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

REPLY BRIEF OF RELATOR AMERICAN FAMILY MUTUAL INSURANCE COMPANY

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SUMMARY OF ARGUMENT

Plaintiffs' arguments do not diminish the compelling reasons to make the writ of prohibition permanent. Indeed, plaintiffs only halfheartedly address the three issues that are dispositive of their request that this underlying case be allowed to proceed as a class action.

First, as plaintiffs concede, the request for class action status is totally dependent on the amazing contention that all non-OEM parts are categorically inferior to all OEM parts, regardless of the skill or lack of skill used in their manufacture. It is a frontal challenge to the many state laws and insurance regulations that specifically allow the use of non-OEM parts to repair vehicles. This case is poised to undo the policy choices and legislative decisions made by governmental authorities to whom Respondents have no accountability. This egregious intermeddling with the insurance laws and regulations of Missouri and its co-equal sovereign states cannot possibly be a proper use of the class action device. To the contrary, class certification under the circumstances of this case is so far beyond the proper purview of a Missouri state court as to make the writ of prohibition a constitutional necessity.

Second, the challenged class certification order simply does not reflect the "rigorous analysis" that is needed to sustain such an order. The proof is in the order itself, a copy of which is found at Tab B to American Family's Petition for a Writ. The order was signed by Judge Clark but prepared by plaintiffs' counsel. The order finds that the various elements of Missouri's class action rule, 52.08(1), are met but contains not a word of explanation as to why that is so. The order does not evaluate or comment on the claims or

evidence, does not analyze the arguments of the parties, and does not enumerate the common issues of law and fact that allegedly predominate over questions affecting individual class members only.

Even more glaring is the order's failure to address the flawed syllogism that underlies the request for class action status. Plaintiffs say all non-OEM parts are categorically inferior, yet they acknowledge that numerous states have insurance regulations and statutes specifically allowing the use of non-OEM parts. Therefore, either plaintiffs' premise is incorrect or numerous states allow the use of categorically inferior parts. It makes no sense to argue, as plaintiffs do, that class certification would not interfere with the laws of those states that allow the use of non-OEM parts, because none of those states allows the use of categorically inferior parts. If none allows categorically inferior parts but many allow non-OEM parts, then there must be some non-OEM parts that are not categorically inferior. If so, the entire premise of plaintiffs' request for class action status fails. Thus, the order fails for lack of a rigorous analysis, but, more important, it fails because rigorous analysis is fatal to this class action.

Third, plaintiffs have not successfully explained away their retreat from the allegations of their own petition. Throughout their Fourth Amended Petition, plaintiffs repeatedly and monotonously asserted that American Family's contractual obligation was to restore damaged vehicles to pre-loss condition. If restoration to pre-loss condition is the issue plaintiffs sued over, as they must to state a breach of contract claim, then determination of breach requires an examination of the pre-loss condition of each damaged vehicle and creates individual issues of proof that overwhelm any common issues.

Plaintiffs seek to evade this obvious point by deleting references to pre-loss condition from their brief as if to retroactively remove them from their petition. Remarkably, they now say that both pre-loss condition and post-repair condition are "irrelevant" to their claims. They seek to pursue instead a fictional breach of contract that is said to occur the moment American Family writes a repair estimate based on the cost of some non-OEM parts or omitting some so-called necessary repairs. There is no basis for an approach that would make irrelevant to the determination of breach the actual condition of the vehicle before loss and the actual condition of the vehicle after all repairs have been paid for by American Family.

American Family has demonstrated the rickety logical and constitutional underpinnings of the class certification order. Plaintiffs have not successfully shown that the order constitutes a proper exercise of the trial court's discretion. Under Missouri law, "An abuse of discretion is an erroneous finding and judgment which is clearly contrary to the facts and circumstances before the court -- a judicial act which is untenable and clearly against reason and which works an injustice." Altenhofen v. Fabricor, Inc., 81 S.W.3d 578, 592 (Mo. Ct. App. 2002). That description applies to the class certification order under scrutiny here. Accordingly, the writ of prohibition should be made permanent and Judge Messina should be directed to vacate the class certification order of December 14, 2001.

I. ARGUMENT

A. A PERMANENT WRIT OF PROHIBITION IS WARRANTED UNDER THE APPLICABLE STANDARD OF REVIEW.

Plaintiffs describe a writ of prohibition as an extraordinary device that is rarely granted. American Family agrees. There are circumstances, however, where the extraordinary remedy of a writ is fully justified, and this is one of them. This Court has explained that: "Prohibition will lie when there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision." State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo. Banc. 1994). Under Missouri law, a writ of prohibition is "generally allowed to avoid useless suits and thereby minimize inconveniences, and to grant relief when proper under the circumstances at the earliest possible moment in the course of litigation." State ex rel. Hamilton v. Dalton, 652 S.W.2d 237, 239 (Mo. App. 1983).

Here, prohibition lies because an important question of law has been decided erroneously in the class certification order. That order allows plaintiffs to proceed with a nationwide class action premised on the contention that all non-OEM parts are categorically inferior and may never legally be used to repair damaged vehicles. That contention demonstrates a blatant disregard of Missouri's own insurance regulations and the regulations of Missouri's sister states that specifically allow the use of non-OEM parts to repair damaged vehicles.

This is an important question of law because it implicates fundamental doctrines of state sovereignty, comity and due process. It is also important because the scope of the class action is huge, covering insurance policies written in the fourteen different states where American Family has done business over a ten-year period and potentially involving claims of hundreds of thousands of policyholders. To suggest, as plaintiffs do, that class certification would not cause American Family to suffer considerable hardship and expense is to ignore what is patently obvious. It does not take a minute examination of American Family's financial statements (which, after all, are public documents accessible both to plaintiffs and to the Court) to establish that the pressures created by a multimillion-dollar class action lawsuit on a regulated defendant like American Family are enormous.

Moreover, if class certification is ultimately useless here, because there is simply no way to fit the square peg of class treatment into the round hole of state regulations that allow what the successful class action would prohibit, then it makes eminent sense to say so now. The relief afforded by a writ of prohibition should be granted at the earliest possible moment in the course of litigation. State ex rel. Hamilton, 652 S.W.2d at 239. That moment is now.

Plaintiffs acknowledge there is little Missouri case law describing the circumstances when a writ is appropriate in class action cases. Plaintiffs' Brief at 34-35. Plaintiffs found only two Missouri cases reviewing a class certification order by way of writ. While it is true that neither of those cases vacated a class certification order, State ex rel. Byrd v. Chadwick, 956 S.W.2d 369 (Mo. App. 1997), did make a preliminary writ of mandamus absolute in a class action proceeding. Therefore, Byrd demonstrates the

availability of a permanent writ in appropriate circumstances. Byrd does not hold that such circumstances can never arise in connection with the class certification decision.

The only other case plaintiffs cite involving the use of a writ in a class action proceeding is State of Missouri ex rel. Leader Motors v. Koehr, 1992 WL 151844 at *4 (Mo. App. 1992). There, the Court of Appeals entered a writ of prohibition finding the class did not meet Rule 52.08 criteria. Without a written opinion, this Court summarily quashed the writ. From that fact, plaintiffs argue that this Court "presumably" agreed with the dissent to the Court of Appeals decision. Surely, the absence of a decision is a thin reed on which to presume an understanding of this Court's approach to the compelling constitutional issues raised by this case.

The class action status of this lawsuit makes a difference to the analysis of whether a permanent writ is appropriate. It makes this case differ markedly from the personal injury claim of one person against one corporation that was considered in State ex rel. K-Mart Corp. v. Holliger, 986 S.W.2d 165 (Mo. banc 1999), on which plaintiffs rely. The legal standards for issuance of a writ need not vary from one circumstance to the other, but surely the varying scope of the two lawsuits warrants a different analysis of the question whether preliminary jurisdictional questions may really be addressed on appeal of a final judgment. In the class action setting, the road to appeal is traveled at tremendous cost and with tremendous uncertainty. Precisely for that reason, the federal system has recently adopted a procedure for interlocutory appeal of class certification decisions. Missouri is not obliged to do the same, but it can achieve somewhat the same effect by using its

superintending power to issue a writ of prohibition when a class certification order of immense scope has been erroneously entered.

Because Missouri's Rule 52.08 is identical to Federal Rule 23, this Court frequently considers interpretations of Rule 23 in interpreting Rule 52.08. Byrd, 956 S.W.2d at 378. The federal approach recognizes the class certification decision as portending such great consequences to a defendant that careful review of the decision is warranted sooner rather than later. With a burgeoning number of nationwide class action lawsuits being filed in state courts, including those of Missouri, the time for this state's highest court to address the standards that apply to these lawsuits has arrived. This case presents an opportunity for this Court to make clear that class certification orders lacking rigorous analysis are always insufficient and class certification orders ignoring obvious conflicts with the laws of other states are not tenable.

B. THE CLASS CERTIFICATION ORDER IS CONSTITUTIONALLY INFIRM BECAUSE IT POSES A THREAT TO VALIDLY ENACTED LAWS AND REGULATIONS OF MISSOURI AND OTHER STATES THAT ALLOW USE OF NON-OEM PARTS TO REPAIR DAMAGED VEHICLES.

Plaintiffs have the daunting task of trying to fit a square peg into a round hole. They claim that non-OEM parts are categorically inferior to OEM parts and can never validly be used in making vehicle repairs. Yet, they acknowledge that the laws and insurance regulations of many states specifically allow the use of non-OEM parts to repair damaged vehicles. Therefore, either many states are allowing cars to be repaired with categorically

inferior parts, or non-OEM parts are not categorically inferior. Plaintiffs say no state authorizes the use of inferior non-OEM parts, leading to the only logical conclusion that at least some non-OEM parts are not categorically inferior. That logical conclusion cannot be squared with the premise of categorical inferiority of non-OEM parts on which the request for class status is predicated.

This is not mere word play or semantical nuance. Instead, it is an issue of constitutional dimension. If the class action is allowed to proceed and plaintiffs prevail, then a judgment will be entered making American Family liable for utilizing non-OEM parts even in other states where, like Missouri, the use of such parts is specifically authorized by rule or statute. A clearer example of officious intermeddling with the laws of other states would be hard to find. The power of any one state is constrained by the need to respect the interests of other states. BMW of North America v. Gore, 517 U.S. 559, 571 (1996). If other states believe it is worthwhile to allow competition among the manufacturers of OEM and non-OEM parts so that rising prices can be kept in check, those policy choices should not be vetoed by one judge and one jury in one Missouri state court.

To avoid the obvious constitutional impediments to proceeding as a class action, plaintiffs argue that their claim will not interfere with insurance regulations of other states because no states authorize the use of inferior non-OEM parts.[1] That fact would be worth

[1] Judge Clark suggested that a Missouri jury could overule these state-by-state policy choices. *See* Supplemental Appendix at SA1-12. Exhibit A to Plaintiffs' Answer to Petition, Vol. VI, 1184-1188.

noting if plaintiffs were willing to concede that not all non-OEM parts are inferior. Plaintiffs cannot make that obvious concession, however, because to claim anything other than categorical inferiority would be to undermine the central premise of their request for class status. If there is variation in quality among both OEM and non-OEM parts,[2] as logic, common sense, and the evidence at the certification hearing established, then each part must be examined to determine whether its use successfully returned an insured's vehicle to pre-loss condition. Under such circumstances, the requirements of predominance of common questions and superiority of the class action device could not be satisfied and class certification would not be warranted.

Plaintiffs contention that all states have the same basic law of contracts, therefore it is constitutionally permissible to apply Missouri's contract law to all out-of-state class members, ignores the unique regulations and laws of each state that are imported into every insurance contract approved for use in that state. In Missouri, for instance, the "like kind and quality" and "pre-loss condition" requirements of the Missouri insurance rules may be imported into American Family's policy even though the policy does not contain that

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[2] Plaintiffs distort the facts and relevance of the dispute between Keystone Automotive and Ford Motor Company. As shown by Hearing Exhibit 1071, Keystone and Ford settled a dispute in 1992 over certain advertising claims Keystone made between *1982 and 1987,* well before the ten-year class period in this case. *See* Supplemental Appendix SA13-22, attached hereto; Plaintiffs' Answer to Petition, Exhibit A, Vol. VI, at p. 1123-25.

language. These requirements are to be construed and enforced according to Missouri law and are inapplicable to policies issued in sister states. Those states, of course, each have their own unique laws and regulations that are imported into policies approved for use in those states.

Even accepting plaintiffs' argument that it is possible to determine categorically whether aftermarket parts are inferior, a Missouri jury should not be solely entrusted with making that determination. Each state has a right to determine for itself the benchmarks against which parts should be measured (as to fit, corrosion resistance, dent resistance and the like) and whether certain parts or categories of parts meet those benchmarks. Furthermore, American Family presented ample evidence that it is not possible to determine categorically whether aftermarket parts are inferior because the allegedly superior ones -- OEM parts -- are often themselves defective. *See* Answer to Petition, Exhibit A, Vol. 7, at p. 1341-1345; *see also*, Appendix A353-57 *and* Relator's Opening Brief, p. 35 and n. 28.

Moreover, plaintiffs' "categorically inferior" argument is flawed logic. Inferior to what? Plaintiffs insist that new non-OEM parts are inferior to new OEM parts, but that misstates the issue. The issue is whether every new non-OEM part is categorically inferior to every part to be replaced, even a 10 year-old OEM part that, in its pre-collision condition, was rusty, rattling and worn or materially damaged from a prior collision. Even the plaintiffs do not make that contention. Indeed, the plaintiffs do not attack the use of salvaged parts even though such slightly worn parts may be "inferior" to new OEM parts. Plaintiffs thus implicitly acknowledge that they must prove the replacement parts are

inferior to the actual parts they replace – not to some fictitious OEM standard. With that concession, plaintiffs' entire class action slips through their fingers.

In an attempt to discredit the insurance department of other states, plaintiffs cite to the Agnoff affidavit which makes no mention of other states. Plaintiffs' Brief at 46. Further that affidavit fails to mention that Missouri's rule on non-OEM parts is based on the National Association of Insurance Commissioners model replacement parts rule, which was promulgated in the 1980's following a favorable review of non-OEM parts by the NAIC's After Market Task Force. *See* American Family Brief at 67 and 68, n. 45. Finally the affidavit was not admitted at the hearing and Mr. Agnoff was never called as a witness. *See* Plaintiffs' Answer to Petition, Exhibit A, Vol. I, at 119-128.

Plaintiffs rely on Avery v. State Farm, 321 Ill. App. 3d 269, 746 N.E.2d 1242, 1254 (2001), appeal pending, on this issue. The Avery analysis, however, is dubious at best. Avery observed that: "Former and current representatives of state insurance commissioners testified that laws in many of our sister states permit and in some states encourage the use of non-OEM parts as an effort to encourage competitive price control." Id. Despite its recognition of this valid public policy choice, the court in Avery amazingly concluded that none of Illinois' sister states would sanction the use of inferior aftermarket repair parts and, therefore, there was no impediment to proceeding with a nationwide determination of the efficacy of using non-OEM parts. Id.

The logic of Avery is highly suspect. As the Maryland court examining the same issue explained: "The logic of that conclusion seems to conflict with the central premise of the plaintiffs' claim, that non-OEM parts are uniformly and necessarily inferior to OEM

parts. If these insurance commissioners would never sanction the use of inferior aftermarket replacement parts, and if notwithstanding that in some instances they sanctioned the use of such parts, there must be some instances in which these commissioners feel that non-OEM parts are equal to OEM parts. That is, these insurance commissioners must have determined that non-OEM parts are not *categorically* and *universally* inferior." Snell v. The Geico Corp., 2001 WL 1085237 at *9 (emphasis in original). American Family Appendix at A252-71.

Simply put, the premise of plaintiffs' class action flies in the face of validly enacted regulations in numerous states, and Judge Clark's class certification order threatens to strip authority to regulate insurance practices from fourteen state insurance departments and put it in the hands of a single Jackson County jury. This scenario does not pass constitutional muster.

C. THE CLASS CERTIFICATION ORDER IS CONSTITUTIONALLY INFIRM BECAUSE IT DOES NOT REFLECT ANY RIGOROUS ANALYSIS.

Certification of a class, especially a nationwide class, is a serious matter necessitating rigorous analysis. General Telephone Company v. Falcon, 457 U.S. 147, 161 (1982); Beatty v. Metropolitan St. Louis Sewer Dist., 914 S.W.2d 791, 794-95 (Mo. Banc 1995). Here, Judge Clark abdicated his responsibility to analyze rigorously whether plaintiffs in fact had met or could meet the requirements for class certification set forth in MRCP 52.08. The certification order merely recites, in conclusory fashion, that plaintiffs

have met the standards for class certification. This is plain error. In re American Medical Systems, Inc., 75 F.3d 1069, 1082 (6th Cir. 1996).

The deficiencies in the order are numerous and glaring. First, Judge Clark did not draft the order he signed; plaintiffs' counsel drafted it. Order at 4. The order was not accompanied by any written decision setting forth the court's evaluation of the parties' claims and the necessary evidence therefor in light of the governing standards for class certification. Instead, the order simply recites the certification requirements and concludes, without analysis, that they have been met. This is not enough.

Second, the order does not explain why, or if, the court found certification of a nationwide class in a Missouri circuit court to be a superior means of adjudicating the contract rights of American Family and its policyholders, the great majority of whom reside outside Missouri.

Third, the order provides no analysis of whether plaintiffs even have a viable theory upon which to proceed, since plaintiffs seek to pursue a nationwide breach of contract claim without proving what damages, if any, arose from the individual breaches upon which class treatment is predicated. The court below did not rigorously evaluate plaintiffs' contention that the mere act of writing an estimate using the cost of non-OEM parts constitutes a *per se* breach of contract and creates damages, even when the insurance regulations of Missouri and most of the other states in which American Family does business expressly allow the specification of non-OEM parts for car repairs. This is a behind-the-pleadings examination of claims which is necessary to determine predominance and superiority. Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996).

In entering its order, the circuit court did not train its analytical powers on the highly dubious theory on which plaintiffs propose to proceed. They claim they can pursue that theory without considering the following individualized factors: (a) the pre-loss condition of each damaged vehicle; and (b) the nature of the repairs and the type of parts actually used to effectuate the repairs for which American Family paid. In entering its certification order, the trial court did not consider whether, even if Missouri were inclined to adopt plaintiffs' novel breach of contract theory, the other states in which American Family does business would adopt it too. Indeed, plaintiffs expressly told Judge Clark he could safely sidestep choice of law analysis, and simply apply Missouri law across the board. See Plaintiffs' Response to Petition, Exhibit A, Vol. I, at 103-06 (attached hereto as Supplemental Appendix, SA23-30). He did just that.

Fourth, the certification order discloses no consideration of the insureds' contract rights to resolve disputes about the total amount necessary to settle collision losses by invoking out-of-court appraisal procedures. The order does not explain why these appraisal rights in thirteen of the fourteen states should be restricted by a court of the one state where American Family's policy does not include an appraisal right. On its face, the order requires all insureds to be plaintiffs in this litigation even though the vast majority could quickly and efficiently invoke appraisal rights. Those insureds can opt out of the class, but unless they do that the certification order – without comment – quietly eliminates the appraisal rights of all non-resident insureds. Out of hundreds of thousands of potential class members – maybe millions – a significant number of absent class members will be stripped of their appraisal rights without knowing it. An objective, rigorous analysis is

required in part because the trial court has an independent obligation to protect the rights of absent class members. The certification order in this case utterly fails to discuss that unique role of the court.

Fifth, the certification order is not saved by its paragraph 7, which provides that: "This order remains subject to modification, correction, restriction, and/or amendment as further information is provided." Such "conditional" certification language does not lessen the predominance and superiority requirements and the trial court cannot use it to avoid deciding whether at this time these class certification requirements have been met. Castano, 84 F.3d at 741, Southwestern Refg. Co. v. Bernall, 22 S.W.3d 425, 435-437 (Texas 2000) ("We reject this approach of certify now and worry later.")

In signing the class certification order, Judge Clark went against the vast weight of authority, disregarded the insurance regulations of Missouri and the other involved states, overlooked glaring deficiencies in plaintiffs' proofs and ignored undisputed evidence that the quality of OEM and non-OEM parts varies from part to part, a point plaintiffs' own expert conceded.

A trial court has discretion in deciding whether to certify a class, and typically an abuse of discretion can be remedied at the appellate stage. But this is no mere abuse of discretion. Here, Judge Clark failed to exercise his discretion. He abdicated his responsibility to examine the evidence in light of MRCP 52.08 and determine whether a class should be certified. See State ex rel. Byrd, 956 S.W.2d at 376; see also State ex rel. Laclede Gas Co. v. Godfrey, 468 S.W.2d 693, 698 (Mo. App. 1971); American Medical Systems, 75 F.3d at 1088.

To certify a class, Judge Clark would have had to buy into plaintiffs' assertion that damages could be calculated through a "claims process," even though such procedures are normally reserved for settlement.[3] Judge Clark's order can only be described as arbitrary and capricious.[4]

The need for the Court to intervene now is compelling. Even with what may be the minimal risk of a loss on the merits, the gigantic damages plaintiffs are likely to seek -- under the most improbable of theories -- generates immense pressure to settle. This is a dynamic that very often forecloses effective review from a final judgment as a practical matter, thus causing more and more appellate courts to exercise their prerogative to review improvident and extortionate interlocutory class certification orders. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001); Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996); Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995); Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266 (11th Cir. 2000).

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[3] Plaintiffs suggested that damages could decided in a "claims process" by a third party administrator, who would award damages to each class member based upon some pre-determined formula. *See, e.g.,* Plaintiffs' Answer to Petition, Exhibit A, Vol. VIII, 1562-64; 1630-1635.

[4] Remarkably, Judge Clark inappropriately wondered whether a 14 state class was needed to make the case economically feasible for class counsel. Plaintiffs' Answer to Petition, Exhibit A, Vol. VIII, at p. 1593-95.

Plaintiffs claim there is nothing in Rule 52.08 requiring a formal opinion detailing the facts, law and analysis supporting a class certification order. But if the rule itself does not require it explicitly, the interpretative case law to Rule 23 and by extension to Rule 52.08 does do so. See State ex rel. Byrd, 956 S.W.2d at 378 (observing that Rule 23 cases are frequently considered by the Missouri Supreme Court in interpreting Rule 52.08). Plaintiffs provide no authority for applying Rule 73.01, relevant to final judgments in court-tried cases, to a class action hearing. In the class action context the court is instructed to perform a rigorous analysis to insure that the rights of absent class members are adequately protected. If the court does not "show its work," neither the parties nor an appellate court has any way of determining whether or not their constitutional rights were protected. In a case with stakes as high as they are here, surely it cannot satisfy the requirements of "rigorous analysis" merely to sign an order drafted by plaintiffs' counsel and containing no analysis whatsoever. Moreover, a class certification decision that is not supported by findings to satisfy the class certification criteria is not entitled to the traditional deference given to other trial court orders. Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1160-61 (9th Cir. 2001).

D. THE CLASS CERTIFICATION ORDER NECESSARILY ADOPTS THE ERRONEOUS PROPOSITION THAT "PRE-LOSS CONDITION" AND "POST-REPAIR CONDITION" ARE IRRELEVANT.

Twenty-nine times in their Fourth Amended Petition, plaintiffs referenced the pre-loss condition of insured vehicles. Two other times plaintiffs used the comparable phrase "condition prior to the loss." See ¶¶ 11 and 59, Fourth Amended Petition,

Appendix at A331 and 344. Over and over, plaintiffs alleged that American Family is obligated to either pay the actual cash value or pay to repair its insureds' damaged vehicles so they are "restored to their condition prior to the loss." See ¶¶ 11, 12, 14, 24-26, 29, 31, 36, 39, 47, 52, 53, 55, 57, 59, 65, 70 and 71, Plaintiffs' Fourth Amended Petition, Appendix at A331 to A346. In short, this case was pled on the theory that American Family had a "contractual obligation" to so repair its insureds' vehicles as to restore them to pre-loss condition.

Because determining pre-loss condition in each instance of damage would require a claim-by-claim evaluation of the baseline condition of each insured vehicle before it was damaged, plaintiffs now want to walk away from the theory on which they pursued the case. They now argue that pre-loss condition and post-repair condition are irrelevant to the breach of contract analysis and American Family's insistence on a part-by-part analysis is simply a disagreement on the merits as to what constitutes a breach of the insurance contract. Plaintiffs' Brief at 64. Plaintiffs cite cases standing for the proposition that the Court "may not review the sufficiency or substantive merits of the allegations in a class action complaint," but must accept them as true for purposes of class certification. Plaintiffs' Brief at 65, *citing* e.g., Jackson v. Rapps, 132 F.R.D. 226, 230 (W.D. Mo. 1990). But if the allegations of the petition are to be accepted as true for purposes of class certification analysis, then pre-loss condition is front and center and anything but irrelevant. Indeed, in a curious turnabout, plaintiffs, who drafted the petition, are the ones who want to avoid its allegations, or at least those that now conflict with their current theory of breach.

Plaintiffs never answer the central question of how a failure to return a vehicle to pre-loss condition can be evaluated without any information or evidence to establish what the pre-loss condition was. Apparently, plaintiffs would even find a breach of contract if American Family wrote an estimate specifying the use of non-OEM parts to replace non-OEM parts that were already on the vehicle, perhaps placed there when another company in another state insured the policyholder. Plaintiffs seem to believe that only OEM parts are being replaced when cars are fixed, but they offer no basis for that wild speculation. Plaintiffs' Brief at 69.

Further, American Family contracts to pay for loss caused by collision. It does not contract to pay under the collision coverage for loss not attributable to a collision. Therefore, the pre-loss condition of each vehicle is the baseline from which damages from contract breach must be determined. Stated differently, pre-loss condition is the limiting factor that determines the limit of American Family's payment obligation and that condition varies from claim to claim.

The court in Avery read State Farm's limitation of liability out its insurance policies after finding that State Farm did not take pre-loss condition into consideration in arriving at its repair estimates, concluding therefore that pre-loss condition was irrelevant to the resolution of the plaintiffs' claims. But Avery is a widely criticized opinion. For example, in Snell v. Geico Corp., 2001 WL 1085237 at *6-7,[5] a Maryland aftermarket parts class action case, the trial court refused to follow the Avery reasoning: "In order to determine

[5] A copy of the Snell decision can be found in the Appendix at A252 to A271.

whether there was a breach and, if so, the proper measure of damages, the plaintiffs have to establish the pre-loss condition of the vehicle in each instance where a claim was made. This alone would be reason to deny certification [on predominance grounds]." (Emphasis added.)

Snell mirrors this case in all material respects. The plaintiffs sued their automobile insurer, Geico, claiming that Geico's practice of specifying non-OEM repair parts was a breach of its contractual obligation to repair vehicles to their "pre-loss condition" since non-OEM parts were "uniformly inferior to" – not of "like kind and quality to" – their OEM counterparts.[6] Plaintiffs also claimed a breach based on Geico's asserted practice of omitting certain allegedly "necessary" repairs from its damage estimates, another allegation in common with this case. The class certification requirements are the same in Snell as here, since Maryland's class certification rules are the same as Missouri=s certification rules. Both are modeled after Federal Rule 23(a) and 23(b). On nearly identical facts, law and argument as presented here, Snell refused to certify a class, nationwide or in Maryland, for the reason that the plaintiffs had not met and could not meet their substantial burden on predominance. The contractual obligation to restore an

[6] In Snell, the "like kind and quality" and "pre-loss condition" requirements were written into Geico's policy. Here, they are imported from Missouri Insurance Department rule. Contrary to plaintiffs' footnote 38, that difference is no reason to minimize the Snell decision.

insured's vehicle to pre-loss condition could not be evaluated without finding out what that pre-loss condition was in each instance where a claim was made.

As in Avery and Snell, plaintiffs in this case claim that the evidence "proved" that pre-loss condition of the vehicle was not even considered in American Family's decision to use an "imitation crash part." Plaintiffs' Brief at 68, n. 26. Not so. What plaintiffs proved is that American Family does not require specific mention of pre-loss condition on the estimate, an entirely different proposition. In fact, testimony at the hearing established that American Family's goal in handling collision loss claims is to restore the damaged vehicles to pre-accident condition. Plaintiffs' Answer to Petition, Exh. 1, Vol. 3 at 700-01.

As in Snell, without ascertaining each vehicle's pre-loss condition, it is impossible to determine the sufficiency of American Family's performance under its insurance policies, and, if insufficient, the insured's respective damages. Likewise, it is impossible to judge whether American Family expended sufficient funds to repair a vehicle to its pre-loss condition using repair parts of like, kind and quality to those that were damaged without first ascertaining the kind and pre-loss quality of the damaged parts. This is an individual fact peculiar to each claim and not susceptible to class-wide determination, whether the class is nationwide or Missouri only.

Another factual issue in Snell, also "reason enough to deny class certification" was the kind and quality of repair parts actually received by Geico's insureds. Snell, 2001 WL 1085237 at *6-7. As in this case, a number of Geico insureds actually received OEM parts, at no expense to them, even though non-OEM parts had been specified. There are a number of reasons for this result, including that OEM parts were more convenient for the repair

shop or it was willing to pay any cost difference out of its own pocket. Whatever the reason, assuming arguendo these insureds were entitled to new OEM parts, which is what plaintiffs claim here, OEM parts are exactly what they received. There was, therefore, no breach. Certainly, there were no damages. What parts an insured actually received is a fact necessary to a determination of individual damages and cannot be resolved on a class-wide basis. Like pre-loss condition, a determination of individual damages would swamp any issues common to the putative class.

The plaintiffs in Snell tried unsuccessfully to avoid the issue of what parts each insured actually received by raising the collateral source rule, citing Avery as their authority. Snell, 2001 WL 1085237 at *6. Here, plaintiffs also invoked the collateral source rule at the certification hearing which may have been persuasive to Judge Clark. If so, it was error. American Family can find no Missouri collateral source case that would allow class members who received OEM parts – the alleged benefit of their bargains – also to receive "damages" as if they had received non-OEM parts instead. Moreover, plaintiffs make it very clear in their brief to this Court that they no longer claim the collateral source rule has any application to this case, suggesting erroneously that American Family raised it as an affirmative defense. Plaintiffs' Brief at 30, 47 & 50.

In Snell, as here, plaintiffs claimed a breach of contract for "omitted repairs," offering substantially the same definition of that term. The damages expert there, as here, was Gerald DeRungs. He testified that he, not a jury or another constitutionally legitimate trier of fact, could go through the repair estimates and determine whether repairs were "necessary" without ever inspecting any insured vehicle. Even he admitted, however, that

individual vehicle inspections would still be required to determine if the so-called necessary repairs were in fact made, even though not expressly delineated in the loss estimates. The court in Snell noted DeRungs' concession that: "You still have to do individual inspections to determine if the omitted repairs were nevertheless done." Snell, 2001 WL 1085237 at *7. This individualized factual determination would further swamp any issues common to the putative class.

The class certification motion in Snell also failed on superiority grounds. The court could not find that the class action procedural device was "superior to other available methods for a fair and efficient adjudication of the controversy." A case requiring "hundreds of thousands, if not millions, of separate inquires would be completely unmanageable" as a class action. Snell, 2001 WL 1085237 at *10. Snell correctly considered the superiority requirement in Maryland's rule to be more stringent than Illinois' "appropriate method" requirement under which Avery was certified. Snell, 2001 WL 1085237 at *5 and *10.

The decision in Snell is worthy of close consideration because the court provided there what Judge Clark failed to provide here -- a rigorous analysis of the claims and arguments leading to the inevitable conclusion that the requirements for class action status were not satisfied.[7]

[7] Courts in several other aftermarket part cases have decided similarly. Copies of the decisions in Murphy v. Government Employees Ins. Co. (Geico), Florida Circuit Court, 11th Judicial Circuit (Miami-Dade County) Case No. 00-1043CA-30; Casas v. United

Another decision in an aftermarket parts case also worthy of consideration, particularly because it is one on which plaintiffs rely, is the decision in Foultz v. Erie Insurance Exchange, 2002 W.L. 452115 (March 13, 2002 Pa. Comm. Pl.), from a state trial court in Pennsylvania. Plaintiffs' Brief at 60 and Plaintiffs' Appendix at A259-293. Foultz is noteworthy because it demonstrates extremely well the legal cartwheels that must be turned in order to certify an aftermarket parts case.

In Pennsylvania, like Illinois (for the Avery case), there is no "superiority" requirement. Foultz, 2002 W.L. 452115 at *2 ("In contrast to Federal Rule of Civil Procedure 23, which governs class action suits brought in federal court, in [sic] Rule 1702 does not require that the class action method be 'superior' to alternative methods of suit.") (Internal quotations and cites omitted.)

The Foultz decision is even better explained, however, by the court's lack of consideration of the predominance "requirement."[8] By the time it got to predominance, at

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States Automobile Association, Florida Circuit Court, 17th Judicial Circuit (Broward County) Case No. 99-15664(09); and Murray v. State Farm Mutual Automobile Ins. Co., U.S. District Court for the Western District of Tennessee, No. 96-2581 M1/A. Copies of these decisions are included in American Family's appendix at pages A272 to A311.

[8] Under Pennsylvania Rule of Civil Procedure 1708, unlike Mo. RC.P. 52.08(b)(3) and its F.R.C.P. 23(b)(3) model, predominance is only one of many "matters" a trial court need "consider" in determining whether a class action is a fair and reasonable method (as opposed to a superior method) of adjudicating a controversy.

the end of its opinion, the trial court had already decided that the individualized issues of pre-loss condition of the class members' respective vehicles and the kind and quality of the repair parts received by them were not pertinent to the lawsuit claims. This was because the "like kind and quality" language in Erie's policies, the court found, was ambiguous.[9] This meant that language had to be construed in the class members' favor, which further meant, the court concluded, instead of a kind and quality comparison between the actual repair parts and the insured vehicle's actual damaged parts (their pre-loss age, use and condition), the pertinent comparison was of the material and suitability of new non-OEM repair parts generally against the material and suitability of new OEM repair parts generally. Foultz, 2002 W.L. 452115 at *6 - *9.

The space available in this brief does not permit American Family to quote the quotable and incredible statements made by the court in Foultz regarding generalized claims, generalized proof and generalized damage. They demonstrate clearly that in order to certify the class the court permitted the named plaintiffs to convert the individual claims of class members into a general beauty contest between OEM parts and non-OEM parts,

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[9] Erie's automobile policies required it to pay the actual cash value of damaged property, but no more than "what it would cost to repair or replace the property with other like kind and quality." The court criticized Erie for this, saying it should have defined the term "like kind and quality." In this writ proceeding, however, the like kind and quality language is not express policy language but language imported from the Missouri Insurance Department aftermarket parts rules. Any ambiguity cannot be put on American Family.

thereby avoiding individual breach of contract determinations of what was owed to and received by the class members, even to the point that damages were supplanted by "class-wide damages," --something other than the sum of the class members' individual damages. This "fictional composite" of claims, whose adjudication would be neither fundamentally fair to nor binding on the class members or the Foultz defendant, is exactly what the predominance requirement was intended to avoid. Ironically, Foultz aptly demonstrates why it is necessary that a trial court "show its work."

CONCLUSION

For the foregoing reasons and for all the reasons discussed in the briefs of *amici curiae* and American Family, the Court should issue a permanent writ of prohibition, commanding Respondent Messina to vacate the class certification order of December 14, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by U.S. Mail on this 2nd day of December, 2002 on:

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CERTIFICATE OF COMPLIANCE

I certify that this Reply Brief is doubled-spaced, including footnotes, and the font used is Times New Roman 13 point. Based on word count under Microsoft Word, this Reply Brief contains 6,887 words, excluding the cover, the signature block, the certificate of service, the certificate of compliance and the appendix.

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.

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