to identify and recall defective non-OEM parts.

The concerns over the propriety of repairing damaged vehicles with non-OEM parts have only grown since R.C. 1345.81 was enacted in 1990. The aftermarket parts and insurance industries have repeatedly pushed for legislative declarations that non-OEM parts be artificially “deemed” to be of the same quality as OEM parts whether or not that is factually true. They have done so to avoid exactly the most important question raised in any vehicle’s repair: Is this part safe for use in the repair of the specific vehicle and will this part operate exactly like auto-maker’s part in the event of another accident?

In 2005, after a decade of considering a proposed model aftermarket parts certification act, the National Conference of Insurance Legislators (“NCOIL”) scrapped the proposed act in favor of a resolution encouraging competition in the availability of vehicle repair parts, yet ensuring consumers be notified of parts proposed and ensure their right to choose the parts was preserved. *Resolution Regarding Motor Vehicle Crash Parts*, NCOIL, November 21, 2005, <http://www.ncoil.org/news/November212005C.pdf>. Despite the 2005 Resolution, proponents of aftermarket parts resurrected the model aftermarket parts certification act for consideration. This time, the NCOIL committee voted against adopting the proposed model act “due to lingering **concerns over aftermarket part quality, safety, and cost impacts**, among other things.” “Legislators Fail to Achieve a Consensus on Aftermarket Crash Parts Model”,

NCOILETTER, Vol. 3, 2011, p. 4, http://www.ncoil.org/news/2011_Newsletters/Vol32011.pdf (emphasis added).

Collision repairers and consumer organizations continue to be gravely concerned about the propriety of using non-OEM parts in a collision repair. Because auto manufacturers are increasingly turning to newly developed materials to increase the strength of the vehicle's structure, yet enable them to reduce the weight to meet ever-rising fuel efficiency mandates, traditional repair methods and replacement crash parts made of different materials from the auto-makers' parts can have a potentially fatal outcome if used in the repair of a motor vehicle.

During the Collision Industry Conference in November 2009, repair organizations demonstrated testing on OEM and non-OEM bumper reinforcement for a 2009 Toyota Corolla. These tests demonstrated that Toyota's bumper reinforcement made of high-strength steel was exponentially stronger than the non-OEM bumper reinforcements that are made with ordinary carbon steel. This poses enormous safety risks for passengers. (See, e.g., "Cheap Materials Pose Safety Risk in Crash Parts", *Auto Body Repair News*, February 4, 2010, <http://www.searchautoparts.com/abrn/cheap-materials-pose-safety-risk-crash-parts>; "Toby Chess Has Some Questions on Aftermarket Parts", *Auto Body Repair News*, September 12, 2012) <http://www.searchautoparts.com/abrn/collision-repair/toby-chess-has-some-questions-aftermarket-parts?cid=95887>.)

After the collision repair industry voiced its continued safety concerns about the non-OEM bumpers and bumper reinforcements, even the Certified Aftermarket Parts

Association (“CAPA”), an insurance-industry created and funded organization¹, admitted that the failures of non-OEM parts to be made of the same materials, and respond in the same way as auto-maker parts, do pose a significant risk to occupant safety. “CAPA has tested numerous bumpers for comparability to their car-company-brand counterparts. ‘In testing what appear on the surface to be reasonably well-manufactured aftermarket bumpers, our laboratories **discovered serious deficiencies** in mechanical properties such as strength and metal hardness, material thickness, and fit. These deficiencies potentially **place the driving public**, who trust body shops to repair their vehicles with safe quality parts, **at serious risk.**” “CAPA to Establish New Certification Standard for Aftermarket Bumpers”, CAPA News Release, February 1, 2010, <http://www.capacertified.org/press/100201.pdf> (emphasis added). See “Video: Knock Off Bumper Explodes in Crash Test”, Blyskal, Jeff, *Consumer Reports*, August 13, 2010, <https://www.consumerreports.org/cro/news/2010/08/video-knock-off-bumper-part-explodes-in-crash-test/index.htm>

Non-OEM bumper parts that are made with different metal hardness, materials, material thickness, and strength than auto-maker parts can easily kill people. This is because airbag sensors associated with the bumper components are precisely timed to deploy the airbag once the bumper components have crushed to a particular level. By replacing the auto-maker’s bumper components with non-OEM parts made with different materials or strength levels, the airbag timing can be altered and the airbag suddenly becomes a life-threatening device rather than a life-saving one. Honda of America demonstrates in frighteningly graphic detail what the difference 7/100ths of a

¹ GAO Aftermarket Parts Report, p. 7.

second means to vehicle occupants in the deployment of an airbag. "Use Your Melon", *Honda of America*, <http://collision.honda.com/melon-video>.

These examples of deficient non-OEM parts are merely illustrative and do not address the entire universe of safety concerns regarding the use of these parts in collision repairs. In fact, in two separate tests conducted by CAPA on non-OEM headlamps – the only replacement crash part that is required to meet a Federal Motor Vehicle Safety Standard ("FMVSS") – the first found that 82% failed to meet FMVSS 108, and the second (expanded) study found that 100% failed to meet the required federal standard. "Compliance Test Results of Independently Manufactured Automotive Replacement Headlamps to FMVSS 108 Overview of Test Studies, March 18, 2003 and May 13, 2004", CAPA, <http://www.capacertified.org/press/CAPALighting1.pdf>. The fact that knockoff parts exist and may be cheaper than the OEM part does not make them safe or appropriate to use.

It is against this backdrop that the Ohio Legislature enacted R.C. § 1345.81 to make certain that any party calling for vehicle repair using non-OEM parts fully inform consumers of the proposed use *and* obtained their express consent. Without being informed of the particular parts being recommended in a repair, a consumer would never know to ask questions about whether the parts are tested, safe to use, capable of being recalled, endorsed by anyone, or if the professional collision repairer believes the parts are proper for use in the repair. If there are problems with a non-OEM part, consumers complaining to NHTSA will improperly place the blame on the auto-maker and there will be no data establishing that the problem is with the non-OEM. This is

exactly the concern identified by GAO in its Congressional Report on the use of non-OEM parts in collision repair.

Without having the opportunity to make a deliberate choice about utilizing non-OEM parts in their vehicle repairs, consumers lose the right to authorize how their vehicles will be repaired. This is particularly important with insurers writing collision repair estimates because they are not professional repairers and do not undertake any risk or accountability for the use of non-OEM parts in a repair, as professional collision repairers do. Farmers is not a professional collision repairer and is not legally tasked with knowing how vehicle parts will interact with the vehicle after repair. Yet, Farmers and its employees write estimates specifying how a damaged motor vehicle should be repaired. If, however, repairs made with non-OEM parts cause a person's death (or injure someone), it is the collision repairer that installed those non-OEM parts who is legally accountable for their use, not Farmers. Accordingly, Farmers seeks to dictate vehicle repairs and parts without accepting any liability.

What Farmers, and other insurers, might save by using knock-off parts comes with other costs. Non-OEM parts are not made to manufacturer specifications, and therefore do not work as well. The results are increased injury, or death should the vehicle be in a second accident. Non-OEM radiators, for example, often cause engines to run hotter, and decrease function and life span. Such installations also *void* manufacturer warranties, where the problem is traceable to the knock-off part. As the Alliance of Automobile Manufacturers points out, the use of knock-off parts procures a breach of lease agreements. The only protection against these things in Ohio's law is R.C. § 1345.81.

LAW AND ARGUMENT

Farmers is asking this Court to exercise a line-item veto. One provision of the Ohio CSPA applies directly to insurance companies, when they issue collision estimates. Section 1345.81 does not conflict with the general exemption that insurance companies have from the CSPA. Without question, the "consumer transaction" at issue is the vehicle repair, a transaction between the repair shop and the vehicle owner. That transaction is obviously governed by the CSPA.

Farmers issues written estimates in every case. See Farmers Brief at 2, 15; see also O.A.C. 3901-1-54(H)(1)(requiring written estimates be furnished to the claimant). With its refusal to pay for OEM parts, Farmers places a dilemma on the consumer: accept knockoff parts, or pay the difference. R.C. § 1345.81 does not even prohibit this. Rather, it requires disclosure that non-OEM parts will be used, and that these parts are not warrantied by the vehicle's manufacturer. The statute is targeted to the role Farmers has in the collision repair process.

The Appellant and its Amicus contend that the sky would fall, were this Court to affirm. In the first place, the statute has been on the books for 24 years, but this is the first case any party has found even discussing it. This suggests strongly that insurance companies generally comply with the statute, or that controversies arising under it are resolved without protracted litigation. Second, Farmers has devoted considerable resources in this litigation to simply red-line a statute. The statute eliminates uncertainty, by prescribing particular disclosures, and requiring a signature. Instead, Farmers argues for a self-made, substantial compliance test. What Farmers asks here could only be proper in the General Assembly.

First Proposition of Law: An insurer does not engage in a “consumer transaction” for the purposes of any provision of the Ohio Consumer Sales Practices Act (R.C. § 1345.01 et seq.), when it adjusts its insured’s claim for motor vehicle damage, and issues a repair estimate.

I. R.C. § 1345.81 APPLIES TO INSURERS.

There is no conflict between section 1345.81 and R.C. § 1345.01(C)’s definition of a supplier. The Fifth District Court of Appeals did not need to resort to the “specific over general” rule of statutory construction. Section 1345.81 imposes a disclosure and verification requirement directly on insurers, when they give estimates in collision repairs. Farmers’ conduct, as shown in this case, goes well beyond issuing an estimate, and Farmers is certainly a “supplier” under the Ohio CSPA. But both the Court of Appeals and the Appellant miss the point: § 1345.81 is a stand-alone requirement that applies to a particular third party to a particular consumer transaction. Consumers hire shops, and insurers write estimates. Section 1345.81 addresses the insurer’s role.

At page 8, Farmers says, “Title 39 of the Revised Code, along with Chapter 3901 of the Administrative Code, are intended to regulate the insurance industry, not the CSPA.” (emphasis sic.) But the Department of Insurance has recognized that § 1345.81 *does* govern insurers, and promulgated regulation consistent with it:

(4) When partial losses will be settled on the basis of a written estimate prepared by or for an insurer, the estimate must clearly indicate the use of the parts in compliance with section 1345.81 of the Revised Code. When “like kind and quality” parts are expected to be used in the repair, the estimate shall clearly indicate the location of the licensed salvage dealer where the “like kind and quality” parts are to be obtained.

O.A.C. 3901-1-54(H)(4), “Unfair property/casualty claims settlement practices.”

R.C. § 1345.81 requires (1) disclosure that someone other than the manufacturer of the vehicle made parts that are stated in the estimate, and (2) that the vehicle's manufacturer will not warranty the knock-off part. Farmers is completely silent in this Court on the warranty issue, and instead proffers other measures as a substitute for what the General Assembly prescribed. Warranties, however, are a very important issue to consumers, and are protected by the CSPA. See R.C. § 1345.02(B)(10) (deceptive practices include false representations about warranties). Farmers would replace the statute's requirement of a clear, signed disclosure with a statement that Mr. Dillon was "well informed" about knock-off parts. This is no standard at all, and certainly not the one created by the General Assembly.

At subsection (E), R.C. § 1345.81, by its plain language, is contrary to Farmers' position. The statute applies to any violation made "in connection with" the consumer transaction, not that Farmers be a party to it:

(E) Any violation of this section **in connection with** a consumer transaction as defined in section 1345.01 of the Revised Code is an unfair and deceptive act or practice as defined by section 1345.02 of the Revised Code. [Emphasis added.]

Vehicle repairs are consumer transactions, and insurers have a role within them. If Farmers will only pay for the use of knock-off parts, then Farmers is required to get a particular disclosure. R.C. § 1345.81 does not require that Farmers be a "supplier" to fall within its terms, only that the insurer violate the statute "in connection with" the consumer transaction.

Should this Court conclude that Farmers must be a supplier for the statute to apply, there is ample record evidence that Farmers did act as the supplier in this case.

Refusing to pay for OEM parts exerts a very significant influence over the repair.

Farmers' estimate goes so far as to advise the shop where it can obtain knock-off parts recommended by Farmers. "Thus, the fact that the ... Defendants did not 'initiate' the transfer of goods to plaintiffs is not relevant to this analysis. ... Moreover, under the definition of "supplier" the individual need only 'effect ... consumer transactions' (R.C. §1345.01(C)), not 'initiate' them." *Hagy v. Demers & Adams, LLC*, 2011 U.S. Dist. Lexis 141466, 27-30 (S.D. Ohio Dec. 7, 2011).

Ohio Courts recognize that an insurer loses its CSPA exemption when it is not engaged in the business of insurance, but rather acts as a supplier:

The Court agrees with Thornton that this insurance company exception does not provide a blanket exemption for all activities conducted by an insurance company. Rather, the Court must make a practical inquiry into whether State Farm was actually operating as an insurance company in the transaction at issue.

Thornton v. State Farm Mut. Auto Ins. Co., Case No. 1:06-cv-00018, 2006 U.S. Dist. Lexis 83968, 24-27 (N.D. Ohio Nov. 17, 2006), citing *Drozeck v. Lawyer Title Ins. Co.*, 140 Ohio App. 3d 816, 749 N.E.2d 775, 779 (2000); *Hofstetter v. Fletcher*, 905 F.2d 897 (6th Cir. 1988); and *Chesnut v. Progressive Cas. Ins. Co.*, 166 Ohio App. 3d 299, 2006 Ohio 2080, 850 N.E.2d 751(2006)(noting that "Ohio courts have held that the CSPA does not apply to insurance companies *conducting insurance transactions*" [emphasis added]).

In this case, however, there is no requirement that Farmers be a "supplier" in order to fall with the plain terms of § 1345.81. Violations of § 1345.81 occur "in connection" with consumer transactions. To graft a requirement onto the statute that the violator would have to be a supplier would re-write the statute. Similarly, Farmers'

concern for the insurance company exemption from the CSPA is misplaced. If this Court should look beyond the plain language of § 1345.81(E), it becomes clear that Farmers' approach goes well beyond the business of insurance that is typically exempted from the workings of the CSPA.

Either way, there is no conflict between R.C. § 1345.81 and the insurance exemption of the CSPA. If there were, the Court of Appeals' approach to resolving the conflict would be necessary to give effect to all terms of the statute. What Farmers seeks here is nothing short of red-lining a statute that its employee did not comply with. Whether the statute is good policy, or insufficient to protect against the urging of knock-off parts, are issues beyond the scope of this Court's review. It is wrong of Farmers to ask this Court to edit the signature requirement out of R.C. § 1345.81.

Second Proposition of Law: An insurer's issuance of a repair estimate for the use of OEM and non-OEM parts is not an "unfair or deceptive act or practice" pursuant to any provision of the Ohio Consumer Sales Practices Act (R.C. §1345.01, et seq.), where the estimate complies with the express terms of the applicable insurance policy; the insurer orally notifies its insured of the content of the estimate; and the insured chooses the repair facility.

II. R.C. § 1345.81's DISCLOSURE AND SIGNATURE REQUIREMENTS ARE CLEAR AND WORKABLE.

The Appellant's second proposition of law asks this Court to supplant a statute with a case syllabus. The Revised Code does not require mere compliance with the terms of the policy, it requires a disclosure, and a signature. Were this Court to adopt this proposition, the necessity of hiring counsel to purchase insurance intelligently in Ohio would only be heightened. See *Maric v. Adams*, Case No. 98-L-142, 2000 Ohio App. Lexis 1417, *19 (11th Dist. 2000)(J. O'Neill, dissenting).

Farmers wants to be excused from the signature requirement, notwithstanding the fact that the signature line is printed on their own estimate form, and their agent simply did not get it signed. Rather than the signature requirement, Farmers proposes a rule of law that would have Ohio courts inquire on whether the "content of the estimate" was communicated. The purpose of the signature requirement is to end this inquiry. Farmers is notably silent on whether Mr. Dillon was aware of the warranty issue, or whether this would be included in the "content" of the oral communication. R.C. § 1345.81 is a workable, definite standard. Farmers wants this Court to fashion an uncertain and elastic one, just to cover Farmers' non-compliance.

Farmers also advances a specious argument that section 1345.81(A) applies only when the consumer elects a written estimate. Farmers states on page 15 of its brief that it always gives written estimates "as a matter of consistent internal policy and procedure." As shown above, claims regulations also require a written estimate whenever the vehicle is not deemed a total loss. O.A.C. 3901-1-54(H)(1). This means that Farmers never offers an "election" of a written estimate. No insurer ever would, because claims practices regulations *require* the estimate in writing. Section 1345.81 is written to apply to all vehicle repairs, whether the estimate is given in writing, orally, or never at all until the repair is complete. The "election" is not a pre-condition to the statute, and could not be where the thing elected is required by claims practices regulations, and is the standard operating procedure of the Appellant.

Finally, Farmers attempts to provoke outrage at the award of attorneys' fees in this case. But Farmers makes no claim that the trial court abused its discretion in calculating the fees. "The purpose behind most of these types of statutory fee

authorizations is to encourage attorneys to represent indigent clients and to act as private attorneys general in vindicating legislative policies." *Burdge v. Kerasotes Showplace Theatres, LLC*, Case No. CA2006-02-023, 2006-Ohio-4560, P44 (12th Dist.), citing *Turner v. Progressive Corp.*, 140 Ohio App.3d 112, 118, 746 N.E.2d 702 (2000) and *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 161, 2004 Ohio 829, 809 N.E.2d 1161 (2004). Farmers has likely expended far greater sums in this errand to induce this Court to red-line a statute. Farmers' insinuations about the attorneys' fees should be disregarded.

Strictly speaking, whether R.C. § 1345.81 is good policy or not is completely outside of this Court's review. But the signature requirement is Ohio's only speed bump on the path to Farmers' categorical insistence on knock-off parts. Cost is Farmers' only concern. Consumers, by contrast, must be concerned above all with the crashworthiness of the vehicles used by their families. To say nothing of the human costs, Farmers' drive to save \$1,500 in this case will cost it many times over in other cases involving cars repaired with knock-off parts.

CONCLUSION

Farmers articulates no legal basis for its position. It simply does not want to be bound by R.C. § 1345.81, and asks this Court to re-write what the statute requires. There are many good reasons to be wary of non-OEM parts. Consumers have only one protection against their use. Neither Farmers nor this Court should re-write it. For the foregoing reasons, Amici AEPI and CARA ask this Court to AFFIRM the decision of the Fifth District Court of Appeals.

Respectfully submitted,



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Copies of the foregoing Amici Brief were served via First Class US Mail on this 2nd Day of September, 2014, to the following:

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