IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

RASHAD BAKER, RACHAEL LEONARD, and ZELMA STOVALL, on behalf of themselves and all others similarly situated, Plaintiffs, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	)	Case No. 4:19-cv-00014-CDL

MOTION FOR RECONSIDERATION
AND MEMORANDUM OF LAW IN SUPPORT

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COME NOW Plaintiffs pursuant to Local Rule 7.6 and move the Court to reconsider its Order denying class certification (ECF 34). Reconsideration should be granted where the movant demonstrates a clear error of law or fact (*Rhodes v. MacDonald*, 670 F.Supp.2d 1363, 1378 (M.D. Ga. 2009)), such as misunderstanding the nature of the claim at issue or misinterpreting evidence. *Chambers v. Boehringer Ingelheim Pharm.*, 2018 WL 847246, *2 (M.D. Ga. Feb. 13, 2018) (Land, J.) (granting reconsideration because the Court "did not understand [plaintiff] to be asserting such a claim when it issued its previous [] order"). Reconsideration is warranted because the Court misunderstood the claim Plaintiffs were seeking to certify, and such misunderstanding, coupled with the Court's misimpression that Richard Hixenbaugh's expert opinions were based on a small "sample," as opposed to his substantial experience and knowledge appraising the diminished value ("DV") of thousands of varied vehicles, led to the mistaken conclusion that the Rule 23 elements of commonality and predominance were lacking.

Pursuant to Georgia law, State Farm owes two duties to its automobile insureds in the context of DV – the duty to assess for DV and the duty to pay DV. *State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 508-09 (2001) (holding "State Farm is obligated to assess [DV] along with the elements of physical damage when a policyholder makes a general claim of loss" and, separately, that "State Farm is obligated to pay for [DV] when it occurs"). Plaintiffs sought to certify a claim based *solely* on State Farm's breach of the duty to assess for DV. *See* ECF 26, p. 2 ("certification . . . is warranted on [the] claim that State Farm has breached its contractual duty ***to assess***") (emphasis added). Indeed, Plaintiffs alleged that Defendant breached this duty to assess by applying an inherently flawed formula. ECF 26, pp. 16, 20, 22; ECF 33, pp. 1-3.

The Court, however, misunderstood the class claim to be based on a breach of State

Farm's duty ***to pay*** for DV: "The central issue in this action is whether State Farm breached its contractual obligation ***to pay*** [DV] by applying the 17(c) formula." Order, p. 11 (emphasis added); *also* pp. 8 (Plaintiffs contend they "were not ***fully paid*** for [DV]"), 13 (Plaintiffs allege State Farm "breached the contract by ***paying*** the policyholder less than the policy requires") (emphasis added). This misunderstanding led the Court to analyze whether a failure to pay claim satisfied the commonality and predominance requirements, rather than the failure to assess claim as to which Plaintiffs sought certification. Order, pp. 11-23. This mistake is significant because the common evidence needed to prove each claim is materially different.

To certify a failure to pay claim, the Court found that common evidence showing that the 17(c) formula caused each class member to be underpaid was necessary. After considering *some* of Plaintiffs' evidence, the Court found that this threshold was not met. Order, p. 21 ("the present record does not show that alleged flaws in the 17(c) formula injured all the proposed class members"). But different common evidence is relevant to a failure to assess. Indeed, Plaintiffs do *not* need to show that 17(c) invariably resulted in an underpayment of DV, but rather that the formula was so inherently flawed that the very application of it was a breach of the duty to assess. Indeed, when dealing with a failure to assess claim – as opposed to a failure to pay claim – ***it is not necessary to prove that DV exists***. *Thompson v. State Farm Fire and Cas. Co.*, 2016 WL 951537, *10 (M.D. Ga. Mar. 9, 2016) ("as *Mabry* makes clear, breach in the Plaintiffs' failure to assess claim is established by the failure to assess, not by [DV]").

After *Mabry*, it is undisputed that State Farm's policy obligates it to assess for DV. Moreover, it is undisputed that State Farm sought to fulfill this duty with respect to each class member by applying the 17(c) formula. The central liability question is thus whether State Farm failed to use an appropriate assessment methodology that comports with the duty of good faith

and fair dealing. There is substantial ***common*** evidence in the record that the 17(c) formula is so inherently flawed that it constitutes a breach of the duty to assess:

- Hixenbaugh Testimony – Mr. Hixenbaugh is an experienced automobile appraiser who for the last 16 years has been retained to provide DV appraisals for insurance companies (including State Farm) and private individuals. ECF 26-11, ¶¶ 24-33. During his career, he has conducted DV appraisals of *thousands* of vehicles "including virtually every make and model." ECF 26-11, ¶ 33. This DV appraisal experience includes "newer, more valuable vehicles or vehicles that have incurred significant repair damage (or both)" (ECF 26-13, ¶ 30), as well as "older, less expensive vehicles or vehicles with minor damage" (*id.* at ¶¶ 31-32). Given that the 17(c) formula is the most common formula used by insurance companies to assess DV, Mr. Hixenbaugh has seen it applied countless times. ECF 26-13, ¶ 18; ECF 31-3, pp. 98-99 (testifying his clients inform him what they have been offered as a result of the 17(c) formula). He has never seen the 17(c) formula produce an assessment that reasonably approximates a DV loss. ECF 26-11, ¶ 37. He has made substantial efforts to investigate why this is the case and, based on his knowledge and experience, discovered that three assumptions made by the formula are grossly inaccurate and are the root cause of its ineffectiveness. ECF 26-11, ¶¶ 63-79. He has interviewed personnel from every insurance company that uses the formula to understand the foundation for these assumptions and never received an informed response. ECF 26-11, ¶¶ 70-75. He has interviewed other appraisers, including Tim Rogers, who concur that 17(c) is not an appropriate assessment tool. ECF 26-13, ¶¶ 14, 18.

- Rogers Testimony – State Farm's expert Tim Rogers is an experienced appraiser that made no effort to defend the merit of the 17(c) formula; rather he testified he does not use the 17(c) assumptions at issue in his own practice (such as the "silly" 10% cap or double-deduction for mileage) and/or admitted they are not used by any respected appraiser and defy reality (100,000 mileage threshold). ECF 26-12, pp. 158-59, 178-79, 182-83, 246-48.

- State Farm Testimony – At the time the 17(c) formula was first proposed, State Farm claimed it had "evaluated" the 17(c) formula and found that it "do[es] not work." ECF 26-3, p. 9. According to State Farm, the formula "lack[s] foundation." *Id.* These findings were confirmed by evidence procured from State Farm. Indeed, State Farm's 30(b)(6) witness testified that, when Defendant retains an expert to appraise DV, they find that DV losses exceed 10 percent of pre-loss value "probably every time." ECF 26-7, pp. 101-02. State Farm has also admitted that the notion that vehicles over 100,000 miles have "no realistic market value" is inaccurate. ECF 26-22; ECF 26-7, p. 149.

- DV Appraisals Commissioned by State Farm vs. 17(c) Results in Class Data – Plaintiffs introduced evidence of 517 DV appraisals prepared by *experts hired by State Farm.* ECF 26-14. The disparity between the appraisals and the 17(c) results is staggering. State Farm's experts found DV was $0 in less than 1% of

> cases, while 17(c) assessed DV at $0 ***more than 50% of the time***. ECF 26-14, ¶¶ 12, 17. Meanwhile, the average DV loss appraised by experts was $3,237, ***while State Farm paid an average of $190.*** *Id.* at ¶¶ 12, 17.

This wealth of common evidence, coupled with the lack of any individualized evidence offered by State Farm – *such as a single solitary case where the 17(c) formula produced a reasonably accurate result* – was more than sufficient to show both commonality and predominance in the context of a failure to *assess* claim. Plaintiffs thus respectfully ask that the Court reconsider.

Even assuming common evidence showing that the 17(c) formula *invariably* resulted in a DV underpayment was necessary to establish commonality and predominance on a failure to assess claim, Plaintiffs introduced common evidence to this effect – the testimony of Richard Hixenbaugh. The Court's conclusion to the contrary is based on the misimpression that Mr. Hixenbaugh's opinions were based on a small "sample" comparing appraisals to 17(c) assessments for vehicles that the Court deemed not representative of the class based on year, make, model, repair value, and mileage. Order, pp. 14-20 ("to reach his opinion" Hixenbaugh compared DV appraisals to 17(c) assessments from a 75-vehicle sample). However, Mr. Hixenbaugh's opinion that the 17(c) formula's flaws cause it to under-assess DV 100% of the time ***was never based on any sample***. As he noted in his Rebuttal Report:

> Mr. Salve's understanding that my opinions are based on the claim data included in paragraph 82 of my initial report is inaccurate . . . . Had this claim information not been included . . . none of [my] opinions would have changed.

ECF 26-13, ¶ 23. Instead, Mr. Hixenbaugh's opinions were based on his own experience (and the knowledge he gained from that experience) appraising thousands of varied vehicles for DV (both for individuals and insurance companies), including "virtually every make and model" (ECF 26-11, ¶ 33), "newer, more valuable vehicles or vehicles that have incurred significant repair damage (or both)" (ECF 26-13, ¶ 30), as well as "older, less expensive vehicles or vehicles with minor damage" (*id.* at ¶¶ 30-36). All of this varied experience, including seeing how the

17(c) formula works and the results it produces compared to individual appraisals, led him to conclude that the "17(c) formula is incapable of accurately assessing [DV] and indeed under-assesses such losses 100% of the time."[1] ECF 26-11, ¶ 80. While the sample certainly provides additional evidence that the 17(c) formula does not work, it was not the basis for any of his opinions.[2] ECF 26-11, ¶¶ 81-82 (noting it was included "to illustrate" how his recommended tweaks to the formula produced better results). Because the Court's commonality/predominance conclusions are based on an analysis of the sample, reconsideration is warranted.

The Court acknowledged the flaws in the 17(c) formula but concluded they did not impact all proposed class members. Order, p. 21. Plaintiffs respectfully disagree but, at the very least, the Court should allow Plaintiffs to renew their motion with a narrowed class definition to ensure those injured by the formula can obtain the good faith assessment they bargained for. *Shin v. Cobb County Bd. of Educ.*, 248 F.3d 1061, 1065 (11th Cir. 2001) ("The district judge may review his certification order at any time and may consider redefined or more narrowly tailored classes or subclasses"). The Court acknowledged the potential success of such an effort. Order, p. 22 ("it may be possible in some cases to determine with common evidence which class members are injured and thus have standing").

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[1] The fact that 17(c) is inherently flawed is perhaps most obviously evidenced by its double deduction for mileage. Every single vehicle that receives a 17(c) assessment has its mileage considered twice – once to set the base value and once again to reduce (or eliminate) the assessment. This is entirely illogical and ***always*** results in an under-assessment.

[2] Notably, the sample was compiled based on information Mr. Hixenbaugh was able to locate in his files. ECF 26-13, ¶ 26. These are files where he has been retained to write a full appraisal after he has given the client a "range of what their likely [DV] loss is based on a quick analysis of the vehicle characteristics and repair estimate." *Id.* at ¶ 31. These are typically clients with newer, more valuable vehicles or cars that have incurred significant repairs, or both. *Id.* at ¶ 30. The files do not include cases where he performed the quick analysis for clients with older, less expensive vehicles or those with minor damage who do not have the financial incentive to hire him. *Id.* at ¶ 32. As Mr. Hixenbaugh noted, although such vehicles can sustain meaningful DV losses, they are not sufficient enough "to pay to hire an appraiser and pay a lawyer to take the dispute to court if the insurance company decides to stick to the 17(c) assessment." *Id.* at ¶ 30.

DATED this 14th day of September, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of September, 2021, electronically filed the foregoing **Motion for Reconsideration and Memorandum of Law in Support** with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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