

FILED
APR 29 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. **84500-0**
Court of Appeals No. 30880-1-II

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

DAVID MOELLER,

Plaintiff/Respondent,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON and
FARMERS INSURANCE EXCHANGE,

Defendants/Petitioners.

PETITION FOR DISCRETIONARY REVIEW

Jill D. Bowman, WSBA #11754
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 624-0900

Attorneys for Petitioners Farmers
Insurance Company of Washington
and Farmers Insurance Exchange

FILED
COURT OF APPEALS
DIVISION II
10 APR 14 PM 4:28
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

TABLE OF CONTENTS

IDENTITY OF PETITIONERS 1

COURT OF APPEALS’ DECISION 1

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

 A. Statement of Facts 2

 B. Procedural Background 3

ARGUMENT 6

 A. The Court of Appeals’ Interpretation of Farmers’
Automobile Insurance Policy Conflicts with the
Majority View and Raises an Issue of Substantial
Public Interest That Warrants This Court’s Review 6

 B. A Class Certification Order That Allows Damages
to Be Awarded on a Class-Wide Basis Without
Class-Wide or Individualized Proof of Liability Is
Unconstitutional and Warrants Review 13

CONCLUSION 20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Allgood v. Meridian Sec. Ins. Co.</i> , 836 N.E.2d 243 (Ind. 2005).....	8, 9, 12
<i>Am. Mfrs. Mut. Ins. Co. v. Schaefer</i> , 124 S.W.3d 154 (Tex. 2003)	9, 12
<i>Bickel v. Nationwide Mut. Ins. Co.</i> , 206 Va. 419, 143 S.E.2d 903 (1965)	12
<i>Carlton v. Trinity Universal Ins. Co.</i> , 32 S.W.3d 454 (Tex. Ct. App. 2000).....	10
<i>Culhane v. Western Nat’l Mut. Ins. Co.</i> , 704 N.W.2d 287 (S.D. 2005).....	13
<i>Davis v. Farmers Ins. Co. of Arizona</i> , 140 N.M. 249, 142 P.3d 17 (2006), <i>cert. quashed</i> , 142 N.M. 346, 166 P.3d 1090 (2007)	8, 12
<i>Driscoll v. State Farm Mut. Auto. Ins. Co.</i> , 227 F. Supp. 2d 696 (E.D. Mich. 2002)	8, 12, 13
<i>Gov’t Employees Ins. Co. v. Bloodworth</i> , No. M2003-02986-COA-R10-CV, 2007 Tenn. App. LEXIS 404 (Tenn. Ct. App. June 29, 2007)	13, 16, 17, 18
<i>In re Hydrogen Peroxide Antitrust Litig.</i> , 552 F.3d 305 (3d Cir. 2008)	16
<i>Johnson v. Illinois Nat’l Ins. Co.</i> , 818 So.2d 100 (La. Ct. App. 2001)	9
<i>Lupo v. Shelter Mut. Ins. Co.</i> , 70 S.W.3d 16 (Mo. Ct. App. 2002)	11
<i>McLaughlin v. Am. Tobacco Co.</i> , 522 F.3d 215 (2d Cir. 2008)	18

<i>Muise v. GPU, Inc.</i> , 371 N.J. Super. 13, 851 A.2d 799 (N.J. Ct. App. 2004).....	19
<i>Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> 259 F.3d 154 (3d Cir. 2001)	17
<i>Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.</i> , 78 Wn. App. 707, 899 P.2d 6 (1995).....	13
<i>O'Brien v. Progressive N. Ins. Co.</i> , 785 A.2d 281 (Del. 2001).....	10
<i>Panag v. Farmers Ins. Co. of Washington</i> , 166 Wn.2d 27, 204 P.3d 885 (2009).....	18
<i>Ray v. Farmers Ins. Exch.</i> , 200 Cal. App. 3d 1411, 246 Cal. Rptr. 593 (1988)	8, 12
<i>Schnall v. AT&T Wireless Servs., Inc.</i> , 168 Wn.2d 125, 225 P.3d 929 (2010).....	15
<i>Schwendeman v. USAA Cas. Ins. Co.</i> , 116 Wn. App. 9, 65 P.3d 1 (2003).....	9, 16
<i>Seabed Harvesting, Inc. v. Dep't of Natural Res.</i> , 114 Wn. App. 791, 60 P.3d 658 (2002).....	13
<i>Siegle v. Progressive Consumers Ins. Co.</i> , 788 So. 2d 355 (Fla. Ct. App. 2001), <i>aff'd</i> , 819 So. 2d 732 (Fla. 2002).....	8, 12
<i>Siegle v. Progressive Consumers Ins. Co.</i> , 819 So. 2d 732 (Fla. 2002)	12
<i>Sims v. Allstate Ins. Co.</i> , 365 Ill. App. 3d 997, 851 N.E.2d 701, <i>appeal denied</i> , 2006 Ill. LEXIS 1885 (Ill. Nov. 29, 2006).....	9, 10, 12
<i>Sitton v. State Farm Mut. Auto. Ins. Co.</i> , 116 Wn. App. 245, 63 P.3d 198 (2003).....	2, 13, 18
<i>Weisfeld v. Sun Chem. Corp.</i> , 210 F.R.D. 136 (D.N.J. 2002), <i>aff'd</i> , 84 F. App'x 257 (3d Cir. 2004).....	18

STATUTES, REGULATIONS, AND RULES

CR 23(b)(3).....passim

OTHER AUTHORITIES

*Report of the Judicial Conference Committee on Rules of Practice
and Procedure to the Chief Justice of the United States and
Members of the Judicial Conference of the United States 10
(2002).....16*

Webster's Third New Int'l Dictionary (1976).....7

IDENTITY OF PETITIONERS

Petitioners are Farmers Insurance Company of Washington (“Farmers”) and Farmers Insurance Exchange (“FIE”), respondents/cross appellants in the Court of Appeals.

COURT OF APPEALS’ DECISION

The Court of Appeals issued a published opinion on March 16, 2010, more than five years after oral argument. A copy of the opinion is attached in the Appendix (“App.”) at App. 1-15.

ISSUES PRESENTED FOR REVIEW

1. On an issue of first impression in this state, the Court of Appeals ruled that an automobile insurance policy, which provided coverage for loss limited to the amount it would cost to repair or replace the damaged property with other of like kind and quality, obligated the insurer, after paying the cost of repair, to pay the insured an additional sum for the vehicle’s “diminished market value.” Does this ruling, which rejects the strong majority rule in other states (especially among recent cases), and which affects insurance practices throughout the state, raise an issue of substantial public interest that should be determined by this Court?

2. The Court of Appeals affirmed certification of a CR 23(b)(3) class action despite (a) plaintiff’s admission that defendants’

actions caused no injury to some class members, (b) plaintiff's lack of proof of defendants' potential liability to every class member, and (c) the conflict with Division One's decision in *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 63 P.3d 198 (2003). In so doing, the Court of Appeals sanctioned the prosecution of a class action and potential award of class-wide damages without competent proof of class-wide liability. Does this ruling, which violates defendants' due process rights, raise an issue of substantial public interest that should be reviewed by this Court?

STATEMENT OF THE CASE

A. Statement of Facts

Plaintiff David Moeller's 1996 Honda Civic, insured by Farmers, was damaged in a collision occurring in November 1998. CP 1-34, 39, 524-25. The insurance policy stated that Farmers would "pay for **loss to your insured car** caused by **collision** less any applicable deductibles." CP 19. "**Loss**" was defined as "direct and accidental loss of or damage to **your insured car**, including its equipment." *Id.* The policy did not contain definitions of the terms "direct" and "accidental," but defined "**accident**" as "a sudden event ... resulting in **bodily injury or property damage** neither expected nor intended by the **insured person**." CP 12. "**Property damage**" was defined as "physical injury to or destruction of tangible property, including loss of its use." *Id.*

Moeller's policy provided that Farmers could "pay the **loss** in money or repair or replace damaged or stolen property." CP 20. The Limits of Liability clause provided that Farmers' "limits of liability for **loss** shall not exceed ... [t]he amount which it would cost to repair or replace damaged or stolen property with other of like kind and quality; or with new property less an adjustment for physical deterioration and/or depreciation" *Id.*; CP 33. Either Farmers or the insured could demand an appraisal of the amount of **loss**. CP 20.

Farmers elected to pay the cost to repair Moeller's damaged car. CP 79-80. Moeller authorized the repair and did not demand an appraisal of his loss. CP 79. After Moeller acknowledged the repairs were "complete" and "acceptable," Farmers paid the full repair cost, less Moeller's \$500 deductible. CP 79-80.

B. Procedural Background

Moeller filed this action on May 18, 1999. CP 382-91. Suing on his own behalf and on behalf of a putative class of Farmers policyholders residing in the state of Washington, Moeller asserted claims for breach of contract, insurance bad faith, Consumer Protection Act ("CPA") violations, and failure to make prompt payment of his insurance claim in alleged violation of provisions of the Washington Administrative Code.

CP 36-47.

70024188.4 0045556-00018

More than two years after commencing his lawsuit, Moeller moved for class certification under CR 23(b)(3). CP 476-679. He argued that when certain cars sustain certain kinds of collision damage, there is a difference between the pre-accident value of the car and the car's value after it is repaired and returned to the insured (i.e., alleged "diminished value"). CP 474. Diminished value exists, according to Moeller, because such cars "cannot be repaired to their pre-accident condition." CP 145. Moeller hypothesized that determining whether diminished value in fact exists, and the amount of class-wide damages attributable to it, could be proved with testimony by a statistician who would use sales data collected from car auctions to perform a regression analysis, and then testify regarding any "statistical variation in the price of wrecked and repaired cars and unwrecked cars." RP 48-49 (Certification Hearing, June 27, 2002); CP 680-85.

Moeller admitted that some members of the proposed class would not have sustained any diminished value injury (and therefore no uncompensated loss) because, for example, their cars had previously been "wrecked and repaired." RP 77 (Certification Hearing, June 27, 2002). To address this problem, he proposed the class-wide "damage[s] estimate" be "discount[ed]" by "lop[ping] ... off" some amount. *Id.* at 77-78.

The trial court granted Moeller's motion, App. 42-56 (CP 1588-1602), and on September 13, 2002, certified a CR 23(b)(3) class of

all persons who: (1) were insured pursuant to a casualty automobile insurance policy issued by Farmers for the state of Washington; (2) received payment under their collision or comprehensive coverages for damage to an insured automobile from May 30, 1993 to the date of class certification in this action; and (3) did not receive payment for inherent diminished value where: (a) the repair estimate including supplements totaled at least \$1,000, (b) the vehicle was no more than six years old (model year plus five years) and had less than 90,000 miles on it at the time of the accident, and (c) the vehicle suffered structural (frame) damage and/or deformed sheet metal and/or required body or paint work.

Excluded from the class are Defendants; their officers and directors; this Court and any member of the Court's immediate family; and those individuals whose vehicles were leased or total losses.

App. 55 (CP 1601).

Several months later, Farmers and FIE successfully moved for summary judgment on the grounds that Farmers' policy did not require payment of diminished value claims and that Moeller's bad faith and CPA claims were barred because Farmers' decision that the policy did not cover diminished value claims was reasonable as a matter of law. CP 81-104; App. 22-42. Moeller appealed. App. 20-21. Farmers and FIE cross-appealed the class certification ruling. App. 16-19 (CP 1584-1602).

On March 16, 2010, the Court of Appeals issued a published opinion reversing the trial court's ruling on Moeller's breach of contract and CPA claims, affirming the trial court's decision to certify the case as a class action under CR 23(b)(3), and remanding for further proceedings.

App. 1-15. Farmers and FIE seek discretionary review.

ARGUMENT

A. The Court of Appeals' Interpretation of Farmers' Automobile Insurance Policy Conflicts with the Majority View and Raises an Issue of Substantial Public Interest That Warrants This Court's Review.

Automobile insurance policies typically provide that an insurer has the contractual right to choose between paying an insured's loss in money or repairing or replacing a damaged vehicle. In the nearly unanimous view of modern courts, an insurer that elects to repair a vehicle has no obligation to pay the repair cost *and* pay for the vehicle's alleged "diminished value." These courts conclude that when a damaged vehicle is repaired so that its appearance and function are substantially restored, the insurer has fully satisfied its contractual obligation to pay the insured's loss. The Court of Appeals' contrary decision is at odds with the majority view and lacks a reasoned basis. The opinion raises an issue of substantial public importance that should be determined by this Court.

The Court of Appeals' decision hinged on interpretation of the Payment of Loss and Limits of Liability clauses in the Farmers policy. App. 8-10. The Payment of Loss clause allows Farmers to choose between paying a loss in money or repairing or replacing damaged or stolen property; the Limits of Liability clause limits Farmers' liability for loss to "[t]he amount which it would cost to repair or replace damaged ... property with other of like kind and quality; or with new property less an adjustment for physical deterioration and/or depreciation." CP 20; CP 33. The appellate court acknowledged that the terms "repair" and "replace" are unambiguous, but concluded that the obligation to "repair or replace damaged ... property with other of like kind and quality" is ambiguous and can mean that a repaired vehicle's "capacity and value post-loss should be similar to its capacity and value pre-loss." App. 9-10. The court drew this conclusion after examining dictionary definitions of the terms "like," "kind," and "quality." Citing *Webster's Third New International Dictionary* (1976), the court found the terms mean "the same as or similar to," "fundamental nature," and "degree of excellence: grade, caliber," respectively. *Id.* at 9.

None of the definitions mentions the concept of value.

Nevertheless, the appellate court concluded that the phrase "like kind and

quality” means that Farmers’ repair or replace obligation encompasses an obligation to restore a damaged vehicle’s “*appearance, function, and value,*” and therefore if a vehicle cannot be restored to its pre-loss “status,” Farmers must pay the insured for the vehicle’s diminished value. *Id.* at 9-10.

This interpretation has been rejected by a large majority of the courts that have examined identical or similar insurance provisions. For example, in *Siegle v. Progressive Consumers Ins. Co.*, 788 So. 2d 355, 359-61 (Fla. Ct. App. 2001), *aff’d*, 819 So. 2d 732 (Fla. 2002), the court rejected the very same argument (i.e., that an obligation to repair or replace damaged property with other of like kind or quality obligates an insurer to restore a collision-damaged vehicle to its pre-accident appearance, function, and value). In *Davis v. Farmers Ins. Co. of Arizona*, 140 N.M. 249, 255, 142 P.3d 17 (2006), *cert. quashed*, 142 N.M. 346, 166 P.3d 1090 (2007), the court examined a policy with language identical to the language in Moeller’s policy, and concluded that “a reasonable insured could not read ‘diminished market value’ into the phrase ‘like kind and quality’”¹ As one court explained, the “like kind and quality” clause

¹ *Accord, e.g., Driscoll v. State Farm Mut. Auto. Ins. Co.*, 227 F. Supp. 2d 696, 706-08 (E.D. Mich. 2002); *Ray v. Farmers Ins. Exch.*, 200 Cal. App. 3d 1411, 246 Cal. Rptr. 593, 594-96 (1988); *Allgood v. Meridian Sec. Ins. Co.*, 836 (continued . . .)

in the “repair or replace” limits-of-liability provision refers to “replace”² and means that “[i]f an insurer elects to repair a vehicle and must replace parts in doing so, it must use parts of ‘like kind and quality,’ and if an insurer elects to replace the vehicle, it must do so with a vehicle of ‘like kind and quality.’” *Sims v. Allstate Ins. Co.*, 365 Ill. App. 3d 997, 1003, 851 N.E.2d 701, *appeal denied*, 2006 Ill. LEXIS 1885 (Ill. Nov. 29, 2006).

(. . . continued)

N.E.2d 243, 247-48 (Ind. 2005); *Johnson v. Illinois Nat’l Ins. Co.*, 818 So. 2d 100, 104 (La. Ct. App. 2001); *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 160 (Tex. 2003).

² The *Allgood* court, 836 N.E.2d at 247-48, explained further:

To say one would repair an item with goods of like kind or quality is simply not correct English. An item of property (or a part of that item) is “replaced” with other property, but it is “repaired” with tools and labor. . . . “[L]ike kind and quality” unambiguously refers only to replacement, not to repairs, and the verb “restore” appears nowhere in the policy.

In a similar vein, when comparing USAA Casualty Insurance Company’s promise to replace an insured’s “stolen or damaged property with new property of like kind and quality, less an allowance for depreciation and physical deterioration,” with State Farm’s guarantee “to use parts of like kind and quality and to restore the insured’s vehicle to its preloss condition,” Division One of the Washington Court of Appeals concluded “USAA’s policy does not make this guarantee.” *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 24, 65 P.3d 1 (2003). Thus, Division One did not find that a “like kind and quality” clause requires restoration of a vehicle’s pre-loss condition and value.

Despite the Court of Appeals’ suggestion to the contrary, *see* App. 6, 10, nowhere in the Farmers policy is there any promise to restore a vehicle to its “pre-loss condition” or “pre-loss status.”

It does not mean that an insurer is required to repair *and* pay for diminished value. *See, e.g., id.*

In *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281 (Del. 2001), plaintiffs brought suit under a policy with the same “repair or replace ... with like kind and quality” language found in Farmers’ policy, alleging, as does Moeller, that even after their car had been repaired, physical damage remained. Noting the trial judge had assumed the alleged remaining damage resulted in “diminished value”³ and that plaintiffs would be able to prove damages, the Delaware Supreme Court affirmed the dismissal of the action, holding that the policy unambiguously gave the insurer the option to choose between the cost of repair or paying the full value of the vehicle before the covered damage occurred, and that under the repair or replace option, the insurer’s liability was capped at the cost of returning the damaged vehicle to substantially the same physical, operating, and mechanical condition as existed before the loss. 785 A.2d at 290-91; *accord Carlton v. Trinity Universal Ins. Co.*, 32 S.W.3d 454, 465 (Tex. Ct.

³ To assess the summary judgment granted to Farmers, the Court of Appeals made the same assumption. *See* App. 6 (referring to post-repair “remaining, irreparable physical damage” as resulting in diminished value). But whether any class member’s car actually suffered diminished value remains an issue of fact. *See* App. 47 (CP 1593); *see also* Brief of Appellant at 5 and Reply Brief of Appellant/Brief of Cross Respondent at 1 (identifying as “disputed issue of fact” whether class members’ cars were restored to pre-loss condition).

App. 2000) (holding that when insurer has “fully, completely, and adequately ‘repaired or replaced the property with other of like kind and quality,’ any reduction in market value of the vehicle due to factors that are not subject to repair or replacement cannot be deemed a component part of the cost of repair or replacement” and insurer has no obligation to pay for diminution in value); *Lupo v. Shelter Mut. Ins. Co.*, 70 S.W.3d 16, 23 (Mo. Ct. App. 2002) (same).

Implicitly acknowledging that its ruling aligns Washington with the minority view, the Court of Appeals stated in a footnote that it found case law from other jurisdictions of “limited value” because, in most of the cases, the policies limited the insurer’s liability to the “lesser of” the vehicle’s “actual cash value” or the cost of repair or replacement. App. 8 n.10. Farmers’ policy language did not have the “lesser of” language, but allowed the company to choose between paying the loss in money or repairing or replacing damaged property, and stated that Farmers’ limits of liability “shall not exceed” the amount it would cost to repair or replace the damaged property.

Comparing the “lesser of” and “shall not exceed” clauses, the New Mexico Court of Appeals held this “trivial difference in language” does not mean that Farmers must pay the highest-cost alternative of its three

options: payment in money, repair, or replacement.⁴ *See Davis*, 142 P.3d at 23-24. That court observed there are “a number of cases that have disallowed diminished market value where the policies contained the same or similar ‘will not exceed’ language.” *Id.* at 24 (citations omitted); *accord Driscoll v. State Farm Mut. Auto. Ins. Co.*, 227 F. Supp. 2d 696, 698, 708 (E.D. Mich. 2002); *Ray v. Farmers Ins. Exch.*, 200 Cal. App. 3d 1411, 246 Cal. Rptr. 593, 596 (1988).

Holding an insurer liable for diminished value renders meaningless the insurer’s contractual right to elect to repair or replace a damaged vehicle rather than to pay its actual cash value at the time of the loss. *See, e.g., Ray*, 200 Cal. App. 3d 1411, 246 Cal. Rptr. at 596; *Driscoll*, 227 F. Supp. 2d at 707; *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 739 (Fla. 2002); *Sims*, 851 N.E.2d at 706-07; *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 248 (Ind. 2005); *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 160 (Tex. 2003); *Bickel v. Nationwide Mut. Ins. Co.*, 206 Va. 419, 143 S.E.2d 903, 906 (1965). The Court of Appeals’ contrary ruling eviscerated Farmers’ contractual right of choice, and would do the same for other insurers with similar policies.

⁴ No “average insured” would expect his or her insurer to choose the highest-cost option to pay for a loss.

That insurers are *not* obligated by the common terms of insurance policies to both repair a damaged vehicle and pay the insured for any diminished value is “nearly the unanimous view of the multitude of courts.” *Culhane v. W. Nat’l Mut. Ins. Co.*, 704 N.W.2d 287, 296 (S.D. 2005); see *Gov’t Employees Ins. Co. v. Bloodworth*, No. M2003-02986-COA-R10-CV, 2007 Tenn. App. LEXIS 404, at *108 (Tenn. Ct. App. June 29, 2007). Disregarding this abundant authority, the Court of Appeals held to the contrary. Whether this state should continue to disregard “the better view,” *Driscoll*, 227 F. Supp. 2d at 707, is an issue of substantial public interest that warrants review by this Court.

B. A Class Certification Order That Allows Damages to Be Awarded on a Class-Wide Basis Without Class-Wide or Individualized Proof of Liability Is Unconstitutional and Warrants Review.

The possibility of an award of class-wide damages without competent proof of liability to every class member offends due process. See *Sitton*, 116 Wn. App. at 258, 63 P.3d 198. To establish liability for breach of contract, a claimant bears the burden of proving a contractual duty, breach of the duty, and resulting injury.⁵ Moeller admitted he cannot prove breach or resulting injury on a class-wide basis, and his trial plan

⁵ See *Seabed Harvesting, Inc. v. Dep’t of Natural Res.*, 114 Wn. App. 791, 797, 60 P.3d 658 (2002); *Nw. Indep. Forest Mfrs. v. Dep’t of Labor & Indus.*, 78 Wn. App. 707, 712-13, 899 P.2d 6 (1995).

shows he has no intention of providing individualized proof of liability for class members. Although Moeller's trial plan does not satisfy due process requirements, the Court of Appeals affirmed class certification under CR 23(b)(3).

Moeller contends that Farmers and FIE breached their contractual duty to pay class members their entire insured loss when the class members' cars were in accidents and sustained certain types of damage. According to Moeller, because repairs cannot restore certain damaged cars to their pre-accident condition and value, repairing a class member's car without also paying for the car's diminished value is inadequate payment of the loss and therefore a breach of the class member's insurance contract. But Moeller does not plan to prove his claim of breach and resulting injury with evidence of the pre-accident and post-repair values of class members' cars. Instead, using a statistical methodology and data from car auction sales, Moeller plans to prove that, on average, cars that are "wrecked and repaired" sell for lower prices than do cars that are "unwrecked," RP 48-49, and therefore, as a statistical matter, diminished value "exists." Moeller then plans to categorize and quantify the alleged *average* decreases in value associated with types or amounts of damage, multiply each alleged *average* amount by the number of class members in

each damage category, and then tally the numbers to provide a class-wide “damage[s] estimate.” *See, e.g.*, RP 63-64, 73-78, 91-94, 160 (Certification Hearing, June 27, 2002).

This trial plan is constitutionally defective because Moeller’s evidence cannot prove class-wide liability. Moeller admits that class members whose cars previously were “damaged in the same area of the vehicle ... don’t get any more diminished value.” RP 77 (Certification Hearing, June 27, 2002). If a class member’s car is not less valuable after it is repaired – because it was previously damaged in the same area – then that class member’s insurance contract is not breached when Farmers repairs the car but does not also pay anything for the car’s non-existent diminution in value. In such a case, Farmers fully paid the insured loss and there is no breach or resulting injury. Without these essential elements, there is no liability for breach of contract.⁶

The same is true for an insured’s car that is more valuable post-repair than it was before the accident occurred. If before an accident a car had dents and scratches, but the post-accident repairs and new paint job so

⁶ Nor is there any liability for a CPA violation. In a private CPA action, there must be some causal link between the alleged unfair or deceptive act or practice and the consumer’s injury. *See Schnall v. AT&T Wireless Servs., Inc.*, 168 Wn.2d 125, 144-46, 225 P.3d 929 (2010). When an insured loss is fully paid through repair, there is no injury caused by Farmers’ failure to tender additional payment.

improve the car's appearance that any diminution in value allegedly attributable to "weakened metal," for example, is outweighed by the increase in value attributable to the car's improved appearance, then Farmers did not commit any breach of contract by paying only for the repairs.⁷ A class member whose car is equally or more valuable post-repair has no viable damages claim for breach of contract.

Moeller's burden at class certification was to demonstrate that Farmers' alleged contract breach and the class members' claimed resulting injury were "capable of proof at trial through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008).⁸ Moeller did not meet this burden. Merely showing that diminished value "exists" in

⁷ See *Bloodworth*, 2007 Tenn. App. LEXIS 404, at *141 n.36 (noting that *the same type of evidence as was proposed by Moeller* "ignores the possibility that the pre-accident value of a vehicle, based on its condition, ... may be increased after repair"); cf. *Schwendeman*, 116 Wn. App. at 22-29, 65 P.3d 1 (holding individualized proof of the condition of each vehicle repaired was required to determine whether insurer could be held liable for breaching its contractual obligation to replace damaged parts with others of like kind and quality).

⁸ Cf. *Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States* 10 (2002) (explaining that "issues bearing on certification" include "whether the evidence on the merits is common to the members of the proposed class; whether the issues are susceptible to class-wide proof" (quoted in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 319)).

theory does not prove that every class member's insurance contract was breached. *See Bloodworth*, 2007 Tenn. App. LEXIS 404, at *137-47.⁹

Moeller admitted as much when he acknowledged that when a car is repeatedly damaged and repaired, a class member is not entitled to "any more diminished value." RP 77 (Certification Hearing, June 27, 2002).

Because Moeller admittedly cannot prove by common evidence (through expert testimony or otherwise) that *some injury* to each class member actually occurred, certification was untenable. *See, e.g., Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187-89 (3d Cir. 2001) (affirming denial of class certification, explaining that ability of plaintiff's expert "to calculate an aggregate amount of damages does not absolve plaintiffs from the duty to prove each [class member] was harmed by the defendants' practice," that "[p]roof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury)," and that "the issue is not the calculation of damages but whether or not class members have any

⁹ Considering *the very same type of proof as was proposed by Moeller*, the *Bloodworth* court explained that plaintiffs' evidentiary model "may provide a basis for the factfinder to decide that repair cannot restore vehicles with damage as defined in the class to their pre-accident condition and value (leaving aside the question of whether it can establish the impossibility of substantial restoration)," but it does not establish entitlement to diminished value damages. 2007 Tenn. App. LEXIS 404, at 140, 144. Put differently, such proof does not establish class-wide liability.

claims at all”); *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 143 (D.N.J. 2002) (denying class certification, observing “[n]ot only do Plaintiffs have the burden of proving they can *calculate* the damages allegedly suffered by each class member, but to satisfy the antitrust injury requirement, Plaintiffs must demonstrate that ‘some damage to each individual’ actually occurred” (citation omitted), *aff’d*, 84 F. App’x 257 (3d Cir. 2004).¹⁰

Moeller’s trial plan shows Moeller does not intend to prove that each and every class member sustained actual injury. The plan violates due process as much as did the trial plan in *Sitton*. It contemplates an award of class-wide damages without requiring that the essential elements of the claims be proved for every class member. *See Sitton*, 116 Wn. App. at 258, 63 P.3d 198; *accord, e.g., McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231-32 (2d Cir. 2008).

The *Sitton* trial plan was vacated because its effect was to “eliminate causation as an element of plaintiffs’ bad faith and CPA claims.” 116 Wn. App. at 258, 63 P.3d 198. The class certification order in Moeller has the same effect. Allowing Moeller to rely on statistical

¹⁰ *See also Bloodworth*, 2007 Tenn. App. LEXIS 404, at *134-35 n.32 (observing “there is a difference in computing individual damages and proving that some injury has been suffered, which is an essential element of liability”); *cf. Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 58, 204 P.3d 885 (2009) (acknowledging “[i]njury’ is distinct from ‘damages’”).

evidence, without any consideration of the pre-loss and post-repair condition of each class member's damaged car, amounts to eliminating breach and resulting injury as elements of Moeller's and the class members' contract claims and eliminating causation as an element of Moeller's and the class members' CPA claims. It relieves Moeller of the burden of affirmatively proving the elements of his claims, and effectively converts those elements into affirmative defenses.¹¹ Using the class action device, which is purely a procedural tool, to reverse the burden of proof improperly alters substantive rights and violates due process.

The Court of Appeals' decision shows no awareness of the due process issues. Because of the substantial public importance of ensuring that class actions are conducted without violating defendants'

¹¹ See, e.g., RP 77 (Certification Hearing, June 27, 2002) (characterizing as element of "defense" any evidence that individual class member is not entitled to diminished value payment); CP 1598 (stating that Moeller's litigation plan takes into account "the steps necessary to ... analyze the data on the existence or amount of diminished value, *make adjustments to the classwide damages for any defenses raised (and substantiated by Defendants)*, and then provide for notification and allocation of any damages awarded to the class after trial" (emphasis added)). Because proof of liability is a prerequisite to an award of damages, the trial plan's flaw is not remedied by "lop[ping] ... off" some amount from Moeller's class-wide damages estimate, RP 77-78, to account for those class members who have no viable damages claim. See, e.g., *Muise v. GPU, Inc.*, 371 N.J. Super. 13, 851 A.2d 799, 819-23 (N.J. Super. Ct. App. Div. 2004) (upholding trial court's rejection of plaintiffs' statistical damages model where there was no proof of compensable injury to every class member; rejecting plaintiffs' argument that statistical model of class-wide damages is permissible where evidence shows "vast majority" of class members sustained injury).

constitutional rights, this Court should accept discretionary review of the class certification decision.

CONCLUSION

For the reasons stated, this Court should grant discretionary review of both issues raised in this petition.

DATED: April 14, 2010.

STOEL RIVES LLP



Jill D. Bowman, WSBA #11754

Attorneys for Petitioners Farmers
Insurance Company of Washington
and Farmers Insurance Exchange

APPENDIX

Document	Page Numbers
Court of Appeals, Published Opinion, No. 30880-1-II, Filed March 16, 2010	1-15
Notice of Cross-Appeal (excluding exhibit), Pierce County Superior Court, No. 99 2 07850 6, Filed September 30, 2003	16-19
Notice of Appeal (excluding Exhibits), Pierce County Superior Court, No. 99 2 07850 6, Filed September 18, 2003	20-21
Order Granting Summary Judgment of Dismissal (including Exhibit A), Pierce County Superior Court, No. 99 2 07850 6, Filed September 9, 2003	22-41
Class Certification Order, Pierce County Superior Court, No. 99 2 07850 6, Filed September 13, 2002	42-56

FILED
COURT OF APPEALS
DIVISION II

TO MAR 16 AM 11:51

STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DAVID MOELLER, on behalf of himself and
all others similarly situated,

No. 30880-1-II

Appellant and
Cross Respondent,

v.

FARMERS INSURANCE COMPANY OF
WASHINGTON and FARMERS
INSURANCE EXCHANGE,

PUBLISHED OPINION

Respondents and
Cross Appellants.

HOUGHTON, P.J. -- David Moeller insured his automobile through Farmers Insurance Company. After the vehicle sustained damage in a collision, Farmers paid the full cost of repairs, less a deductible. Moeller claimed that the policy covered loss for the diminished value of his vehicle, but Farmers disagreed.

Moeller filed a class action lawsuit, alleging breach of contract, insurance bad faith, and violations of the Washington Administrative Code and Consumer Protection Act (CPA).¹ The trial court certified a class under CR 23(b)(3). It then granted Farmers' motion for summary judgment, finding that the policy did not cover diminished value, and dismissed the CPA claims.

¹ Chapter 19.86 RCW.

No. 30880-1-II

Moeller appeals the order granting summary judgment. Farmers cross-appeals the class action certification. We affirm in part, reverse in part, and remand for further proceedings.

FACTS

Moeller owned a 1996 Honda Civic CRX. Farmers insured the vehicle, covering loss from collision and comprehensive damage. After his vehicle sustained accident damage, Moeller notified Farmers. An adjuster inspected and elected to repair the vehicle. Farmers did not compensate Moeller for the vehicle's diminished value, that is damage that cannot be repaired such as weakened metal.

Moeller filed a third amended class action complaint against Farmers and Farmers Insurance Exchange (collectively Farmers) on behalf of himself and all others similarly situated (collectively Moeller). In his complaint, Moeller alleged (1) breach of contract, (2) insurance bad faith, (3) failure to disclose information/CPA violation, and (4) failure to make prompt payment of claim.

At the crux of Moeller's complaint was Farmers' failure to restore his vehicle to its "pre-loss condition through payment of the difference in the value between the vehicle's pre-loss value and its value after it was damaged, properly repaired and returned." Clerk's Papers (CP) at 435.

After four days of oral argument, the trial court certified a class under CR 23(b)(3). We denied Farmers' motion for discretionary review of that order.

Farmers moved for summary judgment, claiming (1) the policy did not cover diminished value and (2) its denial of the diminished value claim was reasonable as a matter of law, thus barring Moeller's bad faith and CPA claims.² The trial court granted the motion.

Moeller appeals and Farmers cross-appeals.

ANALYSIS

POLICY LANGUAGE

The relevant portions of the policy provide:

DEFINITIONS

....
Accident or occurrence means a sudden event, including continuous or repeated exposure to the same conditions, resulting in **bodily injury or property damage** neither expected nor intended by the **Insured person**.

....
Damages are the cost of compensating those who suffer **bodily injury or property damage** from an accident.

....
Property damage means physical injury to or destruction of tangible property, including loss of its use.

PART IV - DAMAGE TO YOUR CAR

Coverage G - Collision

We will pay for **loss to your Insured car** caused by **collision** less any applicable deductibles.

Additional Definitions Used in This Part Only

....
2. **Loss** means direct and accidental loss of or damage to your **Insured car**, including its equipment.

Limits of Liability

Our limits of liability for **loss** shall not exceed:

1. The amount which it would cost to repair or replace damaged or stolen property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation.

² For our purposes, Moeller's bad faith and failure to make prompt payment claims fold into the CPA argument.

.....
Payment of Loss

We may pay the loss in money or repair or replace damaged or stolen property.

CP at 12, 19-20.

STANDARD OF REVIEW

We review orders granting summary judgment de novo, engaging in the same inquiry as the trial court. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). On review of any pleadings, depositions, answers to interrogatories, admissions, and affidavits on file, a court may grant summary judgment if there are no genuine issues as to any material fact, thus entitling the moving party to judgment as a matter of law. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005); CR 56(c).³ When reasonable persons could reach but one conclusion, summary judgment may be granted. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

We interpret an insurance policy using contract analysis as a matter of law. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). We review de novo a summary judgment ruling on contract interpretation. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 423-24, 932 P.2d 1244 (1997).

When interpreting a policy's terms, we do not analyze words and phrases in isolation. *Peasley*, 131 Wn.2d at 424. Rather, we read the policy in its entirety, giving effect to each provision. *Peasley*, 131 Wn.2d at 424.

³ CR 56(c) provides, in relevant part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

An insurance policy must be interpreted in the manner in which the average insured would understand it. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000). We give terms not defined in the policy their “ ‘plain, ordinary, and popular’ ” meaning. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998) (quoting *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990)). We may ascertain this by referring to standard English dictionaries. *Matthews v. Penn-America Ins. Co.*, 106 Wn. App. 745, 765, 25 P.3d 451 (2001).

When faced with clear and unambiguous language, we enforce the policy as written. *Peasley*, 131 Wn.2d at 424. An ambiguous clause is one susceptible to two different, reasonable interpretations. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992). Extrinsic evidence is admissible to assist the court in ascertaining the parties’ intent and in interpreting the contract. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569, 919 P.2d 594 (1996). After examining the available extrinsic evidence, we resolve any remaining ambiguity against the insurer and in favor of the insured. *Quadrant Corp.*, 154 Wn.2d at 172.

Our analysis differs, depending on whether an inclusionary or exclusionary clause is at issue. See *Mercer Place Condo. Ass’n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 602-03, 17 P.3d 626 (2000). We liberally construe inclusionary clauses, providing coverage whenever possible. *Ross v. State Farm Mut. Auto. Ins. Co.*, 132 Wn.2d 507, 515-16, 940 P.2d 252 (1997). In contrast, we strictly construe exclusionary clauses against the drafter. *Quadrant Corp.*, 154 Wn.2d at 172.

BREACH OF CONTRACT

COVERAGE CLAUSE⁴

First, Moeller contends that his policy covers diminished value.⁵ Although Moeller does not seek stigma damages, we begin our analysis by explaining the differences between diminished value and stigma damages. A vehicle suffers diminished value when it sustains physical damage in an accident, but due to the nature of the damage, it cannot be fully restored to its pre-loss condition. The remaining, irreparable physical damage, such as, for example, weakened metal which cannot be repaired and which results in diminished value. In contrast, stigma damages occur after the vehicle has been fully restored to its pre-loss condition, but it carries an intangible taint due to its having been involved in an accident.

The coverage clause states that Farmers "will pay for loss to your **Insured car** caused by collision less any applicable deductibles."⁶ CP at 19. The definitions state that "loss" is the "direct and accidental loss of or damage to your **Insured car**, including its equipment." CP at 19. Although the policy does not define "accidental," it provides that "accident" means "a sudden event . . . resulting in . . . **property damage** neither expected nor intended by the **Insured person**." CP at 12. Moreover, the policy defines "property damage" as "physical injury to or destruction of tangible property, including loss of its use." CP at 12.

⁴ The question presented is not whether *any* insured may recover for diminished value in Washington. *But see* Respondents/Cross-Appellants' Br. at 6 ("the question of a first-party insured's contractual entitlement to payment for a vehicle's diminished value is one of first impression in this state"). Rather, the issue is whether Moeller's insurance policy covers diminished value. This distinction is important.

⁵ Farmers does not explicitly address coverage but, rather, it argues that the limits of liability clause precludes recovery for diminished value. *See* Respondent/Cross-Appellants' Br. at 10.

⁶ The parties do not dispute that this incident involved an accidental collision with Moeller's insured vehicle.

But the policy does not define “direct” and “damage.”⁷ Accordingly, we examine a standard English dictionary to determine their plain and ordinary meanings. *Matthews*, 106 Wn. App. at 765.

“Direct” means “without any intervening agency or step; without any intruding or diverting factor.” WEBSTER’S THIRD NEW INT’L DICTIONARY 640 (1976). Commentators generally agree with this definition. As noted in COUCH ON INSURANCE, where an insurance policy covers direct and accidental loss to the insured vehicle, the term “direct” “refers to [a] causal relationship, and is to be interpreted as limited to the harm resulting from an immediate or proximate cause as distinguished from a remote cause.” 11 Lee R. Russ, COUCH ON INSURANCE, § 156:21 (3d ed. 1998) (Supp. 2009) (footnotes omitted). In addition, “damage” is defined as “loss due to injury: injury or harm to person, property, or reputation.” WEBSTER’S, *supra*, at 571.

Moeller’s collision damages have been repaired and Farmers paid for those repairs. But there remains damage that cannot be repaired, e.g., weakened metal. Farmers has not paid for this diminished value loss.

Here, the policy covers diminished value. “[D]irect” losses include those proximately caused by the initial harm. CP at 19. A collision begins a chain of events that sometimes results in a tangible, physical injury that cannot be fully repaired. Absent an intervening cause, diminished value is a loss proximately caused by the collision and thus is covered. As Moeller argues,

⁷ The policy defines the term “damages” as “the cost of compensating those who suffer **bodily injury or property damage** from an **accident**.” CP at 12. For purposes of this contract policy, the terms “damages” and “damage” apparently have different meanings.

"[B]ecause it is indisputable that there was physical injury to [his] vehicle[], any and all damages flowing therefrom, and not expressly excluded by the policy, are clearly covered." Appellant's Br. at 22.

Because the policy covers diminished value, we examine whether Farmers limited its liability elsewhere in the policy.⁸

LIMITS OF LIABILITY CLAUSE

Moeller next contends that the limits of liability clause⁹ does not preclude recovery for diminished value.¹⁰ We agree.

⁸ Washington courts have not analyzed similar policy language to determine whether diminished value is a covered loss. But other jurisdictions have addressed this issue. Most courts have determined that diminished value is a covered loss under a "direct and accidental loss" coverage clause. *See, e.g., Campbell v. Markel Am. Ins. Co.*, 822 So. 2d 617, 623 (La. Ct. App. 2001) (after noting that the insurer did not dispute that diminished value was a covered loss, the court agreed that the phrase "direct and accidental loss" was broad enough to cover diminished value).

⁹ Although the parties briefly address the exclusions clause, neither focuses on this argument. Because diminished value is not specifically named in the exclusions clause and we give a narrow reading to such clauses, the question is not whether diminished value is excluded under the contract. Rather, our inquiry is whether the limits of liability clause prohibits recovery of diminished value.

¹⁰ Both parties rely extensively on case law from other jurisdictions, some of which allow recovery for diminished value, *see, e.g., Hyden v. Farmers Ins. Exc.*, 20 P.3d 1222 (Colo. Ct. App. 2000); *State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 556 S.E.2d 114 (2001); and others that deny such recovery, *see e.g., Ray v. Farmers Ins. Exch.*, 200 Cal. App. 3d 1411, 246 Cal. Rptr. 593 (1988); *Sims v. Allstate*, 365 Ill. App. 3d 997, 851 N.E.2d 701 (2006); *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243 (Ind. 2005); *Davis v. Farmers Ins. Co.*, 140 N.M. 249, 142 P.3d 17 (2006); *Am. Mfrgs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154 (Tex. 2003).

In a majority of these cases, the policy expressly limits liability to the "lesser" of the vehicle's "actual cash value" or the cost of repair or replacement. *See e.g. Schaefer*, 124 S.W.3d at 156. Most cases involving this "lesser" and "actual cash value" language have declined recovery for diminished value because the insured was not entitled to both repairs and monetary compensation. *See Schaefer*, 124 S.W.3d at 159. Instead, the insurer could choose the "lesser" of these options. There is no such language here. Because of the different policy language, these cases are of limited value in our analysis.

In other jurisdictions, the courts found no ambiguity, thus distinguishing them from the situation here. *Sims*, 851 N.E.2d at 707; *Allgood*, 836 N.E.2d 248; *Davis*, 142 P.3d at 24.

Here, the limits of liability clause provides that Farmers' liability for loss would not exceed "[t]he amount which it would cost to repair or replace damaged . . . property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation." CP at 20. When read alone, the terms "repair" and "replace" are unambiguous. But "repair" and "replace" cannot be read in isolation. See *Peasley*, 131 Wn.2d at 424 (noting that words and phrases cannot be interpreted in isolation). Instead, we must examine whether Farmers' obligation to "repair or replace damaged . . . property with other of like kind and quality" is ambiguous. CP at 20.

The policy does not define the terms "like," "kind," and "quality" and, therefore, we turn again to a standard English dictionary. *Matthews*, 106 Wn. App. at 765. "Like" is defined as "the same as or similar to." WEBSTER'S, *supra*, at 1310. Webster's provides that "kind" refers to "fundamental nature." WEBSTER'S, *supra*, at 1243. And "quality" is a "degree of excellence: grade, caliber." WEBSTER'S, *supra*, at 1858.

Moeller posits that the clause "like kind and quality" means a restoration of *appearance, function, and value*. He argues that the amount of his premiums was based, in part, on the pre-loss value of the vehicle. When the vehicle returned from the auto shop, the average insured could reasonably expect it to be similar in nature, caliber, and value. Otherwise stated, after repair or replacement with like kind and quality, the vehicle's capacity and value post-loss should be similar to its capacity and value pre-loss. This is a reasonable interpretation.¹¹

Farmers argues that the "like kind and quality" could reasonably be an obligation to restore the vehicle to a similar appearance and function. As it explains, "[j]ust as a plate that is

No. 30880-1-II

broken in two can be repaired by gluing the parts together and making the plate usable again, a damaged car be repaired by pounding out dents or replacing damaged parts so that the vehicle can be driven again.” Respondent/Cross-Appellant’s Br. at 13. Farmers asserts that a reasonable interpretation of this clause suggests that the vehicle need only be “restored to good condition with parts and workmanship of the same essential nature that existed on the vehicle prior to the accident.” Respondent/Cross-Appellant’s Br. at 18-19.

Farmers’ argument about the reasonableness of its interpretation does not persuade us. Even under its interpretation, the vehicle could not be restored to its pre-loss status because the nature of metal and stressed, but working parts, cannot be repaired.

The limits of liability clause and does not exclude recovery here. We reverse the summary judgment order and remand.

CONSUMER PROTECTION ACT

Next, Moeller contends that Farmers’ actions constituted per se violations of the Washington Administrative Code and, thus, per se violations of the CPA. Here, the trial court determined that Moeller premised his CPA claim on a successful breach of contract claim. Because we reverse the trial court’s summary judgment on the contract claim, we remand for further proceedings on Moeller’s CPA claim.

CROSS APPEAL ON CLASS CERTIFICATION

In its cross appeal, Farmers argues that the trial court abused its discretion when it certified a class under CR 23(b)(3). We disagree.

¹¹ In a strikingly similar case, *Gonzales v. Farmers Ins. Co.*, 345 Or. 382, 196 P.3d 1 (2008), the Oregon Supreme Court found coverage. In doing so, it relied on established Oregon precedent. *Gonzales*, 196 P.3d at 7-8.

When a party seeks class certification, it must satisfy the requirements of CR 23. Under CR 23(a), numerosity, commonality, typicality, and adequacy of representation comprise the four prerequisites to certification.¹² Farmers does not challenge these prerequisites.

In addition to the demands of CR 23(a), a party must also satisfy one of the three requirements of CR 23(b). Here, the trial court certified a class under CR 23(b)(3), which provides for certification if

[t]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

We review the trial court's decision for a manifest abuse of discretion. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188-89, 157 P.3d 847 (2007). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). Generally, we uphold the certification decision if it has tenable, reasonable support and if the record indicates that the trial court considered the CR 23 criteria. *Nelson*, 160 Wn.2d at 188-89.

¹² CR 23(a) provides:

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

No. 30880-1-II

Although we liberally construe CR 23 in favor of certification, class actions must strictly conform to the rule's requirements. *Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007). When determining whether to certify a class, the trial court must engage in a rigorous analysis to ensure that the prerequisites of CR 23 have been established. *Weston*, 137 Wn. App. at 168.

Courts afford CR 23 liberal interpretation because it "avoids multiplicity of litigation, 'saves members of the class the cost and trouble of filing individual suits[,] and . . . also frees the defendant from the harassment of identical future litigation.'" *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318, 54 P.3d 665 (2002) (quoting *Brown v. Brown*, 6 Wn. App. 249, 256-57, 492 P.2d 581 (1971)). "[A] primary function of the class suit is to provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group.'" *Behr*, 113 Wn. App. at 318-19 (quoting *Brown*, 6 Wn. App. at 253). In close cases, then, we resolve doubts in favor of allowing or maintaining the class. *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003).

Under CR 23(b)(3), the trial court must determine that common issues of law or fact predominate over questions affecting individual members and that a class action is the superior method of adjudication. *Sitton*, 116 Wn. App. at 253. In this analysis, we engage in a "pragmatic" inquiry into whether there is a 'common nucleus of operative facts' to each class member's claim." *Behr*, 113 Wn. App. at 323 (quoting *Clark v. Bonded Adjustment Co.*, 204 F.R.D. 662, 666 (E.D. Wash. 2002)).

Questions of judicial economy remain central. *Sitton*, 116 Wn. App. at 255. That class members may have to make individual showings of damages does not preclude class certification. *Behr*, 113 Wn. App. at 323.

Here, the trial court certified a class under CR 23(b)(3), defining that class as follows,

[A]ll persons who: (1) were insured pursuant to a casualty automobile insurance policy issued by Farmers for the state of Washington; (2) received payment under their collision or comprehensive coverages for damage to an insured automobile from May 30, 1993 to the date of class certification in this action; and (3) did not receive payment for inherent diminished value where: (a) the repair estimate including supplements totaled at least \$1,000, (b) the vehicle was no more than six years old (model year plus five years) and had less than 90,000 miles on it at the time of the accident, and (c) the vehicle suffered structural (frame) damage and/or deformed sheet metal and/or required body or paint work.

Excluded from the class are Defendants; their officers and directors; this Court and any member of the Court's immediate family; and those individuals whose vehicles were leased or total losses.

VI CP at 1582.

In its analysis, the trial court identified several common issues of law and fact:

(1) where the relevant policy language was materially identical, whether the class members' insurance policies covered diminished value; (2) whether "each class member's vehicle suffered a reduction in value as a result of the vehicle having been in an accident without consideration of repair related diminished value"; (3) whether each class member's vehicle could be returned to preaccident condition; and (4) whether Farmers engaged in "a common and systematic course of conduct designed to process physical damage claims so as to avoid acknowledging or paying diminished value claims in first party insurance contracts." VI CP at 1574.

When determining whether these common issues of fact and law predominated over individual concerns, the trial court analyzed the four factors set forth in CR 23(b)(3)(A)-(D). It

identified CR 23(b)(3)(D), the management factor, as a heavily disputed issue and the most significant factor in its examination.

In conclusion, the trial court determined that “the only conceivable method to adjudicate or resolve this case is through a class action, as the de minimus size of individual claims would leave policyholders without practical recourse, absent class treatment, to address the contract construction (legal) and damages (fact) issues.” VI CP at 1579.

Tenable reasons support the trial court’s determination that common issues predominated over individual issues. The trial court identified the common nucleus of operative facts, namely, that class members shared the same insurance policy, potentially suffered damage, and were allegedly harmed by Farmers’ course of conduct.¹³ Because each claim has a de minimus value, individuals are unlikely to pursue separate actions. Even though individual issues may pose management problems for the trial court, this does not preclude certification.¹⁴

¹³ Farmers cites *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d, 100, 835 N.Ed.2d 801, 296 Ill. Dec. 448 (2005), in its cross appeal. In *Avery*, the Illinois Supreme Court reversed in part on class certification. We do not find the *Avery* analysis persuasive, as that matter involved a class with varying insurance contracts in 48 states that could not be given uniform interpretation.

¹⁴ In addition, Farmers argues “that the class certification order was based on *predictions* by Moeller and his experts that proof of a particular type would permit Moeller to establish liability to all class members without any individualized proof.” Respondent/Cross-Appellants’ Reply Br. at 20. Thus, it claims that it cannot obtain a binding adjudication against all members of the class. Respondent/Cross-Appellants’ Br. at 46. But the trial court determined that Moeller offered an acceptable plan of proof:

Plaintiffs have also presented the Court with a preliminary plan of how to proceed to gather the data on vehicles and how to manage this litigation as a class action. Their plan evidences a keen understanding of the steps necessary to process claims, identify class members, analyze the data on the existence or amount of diminished value, make adjustments to the classwide damages for any defenses raised (and substantiated by Defendants), and then provide for notification and allocation of any damages awarded to the class after trial. Plaintiff’s counsel have exhibited an understanding of the sources of data, cross checks on that data, supplemental sources of data, and the use of computers to index and manipulate that data. This will expedite the retrieval, sorting, and analysis of pertinent data for both the Plaintiffs and Defendants.

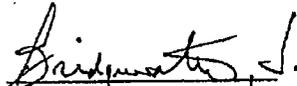
No. 30880-1-II

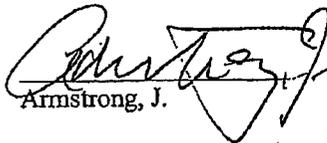
Nor does it, as Farmers contends, result in an improper shift in the burden of proof. Given the common, overriding issues of law and fact, judicial economy warranted certification.¹⁵ As such, Farmers' argument fails.

We affirm in part, reverse in part, and remand for further proceedings.


Houghton, P.J.

We concur:


Bridgewater, J.


Armstrong, J.

CP at 1579-80. We see nothing in the record indicating that the trial court abused its discretion on this point.

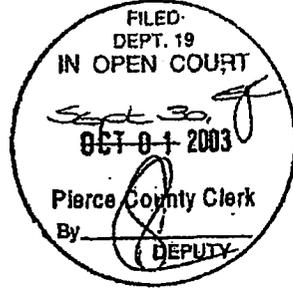
¹⁵ Farmers also argues that implementation of the certification order results in an impermissible bifurcation: "the supposed classwide finding of liability would have to be reexamined in each claim proceeding, to determine whether that particular class member suffered any injury." Respondent/Cross-Appellants' Br. at 44-45. The trial court rejected Farmers' injury argument:

After close consideration and scrutiny of the desirability and claimed need to assert individual defenses in each particular case, it is the Court's finding, based on the evidence and argument of counsel, that in the course of identifying the particular class members and in evaluating their particular cases, that the Defendants in this case will be able to present any relevant information to the Court and jury in a classwide trial and that classwide treatment is therefore preferable.

CP at 1578. The trial court acted within its discretion when it determined that classwide treatment both protected Farmers' interests and served interests of judicial economy.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

DAVID MOELLER,
Plaintiff,

v.

FARMERS INSURANCE COMPANY
OF WASHINGTON and FARMERS
INSURANCE EXCHANGE,
Defendants.

No. 99-2-078560-6
Court of Appeals No. 30880-1-II
NOTICE OF CROSS APPEAL TO THE COURT
OF APPEALS
Assigned Judge: Honorable Marywave Van Deren
Remann Hall

The Defendants, Farmers Insurance Company of Washington and Farmers Insurance Exchange, seek review by Division II of the Court of Appeals of the Order Granting Class Certification as entered by the Hon. Marywave Van Deren on September 13, 2002, and as filed with the Pierce County Clerk.

A copy of the Order is attached to this Notice.

Dated this 29th day of September, 2003.

GORDON & POLSCER, L.L.C.

By: *Joseph D. Hampton*
Joseph D. Hampton, WSBA No. 15297
Scott Jonsson, WSBA No. 13820
Russell W. Pike, WSBA No. 17715
Attorneys for Defendants Farmers Insurance Exchange and Farmers Insurance Company of Washington.

NOTICE OF CROSS APPEAL - 1
\\gspeca\all\Active Cases\00643\Appeal\CrossAppeal\Notice.doc

ORIGINAL

GORDON & POLSCER, L.L.C.
1000 Second Avenue, Suite 1500
Seattle, WA 98104
(206) 223-4226

1584

1 **PLAINTIFF'S COUNSEL:**

2 Stephen M. Hansen
3 **LOWENBERG, LOPEZ & HANSEN**
4 950 Pacific Avenue
5 Suite 450, Rust Building
6 Tacoma, Washington 98402-4441
7 Telephone: (253) 383-1964
8 Facsimile: (253) 383-1808

9 Debra Hayes
10 **REICH & BINSTOCK**
11 4265 San Felipe, Suite 1000
12 Houston, TX 77027
13 Telephone: (713) 622-7271
14 Facsimile: (713) 623-8724

15 Scott P. Nealey
16 **LIEFF, CABRASER, HEIMANN**
17 **& BERNSTEIN, LLP**
18 275 Battery Street, 30th Floor
19 San Francisco, CA 94111-3339
20 Telephone: (415) 956-1000
21 Facsimile: (415) 956-1008

22 Terrell W. Oxford
23 **SUSMAN & GODFREY, LLP**
24 901 Main Street, Suite 4100
25 Dallas, TX 75202-3775
26 Telephone: (214) 754-1900
Facsimile: (214) 754-1933

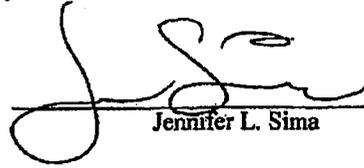
DEFENDANTS' COUNSEL:

Scott A. Jonsson
Russell W. Pike
GORDON & POLSCER, L.L.C.
121 SW Morrison Street, Suite 1200
Portland, OR 97204
Telephone: (503) 242-2922
Facsimile: (503) 242-1264

Joseph D. Hampton
GORDON & POLSCER, L.L.C.
1000 Second Avenue, Suite 1500
Seattle, WA 98104
Telephone: (206) 223-4226
Facsimile: (206) 223-5459

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26

DATED this 30th day of September, 2003.



Jennifer L. Sima

NOTICE OF CROSS APPEAL - 4
\\pccaball\Active Cases\00643\Appeal\CrossAppeal.Notice.doc

GORDON & POLSCER, L.L.C.
 1000 Second Avenue, Suite 1500
 Seattle, WA 98104
 (206) 223-4226

1587



99-2-07850-6 19877322 NACA 09-19-03

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED
IN COUNTY CLERK'S OFFICE
A.M. SEP 18 2003 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY [Signature] DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

DAVID MOELLER,

Plaintiff,

NO. 99-2-07850-6

vs.

NOTICE OF APPEAL TO THE COURT OF APPEALS

FARMERS INSURANCE COMPANY OF WASHINGTON and FARMERS INSURANCE EXCHANGE,

Defendants.

The Plaintiff, DAVID MOELLER, seeks review by Division II of the Court of Appeals of the Order Granting Summary Judgment of Dismissal and Judgment for Defendants as entered by the Honorable MARYWAVE VAN DEREN on September 9, 2003, and as filed with the Pierce County Clerk. Copies of these decisions are attached.

DATED this 17th day of September, 2003.

LOWENBERG, LOPEZ & HANSEN, P.S.

[Signature]
STEPHEN M. HANSEN, WSBA 15642
Of Attorneys for Plaintiff
(Additional Counsel for Plaintiff listed below)

NOTICE OF APPEAL - 1

ORIGINAL

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
SUITE 450, RUST BUILDING
850 PACIFIC AVENUE
TACOMA, WASHINGTON 98402-4441
(253) 383-1864 / (253) 838-4993
(253) 383-1808 fax

1 **DEFENDANTS' ATTORNEY:**

2 **GORDON & POLSCER, L.L.P.**
3 Scott A. Jonsson, WSBA#: 13820
4 121 SW Morrison St Ste 1200
5 Portland, OR 97204

6 **PLAINTIFF'S COUNSEL:**

7 Debra Hayes
8 **REICH & BINSTOCK**
9 4265 San Felipe, Suite 1000
10 Houston, TX 77027
11 Telephone: (713) 622-7271
12 Facsimile: (713) 623-8724

13 Elizabeth J. Cabraser
14 Morris A. Ratner
15 Scott P. Nealey
16 **LIEFF, CABRASER, HEIMANN &**
17 **BERNSTEIN, LLP**
18 275 Battery Street, 30th Floor
19 San Francisco, CA 94111-3339
20 Telephone: (415) 956-1000
21 Facsimile: (415) 956-1008

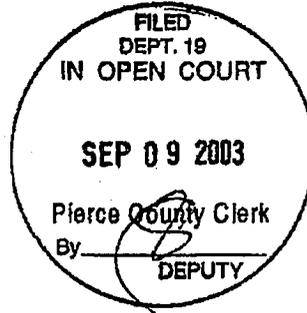
22 Terrell W. Oxford
23 **SUSMAN GODFREY, LLP**
24 901 Main Street, Suite 4100
25 Dallas, TX 75202-3775
26 Telephone: (214) 754-1900
27 Facsimile: (214) 754-1933

28 NOTICE OF APPEAL - 2

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
SUITE 450, RUST BUILDING
850 PACIFIC AVENUE
TACOMA, WASHINGTON 98402-4441
(253) 383-1964 / (253) 838-4883
(253) 383-1808 fax



89-2-07850-6 18639588 ORGSJ 09-12-03



3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

DAVID MOELLER,
Plaintiff,

v.

FARMERS INSURANCE COMPANY
OF WASHINGTON and FARMERS
INSURANCE EXCHANGE,
Defendants.

No. 99 2 07850 6

ORDER GRANTING SUMMARY
JUDGMENT OF DISMISSAL

Motion for Summary Judgment
Date of Hearing: July 29, 2003
Assigned Judge: Honorable Marywave Van Deren
Department 19

I. HEARING

1.1. Date: July 29, 2003

1.2. Appearances: Plaintiffs appeared by and through their attorneys of record

Scott P. Nealey, Esq. of Leiff, Cabraser, Heimann & Bernstein, LLP, and Stephen Hansen of
Lowenberg, Lopez & Hansen, and defendants appeared by and through their attorneys of record,
Scott A. Jonsson and Joseph D. Hampton of Gordon & Polscer, L.L.P.

1.3. Notice: Adequate notice of hearing was provided to all parties.

1.4. Purpose: The purpose of the hearing was to entertain defendants' Motion for
Summary Judgment.

1.5. Record: The parties submitted the following pleadings and papers in support
and opposition to the Motion:

ORDER GRANTING SUMMARY
JUDGMENT OF DISMISSAL - 1

\\apps\all\Active Cases\100643\Pleadings\SJMotion\order.doc

GORDON & POLSCER, L.L.P.
1000 Second Avenue, Suite 1500
Seattle, WA 98104
(206) 223-4226

ORIGINAL

From Defendants:

- (1) Defendants' Motion for Summary Judgment;
- (2) Declaration of Joseph D. Hampton in Support of Defendants' Motion for Summary Judgment, with Exhibits Thereto;
- (3) Appendix of Trial Court and Out-of-State Cases to Defendants' Motion for Summary Judgment; and
- (4) Defendants' Reply Memorandum in Support of Motion for Summary Judgment.

From Plaintiffs:

- (1) Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment;
- (2) Declaration of Stephen M. Hansen in Opposition to Defendants' Motion for Summary Judgment and Exhibits thereto;
- (3) Declaration of Public Records Officer.

II. RULING

The court reviewed all written submissions of the parties, including documentary evidence, deposition testimony, declarations, memoranda and briefs of law, case law and other legal authorities provided by the parties. The court heard extensive oral argument from both sides. The court was fully apprised in the premises.

In open court on July 29, 2003, the Court delivered an oral ruling on Defendants' Motion for Summary Judgment. A true and correct copy of the transcript of the ruling is attached hereto as Exhibit A, and incorporated herein by reference.

III. ORDER

Pursuant to the foregoing Ruling, it is hereby ORDERED as follows:

- 3.1. Defendants' Motion for Summary Judgment is hereby GRANTED.

ORDER GRANTING SUMMARY
JUDGMENT OF DISMISSAL - 2

\\gpcsa\all\Active Cases\00643\Pl\loadings\SI\Motion\order.doc

GORDON & POLSCER, L.L.P.
1000 Second Avenue, Suite 1500
Seattle, WA 98104
(206) 223-4226

1 3.2. All claims of any nature by David Moeller and any member of the class against
2 defendants are hereby DISMISSED with prejudice.

3 3.3. Defendants are entitled to recover their statutory attorneys fees incurred in this
4 action.

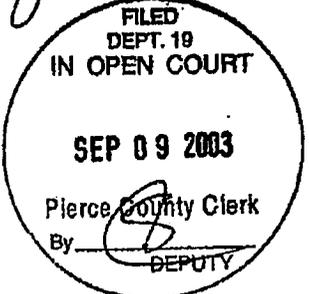
5 3.4. There is no just reason for delay, and entry of a final judgment in favor of
6 Defendants shall immediately follow.

7 DONE IN OPEN COURT this 9 day of September, 2003.

Marywave Van Deren

Judge Marywave Van Deren

10 Presented by:
11 GORDON & POLSCER, L.L.P.



12
13 By *Joseph D. Hampton*
14 _____
15 Joseph D. Hampton, WSBA No. 15297
16 Scott A. Jonsson, WSBA No. 13820
17 Kevin Kelly, *Pro Hac Vice*
18 Attorneys for Defendants Farmers Insurance
19 Exchange and Farmers Insurance Company of
20 Washington

21 Approved as to form; notice of
22 presentation waived:
23 LOWENBERG, LOPEZ & HANSEN

24
25 By: *Stephen Hansen*
26 _____
27 Stephen Hansen, WSBA No. 15647
28 Attorney for Plaintiffs

ORDER GRANTING SUMMARY
JUDGMENT OF DISMISSAL - 3

\\gsa\all\Active Cases\00643\Pleadings\SJM\order.doc

Am

GORDON & POLSCER, L.L.P.
1000 Second Avenue, Suite 1500
Seattle, WA 98104
(206) 223-4226

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

THE HONORABLE MARYWAVE VAN DEREN DEPARTMENT 19

DAVID MOELLER,)	
)	
Plaintiff,)	
)	
vs.)	NO. 99-2-07850-6
)	
FARMERS INSURANCE COMPANY OF)	
WASHINGTON and FARMERS)	
INSURANCE EXCHANGE,)	
)	
Defendants.)	

EXCERPT OF
VERBATIM REPORT OF PROCEEDINGS
JUDGE'S RULING

JULY 29, 2003

COPY

APPEARANCES: (See first page of text.)

DIANNE Y. WILSON, CCR-RPR Reporter No. 82124
Official Court Reporter (253) 798-7736
930 Tacoma Avenue South, Department 19
Tacoma, Washington 98402

EXHIBIT A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES:

For the Plaintiffs: SCOTT NEALEY
STEPHEN HANSEN
For the Defendants: SCOTT JONSSON
JOSEPH HAMPTON

BE IT REMEMBERED that on Tuesday, the 29th day of
JULY, 2003, at Pierce County Superior Court, Department 19,
5501 Sixth Avenue, Tacoma, Washington, before THE HONORABLE
MARYWAVE VAN DEREN and reported by Dianne Y. Wilson,
CCR-RPR, the following proceedings were had, to wit:

(The foregoing proceedings
reported but not transcribed.)

THE COURT: Okay. Well, counsel, I spent
hours and hours, not nearly as many as you did, by any
stretch of the imagination, but I took at least one full
day off the bench and closeted myself to read everything
that you had provided in this case and to study this case,
because it's so crucially important to all of these
policyholders and to the defendants Farmers Insurance

1 Company and Farmers Insurance Exchange and because
2 Washington doesn't have any guiding authority for us on the
3 primary issue. And after doing that, I wrote down some of
4 my comments, which I have added to today during the
5 argument. . And so I want to go through this fairly
6 methodically.

7 Farmers brings this matter before the Court on its
8 summary judgment on the issue of contract coverage for the
9 claims of class plaintiffs for diminished value of vehicles
10 repaired under the Third Edition of Farmers Insurance Group
11 of Companies. E-Z Reader Car Policy for Washington. Farmers
12 also brings a summary judgment motion on Consumer
13 Protection Act claims against it for violation of
14 applicable Washington Administrative Code provisions and
15 bad faith contrary to RCW 19.86.

16 Plaintiffs respond that the matter may not be
17 decided favorably for Farmers on summary judgment due to
18 the presence of issues of fact relating to whether
19 plaintiffs have suffered an actual loss in value from
20 unrepairable vehicles, that the Farmers policy does not
21 cover diminished value losses, or that the policy coverage
22 is ambiguous and therefore must be construed in favor of
23 the insureds, and, further, that the Consumer Protection
24 Act claim can also prevail absent a finding of no coverage
25 and it is a factual issue which must await trial.

1 Both sides of this dispute have ably and thoroughly
2 prepared the materials and the arguments submitted for the
3 Court's consideration. The Court has set aside numerous
4 hours to read all the submissions of the parties, even
5 those which have been the subject of the defendant Farmers
6 motion to strike, since the motion to strike was not
7 received until the day before the argument was set to be
8 heard in June and the Court had already read the materials
9 from both plaintiffs and defendants. The Court has also
10 made an attempt to read the copies of the cases which each
11 side cited as well as the entire insurance policy and the
12 reply memos each side submitted with their attachments.

13 It is through the materials and the arguments of
14 counsel that this Court was educated about the numerous
15 cases nationwide dealing with the issues presented to this
16 Court. In the course of hearing the matter for
17 certification of the class, the Court realized that this
18 was not an isolated case, that attorneys from numerous
19 local, regional and far-flung firms were examining vehicle
20 insurance policies and the coverage they afford insureds.

21 But it was in the preparation for this hearing that
22 the Court confronted the large number of cases decided in
23 the trial courts of numerous states, which then moved to
24 the appellate courts in those states, resulting in a
25 plethora of published opinions on the meaning and

1 interpretation of the contracts insuring automobiles for
2 losses when claims for diminished value were made by
3 insureds.

4 What I draw from the materials and cases is that
5 there is definitely a split of opinion among different
6 states on the issues presented, as well as differences in
7 approach to the cases over time. Washington provides no
8 appellate guidance for the trial courts on the issues
9 relating to the insurance policy.

10 Other courts have interpreted exactly the same
11 contract language relating to repair, like kind and
12 quality, the limits of liability clauses read in
13 conjunction with the coverage provisions, and payment of
14 loss provisions. In some instances, there have been
15 variations in language of policies. And one court in
16 addressing the lack of the language of like kind and
17 quality in two of the three cases consolidated for appeal
18 pointed out that the absence of the term from the Allstate
19 and State Farm policies was not dispositive of the issue
20 regarding whether the policies provided coverage for
21 diminution of value. That is in O'Brien v. Progressive
22 Northern Insurance, 785 A.2d. 281, decided in 2001.

23 This Court finds that the better-reasoned cases
24 consistently apply the proper contract interpretation
25 standards in their analysis before reaching the issues

1 presented on a factual basis. Those standards are
2 paramount in properly addressing the serious issues which
3 confronted the counsel and the Court in this case.

4 There are certain basic rules which the Court must
5 observe in the interpretation of an insurance contract when
6 it is disputed. The Court is confined to the four corners
7 of the document unless it is persuaded that the words used
8 in the document itself are used ambiguously or that the
9 language of the policy is ambiguous, unless the extrinsic
10 evidence relates to the mutual intent of the parties.

11 Keytronic Corporation v. Aetna Fire Underwriters Insurance,
12 124 Wn.2d. 618, 1994.

13 Extrinsic evidence is not used to interpret a
14 standard and unambiguous form insurance policy when no
15 actual negotiations occur unless the extrinsic evidence
16 relates to the situation of the parties or the
17 circumstances under which the contract was executed.

18 Spratt v. Crusader Insurance Company, 109 Wn.App. 944,
19 2002.

20 The Court may not use extrinsic evidence in
21 deciding whether the contract is ambiguous when the
22 language is plain and clear on its face. The Court must
23 first review the language of the contract to decide if the
24 language in controversy is reasonably or fairly susceptible
25 to two or more different interpretations.

1 The Court is to apply the ordinary person's reading
2 of contested language and shall not torture the language of
3 the policy to create an ambiguity where an ordinary reading
4 leaves no room for uncertainty. Disagreement between the
5 parties on the meaning of the language does not of itself
6 create an ambiguity. The existence of a split in the case
7 law reported from numerous jurisdictions does not render
8 the language in dispute ambiguous.

9 Extrinsic evidence admitted for the purpose of
10 determining the intent of the parties shall not vary the
11 terms of the agreement. Extrinsic evidence cannot be
12 admitted to add to, modify, or contradict express written
13 terms of the agreement.

14 If the Court finds that the terms of the insurance
15 agreement are ambiguous, it shall be interpreted liberally
16 in favor of the insured and strictly against the insurer
17 who prepared the policy. An ambiguity in coverage shall be
18 construed in favor of coverage for the insured.

19 One of the first issues raised by the defendants is
20 whether the evidence offered by plaintiffs on the
21 interpretation of the contract by insurance company
22 employees and others is admissible on the issue of the
23 meaning or ambiguity of terms of the agreement; that is,
24 does extrinsic evidence regarding the interpretation of the
25 contract to include diminished value add to, modify, or

1 contradict the writing which is the insurance contract
2 between the parties?

3 The term "diminished value" does not appear in this
4 insurance policy. The only explicit reference to value of
5 the insured car appears in the Limit of Liability
6 Endorsement S7995, stating that increases in value of a
7 repaired vehicle may be the basis of a deduction from the
8 amount paid in covering a loss to the insured.

9 A reading of this term to require inclusion of its
10 opposite meaning -- that is, diminished value -- for the
11 purpose of increasing the payments by the insurance company
12 required under the limits of liability provision for
13 repaired vehicles would recklessly ignore the directions to
14 the trial courts. It would not only be the addition of a
15 term but also of an obligation not mentioned elsewhere in
16 the policy.

17 In this instance, the Court will not use the
18 offered extrinsic evidence of opinions and interpretations
19 of the written policy which relate to unstated terms which
20 appear to add to, modify, or vary the written contract.

21 Turning to the contract as a whole, it's recognized
22 that courts and others may find that diminished value of a
23 repaired vehicle, upon proper proof, may be a direct and
24 accidental loss, thus covered by insurance unless the
25 definitions, coverage statements, limits of liability, and

1 payment of loss provisions exclude it from coverage in a
2 public policy.

3 This policy defines various terms. "Damages" is
4 defined on page 3 as the cost of compensation to those who
5 suffered property damage. "Property damage" is defined on
6 page 3 as physical injury to or destruction of tangible
7 property. "Insured car" is defined on page 3 as the
8 vehicle. "Loss" is defined in Part IV on page 10 as direct
9 damage to the insured car. "Limits of liability" is
10 defined on page 11 and on Endorsement S7995 as an amount
11 which, quote, "shall not exceed the amount which it would
12 cost to repair damaged property with other of like kind and
13 quality" when read with the pertinent definition.

14 The exclusion provisions relate to specific losses
15 which are not covered by the policy. As such, and read
16 with their ordinary meanings, they are not ambiguous. A
17 question has been raised about whether an additional
18 exclusion relating to diminished value should have been in
19 the policy to clarify included and excluded coverage. The
20 Court finds no ambiguity for the failure of an exclusion to
21 be listed in this instance.

22 Putting these policy provisions together to read
23 the policy as a whole, to determine what coverage is
24 available to the insured, a loss is the cost of
25 compensation to those who suffer physical injury to or

1 destruction of tangible property relating to the insured
2 car. The limit of payment for this loss is the amount
3 which does not exceed the cost of repair to the vehicle to
4 like kind and quality.

5 Value of the vehicle prior to the accident which
6 resulted in the loss is not tangible property, nor is it a
7 physical injury to be compensated.

8 Numerous states have found the same interpretation
9 of this contract language to be persuasive and controlling,
10 thereby not ambiguous, and not construed to include the
11 preaccident value of the car as a compensable loss.

12 This Court finds that read as a whole this
13 insurance agreement cannot be said to include a payment for
14 diminished value upon repair, the only issue which is
15 presented here. The definitions, the coverage portions,
16 the payment of loss provisions, the limits of liability, as
17 well as the appraisal rights granted to each party of the
18 contract to obtain an independent assessment of the loss
19 all combine to create a comprehensive scheme for asserting,
20 adjusting, and resolving coverage for various losses to
21 vehicles and the choice of which avenue to address losses:
22 repair, replace, or pay cash.

23 No one has argued or brought the Court's attention
24 to the independent assessment right contained in the
25 policy. But such a right contained in the policy assures

1 that a covered insured may raise their own issue of value
2 of the vehicle if they wish to do so in having their loss
3 adjusted and resolved with the insurance company.

4 The choice of which avenue to pursue absent resort
5 to the appraisal rights granted to each party is left to
6 the insurance company. To require that when anything other
7 than payment for new property, less applicable deductions,
8 is the chosen avenue to redress loss that there be cash
9 payments plus repair or replacement makes the choice of
10 means meaningless to the insurance company. The provisions
11 of the insurance policy which provide for repair or
12 preplacement become superfluous. The amount paid in each
13 instance becomes the same, despite the fact that repairs
14 can return the vehicle to utility comparable to that which
15 existed before the loss.

16 Courts are directed to interpret contracts so that
17 effect is given to each term, rather than to render some
18 terms useless. Ascribing to the phrase "repair or replace
19 with like kind and quality," the obligation to compensate
20 the insured for things which may not be reasonably repaired
21 or replaced renders this phrase useless and as such is not
22 consistent with the rules of contract interpretation.

23 The Court is persuaded by the weight of authority
24 from other jurisdictions that "like kind and quality"
25 language is unambiguous and does not provide coverage for

1 diminished value, even in those cases where a loss of
2 market value may be demonstrated by persuasive evidence.

3 The plain and ordinary meaning is given to the
4 terms of the policy to establish the intent of the parties.
5 When a term is not defined within an insurance policy, the
6 Court may look at its ordinary dictionary meaning.

7 "Repair" means to restore to sound condition after injury,
8 to restore or replace in part or putting together what is
9 torn or broken,, or to bring back to good and usable
10 condition, according to Webster's Third New International
11 Dictionary, originally 1923, revised in 1993, and the
12 Riverside Webster's II, Dictionary, page 580, Revised
13 Edition, 1996. There is no inherent concept of value in
14 the ordinary meaning of the word "repair."

15 Thus the insurance company's limit of liability is
16 capped at the limit of returning the damaged vehicle to
17 substantially the same physical, operating, and mechanical
18 condition that exists before the loss, and summary judgment
19 is granted to the defendants on this issue.

20 With regard to the Consumer Protection Act claim
21 under RCW 19.86, the Court finds that this determination is
22 a question of law. Further, if there is a debate over
23 coverage, there is no liability for an insurer under the
24 Consumer Protection Act if the insurer refused to pay over
25 that coverage disagreement.

1 Under Ellwein, Leingang, and Transcontinental, the
2 insured must show that the insurer acted in bad faith as a
3 matter of law, that there was no reasonable basis for the
4 insurer's actions in refusing to investigate or refusing
5 coverage.

6 An insurer must fully and fairly investigate a
7 claim under the policy. Here, the company had repaired the
8 vehicles. A claim for a nonspecified loss does not trigger
9 a duty to do more. The Court finds that the defendants
10 need not have investigated plaintiff's claim further due to
11 their determination that there was no coverage for the
12 additional diminished value claim.

13 With regard to the claims that defendants committed
14 violations of the Washington Administrative Code, Sections
15 284-30-330 and 350, for failure to disclose benefits of the
16 contract, concealed coverage, misrepresented facts or
17 policy provisions, refused to pay with reasonable
18 investigation, or compelled the insured to pursue
19 litigation to obtain the benefits of the policy, the Court
20 finds that there was not a duty imposed on the insurance
21 company to inform claimants that some insureds felt there
22 was greater coverage than that specified in the contract
23 and thus generate more claims work. Thus this claim fails
24 as well.

25 Pursuant to Coventry, the insured must allege and

1 prove actual damages caused by the insurer's refusal to
2 cover a claimed loss when the case proceeds after a
3 determination of no coverage.

4 There having been no evidence deduced at this stage
5 by the plaintiff regarding damages caused by the refusal to
6 cover diminished value, and attorneys' fees not being
7 allowed except by statute or contract, the Court dismisses
8 this claim as well.

9 Do you have a proposed order?

10 MR. HAMPTON: I do, your Honor.

11 MR. JONSSON: It had been prepared with a
12 couple things in mind. Number one, it anticipated that the
13 motion to strike would be granted. Therefore it has some
14 language to that effect in it. It also sets forth a
15 ruling, but I think that may be superseded by your Honor's
16 lengthy and detailed statement on the record here today.

17 So I'm not exactly sure how we ought to proceed. I
18 guess it's possible that we could change part of the
19 original to just -- Excuse me. If I may approach the
20 bench.

21 If you look on the second page, there is a lengthy
22 recitation of a ruling. And I would propose that we simply
23 strike that out and say "as pursuant to the Court's oral
24 decision on the record on July 29th."

25 THE COURT: Well, you know, I think it might

1 be better to have you draft something and let plaintiffs'
2 lawyers review it and then note it for presentation,
3 because it's --

4 MR. JONSSON: We'll do that.

5 MR. HAMPTON: We'll be happy to do that, your
6 Honor.

7 THE COURT: And then run it by them. If they
8 sign off on it, fine. If you have an argument about
9 presentation, we'll take it up at that time.

10 MR. JONSSON: Your Honor, with your permission
11 we'll order a transcript of the hearing where your
12 conclusions were made and then use that as a verbatim
13 finding by the Court.

14 THE COURT: It's up to you to sort it out as
15 to findings and conclusions. I simply wrote out my
16 opinion. And I rely on good counsel to translate it in the
17 appropriate context for the Court of Appeals.

18 Frankly, I think this is a very interesting
19 question. I am hoping that Washington at some point does
20 give us some appellate guidance on these policies. I know
21 that it's very big in the industry. I know it's very big
22 among plaintiffs' attorneys to get this issue resolved,
23 because it's a very expensive process to pursue through
24 class actions. And I'm hoping -- And I only regret that we
25 don't have any clear guidance here, because I think the

1 Court of Appeals and the Supreme Court of Washington could
2 go -- Any way is possible. This is my reading of it. And
3 as the trial court, who is just the first step in these
4 decisions, I can only do the best that I think the case
5 shows.

6 But I certainly respect both parties' ability to
7 appeal these decisions and get us some, hopefully
8 published, guidance on the issues.

9 MR. JONSSON: Thank you, your Honor.

10 MR. HAMPTON:, Thank you, your Honor.

11 MR. NEALEY: Thank you, your Honor.

12 MR. HANSEN: Thank you, your Honor.

13 (Proceedings concluded.)

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THE HONORABLE MARY WAVE VANDEREN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

DAVID MOELLER,

Plaintiff,

vs.

FARMERS INSURANCE COMPANY OF
WASHINGTON and FARMERS
INSURANCE EXCHANGE,

Defendants.

NO. 99-2-07850-6

CLASS CERTIFICATION ORDER

Before the Court is Plaintiff's Motion for Class Certification which seeks certification of the following class under both CR 23(b)(2) and 23(b)(3):

all persons who: (1) were insured pursuant to a casualty automobile insurance policy issued by Farmers for the state of Washington; (2) received payment under their collision or comprehensive coverages for damage to an insured automobile from May 30, 1993 to the date of class certification in this action; and (3) did not receive payment for inherent diminished value where: (a) the repair estimate including supplements totaled at least \$1,000, (b) the vehicle was no more than six years old (model year plus five years) and had less than 90,000 miles on it at the time of the accident, and (c) the vehicle suffered structural (frame) damage and/or deformed sheet metal and/or required body or paint work.

CLASS CERTIFICATION ORDER - 1/15

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW

1 The proposed class does not include Defendants or their officers or directors; this Court
2 or any member of the Court's immediate family; or persons whose insured vehicles were leased.

3 **The Parties' Claims**

4 The record shows that Plaintiff was in an accident in Puyallup, Washington on November
5 19, 1998 in which his 1996 Honda Civic sustained damage to his vehicle. Plaintiff filed a claim
6 under the collision provisions of his Farmers automobile insurance policy, and Farmers
7 subsequently paid for repairs to his vehicle, which Plaintiff alleges were substandard.

8 After his vehicle was repaired, Plaintiff made a claim for the alleged inherent diminished
9 value sustained by his vehicle as a result of the accident. Plaintiff sought coverage for the
10 diminished value resulting from the accident damage that persisted even after repair. Farmers.
11 Insurance Company of Washington denied this claim for inherent diminished value, contending
12 that such a claim was not available to a first party insured under the Farmers insurance policy
13 issued to the Plaintiff. In this suit, Plaintiff makes no claim for any loss resulting from the
14 alleged substandard repairs, which the parties have referred to as "repair related diminished
15 value."

16 Plaintiff asserts that inherent diminished value is a well-recognized factor in the
17 automobile industry. Plaintiff also asserts that inherent diminished value has been recognized by
18 the Washington State Insurance Commissioner as a "direct loss", and that Farmers has
19 recognized and paid inherent diminished value claims, but only to those claimants sophisticated
20 and aggressive enough to seek and insist on payment.

21 The record reveals that there is no express exclusion for diminished value in Farmers'
22 insurance policies. Plaintiffs allege that despite the lack of any exclusion for diminished value in
23 its insurance contract, that Farmers' common classwide practice is not to inform its insureds of a
24 diminished value loss or to provide estimates of damages which include payment for diminished
25 value.

26
27
28 CLASS CERTIFICATION ORDER - 2/15

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
SUITE 400 1211 1ST ST SE PUYALLUP

1 Farmers asserts that it has not paid inherent diminished value claims except in the third
 2 party context where Farmers steps into the shoes of an under or uninsured driver who is at fault
 3 in an accident involving a Farmers insured. Farmers claims that in this context, the insured is
 4 also in a third party position. Farmers further notes that the contract language in Farmers'
 5 insurance policy has been interpreted by some courts to not cover diminished value claims.

6 Plaintiff contends that the requirements of Washington Superior Court Civil Rule 23 have
 7 been met. Defendants contend, among other arguments, that the CR 23 prerequisites are not met
 8 because individual issues of fact as to claims and defenses predominate over common issues of
 9 fact and law; that the nature of Plaintiff's claim allegedly compels individualized consideration
 10 of each vehicle and/or claim file, thereby rendering the manageability of a class action treatment
 11 of these claims impossible or unduly burdensome; that there is only the speculative existence of
 12 a method of calculating the value of damages; that Plaintiff's claims fail the typicality test; and
 13 that a class action would defeat the rights of some Plaintiffs and also defeat the Defendants' right
 14 to assert individualized defenses to claims of class members. This written decision reflects and
 15 incorporates by reference the Court's oral decision rendered on July 26, 2002. As discussed
 16 below, the Court has carefully considered, and now rejects, each of these arguments.

17 **Class Certification Standard**

18 The Court's ruling is governed by CR 23. A class action is a specialized proceeding and
 19 in general must be brought and maintained in strict conformity with the requirements of CR 23.
 20 Class certification should be granted only after rigorous analysis, to ensure the prerequisites of
 21 CR 23 have been satisfied. In rendering its decision the Court is not to consider the merits of the
 22 Plaintiff's case, or the possibility of eventual success at trial, in making a determination of
 23 whether a class should be certified. However, the Court may look beyond the pleadings and
 24 make a preliminary inquiry into the merits of the action so as to obtain an understanding of the
 25 claims, defenses, relevant facts, and application of substantive law to determine if class treatment
 26 is appropriate. See *State v. Oda*, ___ Wn.App. ___, 44 P.3d 8 (2002).

27
 28 **CLASS CERTIFICATION ORDER - 3/15**

LOWENBERG, LOPEZ & HANSEN, P.S.
 ATTORNEYS AT LAW

1 The Court is aware that, as noted in the Manual for Complex Litigation, class
2 certification, or its denial, can substantially affect such fundamental matters as the structure and
3 stakes of the litigation, who the parties are, how discovery is conducted, the procedure for
4 motion practice, application of alternative dispute resolution procedures, if any, the approach to
5 settlement negotiations, and the running of the statute of limitations against unnamed plaintiffs,
6 Manual for Complex Litigation, Third § 30.1 at 212. The Court is also aware that some
7 commentators have criticized state courts for being too lenient in certifying classes under state
8 analogs to Fed. R. Civ. P. 23, and for not carefully considering the class certification issues
9 before them. Because the stakes are high for both parties, the concern of both parties for a
10 proper decision is important.

11 In reaching its decision and findings the Court examined the record developed by the
12 parties. Prior to class certification, the Court addressed, among other matters, Defendants'
13 motion for summary judgment, Defendants' opposition to Plaintiff's motion to join Farmers
14 Insurance Exchange as a party, and motion practice by both parties regarding experts and
15 witnesses. The substantial discovery to date has been overseen by a special master, with this
16 Court evaluating the master's recommendations.

17 Prior to the hearing on class certification, the Court considered, among other
18 submissions: Plaintiff's Motion for Class Certification and Attachments A through F;
19 Defendants' Brief in Opposition to Plaintiff's Motion; Scott Jonsson's Declaration in Support of
20 Defendants' Opposition and Attachments A to X thereto; and Defendants' Supplemental Brief in
21 Opposition and Attachments A through E thereto; and Plaintiff's Reply Memorandum and
22 Attachments A through C thereto.

23 The Court also reviewed the depositions, declarations and affidavit testimony of the
24 expert witnesses for the Plaintiff, and the expert or corporate witnesses for the Defendants which
25 were heavily relied on by both sides. These witnesses, whose testimony was made part of the
26 record, include Messrs. Batton, Griglio, West, Jonsson, McGaughey, Randall, Snowden, Neville,
27

28 CLASS CERTIFICATION ORDER - 4/15

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
SUITE 400, PLUM STREET BUILDING

09/25/03 THU 16:44 [TX/RX NO 8214]

1591

1 Drs. Siskin and Welch, and Ms. Mendoza. Throughout the class certification argument, the
2 testimony of these witnesses on contested matters was thoroughly argued by both sides.

3 Recognizing the importance of the class certification issue, the Court heard four days of
4 oral argument. This extensive argument, with the opportunity for more than one attorney to
5 either respond or argue for each side, is not normally allowed on a motion. However, the Court
6 recognizes that class action certification is an important stage of any class action case, and it
7 therefore tried to make every allowance to allow the parties to argue their positions, and to
8 submit supplemental briefing and authority. For example, the Court allowed additional briefing
9 on the issue of CR 23(b)(2) certification for injunctive and declaratory relief.

10 The parties' comprehensive and complete discussion of the class certification issues, and
11 their efforts to address the Court's many questions, allowed the Court an ample opportunity to
12 become familiar with the claims, potential defenses, relevant facts, management of the case as a
13 class, application of substantive law to the relevant facts, and some of the potential witnesses and
14 their qualifications.

15 Class certification requires that all four requirements of CR 23(a), numerosity,
16 commonality, typicality, and adequacy be satisfied along with at least one of the three sections of
17 CR 23(b). The party proposing certification bears the burden of proving each element of the
18 certification requirements. Each will be considered in turn.

19 **CR 23(a) REQUIREMENTS**

20 **Numerosity**

21 Based upon the record before it, the Court finds that the numerosity requirement is
22 certainly met because there may be as many as 200,000 class members. Absent certification,
23 joinder is impracticable. The value of each potential Plaintiff's claims is sufficiently low to deter
24 many, if not most, of the potential class members from pursuing individual claims. Litigation of
25 multiple separate claims by even a fraction of the plaintiff class members would impose a

26

27

28 **CLASS CERTIFICATION ORDER - 5/15**

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
FIFTH FLOOR, JUSTICE BUILDING

1 hardship on the litigants and the Court. There was no serious dispute that the numerosity
2 requirement is satisfied.

3 **Commonality**

4 The Court finds that there are issues of law and fact common to the class. First, the
5 relevant language of the insurance policies at issue is materially identical, and the legal issues
6 arising from this common contract language therefore presents a common legal issue, whether
7 Farmers' full coverage casualty automobile insurance provision of the policy issued to Plaintiff
8 covers any reduction in value of a vehicle which has been involved in an accident. All members
9 of the proposed class suffer from the same allegedly wrongful conduct by Farmers in the
10 interpretation of the policy language.

11 Second, the Court finds that there is an underlying and overriding common issue of fact:
12 has each class member's vehicle suffered a reduction in value as a result of the vehicle having
13 been in an accident without consideration of repair related diminished value? The Court finds
14 that other common issues of fact exist, including, whether vehicles in the class can be returned to
15 their preaccident condition, and whether Farmers' business practices present a common and
16 systematic course of conduct designed to process physical damage claims so as to avoid
17 acknowledging or paying diminished value claims in first party insurance contracts.

18 Other issues of fact which may vary in degree are whether, and if so, how much, a
19 vehicle's value might have been affected by either the accident or by improvements resulting
20 from the repair process. Defendants argue that the possibility of such factual issues makes a
21 class action unmanageable or the identification of class members impossible or unduly
22 burdensome. The Court does not believe that Class certification will deprive Defendants of an
23 opportunity to present any defenses to asserted claims which might decrease the damages paid to
24 any particular Plaintiff. Moreover, differences in damages to individual class members is not a
25 basis for defeating class certification. I therefore find that the commonality requirement is
26 satisfied.

27

28 CLASS CERTIFICATION ORDER - 6/15

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
SUITE 200 1515 15TH AVENUE

09/25/03 THU 16:44 [TX/RX NO 8214]

1593

1 Typically

2 Defendants contest the typicality of Mr. Moeller, and therefore his ability to serve as a
3 class representative. They argue that he used his car for pizza delivery, a commercial use, and
4 that he refused to allow Farmers to see if his vehicle had been properly repaired after he filed a
5 claim for diminished value.

6 Mr. Moeller challenges the way Farmers handles claims for property damage and the
7 alleged fact that Farmers fails to pay inherent diminished value once a car has been in an
8 accident under a first party claim. Mr. Moeller's car was in an accident, and it suffered the
9 identical types of damage applicable to all class members' vehicles. He received payment under
10 his collision or comprehensive coverage for damages to his 1996 Honda within the class period,
11 and did not receive payment for diminished value. The Court finds that Moeller's claims are
12 typical.

13 The Court further finds that Mr. Moeller does not have a conflict with those insureds who
14 may have additional claims for such items as windshield repair, electrical damage, suspension
15 damage, or repair related diminished value. The Court finds that the typicality requirement of
16 CR 23(a) is met by Mr. Moeller.

17 Adequacy

18 The Court further finds that Mr. Moeller will fairly and adequately protect the interests of
19 the class. Even though it does not appear to be disputed that Plaintiff's counsel would be
20 adequate, in addition to Mr. Moeller's qualifications, the Court carefully scrutinized Plaintiff's
21 counsel.

22 The Court has independently considered the quality and experience of the proposed class
23 counsel that have appeared before it. Taking into consideration its own experience with
24 Plaintiff's Counsel over the course of the case, including the quality of their briefing and
25 argument on the law and the facts, the Court finds that they are knowledgeable and experienced
26 in this type of litigation.

27

28 CLASS CERTIFICATION ORDER - 7/15

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW

1 While there is no evidence in the record of class counsel's ability to absorb the cost in
 2 time and money of this litigation, it is clear that class counsel has already invested substantial
 3 effort, time and money in this and other class action suits related to the issues in this case.
 4 Furthermore, Plaintiff's counsel has retained experts, including Dr. Siskin, who have undertaken
 5 significant work (along with data gatherers in Texas to undertake the costly, complex, and
 6 lengthy project of gathering data to create a damage model). Plaintiff's Counsel's financial and
 7 legal resources appear to the Court to be more than adequate.

8 The elements of CR 23(a) have been satisfied.

9 **CR 23(b) REQUIREMENTS**

10 Plaintiffs have requested certification under both 23(b)(2) as to injunctive relief and
 11 23(b)(3) as to damages. Because 23(b)(2) had not been ^{discussed by judge} addressed in the parties' initial briefing,
 12 additional time was granted to both parties to brief this issue. The Court will address each part
 13 of the Rule in turn.

14 **CR 23(b)(2) Certification**

15 Actions or claims for classwide injunctive or declaratory relief are appropriate for (b)(2)
 16 certification where, as here, they involve uniform group remedies. Such relief may often be
 17 awarded without requiring a specific or time consuming inquiry into the varying circumstances
 18 and merits of each class member's individual case. Therefore, when CR 23(b)(2) applies, it may
 19 obviate the need for what may be relatively complex damage calculations under CR 23(b)(3).

20 For these reasons, proposed (b)(2) classes need not withstand a court's independent probe
 21 into the superiority of the class action over other available methods of adjudication or the degree
 22 to which common issues predominate over those affecting only individual class members. While
 23 granting CR 23(b)(2) class certification would seem an easier route to take here, Plaintiffs have
 24 argued that CR 23(b)(2) relief could potentially serve as the basis for the eventual awarding of,
 25 damages relief to each class member. It thus appears to this Court that in the facts of this case,
 26 monetary relief predominates, precluding certification under CR (b)(2).

1 This Court thus denies certification under CR 23(b)(2), finding that the Plaintiff's
 2 requested relief, as pled, is predominantly a claim for damages, not equitable relief. This
 3 opinion is based on both the late mentioned and unpled assertion of relief under CR 23(b)(2) and
 4 a rigorous analysis of the claim through the Court's hearing and weighing all of the evidence and
 5 argument.

6 **CR 23(b)(3) Certification**

7 In determining whether the prerequisites of CR 23(b)(3) are met, this Court is directed to
 8 determine whether common questions of fact or law predominate over questions affecting only
 9 individual members and whether a class action is superior to other available methods for the fair
 10 and efficient adjudication of the controversy. The following factors are pertinent to the Court's
 11 consideration of these two important issues: The interest of members of the class individually,
 12 controlling the prosecution or defense of separate actions; the extent and nature of any litigation
 13 already commenced by or against a member of the class; the desirability or undesirability of
 14 concentrating litigation in a particular forum; and the difficulty likely to be encountered in
 15 management of the proposed class action. After carefully considering each factor the Court finds
 16 as follows:

17 As to the first factor, Defendants assert that they have a due process interest in presenting
 18 defenses to individual claims on a case-by-case basis. Defendants argue that they cannot
 19 adequately protect their interests unless they can present all factual issues individually as to each
 20 class member at trial. Plaintiff argues that there is nothing in class treatment which would
 21 prevent the Defendants from presenting evidence on individual claims and defenses. Plaintiffs
 22 argue, however, that the best way for Plaintiffs to present their case (and for the Court to
 23 determine whether diminished value can and will be shown for class members) is to use common
 24 classwide evidence such as the model being developed by their expert Dr. Siskin based on
 25 information gathered at auto auctions and from Defendants' own files. Plaintiffs argue that this
 26 model, supported by other evidence, can be adjusted to take into account any defenses raised by
 27

28 CLASS CERTIFICATION ORDER - 9/15

LOWENBERG, LOPEZ & HANSEN, P.S.
 ATTORNEYS AT LAW
 20172 28th St. NW, Suite 200
 Minneapolis, MN 55425

09/25/03 THU 16:44 [TX/RX NO 8214]

1596

1 the Defendants, so that the jury can adjust any eventual class wide award to take into account
2 any relevant defenses raised by Defendants.

3 No other potential class members have come forward to advise the Court that they have
4 an interest in pursuing or controlling the prosecution of separate actions on their own behalf.
5 After close consideration and scrutiny of the desirability and claimed need to assert individual
6 defenses in each particular case, it is the Court's finding, based on the evidence and argument of
7 counsel, that in the course of identifying the particular class members and in evaluating their
8 particular cases, that the Defendants in this case will be able to present any relevant information
9 to the Court and jury in a classwide trial and that classwide treatment is therefore preferable.

10 Regarding the second factor, the Court is not aware of any other litigation already
11 commenced by or against a member of the proposed class. Therefore, this does not weigh for or
12 against class certification.

13 As to the third factor, this case is limited to Farmers insureds in the State of Washington
14 during the relevant period with claims within the class definition. The desirability or
15 undesirability of having this case in Pierce County as opposed to any other county is not argued
16 by either party, so it therefore does not weigh in favor of or against class certification by this
17 Court.

18 The final factor, the difficulty likely to be encountered in management of the class action
19 as proposed, has been heavily disputed. Defendant argues that each claim file or vehicle must be
20 reviewed or investigated and that information on the preaccident condition of each vehicle must
21 be known to determine the existence and amount of diminished value.

22 Defendants first argue that neither they, nor any of their archival resources, can produce
23 the critical records necessary to manage, gather, and synthesize the data necessary to adequately
24 identify the class members and determine if they are owed payment for inherent diminished
25 value. Defendant has identified 19 to 20 factors which its expert has testified are necessary in
26 order to properly evaluate whether diminished value exists. Plaintiff disagrees. The court finds,
27

28 CLASS CERTIFICATION ORDER - 10/15

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
SUITE 200 2000 1ST AVENUE
SEASIDE, CA 92083

1 however, that what factors do, or do not affect, or interact with diminished value is ultimately an
 2 empirical question to be resolved at trial. Defendants therefore argue that this case is not
 3 manageable because one cannot accurately identify the class members or whether they suffered
 4 damages without prohibitively expensive and time consuming efforts. Defendants assert that
 5 individual minitrials will be necessary and these minitrials will overwhelm any benefits of a
 6 class action.

7 The Court has seriously considered these arguments and has regarded the manageability
 8 of this case as a significant factor, if not the most significant factor, in reaching its decision.
 9 Neither the number of potential class members nor the purported difficulty in obtaining data on
 10 them defeat class certification unless such problems of management make a class action less fair
 11 and efficient than other available techniques. Here, the only conceivable method to adjudicate or
 12 resolve this case is through a class action, as the de minimis size of individual claims would
 13 leave policyholders without practical recourse, absent class treatment, to address the contract
 14 construction (legal) and damages (fact) issues.

15 Defendants argued, and attempted to present evidence, that the cost of the resources and
 16 labor required to identify members of the class would exceed several million dollars. Although
 17 the Court did not admit such evidence, the Court does not find Defendants' evidence competent
 18 or believable on this point. Plaintiff, however, has presented Exhibit 1, which shows the sources
 19 of information in Defendants' possession which can be used to ascertain class members and to
 20 provide the basis for a class damage calculation. Plaintiffs have also presented the Court with a
 21 preliminary plan of how to proceed to gather the data on vehicles and how to manage this
 22 litigation as a class action. Their plan evidences a keen understanding of the steps necessary to
 23 process claims, identify class members, analyze the data on the existence or amount of
 24 diminished value, make adjustments to the classwide damages for any defenses raised (and
 25 substantiated by Defendants), and then provide for notification and allocation of any damages
 26 awarded to the class after trial. Plaintiff's counsel have exhibited an understanding of the

27

28 CLASS CERTIFICATION ORDER - 11/15

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW

1 sources of data, cross checks on that data, supplemental sources of data, and the use of
2 computers to index and manipulate that data. This will expedite the retrieval, sorting, and
3 analysis of pertinent data for both the Plaintiffs and Defendants.

4 Defendants next argue that the Plaintiff proposes a fail safe class, one which would bind
5 the Defendants if Plaintiffs prevailed but which would not bind the class member if the case is
6 dismissed with no findings of damages. Defendants argue that they cannot achieve finality with
7 the proposed class definitions.

8 The proposed class definition must be precise, objective, presently ascertainable, and
9 must not depend on subjective criteria or the merits of the case or require extensive factual
10 inquiry to determine who is a class member. This standard is set out in *In re: Copper Antitrust*
11 *Lit.*, 196 F.R.D. 348 (W.D. Wis. 2000).

12 On these issues, the Court has carefully scrutinized the cases cited by Defendants, the
13 facts of those cases, and the arguments by both parties. The Court finds that the proposed class
14 does not rely on the mental state of any plaintiff and does not require the Court to determine that
15 inherent diminished value actually exists in order to identify the class members. Thus, the Court
16 will not need to make a decision regarding the merits of the Plaintiffs' claims in order to
17 determine class membership. Further, it should be noted that the Court need not, and has not,
18 determined the contract construction issue in order to certify the class. The elements of the
19 definition of this class are all ascertainable by reference to objective data.

20 Class members must be insured by Farmers under a full coverage casualty automobile
21 policy for the state of Washington. They must have received actual payment from Farmers for
22 comprehensive or collision damage from May 30, 1993, to today. They must not have received
23 any payment for diminished value. Their vehicle must have suffered damage totaling at least
24 \$1,000. The vehicle must not have been more than six years old at the time of the accident and
25 must not have had more than 90,000 miles on it at the time of the accident. The vehicle must
26 have suffered from structural, frame, damage and/or deformed sheet metal and/or required body

27

28 CLASS CERTIFICATION ORDER - 12/15

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW

09/25/03 THU 16:44 [TX/RX NO 8214]

1599

1 work or paint. None of these elements refers to any subjective factor for ascertaining whether an
2 insured is a member of the proposed class.

3 The Court therefore finds that any insured within this objective definition will be bound
4 by the decision in this case unless he opts out of the class.

5 Finally, there has been much argument between expert witnesses on the existence, or
6 nonexistence, of inherent diminished value. The methodology proposed by Dr. Siskin has been
7 challenged, as has the lack of existence of exact data, and the method proposes to use to gather
8 data on sales. Defendants also argue that under Washington law, ^{economic (B&D)} damages cannot be calculated.
9 These arguments, and others put forth by Defendants, ^{for the recovery of interest & attorney's fees} go to the merits of the Plaintiffs' claims. ^(B&D)

10 In allowing the presentation and argument on these points, the Court has gained
11 considerable insight to the case and now understands how this case will proceed as a class
12 action, what management it will require, and whether it can be accommodated by this Court.
13 These were vitally important matters for the Court to comprehend in making a determination
14 about whether a class action is a superior manageable way to address this case. This is the
15 central and key issue as far as the Court is concerned: whether or not the proposed class action
16 is practical, feasible, appropriate, and superior to litigate the concerns of both parties.
17 Considerations which entered into the Court's decision were articulated above, as well as the
18 economy of time for both the Court and the litigants, economy of expense for all concerned, and
19 whether a class action would promote a uniformity of decisions to accomplish equity and justice
20 for all involved.

21 After carefully and closely considering all of these factors, my decision is that a class
22 action is a superior, although not perfect means, for policyholders to pursue any claims they may
23 have for inherent diminished value against Farmers. The Court finds that such an action should
24 not, and will not, impede Farmers' ability to investigate particular class members claims, and
25 present evidence on individual claims supporting defenses unique to each claim and defend
26 against the nature and extent of damages, if any, in this Court.

27

28 CLASS CERTIFICATION ORDER - 13/15

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
11170 4th St. SE, SUITE 200, FARMERS

1 The class members are potentially numerous, with allegedly small claims for inherent
 2 diminished value, impractical for other means of fair and uniform resolution. Farmers and their
 3 insureds need clarity on this issue, which can only be achieved with efficiency and finality
 4 through a class action, with its economy of time, effort, and expense.

5 The Court therefore certifies the following class:

6 all persons who: (1) were insured pursuant to a casualty
 7 automobile insurance policy issued by Farmers for the state of
 8 Washington; (2) received payment under their collision or
 9 comprehensive coverages for damage to an insured automobile
 10 from May 30, 1993 to the date of class certification in this action;
 11 and (3) did not receive payment for inherent diminished value
 12 where: (a) the repair estimate including supplements totaled at
 13 least \$1,000, (b) the vehicle was no more than six years old (model
 14 year plus five years) and had less than 90,000 miles on it at the
 15 time of the accident, and (c) the vehicle suffered structural (frame)
 16 damage and/or deformed sheet metal and/or required body or paint
 17 work.

18 Excluded from the class are Defendants; their officers and
 19 directors; this Court and any member of the Court's immediate
 20 family; and those individuals whose vehicles were leased or total
 21 losses.

22 Mr. Mueller is appointed as a representative of the Class and Stephen M. Hansen of
 23 Lowenberg, Lopez & Hansen, P.S.; Elizabeth J. Cabraser, Morris A. Ratner, and Scott P. Nealey
 24 of Loeff, Cabraser, Helmann & Bernstein, LLP; Debra Hayes of Reich & Binstock; Mary N.
 25 Strimel of Cohen, Milstein, Hausfeld & Toll, P.L.L.C.; and Terrell W. Oxford of Susman
 26 Godfrey, LLP are appointed as Class Counsel.

27 IT IS SO ORDERED.

28 DONE IN OPEN COURT this 13th day of September, 2002.

151

 MARYWAVE VAN DEREN
 SUPERIOR COURT JUDGE

CLASS CERTIFICATION ORDER - 14/15

LOWENBERG, LOPEZ & HANSEN, P.S.
 ATTORNEYS AT LAW
 SUITE 400, POLIST BUILDING

09/25/03 THU 18:44 [TX/RX NO 8214]

1 Presented by:

2 LOWENBERG, LOPEZ & HANSEN, P.S.

3 

4 Stephen M. Hansen, WSBA #15642
5 Of Attorneys for Plaintiff

6 Copy Received, Approved for Entry;
7 Notice of Presentation Waived

8 GORDON & POLSCER, L.L.P.

9 

10 SCOTT A. JONSSON, WSBA#: 13820
11 Of Attorneys for Defendants

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CLASS CERTIFICATION ORDER - 15/15

LOWENBERG, LOPEZ & HANSEN, P.S.
ATTORNEYS AT LAW
SUITE 400, RELIST BUILDING
200 PATRICK AVENUE

09/25/03 THU 16:44 [TX/RX NO 8214]

1602

CERTIFICATE OF SERVICE BY MAIL

I certify that on April 14, 2010, I caused copies of the foregoing

PETITION FOR DISCRETIONARY REVIEW to be sent via email

(where indicated) and via U.S. Mail, first class, postage prepaid, to the

following counsel of record, at the following addresses:

Stephen M. Hansen
Lowenberg, Lopez & Hansen, P.S.
950 Pacific Avenue, Suite 450
Tacoma, WA 98402-4441

Kenneth W. Masters (via email and
U.S. mail)
Wiggins & Masters PLLC
241 Madison Avenue N
Bainbridge Island, WA 98110-1811

Elizabeth A. Cabraser
Morris A. Ratner
Scott P. Nealey
Lieff, Cabraser, Heimann &
Bernstein, LLP
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339

FILED
COURT OF APPEALS
DIVISION II
10 APR 14 PM 4:29
STATE OF WASHINGTON
BY *John D. Bowman*
DEPUTY
John D. Bowman, WSBA No. 11754