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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
1984CV00977-BLS2

MICHELLE PUOPOLO, VICTOR PAGAN, AND JESSICA NOHMY,
ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

v.

COMMERCE INSURANCE COMPANY

NOTICE SENT
05.18.21
M.M.
B.A.L.
C.T.M.
J.G.V.
D.V.
L.F.B.
K.M.T.
J.P.G.
L.M.S.
F.M.M.Y. ay.
M.C.F.
J.R.Y.
M/M.
K.J.M.
H.B.S.
B.J.M.
no

MEMORANDUM AND ORDERS ON DEFENDANT'S MOTION TO DECERTIFY THE CLASS AND CROSS-MOTIONS FOR SUMMARY JUDGMENT

The three named plaintiffs each owned a motor vehicle that was insured by Commerce Insurance Company and then damaged in a collision. They each had their vehicle towed to a repair shop that was not a "referral shop," and thereby agreed to pay higher storage charges than Commerce has negotiated with shops in its referral network. Commerce declared each vehicle to be a total loss and offered to pay the actual cash value ("ACV") in exchange for taking title to the vehicle, as provided in the standard Massachusetts automobile insurance policy. Plaintiffs' repair shops would not release the vehicles until they were paid in full for all storage charges agreed to by each plaintiff. So Commerce paid the outstanding storage charges and deducted from each ACV payout the amount by which these storage charges exceeded a reasonable rate, or some smaller amount that only partly covered the excess storage charges owed by the plaintiffs but paid by Commerce.

Plaintiffs contend that Commerce violated the standard policy and committed an unfair trade practice in violation of G.L. c. 93A by deducting an amount by which storage charges exceeded reasonable levels. Before discovery, the Court certified a plaintiff class.[1] Discovery is now complete.

The Court will **allow in part** Commerce's motion to decertify the class, with respect to the contract claim in Count I and the G.L. c. 93A claim in Count II. The breach of contract claim cannot be resolved on a class basis because liability turns on whether each class member agreed to Commerce deducting

[1] The class is "[a]ll persons who made a claim or claims under the Limited Collision, Collision or Comprehensive provisions of their automobile policy with Commerce and whose claim payments were reduced by any amount Commerce contends it paid to the storage facility in relation to the claim."

unreasonable storage charges from its ACV payout, such that their claim is barred by an accord and satisfaction. Class certification is inappropriate under G.L. c. 93A with respect to the claim that Commerce unfairly reduced insurance payouts to offset its payment of unreasonable storage charges that an insured voluntarily incurred because, for much the same reasons, the class members are not similarly situated and did not suffer similar injuries.

The Court will **allow** Commerce's motion for summary judgment as to all claims because (i) Commerce had no contractual obligation to pay storage fees that exceed reasonable levels and, having paid the entire storage charge agreed to by its insured, was entitled to recoup the excess above reasonable levels, (ii) it is not an unfair trade practice for Commerce, under these circumstances, to pay a non-referral shop the storage fee agreed to by a policy holder and then pay the insured the vehicle's actual cash value less a deduction equal to the amount by show that storage fee exceeds the highest reasonable amount that Commerce has negotiated with its referral shops, (iii) Commerce did not violate applicable performance standards, and (iv) the various assertions of unfair claims handling cannot succeed because Commerce acted in a manner consistent with the terms of the standard Massachusetts automobile insurance policy. The Court will therefore **deny** Plaintiffs' cross-motion for partial summary judgment on the claims for breach of contract and declaratory judgment. It will order the entry of judgment dismissing the claims for monetary relief and declaring the rights of the parties.

1. **Decertification of Class.** Although the Court previously certified a plaintiff class, it is now convinced that liability cannot be decided on a class basis because Commerce's "accord and satisfaction" defense to the breach of contract claim must be resolved individually as to each class member, and the named plaintiffs cannot show that all members of the class are similarly situated and suffered similar injuries with respect to the claimed violations of G.L. c. 93A.

The Court will therefore exercise its discretion to decertify the class. "A judge has broad discretion to certify or decertify a class." *Salvas* v. *Wal-Mart Stores, Inc.*, 452 Mass. 337, 361 (2008). A decision to certify a class "is not immutable;" if it becomes apparent "at any time" that class certification is not appropriate, then "class status may be withdrawn or appropriately modified." *Aspinall* v. *Philip Morris Cos., Inc.*, 442 Mass. 381, 389 n.22 (2004), quoting *School Comm. of Brockton* v. *Massachusetts Comm'n Against Discrim.*, 423 Mass. 7, 14 n.12 (1996).

1.1. **Contract Claim.** Class certification is not appropriate for common law claims for breach of contract if the questions of law or fact common to all class members do not "predominate over any questions affecting only individual members," or if a class action is not "superior to other available methods for the fair and efficient adjudication of the controversy." See Mass. R. Civ. P. 23(b). Where the issue of liability requires individualized proof and cannot be decided on a class wide basis, common issues are unlikely to predominate over individual ones, a class action is unlikely to be superior to individual adjudication of claims, and denial of class certification—or decertification of an existing class—is therefore appropriate. See *Fletcher* v. *Cape Cod Gas Co.*, 394 Mass. 595, 603–604 (1985).

Commerce has shown that, when it determines that a damaged vehicle is a total loss, it tells the insured what ACV it will pay as compensation and, if the vehicle is being stored at a non-referral shop, what amount Commerce will deduct to cover excess storage fees. It has also shown that in many and perhaps most cases, the insured agrees to settle their claim on this basis. The sample case files provided by Commerce bear this out, except they also shown that Michelle Puopolo did not agree to Commerce's proposed deduction for storage charges. These case files show that:

- **Jessica Nohmy**'s vehicle was damaged in January 2015, and Commerce deemed it to be a total loss five days later. Commerce offered to pay Nohmy an ACV of $13,668, with a deduction for excess storage charges and with Commerce taking the vehicle. Nohmy accepted the offer and received the payment.
- **Michelle Puopolo**'s vehicle was damaged in July 2017. At first Commerce offered to pay an ACV of $6,916.17, with a deduction for excess storage charges and with Commerce taking the vehicle. Then Attorney Yasi began negotiating on Puopolo's behalf. Commerce then increased its offer to an ACV of $8,121.67, and reduced the storage charge deduction from $970 to $485. Puopolo said she would accept the higher ACV amount, but objected to any storage fee deduction. Commerce paid that amount, deducting half the excess storage fee over Puopolo's objection.
- **Victor Pagan**'s vehicle was damaged in October 2019. Four days later Commerce told Pagan that the vehicle was a total loss. It noted that Pagan was accumulating storage charges of $95 per day, and offered

to move the vehicle at its cost to a secure facility to stop these charges. Pagan did not authorize the transfer. Commerce offered to pay Pagan an ACV of $3,255.50 plus sales tax, with a deduction for excess storage charges and with Commerce taking the vehicle. Pagan did not accept at first; some days later Commerce informed Pagan that the storage deduction was up to $960. Pagan then accepted the settlement offer, with that deduction, and received the payment.

- An unidentified insured submitted **Claim #KYVA83** in February 2016. Commerce deemed the vehicle to be a total loss. The insured objected to any deduction for storage fees. Commerce offered to pay an ACV of $7,900.54 and to reduce the storage deduction from $1,000 to $500. The insured accepted the settlement offer, with that deduction, and received the payment.

Class members cannot sue for breach of contract if (like Nohmy, Pagan, and the insured on Claim #KYVA83) they willingly stored their vehicles at a non-referral shop that charges excessive storage fees, agreed with Commerce that their vehicle was a total loss, and knowingly accepted a payment based on the vehicle's ACV with a deduction for part or all of the excess storage fees that Commerce paid in order to get the shop to relinquish its lien on the vehicle. Such insureds accepted an accord and satisfaction that operates as a complete defense to their contract claim under the insurance policy.

"The defense of accord and satisfaction is premised on the principle that '[i]f a creditor, having an unliquidated or disputed claim against his debtor, accepts a sum smaller than the amount claimed in satisfaction of the claim, he cannot afterwards maintain an action for the unpaid balance of his original claim.' " *Cuddy* v. *A & E Mechanical, Inc.*, 53 Mass. App. Ct. 901, 902 (2001) (rescript), quoting *Chamberlain* v. *Barrows*, 282 Mass. 295, 299 (1933). "The defense of accord and satisfaction may be used to defeat a claim for breach of contract if the defendant demonstrates: (1) an accord or settlement of the disputed claim, and (2) satisfaction, i.e. performance of the settlement agreement." *Murray* v. *M.Z.O. Architectural Grp.*, Middlesex Sup. Ct. civ. action no. 08-2753, 2009 WL 4282125, at *2, 26 Mass. L. Rptr. 282 (Mass. Super. Sept. 15, 2009) (Billings, J.); accord *Sherman* v. *Sidman*, 300 Mass. 102, 106 (1938).

Since the issue of a possible accord and satisfaction will have to be analyzed and litigated separately for each class member, the claim for breach of contract is not amenable to resolution on a class basis. For this claim, the common

questions of law or fact do not predominate over the accord and satisfaction issue that affects each class member in different ways based on individual facts, and a class action will not be more efficient than individual adjudication of each class member's potential claim.

1.2. **Chapter 93A Claim.** "To bring a class action under c. 93A, the plaintiff must show that he seeks relief for an unfair or deceptive act or practice, that the act or practice 'caused similar injury to numerous other persons similarly situated,' and that he would 'adequately and fairly represent[ ]' such persons." *Morgan* v. *Massachusetts Homeland Ins. Co.*, 91 Mass. App. Ct. 1, 5 (2017), quoting G.L. c. 93A, § 9(2). Thus, class certification is inappropriate where the class members were not subjected to similar unfair or deceptive conduct and the alleged misconduct did not cause similar injuries. See *Kwaak* v. *Pfizer*, 71 Mass. App. Ct. 293, 300–302 (2008) (vacating class certification).

It is evident from the four claims files summarized above that the class members are not similarly situated with respect to the alleged unfair trade practices by Commerce. Some insureds, like Ms. Nohmy, promptly released their vehicle to Commerce and stopped incurring storage charges after learning that their vehicle was a total loss. Others, like Mr. Pagan, Ms. Puopolo, and the insured on Claim #KYVA83, kept their vehicle in storage at a non-referral shop for many weeks after receiving an ACV offer from Commerce, and in some cases after learning that the storage charge would have to be paid and would not be covered—or not be covered in full—by Commerce.

Whether any insured could show that Commerce acted unfairly toward them in violation of c. 93A by reducing its total payout (the claim in Count II) will turn on the particular circumstances in which insureds accrued and were legally responsible for unreasonable storage charges that had to be paid before the insured could release their vehicle to Commerce in exchange for an ACV payout.

2. **Summary Judgment.**

2.1. **Contract Claim.** Commerce is entitled to judgment in its favor as a matter of law on the claim for breach of contract.

The Plaintiffs' vehicles were deemed to be a total loss, meaning that the cost to repair the vehicles exceeded their pre-collision actual cash value. Under these circumstances, Commerce had a contractual obligation to pay its insured the actual cash value of the vehicle before it was damaged (in exchange for

receiving possession of and title to the vehicle) plus the reasonable cost to store the vehicle in the interim.[2]

Plaintiffs each had their vehicle towed to a non-referral shop after it was damaged, and as result agreed and were bound to pay storage charges that substantially exceeded the reasonable levels Commerce had negotiated with its referral shops. And each Plaintiff agreed to accept Commerce's final estimate of their vehicle's actual cash value to settle their claim, and let Commerce take title to and possession of the vehicle, as it is entitled to do under the policy.

But none of the Plaintiffs made any arrangement to pay the storage fees they owed. Until the repair shop was paid, it had a lien on the vehicle and would not release it until it was paid in full.

Under these circumstances, it was reasonable for Commerce to pay the storage fees, and then pay its insured the vehicle's ACV less a deduction equal to (or less then) the amount by which the actual storage charge exceeded reasonable levels.

Commerce did not commit any breach of contract by doing so. Commerce made all the payments required under its policy. And it had an express contractual right to take title to the vehicle upon payment of the ACV. Plaintiffs could have paid the storage charges themselves, but instead left it Commerce to do so. Commerce was therefore entitled to set off storage fees it paid that were in excess of amounts covered under the standard policy against the ACV payout. Plaintiffs have not identified any policy provision that Commerce breached by doing so.

2.2. Chapter 93A Claims. Commerce is also entitled to judgment in its favor as a matter of law on all of Plaintiffs' claims under G.L. c. 93A.

Count II asserts that Commerce acted unfairly by deducting excessive storage charges, or a portion of them, from ACV payouts on totaled vehicles. This claim fails as a matter of law for the reasons discussed above. Where an insured brings a damaged vehicle to a non-referral shop, thereby agrees to pay storage

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[2] The 2016 standard automobile insurance policy expressly provides that Commerce will pay reasonable storage costs. The 2008 policy provides, at page 34, that Commerce will pay for any reasonable expenses incurred in protecting the automobile from further damage or loss. Commerce's Rule 30(b)(6) designee conceded that Commerce was obligated to, and routinely did, pay reasonable storage charges under that provision.

charges that exceed reasonable levels, then accepts an ACV payout for a totaled vehicle in exchange for giving Commerce possession of and title to the vehicle, yet fails to pay outstanding storage charges, there is nothing unfair or deceptive about Commerce paying those charges and deducting the amount by which they exceed reasonable levels from the ACV payout.

Count III asserts that Commerce violated performance standards established by the Commonwealth Automobile Reinsures to control storage charges. This claim fails as a matter of law because the relevant CAR standards only required Commerce to have appropriate plans, and the summary judgment record establishes that Commerce did so. The relevant CAR standards provide that Commerce and similar insurers:

- "must have a plan to ensure that non-regulated towing and storage charges are reasonable, or to resist and reduce said charges if unreasonable;" and
- "must have a plan to control storage costs including the prompt disposition of salvage."

Commerce has and implements at least two plans that satisfy these CAR standards. Under its direct payment plan, Commerce has established a statewide network of referral shops that do not impose unreasonable storage charges and may be used by insureds. In addition, Commerce has an "early tow program" under which it offers to tow and store an insureds total loss vehicle at Commerce's expense while resolving a total loss claim. Nothing in the CAR regulations requires Commerce to challenge, resist, or reduce unreasonable storage charges imposed by non-referral repair shops chosen by insureds. Nor could they. Commerce does not control such shops and has no contractual relationship with them.

Counts IV through VII assert that Commerce violated various provisions of G.L. c. 176D, and thereby committed unfair trade practices in violation of G.L. c. 93A, by setting off its payment of excessive storage charges on its insured behalf against an ACV payment for a totaled vehicle. Plaintiffs concede that these claims fail as a matter of law if Commerce did not breach the policy terms by making such a setoff. To use Plaintiffs' words:

> Whether Plaintiffs' claims for violations [of] c. 176D, § 3(9) should survive, is wholly dependent upon this court's ruling with respect to the disputes concerning the underlying claims practices. If those

practices are found to be lawful, of course, the c. 176D claims fail as a matter of law.

As discussed above, Commerce's claims practices in setting off excessive storage charges against ACV payouts were and are lawful. So the claims based on an alleged violation of c. 176D all fail as a matter of law.

ORDERS

Defendant's motion to decertify the class is **allowed in part** as to Counts II and III. Defendant's motion for summary judgment is **allowed** as to all claims. Plaintiffs' motion for partial summary judgment is **denied.**

Final judgment shall enter dismissing counts I through VII with prejudice, ordering that the three named Plaintiffs shall recover nothing and that the other Plaintiff Class Members shall recover nothing on Counts III through VII, and declaring that:

- where the owner of an automobile insured in Massachusetts by Commerce Insurance Company entrusts their damaged vehicle to a non-referral repair shop, and thereby agrees to pay storage fees at the rate charged by that shop;
- Commerce Insurance Company declares the vehicle to be a total loss, offers to pay the insured the actual cash value of the vehicle, and exercises its contractual right under the standard Massachusetts automobile insurance policy to take title to the vehicle; and
- the repair shop refuses to release the vehicle until it is paid the full storage charge that was agreed to by the insured;
- then Commerce Insurance Company may, consistent with the terms of the standard policy and Massachusetts law, pay the full storage charge agreed to by the insured, take possession of and title to the damaged vehicle, and deduct from its actual cash value payment to the insured the difference between (i) a reasonable storage charge for the time the vehicle was at the non-referral repair shop, and (ii) the excessive storage charge actually imposed by the shop.

Kenneth W. Salinger
Justice of the Superior Court

13 May 2021