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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
1784CV02089-BLS2
1884CV01627-BLS2

JARRET MCGILLOWAY AND LINDA ESTRELLA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

v.

SAFETY INSURANCE COMPANY

ADAM ERCOLINI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED

v.

THE COMMERCE INSURANCE COMPANY

DECISION AND ORDER DENYING MOTIONS FOR CLASS CERTIFICATION

Plaintiffs seek class certification for their claims that Safety Insurance Company and the Commerce Insurance Company committed breaches of contract, and also engaged in an unfair business and insurance settlement practices, by not paying every class member for lost resale value that their motor vehicle allegedly suffered after being damaged in a collision and then fully repaired.

The kind of loss that plaintiffs seek to recover is known as "inherent diminished value" or "IDV." This term refers to "the concept that a vehicle's fair market value may be less following a collision and repairs;" "it equals the difference between the resale market value of a motor vehicle immediately before a collision and the vehicle's market value after a collision and subsequent repairs." *McGilloway* v. *Safety Ins. Co.*, 488 Mass. 610, 611 n.4 (2021).

The Court finds that individualized inquiry would be required for each member of the proposed classes to determine whether their damaged vehicle suffered any uncompensated IDV loss, and thus to determine whether Safety or Commerce is liable to that class member for breach of contract or for violating G.L. c. 93A and G.L. c. 176D. In the exercise of its discretion, the Court will therefore **deny** the motions for class certification.

1. **Background**. Each plaintiff owned an automobile that was damaged in a collision with a vehicle owned or operated by someone who was insured by Safety or Commerce. These insurers allowed plaintiffs' claims for third-party

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collision damage,[1] and paid to repair plaintiffs' vehicles and restore them to their prior condition, but did not pay for alleged loss of resale value.

1.1. **Prior SJC Decision**. Earlier in these proceedings, the Supreme Judicial Court determined that the 2008 standard Massachusetts automobile insurance policy required insurers to pay third-party collision damage claims "for IDV to vehicles that are damaged and subsequently repaired, provided that the claimant establishes both (1) that his or her vehicle suffered IDV, and (2) the amount of IDV damages owed to him or her." *McGilloway*, 488 Mass. at 611. "In short, if a third-party claimant's vehicle suffers IDV even after it is fully repaired, then under part 4 of the standard policy, the insurer may be liable to the claimant for IDV damages so that he or she may be 'made whole' once again." *Id.* at 614–615.

The SJC made clear it was not suggesting "that every automobile that is involved in a collision and is subsequently repaired has suffered an IDV," explaining that "individualized proof is required to demonstrate that a given automobile has sustained some form of diminished value due to a collision or vehicular accident, even after repairs are made." *Id.* at 617–618. The SJC emphasized this point as follows:

> Specifically, a plaintiff must establish (1) that his or her vehicle has suffered IDV damages, and (2) the amount of IDV damages at issue. Here, a material dispute still exists regarding whether any of the plaintiffs' vehicles have suffered IDV due to a collision and, if so, whether and in what amount such damage can be quantified; as just stated, each plaintiff has the burden of proof on these issues.

Id. at 618.

In addition, the SJC affirmed the Court's grant of summary judgment in defendants' favor on plaintiffs' original claims under G.L. c. 93A because there was no evidence that Safety or Commerce had acted in bad faith or with ulterior motives, and both insurers relied on a "plausible, although ultimately incorrect, interpretation of its policy." *McGilloway*, 488 Mass. at 618, quoting *Boston*

[1] This case does not involve first-party collision damage claims, because the plaintiffs are not seeking compensation from their own insurance provider. Instead, it concerns third-party collision damage claims, because the plaintiffs and putative class members seek compensation from the company that insured someone else or someone else's vehicle. See *McGilloway*, 488 Mass. at 616 n.11.

Symphony Orchestra, Inc. v. *Commercial Union Ins. Co.*, 406 Mass. 7, 14 (1989). The SJC remanded these cases for further proceedings consistent with its decision.

1.2. **New 93A Claims**. After remand from the SJC, plaintiffs served new demand letters on Safety and Commerce, asking them to pay IDV damages to every member of the proposed classes. Safety and Commerce both refused to do so. Plaintiffs then amended their complaints to assert new claims under G.L. c. 93A, alleging that Safety's and Commerce's refusal to offer a class-wide settlement of plaintiffs' IDV claims constituted an unfair insurance settlement practice and an unfair business practice.[2] Thereafter, Safety and Commerce sought judgment on the pleadings in their favor, but Judge Ricciuti for the most part denied those motion.

1.3. **Class Certification Motions**. The plaintiffs have now moved for class certification on their claims for breach of contract and for violation of G.L. c. 93A. They filed separate motions in each of these consolidated cases, seeking certification of one class with claims against Safety and a separate class with claims against Commerce. The proposed class definitions for each case are as follows: would include:

- All third-party collision damage claimants who suffered property damage as a result of a Safety or Commerce insured or a Safety or Commerce insured vehicle driver, where;
  - Safety or Commerce determined that its insured, or its insured vehicle driver, was liable for the property damage to the claimant's vehicle;
  - Safety or Commerce has already paid the third-party property damage claim, either to the claimant, the repair shop, subrogating insurer, or other person or entity;
  - the claimant's vehicle suffered at least $500 in damage as a result of the collision; and
  - Safety or Commerce has not paid IDV damages associated with the respective loss;

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2 Plaintiffs' allegations that the defendant insurers engaged in unfair claims settlement practices in violation of G.L. c. 176D give rise to an unfair business practices claim under c. 93A; claims may not be brought directly under c. 176D. See, e.g., *Adams* v. *Liberty Mut. Ins. Co.*, 60 Mass. App. Ct. 55, 63 n.14 (2003).

- who do not presently have a separate civil action pending against Safety or Commerce "regarding the subject dispute (excepting the Plaintiffs and Putative Class Members) and/or vehicles owned by corporations);"
- whose loss occurred no more than six years before the particular civil action was filed (June 3, 2011, for the *McGilloway* claims against Safety, and December 11, 2011, for the *Ercolini* claims against Commerce); and
- as to whom, at the time of the collision, the Safety or Commerce insured or insured vehicle driver was insured under the 2008 standard Massachusetts automobile insurance policy, not the subsequent 2016 standard policy form.[3]

2. **Standards for Class Certification**. A judge has broad discretion to grant or deny class certification, whether it is sought under Mass. R. Civ. P. Rule 23 with respect to a common-law cause of action, or under G.L. c. 93A, § 9(2), as to a statutory claim that the defendant engaged in unfair or deceptive business practices. See *Salvas* v. *Wal-Mart Stores, Inc.*, 452 Mass. 337, 361 (2008) (Rule 23); *Moelis* v. *Berkshire Life Inc. Co.*, 451 Mass. 483, 489 (2008) (c. 93A).

To obtain certification of a class with respect to their breach of contract claims, plaintiffs must demonstrate that "(1) the class is so numerous that joinder of all members is impracticable" [numerosity], "(2) there are questions of law or fact common to the class" [commonality], "(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class" [typicality], and "(4) the representative parties will fairly and adequately protect the interests of the class" [adequacy of representation]. See Mass. R. Civ. P. 23(a). If these requirements are met, plaintiffs must also show "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members," [predominance] and "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy" [superiority]. See Mass. R. Civ. P. 23(b).

Certification of a class action with respect to claims under G.L. c. 93A may be appropriate if the plaintiffs can show that they are seeking "relief for an unfair or deceptive act or practice," and "that the act or practice 'caused similar injury

[3] Plaintiffs added the last two elements of the proposed class definition during oral argument on their motions for class certification.

to numerous other persons similarly situated.' " *Morgan* v. *Massachusetts Homeland Ins. Co.*, 91 Mass. App. Ct. 1, 5 (2017), quoting G.L. c. 93A, § 9(2). In addition, § 9(2) also "requires satisfaction of the same elements of numerosity, commonality, typicality, and adequacy of representation as are required by Mass. R. Civ. P. 23(a)." *Moelis*, 451 Mass. at 489. "Unlike rule 23, however, § 9(2) does not require that common issues predominate over individual ones, or that a class action be superior to other methods of litigation." *Id.* at 489-490. A court nonetheless "has discretion to consider issues of predominance and superiority" in deciding whether to certify a class claim under c. 93A. *Id.* at 490.

In deciding whether class certification is appropriate for a claim asserted under c. 93A, "a judge must bear in mind the 'pressing need for an effective private remedy [for consumers] and that traditional technicalities are not to be read into the statute in such a way as to impede the accomplishment of substantial justice.' " *Bellermann* v. *Fitchburg Gas & Elec. Light Co.*, 470 Mass. 43, 52–53 (2014) ("*Bellermann I*") (cleaned up), quoting *Aspinall* v. *Philip Morris Cos. Inc.*, 442 Mass. 381, 391–392 (2004). "The right to a class action in a consumer protection case is of particular importance where, as here, aggregation of small claims is likely the only realistic option for pursuing a claim." *Feeney* v. *Dell Inc.*, 454 Mass. 192, 202 (2009).

Nonetheless, a judge may deny class certification as to consumer claims under c. 93A where the standards for certification are not met. See, e.g., *Bellerman I*, *supra*, at 54–59 (affirming denial of class certification).

"The plaintiff must 'provide information sufficient to enable the motion judge to form a reasonable judgment that the class meets the relevant requirements.' " *Morgan*, 91 Mass. App. Ct. at 5, quoting *Bellermann I*, 470 Mass. at 52. However, "neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies the Rule." *Salvas*, 452 Mass. at 363, quoting *Weld* v. *Glaxo Wellcome Inc.*, 434 Mass. 81, 87 (2001).

3. **Findings and Analysis**. The Court finds that the proposed classes would satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation. As for numerosity, the proposed class of plaintiffs with claims against Safety would have at least 26,000 members, and the class

asserting claims against Commerce would have roughly 470,000 members.[4] As for commonality and typicality, all putative class members would assert the same theories of liability and seek the same general kind of damages. And as for adequacy of representation, the interests of the named plaintiffs are aligned with those of the other putative class members, and plaintiff's counsel is well qualified to conduct the litigation on behalf of the proposed class members.

The Court finds, however, that the proposed classes would not meet the requirements under Rule 23 for predominance and superiority or the requirements under G.L. c. 93A, § 9(2), that class members have suffered similar injuries. And it also concludes that the failure to show predominance and superiority further weigh against certifying classes as to the c. 93A claims.

3.1. **Need for Individualized Determination of Liability**. The Court finds that individualized proof, analysis, and findings would be required to determine whether any putative class member's vehicle suffered some amount of IDV and, if so, how much. It credits the sworn testimony by Commerce's valuation expert, Philip Ibrahim, that if a vehicle is involved in a collision, suffers damage, and then is fully repaired, determining whether the vehicle's resale market value is less than it would have been immediately before the collision requires detailed and individualized analysis of many factors, including:

- the nature and severity of the damage and the quality of the repairs;
- whether the vehicle had a prior accident history;
- in what manner the vehicle is to be sold after being repaired (e.g., private sale, retail sale, trade-in);

[4] Safety contends that the proposed *McGilloway* class is impermissible because it would include people who do not have a valid claim against Safety, that the Court should only consider a class definition limited to people with winning claims for unpaid IDV, and that if redefined in this manner the proposed class would not satisfy the numerosity requirement. This argument misses the mark. A class that "is defined so that whether a person qualifies as a member depends on whether the person has a valid claim" is an impermissible "fail-safe" class. *Gammella* v. *P.F. Chang's China Bistro, Inc.*, 482 Mass. 1, 15 n.18 (2019), quoting *McCaster* v. *Darden Restaurants, Inc.*, 845 F.3d 794, 799 (7th Cir. 2017). "A fail-safe class is impermissible because 'a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.' " *Id.*, quoting *McCaster, supra*. It is reversible error to certify a class that excludes all potential claimants as to whom the defendant is not liable. *Gammella, supra*.

- the general class of vehicle (e.g., inexpensive sedans, minivans, high-end luxury vehicles, etc.); and
- the market segment of buyer involved in any subsequent sale.

The Court also credits Ibrahim's testimony that many vehicles that are damaged in a collision and then are fully-repaired do not suffer any IDV, but instead are worth just as much and sometimes even more after being repaired than they were worth before the collision. As a particular example, the Court credits Mr. Ibrahim's specific opinion that after Mr. Ercolini's 2010 Honda Accord was damaged in a collision and then repaired it was worth at least the same as, if not more than, it was worth immediately before the collision.

Plaintiffs conceded during oral argument that many class members may not have suffered IDV. That is consistent with Ercolini's admission (in response to a request for admission) that "not every vehicle that is involved in an accident and is subsequently repaired has incurred inherent diminished value."

The Court does not credit the unexplained opinion of plaintiffs' expert, Paul Amoruso, that any IDV damages can be determined using nothing but a standard vehicle valuation guide (like the one published by the National Automobile Dealers Association) and the damage appraisal report for each vehicle.[5] Instead, as discussed above, the Court credit's Mr. Ibrahim's testimony about the many additional factors that would have to be considered on an individual basis to determine whether any damaged and repaired vehicle suffered IDV and, if so, to what extent.

But, even if Mr. Amoruso were correct in suggesting that each IDV analysis could be much simpler than Mr. Ibrahim describes, the Court finds that would not change the fact that liability cannot be determined on a class-wide basis and instead would have to be decided individually for the tens of thousands or hundreds of thousands of members of each proposed class.

In sum, the Court finds that the evidence presented in connection with the class certification motions confirms that, as the SJC noted earlier in this case, "individualized proof is required to demonstrate that a given automobile has

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[5] The Court agrees with Safety that it is not bound by the deposition testimony of several of its claims adjusters who were not designated as representing Safety under Mass. R. Civ. P. 30(b)(6) and who were not officers, directors, or managing agents of Safety. *Gleason* v. *Source Perrier, S.A.*, 28 Mass. App. Ct. 561, 568–569 (1990).

sustained some form of diminished value due to a collision or vehicular accident, even after repairs are made." *McGilloway*, 488 Mass. at 617–618.

3.2. **Individual Questions Predominate**. Based on these findings, the Court concludes, in the exercise of its broad discretion, that class certification is not appropriate in either of these cases.

Because the issue of liability requires individualized proof and cannot be decided on a class wide basis, the Court finds and concludes that common issues do not predominate over individual ones, a class action is not superior to individual adjudication of claims, and denial of class certification is therefore appropriate. See *Fletcher*, 394 Mass. at 603–604 (affirming denial of class certification); accord *Moelis*, 451 Mass. at 490 (affirming denial of class certification for c. 93A claim because individualized inquiry was needed to resolve statute of limitations defense).

Similarly, because individualized inquiry would be needed to determine which class members suffered injury as a result of Safety's or Commerce's failure to compensate them for IDV, class certification is inappropriate under c. 93A for the further reason that not all class members were subjected to similar unfair or deceptive conduct and suffered similar injuries. See *Kwaak* v. *Pfizer*, 71 Mass. App. Ct. 293, 300–302 (2008) (vacating class certification). Class certification under c. 93A is not appropriate where, as here, many members of the proposed class may have suffered no injury at all. See *Bellerman I*, 470 Mass. at 54–59 (affirming denial of class certification); *Morgan*, 91 Mass. App. Ct. at 7 (same).

3.3. **Not Merely a Question of Damages**. Plaintiffs contend that the issue of which class members suffered injury in the form of uncompensated IDV raises only a question of damages, can be address later on, and should not preclude class certification. Cf. *Weld*, 434 Mass. at 92 (need for individualized assessment of damages "does not preclude class certification where all other requirements are met").

The Court disagrees. There is a difference between determining the extent of harm (the question of damages) and deciding whether there was any harm at all (which goes to liability). "While obstacles to calculating damages may not preclude class certification, the putative class must first demonstrate economic loss on a common basis." *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 189 (3d Cir. 2001).

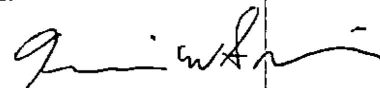
There is no liability for breaching a contract, like an insurance policy, if the alleged wrongdoing did not cause damages. See *Bulwer* v. *Mount Auburn Hosp.*, 473 Mass. 672, 690 (2016) (plaintiff claiming breach of contract must prove that breach caused them to suffer harm).

Similarly, proof of legally cognizable harm or injury is a necessary element of any claim under G.L. c. 93A. See *Bellermann* v. *Fitchburg Gas & Elec. Light Co.*, 475 Mass. 67, 73 (2016) (*"Bellermann II"*); *Tyler* v. *Michaels Stores, Inc.*, 464 Mass. 492, 501–503 (2013); *Hershenow* v. *Enterprise Rent-A-Car Co. of Boston, Inc.*, 445 Mass. 790, 800–802 (2006). "[T]o meet the injury requirement under G.L. c. 93A, § 9(1) or 11, a plaintiff must have suffered a 'separate, identifiable harm arising from the [regulatory] violation' that is distinct 'from the claimed unfair or deceptive conduct itself.'" *Bellermann II, supra,* quoting *Tyler, supra.* A business or consumer is not entitled to collect even nominal damages under c. 93A without proving that the violation caused some sort of "separate" and "distinct" injury. *Tyler, supra; Karaa* v. *Kuk Yim,* 86 Mass. App. Ct. 714, 725 (2014). In enacting c. 93A, "the Legislature ... did not intend to confer on plaintiffs who have suffered no harm the right to receive a nominal damage award which will in turn entitle them to a sometimes significant attorney's fee recovery." *Aspinall,* 442 Mass. at 401, quoting *Lord* v. *Commercial Union Ins. Co.*, 60 Mass. App. Ct. 309, 321–322 (2004). A plaintiff asserting a c. 93A claim based on allegedly unfair insurance claims settlement practices must therefore "prove that the defendant's unfair or deceptive act caused an adverse consequence or loss." *Rhodes* v. *AIG Domestic Claims, Inc.*, 461 Mass. 486, 496 (2012).

If an alleged breach of contract or an allegedly unfair or deceptive act or practice did not injure many of the proposed class members, then "their claims must fail for lack of causation." *Bellerman I,* 470 Mass. at 55. The need in this case for an individualized inquiry to resolve such issues would involve much more than "merely a question of damages," and makes it appropriate to deny class certification. See *Id.*

ORDER

Plaintiffs' motions for class certification are **denied**.



Kenneth W. Salinger
Justice of the Superior Court

20 June 2023