IN THE SUPREME COURT OF MISSOURI

No. SC 84610

STATE OF MISSOURI ex rel.
AMERICAN FAMILY MUTUAL INSURANCE COMPANY

Relator,

vs.

THE HONORABLE THOMAS C. CLARK, JUDGE OF THE 16TH JUDICAL CIRCUIT OF THE STATE OF MISSOURI and THE HONORABLE EDITH L. MESSINA, JUDGE OF THE 16TH JUDICIAL CIRCUIT OF THE STATE OF MISSOURI

Respondents.

REMEDIAL WRIT PROCEEDINGS UNDER THE ORIGINAL JURISDICTION OF THE SUPREME COURT OF MISSOURI

BRIEF OF RELATOR AMERICAN FAMILY MUTUAL INSURANCE COMPANY

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I. JURISDICTIONAL STATEMENT

The Court has original subject matter jurisdiction over this case pursuant to Article V, Section 4.1 of the Missouri Constitution. It states in relevant part: "The supreme court shall have general superintending control over all courts and tribunals…. The supreme court … may issue and determine original remedial writs. Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power." In addition, Chapters 529 and 530 of the Revised Statutes of Missouri grant subject matter jurisdiction to this Court to issue remedial writs in mandamus and prohibition actions.

Under these provisions, this Court is authorized to correct the extra-jurisdictional and unconstitutional class certification order in a case filed in the Circuit Court of Jackson County, Missouri ("the underlying action"), Smith v. American Family Mut. Ins. Co., Case No. 00 CV 211554. The multi-state class certification order is staggering in scope. It covers a ten-year period of first-party auto insurance collision repair claims settled under American Family policies approved, sold, delivered, administered and governed by the laws and insurance regulations of 13 other states besides Missouri. Many millions of dollars of out-of-state claims and alleged damages are at issue. The case purports to affect hundreds of thousands, if not millions, of current and former policyholders all over the country, some of whom are deceased and many of whom cannot be located.

The order, issued under Missouri's class action rule 52.08 - a rule of *procedure*, after all[1] - cloaks the Missouri court system with the power to referee purely private, purely local transactions arising from auto accidents occurring on the roadways in any one of the 13 other sovereign states encompassed by the class. Thus, the challenged order improperly enlarges the adjudicative jurisdiction of the Missouri court system, projecting it into states and transactions in which the government of the State of Missouri simply has no authority or interest, let alone accountability. The challenged order directly raises Due Process Clause issues involving the ancient structural limitations on one state's power to try lawsuits related to private contracts and transactions occurring *wholly* within another state. Non-resident class members - American Family customers - with literally no nexus to the State of Missouri, will find themselves arbitrarily coming under the adjudicative power of a Missouri court, using Missouri law, in clear violation of the Due Process Clause. The order further raises serious questions under the Full Faith and Credit Clause: When and to what extent is Missouri bound to respect, if not defer to,

[1] Article V, Section 5 of the Missouri Constitution provides that the Supreme Court may enact rules of procedure, but that any such rule shall not change substantive rights. Likewise, RS Mo § 477.010 provides: "The supreme court shall have the power to direct the form of writs and process; and to promulgate general rules for all courts of the state. No such forms or rules shall abridge, enlarge or modify the substantive rights of any litigant nor be contrary to or inconsistent with the laws in force for the time being."

the policy choices and statutory mandates of legislators and insurance regulators in other states.

This case presents an opportunity for this Court to provide guidance to trial courts faced with a requested multi-state class action. Multi-state class actions have unique issues and concerns because of the sovereignty of sister states. We suggest it is rarely appropriate to permit a multi-state class action against an insurance company that is subjected to the heavy regulation and diverse laws of sister states. To do so usurps the authority of those other states.

This Court also has jurisdiction because the challenged order violates American Family's clear and vested legal right to present individualized factual and legal defenses to liability. The order ignores the predominance and manageability requirements of the Missouri rule by permitting the litigation of claims by a fictional composite plaintiff, under an illusory set of "common proofs," thereby eliminating American Family's Due Process right to present all available, proper individualized evidence in defense of the plaintiffs' alleged claims and damages.

This Court has plenary power to decide the issues joined in this action and to assert its supervisory powers over the lower Missouri courts. The Court has issued a preliminary writ in prohibition. American Family now respectfully asks this Honorable Court to make that writ absolute and permanent.

II. STATEMENT OF FACTS

American Family Auto Insurance Business

American Family is a mutual insurance company, owned by its policyholders. Founded in 1927, the company is headquartered in Madison, Wisconsin. American Family has been authorized to write property and casualty insurance in Missouri since 1939. *See* http://www.amfam.com/

This case involves American Family's private passenger automobile property and casualty insurance. The Company writes such insurance in 14 states, including Missouri. The affected states are Missouri, Wisconsin, Minnesota, Iowa, North Dakota, South Dakota, Kansas, Nebraska, Colorado, Arizona, Oregon, Illinois, Ohio and Indiana. At the hearing, plaintiffs' counsel contended that: "between '92 and 2001, American Family handled 4,763,000 claims and made collision payments in excess of two billion dollars." Answer to Petition, Exhibit A, Vol. 1, at p. 77.

OEM Parts And Aftermarket Parts

This case is about the parts used to repair vehicles damaged in collisions. Original Equipment Manufacturers' ("OEM") parts are those parts made by the original auto manufacturers or their suppliers. "Aftermarket" parts are those parts made by companies other than the original manufacturers or their suppliers.[2]

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[2] Missouri defines "aftermarket parts" as follows: "After-market parts, for purposes of this regulation, means sheet metal or plastic parts which generally constitute the exterior of a motor vehicle, including inner and outer panels, not made by the original equipment

This case involves "crash parts," sometimes called "cosmetic" replacement parts because, whether OEM or aftermarket, these repair parts are generally irrelevant to the crashworthiness or energy absorption of a vehicle. *See*, Plaintiffs' Answer to Petition, Exhibit 1, Vol. 4, 838-42; *see also* American Family's hearing Exhibits 1024, 1021 and 1025 (attached beginning at Appendix A1-A21). The parts are mainly exterior sheet metal and plastic parts, used for doors, fenders, hoods, bumper covers, side moldings and the like.

American Family Guarantees Aftermarket Parts and

Suggests Their Use Only After The Third Model Year

The regulated use of aftermarket cosmetic parts has been standard practice in the insurance industry for years. That practice – *who regulates it, and where* - lies at the heart of this litigation. American Family has been utilizing aftermarket collision parts to repair older policyholder vehicles since 1985. More important, when an aftermarket part is used to repair an insured's vehicle as suggested by a company estimate, American Family guarantees that part for as long as the insured owns the vehicle. Plaintiffs'

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manufacturer." 20 CSR 100-1.050.2.D.3.(b), Standards for Prompt, Fair and Equitable Settlement of Claims; *see also* RS Mo § 407.295.(1): "Aftermarket crash part," a replacement for any of the nonmechanical sheet metal or plastic parts which generally constitute the exterior of a motor vehicle, including inner and outer panels and (3) "Nonoriginal equipment manufacturer (Non-OEM) aftermarket crash part," aftermarket crash parts not made for or by the manufacturer of the motor vehicle.

Answer to Petition, Exhibit A, Vol. 4, at 787-91; *see* Appendix A22-23. American Family's obligation in all states is to restore the vehicle to pre-loss condition, if it is not a total loss. The Company's policy is to cause OEM replacement parts to be used to repair any vehicle in the third model year or less. Plaintiffs' Answer to Petition, Exhibit A, Vol. 4, at 785-86. For damaged automobiles in the fourth model year and older, American Family adjusters are urged to use salvage OEM parts and aftermarket parts when available. The uncontradicted evidence at the evidentiary hearing established that American Family adjusters take the pre-loss condition of a vehicle into account in preparing the repair estimate. Plaintiff's Answer to Petition, Exhibit A, Vol. 6, at 1232-33, 1240-1241. Company adjusters have wide discretion to determine pre-loss condition, approve necessary repairs, and, where appropriate, make adjustments to estimates of loss. Plaintiffs' Answer to Petition, Exhibit A, Vol. 4, at 785-789.

Aftermarket Parts Were Developed In Response

To The Auto Manufacturers' Monopoly

Argument I of this brief will detail the state laws and regulations governing the use of aftermarket parts, but such regulations did not develop in a vacuum. Rather, the laws developed in response to competing interests from various sectors of the economy and society.

"For many years, automobile manufacturers enjoyed a monopoly on supplying parts for the repair of damaged motor vehicles. Independent body shops, required to purchase repair parts from authorized dealers, were at a competitive disadvantage. Then in the mid-1980s, in response to escalating replacement part prices, independent parts

manufacturers began offering 'after-market' replacement parts at substantially lower prices. Competition between automobile manufacturers, wanting to preserve their monopoly on replacement parts, and independent parts manufacturers, seeking to carve out a part of this $50 billion industry, has become fierce." Bratton and Avila, *After-Market Crash Parts: An Analysis of State Regulations*, 18 J. Ins. Reg. 150 (Vol. 2) (Winter 1999) (Appendix at A24-A51) (hereafter "Bratton and Avila"). At the class certification hearing, Dr. Samuel Peltzman, an economist and professor at the Graduate School of Business of the University of Chicago, testified that the cost of OEM collision repair parts would increase by approximately 26% in the absence of competition from the aftermarket repair part industry. He opined that an inevitable result of the elimination of aftermarket parts is an increase in insurance premiums. *See*, Plaintiffs' Answer to Petition, Exhibit 1, Vol. 5, at 1103-06; 1094.

"Prior to the mid-1970s, automobile manufacturers monopolized the replacement parts market. Before the introduction of non-OEM parts, automobile companies enjoyed up to an 800% mark-up on OEM parts sales. Henry Ford is reputed to have said he'd 'give his cars away if he could have a monopoly on selling replacement parts.' Indeed, OEM prices decreased after non-OEM parts introduced competition into the market." Note, *OEM or Non-OEM Automobile Replacement Parts: The Solution to Avery v. State Farm*," 28 Fl. St. U. L. Rev. 543 (2000). Appendix at A52-A80. Uncontradicted evidence at the hearing substantiated these facts. *See* Plaintiffs' Answer to Petition, Exhibit 1, Vol. 5, at 1103-06; 1094.

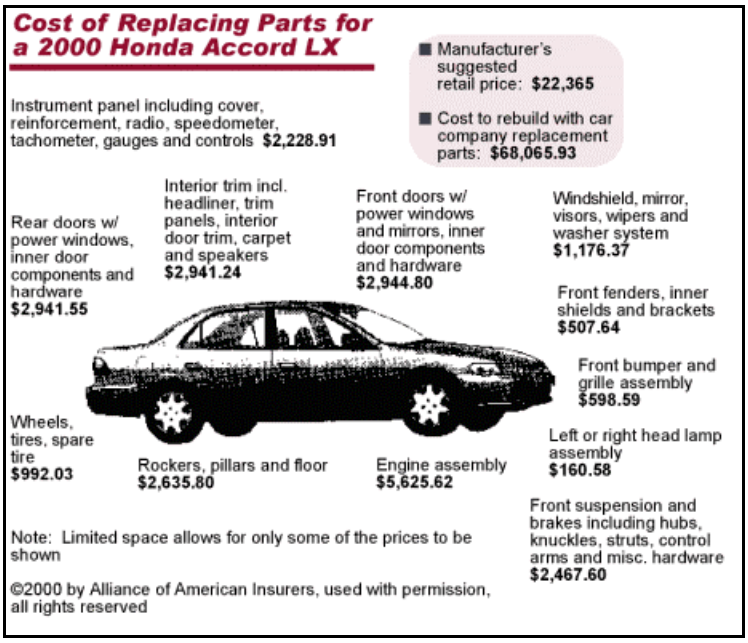
Insurance Companies Lead The Challenge To The Monopoly

In the 1980s, automobile manufacturers began to standardize automobile designs and the cost of tooling needed to duplicate exterior sheet metal parts decreased. This set the stage for the growth of the aftermarket parts market. Bratton and Avila, supra, at 152-53, Appendix at A27-28. Insurers increasingly turned to the independent aftermarket suppliers for less expensive replacement parts to contain spiraling collision repair costs. "…[A]utomobile manufacturers [supported] campaigns asserting that after-market parts are inferior in quality and safety and … call[ed] for state and federal laws that restrict the use of non-Original Equipment Manufacturer (non-OEM) parts." Bratton and Avila, *supra*, at 151, Appendix at A26.[3] However, at nearly every turn, consumer groups extolled the virtues of aftermarket parts because they have cosmetic effects only in repairing an already damaged and used customer vehicle to "pre-loss condition" and, most importantly, because they help contain the cost of insurance. Liffick, *Avery v. State Farm: The Potential for Abuse of the Class Action and Its Extraordinary Impact on Insurer and Insured*, 13 Loyola U. Consumer L. Rev. 88, 89-92 (2001). Appendix at A81.

In case it be thought that the high cost of OEM parts is not a significant issue affecting auto insurers and insureds alike, the Alliance of American Insurers periodically puts out a graphic to illustrate the cost of repairing a vehicle with all-OEM replacement

[3] See Appendix at A89-91, 40 BNA Patent, Trademark and Copyright Journal News and Comment, Issue No. 987 (June 28, 1990).

parts as compared to the *original* cost of the same vehicle. Plaintiffs in the underlying action tendered an article containing a graphic showing a 1998 vehicle. Exhibit VIII to Volume I of their Appendix of Exhibits in support of their Motion for Class Certification. Appendix at A92-93 (relevant excerpt). Reproduced below is an updated version of that graphic, applicable to a 2000 Honda Accord LX:



See also Schwartz and Lorber, State Farm v. Avery: State Court Regulation *Through Litigation Has Gone Too Far*, 33 Conn. L. Rev. 1215, 122-23, n.43 (2001).[4]

[4] "For example, in 1982, a 1983 Chevrolet Camaro front nose cover made by GM cost $325. In 1988, as after-market replacement parts began to appear, the same GM part cost only $225. But no competing replacement parts existed for a door shell for the same Camaro, and its price continued to increase. In 1982, it cost $445; its price had risen to $590 by 1988." *See also*, Bratton and Avila, *supra*, at 169 (table showing historical pricing of comparable OEM and non-OEM parts). Appendix at A43-44.

Appendix at A94-96, 97. Facts such as these explain in part why consumer interest groups have consistently praised insurers' use of less expensive aftermarket parts as a way to contain repair costs and, as a consequence, insurance premiums. Note, *OEM or Non-OEM Automobile Replacement Parts: The Solution to* Avery v. State Farm, 28 Fl. St. U. L. Rev. 543 (2000).[5] Appendix at A52.

The Underlying Action

The underlying action is a direct descendant of Avery v. State Farm Insurance Company, [6] filed in 1997 in the Circuit Court of Madison County, Illinois.[7] Nearly all of

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[5] Amicus Brief of Public Citizen, Inc., The Center for Auto Safety, The Consumer Federation of America, and the Massachusetts Public Interest Research Group, in Support of Petition for Certiorari, State Farm Automobile Ins. Co., v. Speroni, No. 97-2063 (United States Supreme Court), filed August 19, 1998: "And of particular relevance here, the use of non-OEM parts benefits policyholders in general, and the plaintiff class members in particular, by reducing the cost of repairs and thus insurance premiums." Amicus Brief at 5. Appendix at A114, A126.

[6] Avery v. State Farm Ins. Co., 746 N.E.2d 1242 (Ill. Ct. App. 2001), *leave to appeal granted*, No. 91494 (Supreme Court of Illinois, October 2, 2002).

[7] "Court Has Dubious Record as a Class-Action Leader," New York Times, August 15, 2002. Appendix at A138-140; Beisner & Miller, *They're Making a Federal Case Out of It…In State Court*, 25 Harv. J.L. & Pub. Policy 143, 69-170 (2001) (copy attached as Exhibit A to Relator's Petition herein).

the copy cat cases filed after Avery have failed to be certified as class actions. Appendix at A141-327. Nevertheless, plaintiffs' counsel sought to replicate the Avery outcome, describing this action as a "mirror" of Avery. Answer to Plaintiffs' Petition, Exhibit A, Vol. 1, at 24. Indeed, plaintiffs' counsel told Judge Clark: "…[T]he Avery case is the case that takes you off the limb." Answer to Plaintiffs' Petition, Exhibit A, Vol. 1, at 69.

Suit was filed against American Family in May 2000 in the Circuit Court of Jackson County, Missouri. Plaintiffs brought the case in the face of the conflicting regulations and laws described in Argument I, and against a contrary, controlling Missouri insurance regulation which permits use of aftermarket crash parts to repair vehicles to "pre-loss condition" so long as they are of "like, kind and quality." Plaintiffs suggested that a state's department of insurance: "…simply doesn't have the expertise or the authority to address and resolve these claims." Plaintiff's Answer to Petition, Exhibit A, Vol. 1, at p. 118.

This Is A Breach Of Contract Action

The suit is for breach of contract. Count One of the Fourth Amended Petition, ¶ 59, states: "American Family entered into a standard form of automobile policy with plaintiffs and Class members in which it promised and agreed to pay the cost to fully *repair damaged vehicles to their condition prior to the loss*. To do this, American Family must pay for parts which are at least equal in like, kind and quality to original equipment manufacturer parts." (emphasis added) Appendix at A328, A344. Their theory of the case rests on the extraordinary premise that (1) there is no need to look at any particular part to tell if it is of "like, kind and quality," and (2) there is no need to

examine a particular vehicle to see if it was or was not restored to its "pre-loss condition," even though the failure to do that is the gist of the contractual obligation allegedly breached.

Plaintiffs Claim Millions of Aftermarket Parts Are Inherently Inferior

An absolutely essential element of the plaintiffs' case is the extraordinary proposition that all aftermarket parts in the marketplace – of which there are literally millions made by numerous different manufacturers[8] - are all "uniformly inferior." Further, the plaintiffs insist that a single Jackson County jury should make that decision for all American Family insureds nationwide and for all different vehicles and accidents over the past ten years. Fourth Amended Petition at ¶ 16, Appendix at A333. A second essential element to plaintiffs' claims is that the *mere specification* in a repair estimate of aftermarket crash parts to estimate the cost of repair is a breach of the contract to restore a damaged vehicle to pre-loss condition. Even though the independent body shop may perform the actual repairs with OEM parts or reconditioned OEM parts or make no repair at all, because of some side deal cut between the policyholder and the body shop, plaintiffs' theory of the case would subject American Family to contract liability merely because of the original estimate. The contrived nature of this element of plaintiffs' case was demonstrated by the example of Mr. Barthol, a former named plaintiff in the underlying litigation. Although his repair estimate specified some aftermarket parts, his

[8] See Testimony of Gregg Marshall, Volume VII of VIII, to Exhibit 1 to Plaintiff's Answer to Petition, at p. 1330.

vehicle was repaired with reconditioned OEM parts, and he apparently received an under-the-counter discount on the repair work while collecting the full amount of the repair from American Family. The estimate, then, only governs the amount of money initially anticipated for repairs, not the manner in which repairs are performed. See Testimony of Don Parker, Volume IV of VIII, to Exhibit 1 to Plaintiff's Answer to Petition, at p. 916-922.

Plaintiffs Claim The Breach Occurred At The Estimate Stage

Plaintiffs posited that American Family breached its contracts of insurance in 14 states over a ten year period by failing to restore policyholder vehicles to "pre-loss condition" each and every time it used "aftermarket" crash parts to estimate the cost to repair damaged automobiles. The plaintiffs brought the action:

> …on behalf of themselves and on behalf of all others nationwide, or in the alternative all others in the state of Missouri, who, during the period of May 11, 1990 through the present ("Class Period"), were insured by a vehicle insurance policy issued by [American Family], and made a claim for vehicle repairs pursuant to their policy and had imitation crash parts installed on their vehicle or who received monetary compensation determined by the cost of such imitation crash parts.

Fourth Amended Petition, Appendix at A328. The gist of the underlying action is that Relator breached the contract of insurance *automatically* by specifying the use of

"aftermarket" crash parts in a repair estimate.[9] The pleaded obligation was to restore the vehicle to "pre-loss condition."[10] The pleaded breach was the failure to perform that obligation.

The Certification Order Eliminates "Pre-Loss Condition" As A Requirement

By certifying the class, plaintiffs are now allowed to uncouple their stated cause of action from the analytical requirements of "pre-loss condition." If that were not the case, the litigation would lead directly and rapidly into a swamp of individual questions that preclude a finding of predominance. See Snell v. The GEICO Corp., 2001 WL 1085237 (Circuit Court of Maryland, August 14, 2001): ("In the Court's view, given the undisputed language of the contract, in order to determine if there was a breach and, if so, the proper measure of damages, the Plaintiffs will have to establish the pre-loss condition of the vehicle in each instance where a claim was made. This alone would be reason enough to deny certification").

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[9] Plaintiffs' counsel told Respondent Clark: "…Your Honor, liability and damages necessarily flow from the estimate and the payment which is based on the estimate." Answer to Plaintiffs' Petition, Exhibit A, Vol. 1, at 101. There is no legal authority for this proposition.

[10] This allegation appears throughout the Fourth Amended Petition: See ¶¶ 2, 3, 11, 12, 14, 24, 25, 26, 29, 31, 36, 39, 47, 52, 53, 55(b)(ii), 55(b)(iv), 55(b)(v), 55(b)(vii), 57, 59, 65, 69, 70, 71. Appendix at A328 passim.

The plaintiffs were allowed to plead their case on one theory (the failure to restore to pre-loss condition), but the class certification order is premised on a thumbs up or thumbs down litigation on aftermarket parts, as a class of objects, regardless of pre-loss condition.[11] According to plaintiffs, nothing matters in this case but the estimate contents and the abstract proposition of whether all aftermarket parts whatever their source are or are not of "like, kind and quality."

The Certification Order Eliminates The Quality Of The Repair Job

Not only did plaintiffs relieve themselves of the burden to inquire into the actual pre-loss condition of the vehicle, they also relinquished the need to look at the quality of the repair job, the quality of any particular OEM or aftermarket parts, or the post-accident/post-repair condition of the vehicle. They claimed that because aftermarket parts are "uniformly inferior," it is impossible to restore a vehicle to pre-loss condition. The oddity of this contention was magnified when plaintiffs' expert testified at the hearing that, whether one uses OEM or aftermarket parts, it is not possible to restore a vehicle to its pre-loss condition.[12]

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[11] This is true even though plaintiffs' own expert testified that it would be necessary to look at the condition of a vehicle in order to determine if it had been restored to pre-loss condition. Plaintiffs' Answer to Petition, Exhibit A, Vol. 2, at 377.

[12] Paul Griglio testified that "Pre-loss condition is the condition of the vehicle prior to the accident." Answer to Plaintiffs' Petition, Exhibit A, Vol. 2, at 299. Mr. Griglio also testified, Answer to Plaintiffs' Petition, Exhibit A, Vol. 2, at 300:

No Fraud Or Misrepresentation Is Claimed

The underlying action contains no fraud or misrepresentation claims. There is no allegation that any course of conduct emanated from Missouri. The causes of action asserted on behalf of the putative class indisputably arose from collision repair claims filed over wholly local, wholly private fender benders and other auto accidents occurring on the city streets and highways of all the states included in the class, over a ten year period of time. There was no evidence that any but the named plaintiffs from Missouri themselves had vehicles insured, stored, driven and repaired in Missouri.

Proceedings in the underlying action were temporarily stayed, until May 2002. Relator made a request in June to the Missouri Court of Appeals, Western District, for extraordinary relief. That petition was denied. Relator then invoked this Court's original remedial writ and supervisory powers.

Q. Isn't it true that with respect to parts such as hoods, fenders, and doors, it is your testimony that even if OEM parts are used to repair that vehicle, it cannot be restored to pre-loss condition?

A. That's correct.

Q. That's your opinion, isn't it?

A. Yes.

III. POINTS RELIED ON

A. RELATOR IS ENTITLED TO A PERMANENT WRIT PROHIBITING RESPONDENTS FROM TAKING ANY ACTION IN THE UNDERLYING CASE OTHER THAN VACATING THE DECEMBER 14, 2001 MULTISTATE CLASS CERTIFICATION ORDER, BECAUSE THAT ORDER VIOLATES THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, AS WELL AS THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION, ART. IV, § 1, IN THAT IT ARBITRARILY AND UNFAIRLY USES THE MISSOURI CLASS ACTION PROCEDURAL RULE AND AN UNFOUNDED CHOICE OF SUBSTANTIVE LAW TO PROJECT THE ADJUDICATIVE JURISDICTION OF THE MISSOURI COURTS, AND THE FORCE OF MISSOURI LAW, IN UNAUTHORIZED EXTRA-TERRITORIAL FASHION, OVER WHOLLY PRIVATE, WHOLLY LOCAL TRANSACTIONS AND EVENTS OCCURRING IN 13 OTHER SOVEREIGN STATES, EMBRACING A TEN YEAR PERIOD OF TIME, AND HAVING NO SUBSTANTIAL INDIVIDUAL OR AGGREGATION OF CONTACTS WITH THE STATE OF MISSOURI, DESPITE MIXED AND CONFLICTING

RULES OF SUBSTANTIVE LAW AND DIFFERING STATUTES OF LIMITATION IN THE VARIOUS JURISDICTIONS, IN EXCESS OF THE POWER, INTEREST AND LEGITIMACY OF THE MISSOURI GOVERNMENT AND IN DEROGATION OF THE AUTHORITY, SOVEREIGNTY AND COMITY DUE MISSOURI'S SISTER STATES.

Principal Authorities:

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981)

Philips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)

Home Ins. Co. v. Dick, 281 U.S. 397 (1930)

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)

John Hancock Ins. Co. v. Yates, 299 U.S. 178 (1936)

B. WHETHER OR NOT THE DECEMBER 14, 2001 ORDER IS APPLIED IN EXTRA-TERRITORIAL FASHION, RELATOR IS ENTITLED TO A PERMANENT WRIT PROHIBITING RESPONDENTS FROM TAKING ANY ACTION IN THE UNDERLYING CASE OTHER THAN VACATING THE DECEMBER 14, 2001 MULTISTATE CLASS CERTIFICATION ORDER IN THAT EVEN A "MISSOURI ONLY" CLASS CERTIFICATION ORDER IS IMPERMISSIBLE AND EXTRA-JURISDICTIONAL BECAUSE IT WOULD FAIL TO SATISFY THE CONSTITUTIONALLY-DRIVEN, AND CONSTITUTIONALLY-

REQUIRED, PREDOMINANCE ELEMENT OF THE MISSOURI CLASS ACTION RULE, WHERE ANY COMMON QUESTIONS OF FACT ARE VASTLY OUTWEIGHED AND OUTNUMBERED BY INDIVIDUALIZED, OUTCOME-DETERMINATIVE QUESTIONS OF PROOF AS TO LIABILITY, LIMITATIONS OF ACTION, DEFENSES, AND DAMAGES, AND THUS ANY SUCH ORDER WOULD PRODUCE A VIOLATION OF RELATOR'S SUBSTANTIVE AND PROCEDURAL RIGHTS UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, BY REASON OF MISSOURI'S RULES ENABLING STATUTE AND CONSTITUTIONAL PROVISIONS, WHICH PRECLUDE THE USE OF MISSOURI'S CLASS ACTION RULE OF PROCEDURE TO ENLARGE OR ALTER PLAINTIFFS' SUBSTANTIVE LEGAL RIGHTS, OR TO DIMINISH RELATOR'S, WHILE ENLARGING ITS DUTIES, THROUGH THE EXPEDIENT OF RELAXING SUBSTANTIVE LEGAL DOCTRINE, INCLUDING CONTROLLING MISSOURI INSURANCE LAWS AND REGULATIONS, TO BRING ABOUT THE CERTIFICATION OF A CLASS ACTION.

Principal Authorities:

In the Matter of Bridgestone/Firestone, 288 F.3d 1012 (7th Cir. 2002)

Broussard v. Meineke Discount Muffler Shops, Inc. 155 F.3d 331 (4th Cir.1998)

Lindsey v. Normet, 405 U.S. 56, 66 (1972)

Article V, Section 5, Missouri Constitution

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)

United States v. Armour & Co., 402 U.S. 673 (1971)

RS Mo § 477.010 (State Rules Enabling Act)

Supreme Court Rule 52.08(b)(3)

IV. ARGUMENT

For every requested class action, the trial court must subject the facts and law to a reviewable "rigorous analysis." Castano v. American Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996); Beatty v. Metropolitan St. Louis Sewer Dist., 914 S.W.2d 791 (Mo. 1995). There was no such analysis here, and for that reason alone the certification order should be reversed. Had there been a rigorous analysis of the facts and law described in the following arguments, no certification order – multi-state or Missouri only – would have been issued. The order should be vacated not only because of the absence of any rigorous analysis but because this Court's analysis establishes that a class action is not appropriate here.

A. CLASS CERTIFICATION IN THIS CASE WOULD ERODE THE PRINCIPLE OF COMITY.

The principle of comity encourages the courts of one state or jurisdiction to give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect. Black's Law Dictionary (6th ed. 1990); Ramsden v. Illinois, 695 S.W.2d 457, 459 (Mo. banc 1985). Comity is an adjunct to the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution, which provides that the various states must recognize legislative acts, public records and judicial decisions of the other states within the United States. Id. These principles are the touchstones of our federal system of coequal sovereign states.

A nationwide class action lawsuit is tenable only when no damage will be done to these bedrock principles of federalism. Those circumstances are not present here. To the

contrary, this is a case where conflicts in state insurance regulations and in state decisional law predominate and make class certification untenable. Some of the key conflicts are identified below.

1. Diverse State Regulations on Use of Aftermarket Parts to Repair Collision-Damaged Vehicles.

This case is about who gets to regulate the kind of replacement parts used to fix vehicles damaged in collisions. Plaintiffs contend that only parts produced by the original equipment manufacturer ("OEM") can restore damaged vehicles to pre-accident condition. That contention, however, disregards the fact that aftermarket parts, such as doors, fenders, hoods, bumpers and the like, have been used successfully to repair damaged vehicles for years. For example, since 1985, American Family has been specifying non-OEM parts to repair older policyholder vehicles and has been independently guaranteeing the quality of those parts. Plaintiffs' Answer to Petition, Exh. A, Vol. 4, at 787-91. If the vehicle is less than three model years old, then American Family specifies OEM replacement parts for collision repairs. Id. at 785-86. For older models, salvage OEM parts and aftermarket parts are the norm,[13] subject to state-by-state regulation.

[13] American Family adjusters have discretion to vary the specification of OEM or aftermarket parts as necessary to return the vehicle to pre-loss condition. Plaintiffs' Answer to Petition, Exh. A, Vol. 6, at 1232-33). Therefore, one cannot say categorically

Increasing use of non-OEM parts by insurers, set against lobbying pressure from OEMs, led state insurance commissioners to address the issue. In the mid-1980's, the National Association of Insurance Commissioners proposed model regulations to govern the conditions under which insurers could use aftermarket parts to repair damaged vehicles. Bratton and Avila at 153-56, Appendix at A28-31. The states responded to the model regulations and the competing interests in different ways. Unfortunately, Judge Clark failed to consider the impact of those differences on the viability of a class action lawsuit. This Court should not make a similar mistake.

Thirteen of the fourteen states where American Family does business (North Dakota being the exception) have enacted statutes and/or regulations specifically regulating the use of aftermarket non-OEM parts. Their positions vary: they range from *prohibition* on the use of such parts; to the *requirement* that such parts be offered to the consumer; to silence on the subject; to the dominant view among the states, which is that non-OEM parts are implicitly lawful and proper as long as: (a) their use is timely and properly disclosed; and (b) they are of ”like, kind and quality” sufficient to enable the insurer to perform its contractual obligation of restoring the policyholder’s vehicle to its "pre-loss condition.”

Because the statutes and regulations vary, the insurance policies themselves vary from state to state. That result follows because the statutes and regulations of the state

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that all vehicles more than three model years old are repaired with aftermarket parts. A car-by-car inquiry would be necessary to make that determination.

where the insurance contract is made form a part of that contract as though they were expressly incorporated. *See, e.g.*, Sharp v. Interstate Freight System, 442 S.W.2d 939, 945 (Mo. 1969).

The laws and regulations of Arizona[14], Iowa[15], Ohio[16], Wisconsin[17] and South Dakota[18] require aftermarket parts to be clearly identified in the repair estimate or accompanying notice. They require such parts to be inscribed or affixed with the name or logo of the part manufacturer. They also require the customer to be given specific information about the use of such parts and warranties applicable to such use. Kansas[19] does not require aftermarket parts to be inscribed or affixed with the name or logo of the manufacturer, but does require non-OEM parts to be clearly identified in the repair estimate or accompanying notice. Kansas further entitles the consumer to be given specific information about the use of, and warranties[20] applicable to, such parts. Notably,

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[14] A.R.S. §§ 44-1292 and 44-1293.

[15] I.C.A. § 537B. 4; Iowa Admin. Code 191-15.15 (507 B).

[16] R.C. § 1345. 81(B) and (C).

[17] W.S.A. § 632.38(2) and (3); and W.S.A. 100.44(2).

[18] SDCL § 32-15-36; SDCL § 58-33-71.

[19] K.S.A. §§ 50-661, 50-662, 50-664.

[20] Under the Magnuson-Moss Act of 1975, 15 U.S.C. § 2301 (2000), product manufacturers are prohibited from conditioning continued effectiveness of product warranties upon consumers' use of original manufacturer parts. Still, some OEMs (Ford

Kansas imposes no restrictions on use of aftermarket parts for vehicles ten model years of age or older.

Illinois[21], Missouri[22] and Nebraska[23] have all the requirements of Arizona, Iowa, Ohio, Wisconsin and South Dakota for use of aftermarket parts, but they go further. These states require that aftermarket parts used to restore a vehicle to pre-loss condition be ”at least equal in like, kind and quality to the original part in terms of fit, quality and performance.”

Colorado[24] has all the requirements of Arizona, Iowa, Ohio and Wisconsin and South Dakota, but also requires that a motor vehicle repair facility obtain the written or oral consent of the customer before such parts are installed on the vehicle.

Oregon[25] requires the customer to be given specific information about the use of and warranties applicable to aftermarket parts. Oregon also requires an insurer specifying such parts to make available to its insured a “crash parts warranty” when the

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and GM, for example) inaccurately suggest to the contrary. *See* A351, 352. *See also* http://www.qualitycareservice.com/default.asp?page=G2 and http://www.gmgoodwrench.com/dhtml/parts/parts_collision_genadvantage.shtml

[21] 215 ILCS 5/155.29; 50 Ill. Admin. Code Tit. 50, § 919.80(d)(5).

[22] RS Mo § 407.295; 20 MO. CSR 100-1.050(2)(D)2.

[23] Neb. Admin. R. & Regs. Tit. 210, Ch. 45, §§ 003, 004, 005.

[24] C.R.S.A. §§ 42-9-107, 10-3-1304 & 10-3-1305.

[25] O.R.S. §§ 746.287, 746.289 & 746.292; *see also* Or. Admin. R. 836-080-0240(9).

insured requests one, and, unless the owner of the vehicle agrees otherwise, requires such parts to "be certified by an independent test facility to be at least equivalent to the part being replaced."

Indiana[26] affirmatively gives the policyholder an option: It requires that insureds *must* be given an opportunity to have their vehicle repaired using "[n]ew body parts that were not manufactured by or for the manufacturer of the motor vehicle." Minnesota[27] forbids the option of using aftermarket parts: It is an unfair settlement practice in Minnesota to require "as a condition of payment of a claim that ... parts, other than window glass, must be replaced with parts other than original equipment parts."

In summary, there is anything but uniformity: Indiana *requires* that policyholder be given a choice of parts, while Minnesota *forbids* it. In Colorado, the insured's written or oral consent is an added requirement before aftermarket parts may be used, while in the rest of the states, the parts may generally be used so long as their use is disclosed to the policyholder and the individual parts at issue are of "like, kind and quality." Some states require certification of the aftermarket parts. In Kansas, the parts may freely be used if the vehicle is more than 10 years old.[28]

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[26] IC § 27-4-1.58.

[27] M.S.A. § 72A.201, Subd. 6(7).

[28] Just as the laws are anything but uniform, the relevant aftermarket parts are anything but uniform. American Family brought numerous OEM and aftermarket collision parts into the courthouse for Judge Clark's inspection, including OEM parts that were visually

The disparity among the involved states in the regulations addressed to the very issue in controversy -- the use of non-OEM parts -- should have immediately told Judge Clark that class certification was untenable. Where the lawmakers of Missouri's sister states have made individualized policy judgments on whether and how to allow the use of non-OEM parts, no trial court in Missouri should cloak itself with the power to reverse those sovereign judgments in the guise of a class action.

In short, the legislatures of most of the involved states have addressed the use of non-OEM parts in ways that govern insurers doing business within those jurisdictions. By necessary implication, those regulations presuppose that non-OEM parts are not uniformly defective and inferior to OEM parts. One judge and one jury sitting in one Missouri court should not have the power to rewrite the laws of numerous states regarding the use of non-OEM parts. When a class action lawsuit becomes the instrument by which validly enacted out-of-state legislation can be effectively nullified, then the class action mechanism has gone too far.

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defective. To illustrate the point that American Family made at the hearing; that is, that individual parts must be inspected to determine their suitability, selected photographs of particular misfit OEM replacement parts shown at the hearing are included herewith. Appendix A353-357. See Plaintiffs'Answer to Petition, Exhibit A, Vol. 7, at p. 1341-1345 (describing blocked bolt mounting holes on randomly bought OEM replacement hood for Buick Regal and proper holes on randomly bought non-OEM hood for same vehicle).

2. State-by-State Variations in Limitation Periods and Contractual Rights Make Class Certification Improper.

In addition to the divergence of state regulations specific to the use of aftermarket crash parts, there are other conflicts among the affected states with respect to such important matters as the applicable statutes of limitations, the availability of arbitration and appraisal as a contract right, and the applicability of the collateral source rule to claims for breach of contract. These variations in state laws create individual issues of the kind that generally preclude certification of multi-state classes. *See* Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 94-95 (W.D. Mo. 1997). "Variations in state law may swamp any common issues and defeat predominance." Adams v. Kansas City Life Ins. Co., 192 F.R.D. 274, 277 (W.D. Mo. 2000). The bare-bones certification order in this case failed to consider the impact of these state law variations on the manageability of the proposed class action. This Court should provide that analysis, addressing specifically the state law conflicts identified below.

a. Statutes of Limitations

Plaintiffs' cause of action is for breach of contract. There are no tort claims in the case. Thus, the claim is subject to the statute of limitations for breach of contract. That limitation period varies from state to state. In Missouri, the limitations period is ten years under RS Mo § 516.110. In Colorado, it is three years. Col. Stat. § 13-80-101. In Minnesota and in Wisconsin, the limitations period is six years. See M.S.A. § 541.05 and W.S.A. § 893.43.

Wisconsin's six-year statute is particularly notable because, in Wisconsin, statutes of limitation are not mere statutes of repose. Instead, the expiration of the limitations period creates a right in one party as it extinguishes a right in another. The right to insist upon the statutory bar is a vested property right protected by the Wisconsin Constitution. See Maryland Cas. Co. v. Belezney, 245 Wis. 390, 393, 14 N.W.2d 177 (1944); Pulchinski v. Strnad, 88 Wis.2d 423, 428, 276 N.W.2d 781 (1978).

The Wisconsin limitation period is also worth emphasis because Wisconsin is home to the greatest proportion of American Family policyholders. Thus, the effect of Judge Clark's order, making viable claims going back ten years, is to disregard the Wisconsin Constitution for hundreds of thousands of claims. Even more unfairly, the order resurrects barred claims for policyholders, but does not resurrect American Family's right of subrogation against the drivers who damaged their policyholders' vehicles.

In a class action proceeding, the forum state's statute of limitations -- unlike its substantive law -- can constitutionally be applied to claims governed by the laws of another jurisdiction. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 722-30 (1988). Whether this rule applies where the statute of limitations is not merely procedural, but rather substantive and constitutional, as in Wisconsin, has not yet been decided by the United States Supreme Court.

That unsettled question need not be resolved in this case because application of Missouri's borrowing statute, RS Mo. § 516.190, is enough to render the certification order unenforceable as written. Missouri's borrowing statute precludes application of

Missouri's statute of limitations and renders the statutes of limitations of other states applicable, to the extent the asserted causes of action originated in other states, as these did. Therefore, Wisconsin's six-year statute would have to apply to claims of Wisconsin policyholders and Colorado's three-year statute would have to apply to claims of Colorado policyholders. Essentially, Missouri's borrowing statute preempts any conflict of law question on the applicable limitation period by mandating the use of diverse out-of-state limitation periods for diverse out-of-state claims. Thompson by Thompson v. Crawford, 833 S.W.2d 868, 872 (Mo. Banc 1992).[29] Nothing in the record suggests that Judge Clark even considered the effect of Missouri's borrowing statute on the manageability of this case as a class action.

b. Arbitration and Appraisal Rights

Most of the fourteen states in which American Family does business allow it or its policyholders to elect a non-judicial proceeding to resolve disagreements about the handling of collision losses. For example:

[29] Unlike some states, which apply their borrowing statutes only to nonresidents who come into the forum, "[r]esidents and nonresidents are to be treated the same under the Missouri borrowing statute." Finnegan v. Squire Publishers, Inc., 765 S.W.2d 703, 705 (Mo. App. 1989); *see*, *e.g.*, Trzecki v. Gruenewald, 532 S.W.2d 209 (Mo. 1979) (en banc) (Missouri's borrowing statute made the two-year Illinois statute of limitations a Missouri statute for purposes of the case and thus barred the action).

- **In Missouri:** A written agreement to submit any existing controversy to arbitration is valid and enforceable *except* as such agreement is contained in a contract of adhesion or an insurance contract. RS Mo '435.350.
- **In Wisconsin:** An insurance policy may contain provision for independent appraisal and compulsory arbitration. W.S.A. § 631.85.
- **In Minnesota:** Binding arbitration is *mandated* for claims of less than $10,000.00 for collision damage coverage. M.S.A. § 65B.525.

The standard form policies used by American Family in the states covered by the certification order (excluding Missouri) all include the contractual right to invoke an appraisal procedure if American Family and its insured are unable to agree on the amount necessary to satisfy a specific collision loss. American Family's right and the policyholder's right to invoke that procedure are worthy of this Court's protection. The following contractual term is contained in the vast majority of American Family's car policy contracts:

> You or we may demand appraisal of the loss. Each will appoint and pay a competent appraiser and will equally share other appraisal expenses. The appraisers, or a judge of a court having jurisdiction, will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of loss. An award in writing by

any two appraisers will determine the amount payable.[30]

Appendix at A358.

In Arizona, an appraisal is analogous to arbitration. Meineke v. Twin City Fire Ins Co., 181 Ariz. 576, 892 P.2d 1365, 1369 (Ct. App. Div. I, 1994). The same is true in Illinois. Bear v. Mt. Carroll Mut. Fire Ins. Co., 561 N.E.2d 116 (Ill. App. 1990). Other states distinguish between "appraisal" and "arbitration." See Sanitary Farm Diaries, Inc. v. Gammel, 195 F.2d 106, 114 (8th Cir. 1952).

Here, the class certification order purports to reopen the issue as to the amount of the loss sustained by each member of the class. Accordingly, the appraisal remedy again becomes operative with respect to the extent of each policyholder's claim in all involved states except Missouri. On this issue, the policyholder and American Family each have a right to enforce the appraisal clause. As indicated above, however, the states differ as to the method of enforcing the clause.

At a minimum, the appraisal right separates all other class members from the Missouri policyholders who have no appraisal clause in their policies. The effect of the appraisal clause means there can be no class for non-Missouri policyholders because each

[30] This provision is included in the policies approved by the regulatory agencies of Arizona, Colorado, Illinois, Indiana, Iowa, Kansas, Minnesota, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin. A slightly different version is contained in the policy approved by the State of Oregon. Only the Missouri policy form contains no appraisal right.

policyholder has the right to determine whether or not his or her loss will be determined by appraisal, and American Family has a corresponding right. No class action can be premised upon such individualized contracts. The trial court's failure to discuss this important issue highlights the inadequacies of the class certification order.

c. Collateral Source Rule

Plaintiffs' invocation of the collateral source rule to justify their damage claims also raises substantive conflict of law issues. Plaintiffs claim that class members are entitled to recover damages if American Family wrote estimates specifying the use of non-OEM parts even if the body shop actually installed OEM parts instead. As American Family demonstrated at the evidentiary hearing, this happens frequently. In many instances, even though an estimate specifies otherwise, a body shop may elect to install OEM parts. The body shop may do this because the specified aftermarket part is not readily available while an OEM part is.

In response to this evidence, plaintiffs did not dispute that substitution of OEM parts for aftermarket parts may have occurred. Instead, they claimed that any such occurrences were irrelevant. Citing the collateral source rule, plaintiffs asserted that American Family's liability should not be reduced because of the fortuity that the body shop, a third party, conferred a benefit on some plaintiffs.

Plaintiffs' theory presupposes that the collateral source rule applies uniformly to breach of contract actions in all of the states in which American Family does business. That assumption is wholly unwarranted. For example, in Arizona, the collateral source rule does not apply to ordinary breach of contract claims. Norwest Bank v. Simington,

III, 3 P.3d 1101, 1109 (Ariz. Ct. App. 2000). In Illinois, the collateral source rule applies in contract actions only when there has been an element of fraud, tort or willfulness in breaching the contract. Avery v. State Farm Mut. Auto. Ins. Co., 746 N.E.2d 1242, 1258-59 (Ill.. App. 5th Dist. 2001) (leave to appeal granted by Illinois Supreme Court, October 2, 2002). In Iowa, the collateral source rule does not apply to a pure breach of contract, but it is undecided whether the rule applies in contract actions involving willful or tortious conduct. Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc., 579 N.W.2d 823, 830 (Ohio 1998). In Minnesota, a statute specifically requires a court to reduce a civil damage award by amounts of collateral sources. M.S.A. § 548.36. *See also* Smith v. American Ins. Co., 586 N.W.2d 784 (Minn. App. 1998).

In Wisconsin, the case law on the application of the collateral source rule to a contract action is equivocal. *Compare* W.G. Slugg Seed & Fertilizer v. Paulsen Lumber, 62 Wis.2d 220, 214 N.W.2d 413 (1974) (applying collateral source rule in a breach of contract case) *with* Kramer v. Board of Education, 248 Wis.2d 333, 341-42, 635 N.W.2d 857 (Ct. App. 2001) (holding that a party is not entitled to be placed in a better position because of a breach than he would have if the contract had been performed). Other states, including South Dakota, Nebraska, North Dakota and Ohio, do not appear to have directly addressed the question.

Certainly, none of the states, except Illinois in the still pending Avery case, have addressed the application of the collateral source rule to prevent an insurance company from arguing that an insured who received repairs with OEM parts, paid for by the insurance company, was not damaged and, therefore, has no breach of contract claim

against the company for the mere writing of an estimate specifying non-OEM parts. Indeed, there is a real question of whether any state recognizes a breach of contract claim that is missing the essential element of damages.[31] The diversity of insurance regulations and other substantive legal rules among the states subject to the nationwide class action, makes Judge Clark's certification order invalid. The legal and factual complexities are real. The countless individual requirements of proof and the divergent state laws needed to resolve the legal questions raised by the evidence are fundamentally incompatible with the idea of representative litigation, where proof of one claim and one person's damages is fundamentally fair as proof of the claims and damages of another.

[31] That essential element was missing with respect to one of the original plaintiffs and class representatives in this case, a man named Jeff Barthol. He had his vehicle, a used 1995 Chevy Lumina, repaired pursuant to an American Family estimate in which aftermarket parts were specified. Despite that specification, Barthol cut a side deal for OEM parts with the body shop, without American Family's knowledge or participation. American Family found out only after the vehicle was inspected once this lawsuit was filed. See Testimony of Donald Parker, Vol. IV of VIII to Exh. 1 to Plaintiffs' Answer to Petition at 916-922. Since Barthol ended up with OEM parts on his used Chevy at no extra cost, most people, but not plaintiffs' counsel, would think he had no claim in a lawsuit premised on the use of allegedly inferior aftermarket parts.

B. THE CLASS CERTIFICATION ORDER INTERFERES WITH THE SUBSTANTIVE LAW OF SISTER STATES CONTRARY TO THE DUE PROCESS CLAUSE AND FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION.

The United States Constitution established a system of residual, dual sovereignty. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991). Moreover, "…[t]he Constitution… contemplates that a State's government will represent and remain accountable to its own citizens." Printz v. United States, 521 U.S. 898, 920-21 (1997). When the governmental powers of one state are used, under any pretext, to dictate the laws or policies of another, issues of "horizontal sovereignty" are directly and immediately raised. Baker, *Respecting a State's Tort Law, While Confining Its Reach to That State*, 31 Seton Hall L. Rev. 698, 706-710 (2001) Appendix at A359, 362-363.

This case asks this Court to do something that no other court can: Define and delimit the constitutional boundaries of interstate class actions filed in the Missouri judicial system. The certification order threatens unconstitutional interference by one state into the affairs and policies of another.

The analytical constitutional tools available to the Court are the well-known concepts under the Due Process Clause and the Full Faith and Credit Clause of the Constitution. Their application in this setting may be somewhat new, because the growth industry of multi-state class actions in the state courts is a fairly recent phenomenon. But there is nothing new about the respect one state is constitutionally compelled to have for

the laws of another. And there is nothing novel about the constitutional right of a litigant to defend itself in every possible way.

1. The United States Supreme Court Cases Of Allstate and Shutts Provide The Framework For Deciding The Constitutional Issues.

One state does not have the constitutional power in our federal system of government to regulate wholly private affairs, events and transactions occurring wholly within another state. Related concepts of "legislative jurisdiction" and "adjudicative jurisdiction" circumscribe the power of each state to project its statutes and dispute resolution powers into another, consistent with the interstate character of the nation and the sovereign status each state holds in our system of government. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (internal quotation marks omitted) (Scalia, J., dissenting); *see also*, BMW of North America, Inc. v. Gore, 517 U.S. 559, 568-573 (1996); *Accord* New York Life Insurance Co. v. Head, 234 U.S. 149, 161 (1914) (the Full Faith and Credit Clause made it "impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State."); *compare* Rositzky v. Rositzky, 46 S.W.2d 591, 594 (Mo. 1931): "[I]t is settled law and almost axiomatic that the statutes of a state or country prescribe the law within its boundaries only, and have no extraterritorial effect."

Under the Due Process Clause, a state court is barred from arbitrarily or unfairly applying the forum state's substantive law in extra-territorial fashion. The working test is that in the absence of substantial contacts or aggregation of contacts with the relevant

transactions and parties, a state simply has no interest - and thus no constitutional power - to apply its substantive laws, or its dispute resolution powers in furtherance of those laws, extra-territorially. Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 180-181 (1964); Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954); John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178, 181,83 (1936); Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 S.Ct. 634, *reh'g denied* 292 U.S. 607 (1934); Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Aetna Life Ins. Co. v. Dunken, 266 U.S. 389, 393 (1924); New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918).[32]

The two most recent formulations of Due Process Clause doctrine that identify the choice of law prerogatives for the state courts recognize "that a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction." Allstate Inc. Co. v. Hague, 449 U.S. 302, 307 (1981); Philips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).[33]

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[32] This limitation is to be distinguished from the more frequently litigated Due Process constraints on a state court's power to assert personal jurisdiction over non-residents. *See* Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal., 480 U.S. 102, 113 (1987) (state may not exercise judicial jurisdiction over a person if to do so would run afoul of "traditional notions of fair play and substantial justice."); Allstate Inc. Co. v. Hague, 449 U.S. 302, 320 and n.3 (1981) (Stevens, J., concurring).

[33] Research discloses that this Court has never cited or discussed either Allstate v. Hague or Philips Petroleum v. Shutts in any published decision. The Court of Appeals, Western

Allstate synthesized the earlier cases. The plurality opinion merged the Full Faith and Credit and Due Process Clause approaches to hold that the Constitution prohibits a court from choosing to applying its own substantive law unless there is a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 449 U.S. 302, 313 (1981). Characterizing the approach of its earlier cases, the Court stated: "In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation." 449 U.S. 302, 308. Later opinions interpreting Allstate have noted that the "potential clash of the forum's law with the 'fundamental substantive social policies' of another State may be accommodated through application of the forum's choice-of-law rules." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 and n. 19 (1985).

That holding and rationale have been extended to the class action arena. In Philips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), the Court held, absent the criteria in

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and Eastern District, have previously discussed Allstate, but not Shutts. Thompson v. Thompson, 645 S.W.2d 79 (Mo. App. W.D. 1982) (Missouri court was not bound to respect Kansas divorce decree child support limitations); Carver v. Schafer, 647 S.W.2d 570 (Mo. App. E.D. 1983) (Illinois Dram Shop Act was not applied to Missouri wrongful death action). Neither case was a class action.

Allstate, that application of Kansas substantive law to a nationwide class of persons violated the Due Process Clause.

In Shutts, the defendant owned property and conducted business in Kansas, but there was no identifiable *res* or fund in Kansas that would serve to compensate the class members in the event of a recovery. Nor did the fact that the plaintiffs desired to be bound by Kansas law and chose to bring suit in Kansas make any difference. 472 U.S. 797, 819-20. The Kansas Supreme Court had reasoned that the procedural guarantees of notice to the class and adequate representation by the named class representatives, was sufficient for application of the forum state's substantive law. Id., at 821. The Court rejected this as akin to "bootstrap" reasoning. Id., at 822.

First, the Court found that the issue of personal jurisdiction over the class members was "entirely distinct from the question of the constitutional limitations on choice of law." Id., at 821. The Court said it would not approve taking "a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law." Id. The Court also disallowed analytical shortcuts in finding a common question of law because it may more difficult or burdensome to apply the forum state's law consistent with the constitutional limitations of Allstate v. Hague and its progeny. Id., at 821. "Kansas must have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests," in order to ensure that the choice of Kansas law is not arbitrary or unfair." [*citing* Allstate]. The Court completed its analysis, stating, "Given Kansas' lack of 'interest' in claims

unrelated to that State, and the substantive conflict with [one of the jurisdictions, for example], we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits." Shutts, 472 U.S. 797, 822.

Under Shutts, state courts remain free in many situations, consistent with the Due Process Clause, to "apply one of several choices of law. But the constitutional limitations laid down in cases such as Allstate and Home Ins. Co. v. Dick, must be respected even in a nationwide class action." 472 U.S. 797, 823. Thus, individual claims to which forum state law may *not* be applied under Allstate and Shutts, do not suddenly count in arguing for the satisfaction of procedural class certification criteria.

2. The Certification Order In This Case Fails The Allstate And Shutts Test.

We have identified the diversity of rules and regulations adopted by the fourteen states to govern aftermarket parts, appraisal and arbitration rights, statutes of limitation and the collateral source rule. Far from conducting a "rigorous analysis" of anything, let alone choice of law, the trial court simply signed the order plaintiffs' counsel put before him, and that order was based on the explicit premise that there was no material conflict between Missouri substantive law, and that of any other affected jurisdiction. Plaintiffs' Answer to Petition, Exhibit A, Vol. 1, at 103-06.

American Family's policyholders live, work and drive in 14 separate states. The claims affected are for breach of the obligation to restore policyholder vehicles – vehicles owned, licensed, kept, driven, wrecked and repaired, on the highways and

avenues of each of the 14 states in that period of more than a decade. Untold numbers of policyholders drove their vehicles in one state, and had accidents in another. Untold numbers of policyholders - in Colorado for example – have consented to the use of aftermarket parts, as that state's law permits.

The contacts with the parties and the transactions at issue, necessary to support application of the forum state's law, *must be greater* than that which would suffice to assert personal jurisdiction.[34] There is no reason the underlying action had to be brought in the courts of this state. Had it been filed in Colorado, Indiana, Nebraska or any other state where American Family does business, the constitutional barriers that define the range of choices of governing substantive law would be the same.[35]

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[34] Note, *Resolving the Choice of Law Problem in Rule 23(b)(3) Nationwide Class Actions*, 67 U. Chi. L. Rev. 835, 850 (2000): "Yet, even after personal jurisdiction is established, a district court may not apply a single state's law to the class unless that law meets the higher threshold of "significant contacts" required by the Shutts test. Bootstrapping is prohibited." Appendix at A386, 390.

[35] Nor is there any Missouri choice of law rule to dictate that the law of American Family's headquarters (Wisconsin) should apply to the claims of the members of the plaintiff class. Such a ruse is often tried and often rejected. *See, e.g.*, In re Bridgestone/Firestone, 288 F.3d 1012, 1018 (7th Cir. 2002); In re Ford Motor Co. Ignition Switch Product Liability Litigation, 174 F.R.D. 332, 348 (D.N.J. 1997); In re Masonite Corp Hardboard Siding Products Litigation, 170 F.R.D. 417, 423 (E.D. La. 1997).

Taking into account the "claims asserted by *each member of the plaintiff class*" in the 14 affected states, it simply cannot be said that Missouri's substantive law may be applied to these far-flung, disparate transactions, most of which have utterly no connection to Missouri; there is no showing, nor can there be, that the large majority of these claims and transactions for each of these plaintiff class members has any contacts with Missouri, let alone the requisite significant contacts or aggregation of contacts with Missouri, necessary for the Court to project Missouri's adjudicative jurisdiction and law uniformly over this amorphous, fragmented assemblage of American Family's policyholders. Shutts, 472 U.S.797, 821-22.[36]

[36] There is no basis for the assertion that American Family has "waived" its Shutts challenge to class certification in this case. Plaintiffs' Answer to Petition, at ¶ 20, p. 11. At the class certification hearing, plaintiffs' counsel stated: "Now, one of the arguments raised by the defendant, Your Honor, is that somehow the application of Missouri law here would implicate the Phillips Petroleum versus Shutts, a Supreme Court case. And, this point really doesn't need to be belabored, Your Honor. The point is that -- Your Honor, I have a copy of that case, as well, if I could hand that up, Your Honor. The point here, Your Honor, is simply that they have raised due process concerns with the application of a single state's law where it, in a multi-state class action." Plaintiffs' Answer to Petition, Exhibit A, Vol. I, at 107-108.

3. The Interests And Sovereignty Of The Various States Prevents A Multi-State Class Certification Order In This Case.

The Full Faith and Credit component of the Allstate/Shutts limitation requires a consideration of the policies, interests and sovereignty of the various states whose substantive law might be applicable to the case. Allstate, 449 U.S. 302, 320 (Stevens, J., concurring). "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." In re Bridgestone/Firestone, 288 F.3d 1012, 1020 (7th Cir. 2002).

Under the McCarran Ferguson Act, each state is left to regulate the business of insurance in its own borders. FTC v. Travelers Health Ass'n, 362 U.S. 293, 301-02 (1960). Missouri has no more interest regulating the business of insurance in Indiana or Colorado than courts or regulators in those states have in regulating the business of insurance in Missouri. The Missouri judicial system has no more business than the Missouri executive or legislative branches in making its presence felt beyond its borders.

In BMW of North America v. Gore, 517 U.S. 559 (1996), the Court recognized that the Due Process Clause imposes limits on a state's ability to regulate conduct in other jurisdictions. No state can "impose its own policy choice on neighboring States." Id. at 571. Indeed, "one State's power to impose burdens on the interstate market ... is not only subordinate to the federal power over interstate commerce, ... but is also constrained by the need to respect the interests of other States." Id.

It has been noted in another context that "[S]tate regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959). So viewed, can there be any serious doubt that allowing the Missouri courts to use the class action procedure to issue a judgment governing in wholesale fashion – regulating in wholesale fashion - the conduct of American Family and millions of its policyholders across the nation offends basic notions of state sovereignty?[37] Are the regulators, courts and lawmakers in these 13 other states expected to sit and watch while the Missouri judiciary and the vagaries of the jury

[37] "[S]overeigns confer rights as a means of social organization: to shape the conduct or conditions of people. The positive law of a state reflects the judgment of the state's lawmakers about the best way to organize society." At the same time, "each state presumably recognizes that other states can have different views about what is best." L. Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277, 293-94 (1990). As one court put it: "Legislative jurisdiction refers to both 'the lawmaking power of a state' and 'the power of a state to *apply* its laws to any given set of facts,' whereas adjudicative jurisdiction 'is the power of a state to *try* a particular action in its courts.'" McCluney v. Jos. Schlitz Brewing Co., 649 F.2d 578, 581 n. 3 (8th Cir.) (emphasis in original), *aff'd*, 454 U.S. 1071 (1981) (emphasis in original) (striking down extra-territorial application of Missouri service letter requirements).

process in the Circuit Court of Jackson County determine issues of insurance policy and regulation for millions of people distributed across the United States, people whose dealings and transactions with American Family lack even a nodding acquaintance with Missouri? Missouri judicial officers are not elected or appointed by – and thus not accountable to - the citizens or political institutions in these other states, but the certification order gives them the power to control the fate of insurance claims wholly unrelated to Missouri.

4. The Constitutional Problem Is The Certification Order, Not Missouri Choice Of Law Doctrine.

Judge Clark could have avoided the constitutional choice of law infirmities with the certification order if he had applied Missouri's choice of law test applicable to automobile insurance contracts. Instead, the certification order adopts plaintiffs' mindless invitation to apply Missouri law to everything. Plaintiffs' Answer to Petition, Exhibit A, Vol. 1, at 103-06. In determining the law governing the obligations under an automobile insurance contract, the single most important determinant is the principal location of the insured risk – the automobile. Hartzler v. American Family Mut. Ins. Co., 881 S.W.2d 653, 655 (Mo.Ct.App.1994). The location of the insured risk in an auto insurance contract is generally the state where the vehicle is expected to be during the major portion of the insurance period; for auto liability that is where the vehicle is principally garaged. Brown v. Home Ins. Co., 176 F.3d 1102 (8th Cir. 1999) (stating Missouri has adopted the criteria of Restatement (Second) Conflict of Laws §§ 188 and 193 (1971).

The due process standards of Allstate and Shutts could be satisfied *if* the Missouri choice of law rule for auto insurance contract cases were properly applied. This would mean that the location of the "insured risk" – the state in which each class member's automobile was garaged at the time of the alleged breach – is the law applicable to that class member's claim. Because the substantive law among these states differs materially (regulations on non-OEM parts, statute of limitations, arbitration/appraisal, collateral source rule, to name a few), the Hartzler conflicts rule dictates that the law of each of these 14 states governs the claims of each respective set of American Family's policyholders. The class certification order is thus invalid because it arbitrarily and unfairly applies Missouri law uniformly, in derogation of the Allstate/Shutts criteria.

Applying Missouri choice of law rules in a constitutional fashion drains the certification order of any assumed predominance of questions of law or fact. "No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed.R.Civ.P. 23(a), (b)(3)." In re Bridgestone/Firestone, 288 F.3d 1012, 1014 (7th Cir. 2002). Colorado law allows use of non-OEM parts as long as the customer consents: "If such consent is oral, the motor vehicle repair facility shall make a record of such consent on the work order and shall include the date, time, and manner of consent." C.R.S § 42-9-107. How does American Family defend itself against claims of Colorado policyholders if Missouri law is applied? Indiana law *requires* the customer to be given the option of using these parts in a repair job, IC 27-4-1.58, yet the certification order would subject American Family to contract liability to Indiana insureds for complying with its law. These issues required

"rigorous analysis" by the trial court. Castano v. American Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996) (the failure of the trial court to include "consideration of how a trial on the merits would be conducted…mandated reversal"); In re Rhone Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) (the court may not merge multiple state's law to arrive at a jury instruction).

The Missouri borrowing statute eliminates any common law choice of law test for statutes of limitations on foreign claims. Thompson by Thompson v. Crawford, 833 S.W.2d 868 (Mo. banc 1992). The certification order establishes a ten-year class period, yet the statute dictates that the claims of plaintiff class members already time barred under the laws of the state where they "originated" may not be brought in this court unless the trial court intended to resurrect claims extinguished under the other state's law.[38]

To fail to apply the statute violates due process. To apply the statute balkanizes this "class" to the point where it is not a class, but a collection of persons with a great many time-barred claims.

5. The Class Certification Order Unconstitutionally Deprives American Family Of Its Defenses.

Missouri's class action rule, Supreme Court Rule 52.08, was enacted pursuant to this Court's authority under Article V, Section 5, Missouri Constitution. It provides that

[38] Missouri's ten-year statute of limitations on contract claims of this nature may explain why the case is filed in this state.

"The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. *The rules shall not change substantive rights.*" (emphasis added). With more particularity, the Missouri General Assembly has granted this court similar power: "The supreme court shall have the power to…promulgate general rules for all courts of the state. *No such forms or rules shall abridge, enlarge or modify the substantive rights of any litigant* nor be contrary to or inconsistent with the laws in force for the time being." RS Mo § 477.010 (emphasis added).

Just as federal courts operate under similar constraints when applying rules of procedure subject to the Rules Enabling Act, 28 U.S.C. § 2072(b), Windsor v. Amchem Products, Inc., 521 U.S. 591, 613 (1997); Broussard v. Meineke Discount Muffler Shops, Inc. 155 F.3d 331, 345 (4th Cir.1998), so are the Missouri courts barred, constitutionally, from interpreting or applying a rule of procedure like Rule 52.08 so as to abridge or alter the substantive legal rights of a party. The class action rule "does not alter the required elements which must be found to impose liability and fix damages (or the burden of proof thereon) or the identity of the substantive law…which determines such elements." Cimino v. Raymark Indus., Inc., 151 F.3d 297, 312 (5th Cir. 1998).

Class action cases are an exception to the general rule that people sue and defend by and on behalf of individual named parties only. Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979). "It is axiomatic that the procedural device of [the class action rule] cannot be allowed to expand the substance of the claims of class members. Broussard v. Meineke Discount Muffler Shops, Inc. 155 F.3d 331, 345 (4th Cir.1998).

Several federal courts have recognized that it would violate a defendant's due process rights to try a case on the basis of class-wide proof when claims and defenses are individualized. *See, e.g.*, In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990); Western Elec. Co. v. Stern, 544 F.2d 1196, 1199 (3d Cir. 1976); Arch v. American Tobacco Co., 175 F.R.D. 469, 487-89 & n.21 (E.D. Pa. 1997); In re Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417, 425 (E.D. La. 1997); Lusardi v. Xerox Corp., 118 F.R.D. 351, 372 (D.N.J. 1987), *mandamus granted on other issues*, 855 F.2d 1062 (3d Cir. 1988). Basic notions of due process further demand that the defending litigant be afforded the opportunity to raise all proper defenses, and that this right not be sacrificed in the name of efficiency to a rule of procedure. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), Lindsey v. Normet, 405 U.S. 56, 66 (1972); United States v. Armour & Co., 402 U.S. 673 (1971).

We do not suggest that the class action rule is per se unconstitutional or that class actions are "bad" and should be shunned. But, here the class action procedural rule was applied so as to dispense with the inconveniences and inefficiencies of substantive legal doctrine. "Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." In re Bridgestone/Firestone, 288 F.3d 1012, 1021 (7th Cir. 2002), *citing*, Windsor v. Amchem Products, Inc., 521 U.S. 591, 613 (1997).

The Texas Supreme Court recently explained the trap that some courts are prone to fall into merely because a class action is filed:

> The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment. It is not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort.*** Although a goal of our system is to resolve lawsuits with great expedition and dispatch and at the least expense, the supreme objective of the courts is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. This means that convenience and economy must yield to a paramount concern for a fair and impartial trial. And basic to the right to a fair trial - indeed, basic to the very essence of the adversarial process close - is that each party have the opportunity to adequately and vigorously present any material claims and defenses.

Southwestern Refg. Co. v. Bernal, 22 S.W.3d 425, 437 (Texas 2000) (internal quotations and citations omitted).

Similarly, in Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 345 (4th Cir.1998), the United States Court of Appeals for the Fourth Circuit vacated a final judgment in a class action, and decertified the class, because the trial court permitted plaintiffs to present a case of such breadth and abstraction that the defendant was forced to defend, not against any plaintiff, but against a "fictional composite" of evidence and claims. Id. The court cautioned, “Thus courts considering class certification must rigorously apply the requirements of [the class action rule] to avoid the real risk, realized

here, of a composite case being much stronger than any plaintiff's individual action would be."

This case involves the messy world of wrecked, used automobiles, and how to fix them. It does not readily accept made-to-order abstractions and generalizations masquerading as "common proof."

The predominance requirement of Rule 52.08(b)(3) is intended to ensure that the litigation unit of proposed class members is sufficiently cohesive that it is fundamentally fair to permit the trial of the named representative's claims to bind not just the defendant, but the rest of the members of the proposed class. Windsor v. Amchem Products, Inc., 521 U.S. 591, 613 (1997). The predominance requirement is far more demanding than the commonality requirement, and goes to the heart of the defendant's due process rights. Id.

C. A MISSOURI-ONLY CLASS CANNOT MEET THE PREDOMINANCE REQUIREMENTS OF RULE 52.08(b)(3).

As discussed in detail above, a defendant's due process rights are violated when it is forced to try a case on the basis of class-wide proof when material facts of the class members' claims (and the defendant's applicable defenses) are susceptible only to individualized, claim-specific proof. For this it makes no difference whether the putative class is statewide or nationwide. Even in a one-state class action with legal issues truly common, the perceived expediency and economy of the class action device does not justify the substitution of a collage of claims for what are in reality individual claims whose factual circumstances vary with each would-be class member. The defendant is

still entitled to present proper defenses against actual claims. Accordingly, should the Court make permanent its temporary writ, it should do more than reduce the class to a Missouri-only class, as plaintiffs would wish;[39] it should prohibit a class altogether.

On the matter of a Missouri-only class, American Family and the Court should not have to be dealing with constitutional issues in this special writ proceeding. Certification of a Missouri-only class (and a nationwide class) should have been (still can be) dispelled solely under Missouri's class action rules – in particular, the "predominance" requirement for (b)(3) classes. Had the Missouri class action rules been followed, the constitutional issues would have been avoided.

There is no dispute that a (b)(3) class, such as the one included in the circuit court's challenged certification order, cannot lawfully be certified under Missouri law, unless "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Supreme Court Rule 52.08(b)(3). This predominance requirement did not just fall from a tree. It comes from Federal Rule of Civil Procedure 23(b)(3), and was developed over the years to identify would-be (b)(3) class actions, once called "spurious" class actions, whose issues are sufficiently common and cohesive as to permit representative litigation and

[39] Plaintiffs say to the Court several times in their Answer that American Family "conce[des] that the class is properly certified as to Missouri residents." Answer to Petition at ¶¶ 11 & 15, pp. 7 & 10. This statement is totally incorrect. American Family has always resisted the certification of any class in this case. *See* Relator's Petition, ¶ 37.

bind absent class members. It ensures due process for absent class members and party defendants alike.[40]

A finding of predominance under Rule 52.08(b)(3) is not a simple matter and cannot be made lightly. It, even more than other predicate certification findings,[41] can only be made by a court after a rigorous analysis of the circumstances of the case, including the parties' claims and defenses and the substantive laws on which they are set. Castano, 84 F.3d at 744 (a court must analyze the claims, defenses, relevant facts and substantive law in order to make a meaningful predominance determination).

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[40] The history, necessity and purpose of the (b)(3) predominance requirement are discussed in the Supplementary Notes to Rule 23, subdivision (b)(3), Federal Civil Judicial Procedure and Rules (West 2002).

[41] In a (b)(3) class action, the circuit court must also find that the claims of the representative plaintiffs (and defenses thereto) are "typical" to those of the absent class members, under Mo. R.C.P. 52.08(a), and that class action litigation is "superior" to other available methods for the fair and efficient adjudication of the controversy, under Supreme Court Rule 52.08(b)(3). Whether a case is even "manageable" as a class action is another matter requiring consideration under Supreme Court Rule 52.08 (b)(3)(D). The circumstances of this case (and the language of and lack of analysis in the challenged certification order) demonstrate that a proposed class of Missouri insureds also fails the typicality, superiority and manageability tests.

In this case, the circuit court clearly did not perform that rigorous analysis. Its certification order was skeletal at best – a bare recitation of the certification elements, devoid of any discussion of those elements and supporting case circumstances. While a rigorous analysis of applicable substantive law would have demonstrated to the circuit court that a nationwide class involving disparate and conflicting state laws could not satisfy the predominance requirement, American Family submits that a much less rigorous, even cursory, review of the alleged facts in this case should have been sufficient for the court to recognize that proof of one class member's claim is not proof of another's claim, and that separate, substantial "mini-trials" – as many as there are class members – [42]would be required to adjudicate the many significant, claim-specific facts relevant to each class member's claim.

On the issue of common facts (as opposed to common legal questions), plaintiffs have identified one they believe can be the basis of class certification. Plaintiffs say they "demonstrated at the class certification hearing that American Family's common scheme of soliciting imitation [non-OEM] crash parts . . . and omitting repairs universally breached their policies with plaintiffs, policies that contain identical language and

[42] For example, available data indicates that of the approximately 130,496 automobile insurance, first-party, property damage claims handled by American Family between October 1, 2001 and September 30, 2002, approximately 24,156 of them involved Missouri insureds. An average claim involves approximately 6.5 replacement parts, some OEM and some non-OEM.

identical obligations to all plaintiffs, residents and non-residents alike."[43] *See*, Plaintiff's Answer to Petition, ¶ 3. First, of course, while it may have been demonstrated that American Family typically specified non-OEM parts for the repair of insured vehicles (three years and older), and that all Missouri-form policies are substantially the same as other Missouri-form policies, plaintiffs did not demonstrate, let alone establish, a breach of their own auto policies, let alone those of absent class members, and no such breach was found by the circuit court. Also, this is not a significant common fact at all but a summary statement of plaintiffs' breach of contract claim. Finally, a significant, even core issue of fact, even if true, does not make class certification appropriate when remaining, significant, individual, claim-specific issues of fact are so many as to virtually swamp any common issues. *See*, Georgine v. Amchem Products, Inc., 83 F.3d 610, 626-68 (3d Cir. 1996), *aff'd sub nom*, Windsor v. Amchem Products, Inc., 521 U.S. 591 (1997) (even the critical core issue of whether asbestos fibers causes serious injury does "not even come close" to satisfying the predominance requirement in light of the other significant factual issues that vary with each class member's claim).

[43] Other, lesser facts allegedly common to the class are identified by plaintiffs in Answer to the Petition, at Exhibit 4. Some are subparts of others; some are uncontested; some are insignificant or irrelevant; some apply or are true respecting some insureds but not others; none can justify class certification in light of the multitude of remaining, significant, claim-specific facts.

A necessary premise of plaintiffs' class certification request – one critical to meeting their burden on the predominance requirement – is plaintiffs' central allegation that all non-OEM parts are inferior to all OEM parts. *See*, *e.g.*, Fourth Amended Petition, ¶¶ 12, 13, 14, 16, 17, 22, 23 and 55. Appendix at A328 passim. A second, equally necessary premise is that all of the damaged parts at issue in this case for all class members were OEM parts in good condition immediately prior to the respective covered losses. Unless these premises are absolute fact – something the circuit court clearly did not find, and something thoroughly contradicted throughout the record – the quality of each non-OEM part specified by American Family for a repair and the origin (OEM or non-OEM) and pre-loss condition of each damaged part being replaced are things that will have to be established for each would-be class member's claim. This is because, under established Missouri law – Missouri Insurance Department rules applicable to automobile insurance policies written in the state – an insurer is permitted to specify non-OEM parts for a covered loss, so long as they are "at least equal in like, kind and quality to the original part [they are replacing] in terms of fit, quality and performance." Mo. Ins. Dept. Rule (20 C.S.R.) 100-1.050, subparagraphs (2)(D)2.A and (2)(D)2.B.

American Family's Missouri-form auto insurance policy does not require that OEM replacement parts be specified for the repair of insured vehicles. Nor does it require that non-OEM parts, when specified by American Family, be of like, kind and quality to original parts. The like, kind and quality ("LKQ") requirement arises out of Insurance Department Rule (20 C.S.R.) 100-1.050, subparagraphs (2)(D)2.A and (2)(D)2.B, which cannot be construed any way other than to permit the use of LKQ non-

OEM parts or at least to require a part by part evaluation. Snell v. The GEICO Corp., 2001 WL 1085237 at *8, n.2 (Circuit Court of Maryland, August 14, 2001). This rule also cannot reasonably be construed to require that preexisting non-OEM parts (already on the vehicle at the time of the insured loss) be replaced with OEM parts, or that previously damaged OEM parts (parts already in poor condition immediately prior to the insured loss) be replaced with new OEM parts. In fact, Missouri Insurance Department Rule (20 C.S.R.) 100-1.050, subparagraph (2)(E), specifically permits American Family to reduce a loss payment for "betterment," where, for example, the subject parts were previously damaged. Furthermore, the requirement that an insured vehicle be "restored to its condition prior to the loss" (its pre-loss condition) is also a creature of Missouri Insurance Department rule, Rule (20 C.S.R.) 100-1.050, subparagraph (2)(F), a companion to the LKQ and betterment rules.[44] Given the language and purpose of these rules, there is no doubt the Missouri Insurance Department believed, in effect, has regulated with the force of law, that non-OEM parts are not uniformly inferior to OEM

[44] The Department's pre-loss condition requirement at least applies when "the insurer elects to repair and designates a specific repair shop for [the] repairs." Mo. Ins. Dept. R. 20 (C.S.R.) 100-1.050, subparagraph (2)(F). Relator's witnesses at the hearing acknowledged this as the obligation of the company in repairing vehicles which are not a total loss.

parts,[45] and their specification is not a *per se* breach of the class members' auto insurance policies.

With this background, the factual issues specific to each would-be class members' claim virtually swamp any significant common facts. The individual questions include: Was the damaged part on the insured vehicle OEM or non-OEM, and if OEM what was its pre-loss condition?[46] What was the kind and quality of the replacement part specified by American Family for the repair? Did the insured actually want OEM parts, or did he or she prefer non-OEM, either for quality reasons, or because of American Family's accompanying life-of-the-car guarantee of non-OEM parts, or because OEM parts prices would have "totaled" the vehicle when the insured wanted it repaired? Were OEM parts even available for the repair? Did the insured actually get the OEM or non-OEM part specified by American Family (or some other-part), and if not whose fault or choice was it? If the replacement part was not of like, kind and quality, was it a specification

[45] The LKQ requirement of Mo. Ins. Dept. Rule (20 C.S.R.) 100-1.050, subparagraph (2)(B), is essentially identical to the National Association of Insurance Commissioner's model replacement parts rule promulgated in the 1980's following a favorable report on non-OEM parts by the NAIC's After Market Task Force. Appendix at A412-431.

[46] The record is clear that the pre-loss condition of insured vehicles was something American Family took into consideration each time a loss was adjusted. Plaintiffs' Answer to Petition, Exhibit A, Vol. 4, at 785-789; Answer to Petition, Exhibit A, Vol. 6, at 1232-33, 1240-1241.

problem, manufacturer problem, supplier problem or repair shop problem? Would the non-OEM parts have fit and performed at least as well as OEM parts had they been properly installed by the insured's repair shop? For that matter, was the condition of the vehicle or ability of the insured's repair shop such that any repair part would have fit or performed well?[47] Was the insured aware of non-OEM parts and American Family's specification practices regarding them (say, from his or her agent or a prior claims experience) when he or she bought the auto policy? (In other words, did the insured consent to the specification of non-OEM parts, which goes in part to each insured's state of mind.) When the insured eventually sold the insured vehicle, did he or she receive less for it than it was worth had OEM parts been specified and used? And likewise, did the repair shop use OEM parts, at no additional expense to the insured, even though non-OEM parts were specified by American Family? Also, did the insured make a claim on American Family's non-OEM parts guarantee, and what was the result? (These last three questions are relevant at least to the individual damages issue.)

[47] Plaintiffs' expert testified at the certification hearing that, whether one uses OEM or non-OEM parts such as doors, fenders and hoods, it is <u>not</u> possible to restore a vehicle to its pre-loss condition. Plaintiffs' Answer to Petition, Exhibit A, Vol. 2 at 299-300. If that be the case, why then would American Family be required to specify more expensive, non-"imitation" OEM parts to restore insured vehicles "to their pre-loss conditions?" *See*, Fourth Amended Petition, ¶¶ 11 and 12. A328-A331.

Even more problematic, from a predominance perspective, is plaintiffs' claim that American Family uniformly omitted from its repair estimates, for some class members, repairs necessary to return their insured vehicles to their pre-loss condition. This allegation and a loose definition of "Omitted Repairs" are included within the class definition.[48] Order Granting Motion for Class Certification, ¶ 1, *see* Relator's Petition at Exhibit B. The additional, significant, individual issues of fact presented by this claim are many. For example: Were these repairs actually necessary to return an insured's vehicle to its pre-loss condition? Were these repairs even omitted, just because they were not particularized in the repair estimate? In other words, were they subsumed and paid for in other particularized repairs, and if not, were they nonetheless performed and paid for by American Family or someone else other than the insured? Was the repair estimate subsequently amended to add the omitted repairs? Did an American Family adjuster override the estimation software during the adjustment process, or later approve and pay for an omitted repair when its omission or necessity became apparent? When the insured eventually sold the insured vehicle, did he or she receive less for it than it was worth had the omitted repair not been omitted?

In conclusion, the Court need not get to the constitutional issues when it comes to the matter of a Missouri-only class. A class of American Family's Missouri insureds

[48] This is but one of the many problems with the class definition. There is no way to identify these class members without first adjudicating their claims.

does not meet the predominance requirement of the Missouri class action rule. Supreme Court Rule 52.08(b)(3).

CONCLUSION

This Court should convert its August 27, 2002 preliminary writ of prohibition into a permanent writ of prohibition.

Dated: October 25, 2002

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by U.S. Mail on this ___ day of October, 2002, on:

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CERTIFICATE OF COMPLIANCE

I certify that this Brief is doubled-spaced, including footnotes, and the font used is Times New Roman 13 point. Based on word count under Microsoft Word, this Brief contains 17,125 words, excluding the summary of the case, table of contents, table of authorities, addendum and certificates of counsel.

I also certify that the computer diskette that I am providing has been scanned for virus under McAfee, version 5.4.1, and has been found to be virus-free.

_____

APPENDIX

Relator's separately bound appendix consisting of 431 pages is submitted herewith.