THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

BRENDA L. FOULTZ,	:	February Term, 2000
Plaintiff	:	
	:	No. 3053
v.	:	
	:	Commerce Case Program
ERIE INSURANCE EXCHANGE, et al.	:	
Defendants	:	Control No. 071970

OPINION

This Opinion is being issued to comply with the requirement under Pennsylvania Rule of Civil Procedure 1710(a) that a Court's order resolving a motion for certification be accompanied by findings of fact and conclusions of law setting forth the reasons for its decision. Plaintiff Brenda L. Foultz's Revised Motion for Certification asks that the Court certify a class on claims arising from Defendants Erie Insurance Exchange and Erie Insurance Company's use of allegedly inferior parts in repairing vehicles covered by insurance policies they have issued. For the reasons set forth in this Opinion, the Court is granting the Revised Motion for Certification.

FINDINGS OF FACT

1. Defendants Erie Insurance Exchange and Erie Insurance Company (collectively, "Erie") are providers of automobile insurance and are based in Erie, Pennsylvania.

2. On August 29, 1999, Plaintiff Brenda L. Foultz ("Plaintiff") was involved in an automobile accident. At that time, the Plaintiff's vehicle was covered by an Erie automobile insurance policy ("Policy"),[1] the Limit of Protection clause of which states that Erie:

> [W]ill pay the Actual Cash Value for loss to stolen or damaged property, but no more than:
>
> 1. What it would cost to repair or replace the property with other of like kind and quality; or
>
> 2. The Stated Amount that may be shown in the Declarations.
>
> Actual Cash Value reflects fair market value, age and condition of the property at the time of the loss.

Pl. Ex. 1[2]

3. Erie inspected the Plaintiff's vehicle and prepared an estimate of repair costs based on the use of at least five parts that were not original equipment manufacturer ("OEM") parts.[3]

4. According to the Plaintiff, non-OEM parts are made without the original manufacturer's specifications, tools, dies, stamping or production processes. A subset of these parts are known as "crash parts," which are outer body, stamped sheet metal, plastic or plastic

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[1] The Erie insurance policies insuring members of the proposed class are referred to collectively as the "Policies."

[2] "Like kind and quality parts" are referred to as "LKQ Parts."

[3] Two non-OEM lenses and housings and three non-OEM alloy-type wheels were used in repairing the Plaintiff's vehicle.

composite components.[4] The Plaintiff asserts that the Contested Crash Parts are inferior and not of "like kind and quality" as their OEM counterparts.

5. The Plaintiff asserts that Erie's use of non-OEM parts is an undisclosed Erie policy that diminishes the value of the vehicle while failing to restore the insured vehicle to its pre-loss condition and fair market value.

6. Based on these assertions, the Plaintiff brought a class action suit against Erie based on its alleged breach of the Policy, violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL")[5] and insurance bad faith.[6]

7. Erie has joined Genera Corporation ("Genera") and TYC Brother, Inc. ("TYC"), the manufacturers of the non-OEM parts used to repair the Plaintiff's vehicle, as Additional Defendants.[7] According to Erie, the Additional Defendants represented that their parts were as good as OEM parts and that they were not defective, inferior or substandard. As a result, Erie

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[4] This case concerns 25 specific crash parts: bumpers, hoods, doors, deck lids, luggage lid panels, quarterpanels, rear outer panels, front end panels, header panels, filler panels, door shells, pickup truck beds, radiator/grill support panels, grilles, head lamp mounting panels/brackets/housings/lenses, tail light mounting panels/brackets/housings/lenses, outer body moldings, door body side molding, front wheel opening moldings, side moldings, front and rear fascias, outer panel mounting brackets, supports and surrounds, bumpers (excluding chrome bumpers); bumper covers/face bars, and bumper brackets/supports. These specific crash parts are referred to as "Contested Crash Parts."

[5] 73 Pa. C.S. §§ 201-1 to 201-9.3.

[6] Originally, the Plaintiff also demanded a declaration of rights and permanent injunction ordering Erie to abide by the terms of its contracts, but this claim has since been dismissed.

[7] Erie also joined Wheels to the World, LLC and Smeals, Inc., although both have since been dismissed from the instant action.

contends, they are solely liable to the Plaintiff, jointly and severally liable with Erie or liable over to Erie on the Plaintiff's claims.

8. The Plaintiff has filed a Revised Motion for Certification ("Motion") seeking certification of the following class ("Class"):

> All persons in the United States (1) who have been insured by an automobile policy issued by Erie Insurance Company or any other member of the Erie Insurance Exchange; (2) who have made a claim at any time on or after February 2, 1994 for vehicle repairs pursuant to their Erie insurance policies; and (3) have had non-OEM crash parts specified for their repairs.
>
> Excluded from the Class are officers, directors and employees of Erie Insurance Company, Erie Insurance Exchange, and their subsidiaries.

DISCUSSION

The purpose behind allowing class action suits is "to provide a means by which the claims of many individuals could be resolved at one time, thereby eliminating the possibility of repetitious litigation and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate." DiLucido v. Terminix Int'l, Inc., 450 Pa. Super. 393, 397, 676 A.2d 1237, 1239 (1996) (citing Bell v. Beneficial Consumer Discount Co., 465 Pa. 225, 231, 348 A.2d 734, 737 (1975)). See also Lilian v. Commonwealth, 467 Pa. 15, 21, 354 A.2d 250, 253 (1976) ("The class action in Pennsylvania is a procedural device designed to promote efficiency and fairness in the handling of large numbers of similar claims."). For a suit to proceed as class action, Rule[8] 1702 requires that five criteria be met:[9]

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[8] Each Pennsylvania Rule of Civil Procedure is referred to individually as a "Rule."

[9] It has been noted that "the requirements for class certification are closely interrelated and overlapping. . . ." Janicik v. Prudential Ins. Co., 305 Pa. Super. 120, 130, 451 A.2d 455 (1982) (citations omitted).

> (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;
> (4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and
> (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

In contrast to Federal Rule of Civil Procedure 23, which governs class action suits brought in federal court, in Rule 1702 "does not require that the class action method be 'superior' to alternative modes of suit." Weinberg v. Sun Co., 740 A.2d 1152, 1163 (Pa. Super. Ct. 1999), rev'd on other grounds, 565 Pa. 612, 777 A.2d 442 (2001).

The moving party initially bears the burden of proving, although this burden "is not heavy and is thus consistent with the policy that decisions in favor of maintaining a class action should be liberally made." Cambanis v. Nationwide Ins. Co., 348 Pa. Super. 41, 45, 501 A.2d 635, 637 (1985) (citing Bell v. Beneficial Consumer Discount Co., 241 Pa. Super. 192, 205, 360 A.2d 681, 688 (1976)). Once the moving party has shown that each of the elements is satisfied, "the class opponent shoulders the burden, which has shifted, of coming forward with contrary evidence challenging the prima facie case." D'Amelio v. Blue Cross of Lehigh Valley, 347 Pa. Super. 441, 449, 500 A.2d 1137, 1141 (1985) (citations omitted).

I. The Class Is Sufficiently Numerous

The numerosity requirement for maintaining a class action is not determined by applying a specific formula:

> Whether the number is so large as to make joinder impracticable is dependent not upon any arbitrary limit, but rather upon the circumstances surrounding [each] case. In

> determining numerosity, the court should examine whether the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants. The class representative need not plead or prove the number of class members so long as she is able to define the class with some precision and affords the court with sufficient indicia that more members exist than it would be practicable to join.

Janicik v. Prudential Ins. Co., 305 Pa. Super. 120, 131-132, 451 A.2d 451, 456 (1982) (citations and quotation marks omitted).

Erie itself estimates that the Class numbers at least 100,000 people,[10] but contends that the Plaintiff cannot satisfy the numerosity requirement because the Class's claims can be resolved in small claims court or by a neutral appraiser. This argument is at best specious, and the numerosity requirement is satisfied.

II. The Claims Presented by the Class Raise Common Questions of Fact and Law

A plaintiff generally satisfies its burden of showing common questions of fact and law where "the class members' legal grievances arise out of the same practice or course of conduct on the part of the class opponent." Foust v. Southeastern Pa. Transp. Auth., 756 A.2d 112, 118 (Pa. Commw. Ct. 2000) (citing Janicik, 305 Pa. Super. at 133, 451 A.2d at 457) (quotation marks omitted). See also D'Amelio, 347 Pa. Super. at 452, 500 A.2d at 1142 ("While the existence of individual questions is not necessarily fatal, it is essential that there be a predominance of common issues shared by all class members which can be justly resolved in a single proceeding."); Allegheny County Housing Auth. v. Berry, 338 Pa. Super. 338, 342, 487 A.2d 995, 997 (1985) ("The common question of fact means precisely that the facts must be substantially the same so that proof as to one claimant would be proof

[10] Erie's estimates of the Class's size run from 100,000 to 500,000 people. Def. Mem. 16-17.

as to all."). In examining the commonality of the class's claims, a court should focus on the cause, and not the amount, of the alleged damages. See Weismer v. Beech-Nut Nutrition Corp., 419 Pa. Super. 403, 409, 615 A.2d 428, 431 (1992) ("Once a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification.").

The Plaintiff advances the following common questions of law and fact that make her claims appropriate for class certification:

- Erie engaged in the common practice and course of conduct of specifying non-OEM parts for Class Member's repairs.
- Each of the Policies is substantially identical and requires Erie to repair an insured's vehicle with LKQ Parts.
- Erie had each Class Member's vehicle repaired using Contested Crash Parts.

Erie presents eight reasons why the Plaintiff's claims do not present common questions of law and fact.[11] The majority of these reasons stem from Erie's contention that the Plaintiff will not be able to show that the Contested Crash Parts are uniformly not of "like kind and quality" as OEM parts, and that the damages to Class Members are difficult to calculate. A careful review of these arguments reveals that each is without sufficient merit to bar certification.

[11] These reasons are (1) that Erie had no common practice regarding the specification of non-OEM parts; (2) that generalizations about the qualities of non-OEM parts are unsupportable; (3) that the Policies do not present common questions; (4) that the injuries suffered by the Class are not common in nature; (5) that there are no common UTPCPL issues; (6) that there are no common bad faith issues; (7) that the issue of damages is not common; and (8) that the 12 jurisdictions in which the Class Members are located present substantially different laws.

A. The Plaintiff May Establish That the Contested Crash Parts Are Uniformly Not of Like Kind and Quality as OEM Parts

Erie first asserts that it is impossible to generalize about the quality of all of the Contested Crash Parts, as each is manufactured for a different vehicle and has different properties and characteristics. While the Plaintiff may fail to sustain her claims at trial, she presents sufficient evidence at this stage to support her generalizations as to the kind and quality of OEM parts and Contested Crash Parts.

The question as to whether the quality of non-OEM parts can be addressed on a class-wide level shapes up as a battle of decisions of out-of-state courts. In Avery v. State Farm Mutual Automobile Insurance Co., 746 N.E.2d 1242 (Ill. App. Ct. 2001), the Illinois Appellate Court held that the condition of non-OEM parts could be determined on a class-wide basis in part through expert testimony:

> Plaintiffs' theory of the breach was based upon the categorical inferiority of the non-OEM crash parts that State Farm specified on the repair estimates. Plaintiffs presented evidence that the non-OEM parts specified did not comport with the design and materials specifications used in manufacturing original equipment parts and the preassembly treatment of materials used in non-OEM parts was deficient, leading to problems of fit, durability, quality, and appearance in aftermarket crash parts. There was sufficient evidence to support plaintiffs' theory of categorical inferiority of non-OEM parts.

746 N.E.2d at 1242. See also Purdue v. Country Mut. Ins. Co., No. 99-L-91 (Ill. Cir. Ct. May 22, 2000) (unpublished opinion) (certifying class in action similar to the instant one);[12] Matthew W. Rearden, Note, OEM or Non-OEM Automobile Replacement Parts: The Solution to Avery v. State

[12] It is worth noting that Illinois's class action rules require the same elements for certification as Pennsylvania's, with the exception of typicality. See 735 Ill. Comp. Stat. 5/2-801.

Farm, 28 Fla. St. U. L. Rev. 543, 561-69 (2001) (setting forth values of OEM and non-OEM parts for numerous makes and models of vehicles).[13]

Like the plaintiff in Avery, the Plaintiff intends to rely on expert testimony and has submitted the declaration of one such expert. According to Paul Griglio, an automotive consultant with over 40 years experience with the production of crash parts, the common design and manufacturing processes used to make Contested Crash Parts make it possible to develop an opinion about the relative quality of non-OEM crash parts, including the Contested Crash Parts. Decl. of Paul Griglio ¶ 2. Mr. Griglio contends that it is not necessary to examine each Contested Crash Part individually or to consider the work of each individual repair shop. Id. at ¶¶ 3, 5. The reasons supporting these conclusions are discussed by Mr. Griglio extensively in his declaration.

To support its counterargument, Erie directs the Court's attention to Thames v. United Services Automobile Association, No. 98-01324 CA DIV. CV-B (Fla. Cir. Ct. June 9, 2001) (unpublished opinion), where the court granted the defendants' motion for summary judgment as to the plaintiff's inability to present the case as a class action. This decision was based on the perceived impossibility of showing that each and every non-OEM part did not meet the "like kind and quality" requirement and that a generalization as to the quality of the non-OEM parts was improper. To the extent that Erie relies on Thames, its argument is undermined by the fact that the Florida District Court of Appeals subsequently reversed the trial court's decision. See Thames v. United Services Automobile

[13] The Plaintiff has also submitted orders granting class certification without opinion in Smith v. American Family Mutual Insurance Co., Case No. 00-CV-211554 (Mo. Cir. Ct.), and Skene v. State Farm Mutual Automobile Insurance Co., CV 99-01053 (Ariz. Super. Ct.).

Association, 798 So.2d 11 (Fla. Dist. Ct. App. 2001). However, the logic espoused in Thames is echoed in five decisions from other jurisdictions, all of which are unpublished and most of which were handed down before Avery was decided.[14] In addition, Erie has presented the affidavit of Michelle M. Vogler, Ph.D., who contests each of the major points made by Mr. Griglio.

While reserving judgment as to whether the Plaintiff's claims can be corroborated, the Court is inclined to agree with the Plaintiff that the question of OEM parts and the Contested Crash Parts' uniformity does not preclude certification. For the Court to involve itself at this stage in determining which Party's experts are correct would be to improperly address the merits of the Plaintiff's claim, at least in part. See Cavanaugh v. Allegheny Ludlum Steel Corp., 364 Pa. Super. 437, 445-46, 528 A.2d 236, 240 (1987) (admonishing trial court for examining the merits of the plaintiff's claim at certification). Moreover, the Plaintiff's expert's declaration presents a logical argument as to why non-OEM parts may be addressed in a blanket fashion. As such, the Plaintiff's claim that she can establish

[14] These decisions are: Murray v. State Farm Mutual Automobile Insurance Co., No. 96-2585 M1/A, slip op. at 15 (W.D. Tenn. Aug. 19, 1997) (concluding that the quality of non-OEM parts could not be determined on a broad scale); Murphy v. Government Employees Insurance Co., No. 00-1043 CA-30, slip op. at 5 (Fla. Cir. Ct. May 25, 2001) (expressing doubts as to whether the plaintiff could establish common questions based on disparate scenarios, vehicles and parts); Casas v. United Services Automobile Association, No. 99-15664, slip op. at 6 (Fla. Cir. Ct. Oct. 17, 2000) (holding that the plaintiff "cannot possibly establish that each and every non-OEM part specified on an estimate . . . in not of like kind and quality to each and every part replaced"); Snell v. GEICO Corp., No. Civ. 202160, 2001 WL 1085237 (Md. Cir. Ct. Aug. 14, 2001) (denying motion to certify class on breach of contract claim); Schwendeman v. USAA Casualty Insurance Co., No. 99-2-06505 (Wash. Super. Ct. Mar. 9, 2001) (unpublished opinion) (holding that the plaintiff had failed to demonstrate that there were common questions of fact and law). See also Michelle Liffick, Consumer News, Avery v. State Farm: The Potential for Abuse of the Class Action and its Extraordinary Impact on Insurer and Insured, 13 Loy. Consumer L. Rev. 88 (2001) (highlighting perceived flaws in Avery).

the value of OEM parts in relation to the value of the corresponding Contested Crash Parts on a class-wide scale supports certification.

As an aside, it is worth noting what the Court believes the Plaintiff would be unable to show at trial. It is implausible that the Plaintiff could show the value of each pre-repair OEM part in Class Members' vehicles or the difference in value between such parts and the Contested Crash Parts on a class-wide basis. To establish either the value or the related difference in value would appear to require an examination of the individual parts in each Class Member's vehicle and would be a substantial obstacle to showing common questions of law and fact. Although this conclusion has no impact on whether the Plaintiff can establish generalized values of Contested Crash Parts and OEM parts, which the Court has concluded is plausible, it has potential implications for the Plaintiff's ability to show damages on a class-wide basis, as seen infra.

B. The Values Necessary to Establish Damages Can Be Determined on a Class-Wide Basis

Erie next turns to its contention that any breach of the Policy and any resulting injury cannot be shown or ascertained on a class-wide scale. The crux of this argument is that the Plaintiff cannot show a class-wide difference in kind and quality, if any, between the Contested Crash Parts used to repair the Class Members' vehicles and the damaged OEM parts they replaced. Because the individual characteristics of any given Class Member's parts are irrelevant, the Plaintiff's attempt to show damages to the Class as a whole raises common questions of fact and law.

Erie asserts that there are three difficulties with the Plaintiff's proposal to address breach and proof of damages on a class-wide basis: (1) Class Members do not suffer damages until they sell their

vehicles; (2) it is unclear what damages the Plaintiff is seeking or how to prove them; and (3) any proof of damages would necessarily be individual, as each vehicle, as well as its pre-loss condition, would have to be evaluated. The first of these is contradicted by the fact that a Class Member would incur a loss when the inferior Contested Crash Part is installed and need not wait until the vehicle is sold to suffer damages. See Olmo v. Matos, 439 Pa. Super. 1, 6, 653 A.2d 1, 3 (1994) (measuring damages for breach of contract at the time of breach). Cf. 13 Pa. C.S. § 2714 (stating that damages in breach of warranty action are measured "at the time and place of acceptance"). Moreover, the Plaintiff has set forth what damages she is seeking and how she intends to prove them.[15]

Erie's third attack centers on the difficulty of determining whether the Contested Crash Parts are of "like kind and quality" as the parts they replace. This attack is worth addressing in depth. As discussed supra, value generalizations involving the Contested Crash Parts and OEM parts are possible, while value generalizations involving used OEM parts are not. Thus, if "like kind and quality" includes distinctions based on the age, condition and use of the part being replaced, resolving the Class's claims will require the Court to confront individual questions, and the commonality element will not be satisfied. On the other hand, if "like kind and quality" refers only to the design and material of the part replaced, valuation questions may be addressed on a class-wide scale, and the condition of each Class Member's used OEM part will be irrelevant. The Court therefore must examine the definition of "like kind and quality" under the Policy.

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[15] The Plaintiff "anticipates that classwide damages will include the difference in price between the non-OEM crash parts and OEM crash parts, the part and labor cost to replace the non-OEM crash parts with OEM crash parts, and rental car costs." Pl. Rep. Mem. 11.

Interpretation of an insurance policy is a matter of law to be decided by the court. Curbee, Ltd. v. Rhubart, 406 Pa. Super. 505, 509, 594 A.2d 733, 735 (1992). Where a court finds an insurance policy provision ambiguous, "the provision is to be construed in favor of the insured and against the insurer." Redevelopment Auth. of Cambria Cty. v. International Ins. Co., 454 Pa. Super. 374, 388, 685 A.2d 581, 588 (1996). See also Bubis v. Prudential Prop. & Cas. Ins. Co., 718 A.2d 1270, 1273 (Pa. Super. Ct. 1998) ("[A]n ambiguity in an insurance contract should be read in favor of the insured.").[16] This can be attributed to the general principle that a contract must be construed against the drafter, as well as the fact that insurance contracts generally are contracts of adhesion. Rudolph v. Pennsylvania Blue Shield, 553 Pa. 9, 17, 717 A.2d 508, 511 (1998) (citation omitted). In addition, this approach conforms to Pennsylvania's policy of interpreting insurance coverage clauses "broadly so as to afford the greatest possible protection to the insured." Eichelberger v. Warner, 290 Pa. Super. 269, 275, 434 A.2d 747, 750 (1981) (citing Mohn v. American Cas. Co. of Reading, 458 Pa. 576, 326 A.2d 346 (1974), and Penn-Air, Inc. v. Indemnity Ins. Co. of N. Amer., 439 Pa. 511, 269 A.2d 19 (1970)). See also Butterfield v. Giuntoli, 448 Pa. Super. 1, 14 n.8, 670 A.2d 646, 652 n.8 (1995) ("[I]f a policy is reasonably susceptible of two interpretations, it must be construed in the insured's favor so as not to defeat, unless clearly necessary, the claim to indemnity which the insured intended to obtain.").

[16] A specific provision in an insurance policy is deemed ambiguous "if reasonably intelligent people could differ as to its meaning." Williams v. Nationwide Mut. Ins. Co., 750 A.2d 881, 885 (Pa. Super. Ct. 2000).

While numerous cases address the term "like kind and quality," most of these cases address the term broadly and provide little guidance as to what the term's underlying meaning is. Frequently, courts have stated that a "like kind and quality" replacement provision requires the insurer "to put the automobile in as good condition as it was before the collision" without reaching a conclusion as to whether age and use should be factors in determining the condition or whether an examination is limited to the suitability and material of the parts in question. Karp v. Fidelity-Phenix Fire Ins. Co.,134 Pa. Super. 514, 520, 4 A.2d 529, 532 (1939). See also Ray v. Farmers Ins. Exch., 246 Cal. Rptr. 593, 596 (Cal. Ct. App. 1988) ("Insurer's duty was discharged where vehicle "was repaired to its pre-accident safe, mechanical, and cosmetic condition."); John L. Palmer, Cheeks v. California Fair Plan Ass'n: "Actual Cash Value" Is Still Synonymous with "Fair Market Value" in California; Do the Courts Know What this Means?, 26 W. St. U. L. Rev. 183, 230 (1998-99) (stating that several decisions "unfortunately beg the question" as to the precise definition of "pre-loss condition").

After reviewing the relevant case law and respected authorities, the Court has reached the conclusion that "like kind and quality" refers only to a part's material and suitability, not its age or extent of use. In Maryland Motor Car, Insurance Co. v. Smith, 254 S.W. 526 (Tex. Civ. App. 1926), for example, the plaintiff brought suit against her automobile insurer to recover the amount that it would have cost to repair her vehicle with LKQ Parts. In affirming the trial verdict in favor of the plaintiff, the Texas Appellate Court found that "[t]he words 'of like kind and quality' do not refer to parts of like age, use, and condition, or present cash value or the parts injured or destroyed by the fire. The words are used as relating to quality and suitableness or fitness for the purposes used." 254 S.W. at 528.

Similarly, North River Insurance Co. v. Godley, 189 S.E. 577 (Ga. Ct. App. 1936), revolved around a plaintiff's attempt to recover for damages to his roof under an insurance policy that allowed recovery up to the cost to repair the property with "material of like kind and quality." To define this term, the Georgia Court of Appeals held that "the expression 'material of like kind and quality' refers to the kind and quality used in the original construction. There is no plea and no contention that the roof could have been repaired by using old shingles." 189 S.E. at 579. On a related note, the Florida District Court in Siegle v. Progressive Consumers Ins. Co., 788 So.2d 355 (Fla. Dist. Ct. App. 2001), looked at the relationship between "like kind and quality" and market value:

> A repair with like kind and quality would thus require the property to be restored to good condition with parts, equipment and workmanship of the same essential character, nature and degree of excellence which existed on the vehicle prior to the accident. The damaged vehicle may or may not be returned to its pre-accident market value, but a return to market value is not what the words "repair" with "like kind and quality" commonly connote and is not what an ordinary insured would reasonably understand the phrase to mean. The psychology of the market place, which assigns a lesser value to an adequately and competently repaired vehicle, has nothing to do with the "quality" of the repair itself.

788 So.2d at 360 (footnote omitted and emphasis added). Other courts have reached similar conclusions as to the definition and meaning of this term. See, e.g., Mandl v. San Roman, 170 F.2d 839, 841 (7th Cir. 1948) ("The words 'kind and quality' relate to quality and suitableness of fitness for the purpose intended."); Lupo v. Shelter Mut. Ins. Co., __ S.W.3d __, No. ED79238, 2002 WL 104888, at *5-*6 (Mo. Ct. App. Jan. 29, 2002) ("Like kind and quality" requires the insurer to "restore the damaged automobile to good, sound condition with parts and workmanship of the same essential quality or character that existed on the automobile prior to the accident," and reductions in

market value due to other factors may not be made). Cf. Metz v. Travelers Fire Ins. Co., Hartford, Conn., 355 Pa. 342, 346, 49 A.2d 711, 713 (1946) ("If part of the building destroyed cannot be replaced with material of like kind and quality, then it should be substantially duplicated within the meaning of the policy.").

Another indication that age is irrelevant to a part's kind and quality is the fact that many courts have held that depreciation, which accounts in part for the age of and wear-and-tear on a specific item, cannot be considered as a factor when calculating the cost of repairs based on parts of "like kind and quality":

> It is generally accepted that depreciation is a factor to be considered when an insurer elects to pay the "actual cash value" of the damaged property, which the Company declined to do here. By electing to pay . . . the "amount necessary to repair or replace" the engine with another "of like kind and quality," we believe the [Insurer] elected a measure of loss that does not allow for depreciation.

Great Texas County Mut. Ins. Co. v. Lewis, 979 S.W.2d 72, 74 (Tex. Ct. App. 1998) (citation and footnote omitted). See also Campbell v. Calvert Fire Ins. Co., 109 S.E.2d 572, 577 (S.C.1959) (holding that insurer has not fulfilled its duty to repair or replace with LKQ Parts unless there has been no diminution of value after repair). Cf. Roberts v. Allied Group Ins. Co., 901 P.2d 317, 318 (Wash. Ct. App. 1995) (defining "replacement cost" as "the cost, at the time of loss, to repair or replace the damaged property with new materials of like kind and quality, without deduction for depreciation").[17]

[17] While the conclusions reached on this subject are far from unanimous, most courts that have allowed insurers to deduct depreciation from payments under these conditions have reviewed insurance policies that specifically allow for depreciation deductions or require the insured to pay for any "betterment" arising from vehicle repairs. See, e.g., MFA Ins. Co. v. Citizens National Bank of Hope, 545 S.W.2d 70 (1977); Venable v. Import Volkswagen, Inc., 519 P.2d 667 (Kan. 1974).

Commentators agree with this interpretation of "like kind and quality":

> An express limitation of liability in an insurance policy to the "cost to repair or replace" such parts of an insured automobile as may be damaged "with other of like kind and quality" does not mean parts of like age, use, and condition, or present cash value of the parts injured or destroyed, but relates to quality and suitability or fitness for the purpose, and the material should be substantially duplicated where it is impossible to obtain material of like kind and quality. If it is practicable to use only new parts, new parts are contemplated.

Couch on Insurance § 175:44 (3d ed. 1998) (footnotes omitted).

In this instance, this reading of "like kind and quality" is even more warranted. The Policy does not provide a specific definition for "like kind and quality" and does not detail what attributes of a given part are to be taken into account when making repairs. This absence of a definition is particularly striking because the Policy defines "Actual Cash Value" as reflecting "fair market value, age and condition of the property at the time of the loss." This creates a potential ambiguity in how "like kind and quality" should be interpreted, forcing the Court to construe the term in favor of the insured.[18]

[18] The term "like kind and quality" has been held to be ambiguous by some, but not all, courts. Compare Hyden v. Farmers Ins. Exch., 20 P.3d 1222, 1225 (Colo. Ct. App. 2000) ("[T]he phrase 'of like kind and quality' is ambiguous because it fails to specify the protections afforded by the policy."), Bellefonte Ins. Ct. v. Griffin, 358 So.2d 387, 390 (Miss. 1978) (holding "like kind and quality" repair provision to be ambiguous), and Cazabat v. Metropolitan Prop. & Cas. Ins. Co., No. C.A. KC99-0544, 2000 WL 1910089, at *3 (R.I. Super. Ct. Apr. 24, 2000) ("Like kind and quality" is "ambiguous as it is susceptible to more than one reasonable interpretation."), with Great Amer. Ins. Co. v. Railroad Furniture Salvage of Mobile, Inc., 162 So.2d 488, 494 (Ala. 1964) ("Like kind and quality" provision was "certain and free from ambiguity."), Siegle v. Progressive Consumers Ins. Co., 788 So.2d 355, 361 (Fla. Dist. Ct. App. 2001) (finding no ambiguity in "like kind and quality" provision), and Custom Controls Co. v. Ranger Ins., 652 S.W.2d 449, 452 (Tex. Ct. App. 1983) (concluding that "like kind and quality" provision was not ambiguous).

It is also significant to note Erie's own application of the term "like kind and quality." The Plaintiff contends that Erie itself does not examine each part to be replaced for its pre-accident age and condition and incorporate these features. For example, in questioning James M. Brown, Erie's Assistant Vice President and Manager of Material Design, at his deposition, Plaintiff's Counsel asked what Erie's approach would take when an insured car's door was damaged in an accident, but had a dent that predated an accident covered by a Policy. Pl. Mtn. Ex. 2 83. Mr. Brown answered that, even if a dented replacement door could be located, Erie would use an undamaged door. Id. Mr. Brown went on to acknowledge that Erie appraisers do not record or describe the pre-accident condition of the vehicle or its parts. Id. This supports the conclusion that the age and use of a particular part is irrelevant to the meaning of "like kind and quality."

Based on this reasoning, the Court concludes that the age and use of an individual Class Member's OEM parts is not pertinent to determining whether the replacement parts are of "like kind and quality." Rather, "like kind and quality" centers on the original parts' OEM status alone, and an analysis may focus on the quality of OEM parts and Contested Crash Parts in general. As such, contingent on her ability to substantiate her generalizations as to the quality of OEM parts and the Contested Crash Parts, the Plaintiff will be able to establish damages and the value of such damages on a class-wide basis. Cf. Avery, 746 N.E.2d at 1258-61 (concluding that plaintiff could establish damages on a class-wide basis by comparing the values of OEM and non-OEM parts).

C. Erie's Remaining Objections to Commonality Are Without Merit

Erie raises several less complex arguments to challenge the Plaintiff's assertion that this matter presents common questions of law and fact. Each of these arguments is unpersuasive.

1. The Plaintiff Alleges a Uniform Erie Policy of Using Non-OEM Parts

Erie challenges the Plaintiff's assertion that it uniformly used non-OEM parts and intends to show that there is no common pattern as to when non-OEM parts were used. As mentioned supra, however, the Court cannot delve into the merits of the Plaintiff's claim. Consequently, Erie's defense to the Plaintiff's assertion cannot serve as a basis for denying certification.

2. The Policy Presents Common Questions of Interpretation

Pennsylvania courts have found sufficient commonality and have certified classes where a plaintiff asserts breach of contract claims. This is especially true where the contract in question is a form contract, although "[c]lass actions may be maintained even when the claims of members of the class are based on different contracts so long as the relevant contractual provisions raise common questions of law and fact and do not differ materially." Janicik, 305 Pa. Super. at 132, 451 A.2d at 457 (quotation marks omitted). See also Buchanan v. Century Fed. Sav. & Loan Ass'n, 347 Pa. Super. 1, 5, 542 A.2d 117, 119 (1988) (certifying class asserting claims for breach of contract); O'Neill v. Sovereign Bank, No. 9708-0525, 1998 WL 1543498 (C.P. Phila. Dec. 15, 1998) (certifying class action for breach of contract).

While Erie concedes that there are no material differences in the language of the different Policies, Erie argues, in spite of this case law, that the Policy does not give rise to common questions of law. This argument is based on Hayes v. Motorists Mut. Ins. Co., 370 Pa. Super. 602, 537 A.2d 330 (1988), in which the plaintiff's attempt to avoid the coordination of benefits clause in her insurance contract was based on the conduct of the agent who sold her her policy and the fact that she was subjectively unaware that a coordination of benefits clause had been inserted into her policy. Hayes is

readily distinguishable, as the plaintiff's action there was based solely on her individual perceptions, while here, the Plaintiff's assertion that the use of non-OEM parts uniformly violates the Policy presents common questions as to the interpretation of the terms of the Policy. Because Erie's Policy argument is little more than the debate over the quality of Disputed Crash Parts revisited, the argument should be rejected.

3. The Different States of Residence of Class Members Does Not Preclude the Existence of Common Questions

Erie points out that Class Members are residents of 12 different jurisdictions,[19] some of which have statutes that Erie asserts allow the use of non-OEM parts[20] and many of which have substantial differences in their consumer protection and bad faith laws.[21] Accordingly, Erie asserts, the Court will have to engage in a conflicts of law analysis with respect to each Class Member's claim. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (rejecting the argument that a forum state may uniformly apply its law to all claims in a class action suit).

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[19] The jurisdictions involved are the District of Columbia, Illinois, Indiana, Maryland, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin.

[20] As examples of such statutes, Erie cites Md. Com. Law § 14-2302, N.J. Admin. Code tit. 11, § 2-17.10, N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7, N.C. Admin. Code tit. 11, r. 4.0427, Ohio Rev. Code Ann. § 1345.81, 31 Pa. Code § 62.3(b)(10)-(11), W. Va. Code § 46A-6B-3 to -4, and Wis. Stat. Ann. § 632.38. For the most part, these statutes and regulations impose requirements in the event that aftermarket crash parts are used. Cf. Avery, 746 N.E.2d at 1254 (finding that State Farm "has not identified any state that authorizes an insurer to specify inferior replacement parts" and "has not demonstrated that its conduct is authorized by any other state's laws nor that compliance with the substantive laws of Illinois would lead it to violate a law or regulation imposed by any other state.")

[21] For details of ways in which the laws of the various states differ, see Defendant's Memorandum 52-58.

This point on the differing applicable law is a legitimate issue, at least to a certain extent. To resolve this potential pitfall, the Plaintiff has suggested that, should problems develop with regard to choice of law issues, the Court can certify subclasses based on each Class Member's state of residence.[22] Erie has no convincing response to this suggestion, and the challenges posed by the Class Members' differing states of residence is not so formidable an obstacle as to preclude certification.

4. The Claims for UTPCPL Violations and Bad Faith May Be Certified, at Least in Part

Erie next contends that the claims for UTPCPL violations and bad faith are not appropriate because they raise individual issues of fact. To the extent that this assertion is correct, it is not an insurmountable obstacle to certification.

Since the UTPCPL was enacted in 1968, a debate has raged across Pennsylvania as to which UTPCPL claims, if any, require proof of each of the elements of fraud, including the essential element of reliance. This issue was resolved to a certain extent in Weinberg v. Sun Co., 565 Pa. 612, 777 A.2d 442 (2001), in which the Pennsylvania Supreme Court held that UTPCPL false advertising and "Catchall Provision"[23] claims required proof of reliance and are not appropriate for certification. 565 Pa. at 618, 777 A.2d at 446.

While Weinberg resolved the issue presented to the court, no Pennsylvania appellate court has yet addressed the impact of a recent amendment to the Catchall Provision. Before 1996, the Catchall

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[22] Because of the 1997 amendment to Pennsylvania's consumer protection law discussed infra, it would probably be necessary to certify two Pennsylvania classes: one in which Class Members incurred damages on or before February 1, 1997, and those who incurred damages on or after February 2, 1997.

[23] 73 Pa. C.S. 201-2(4)(xxi).

Provision prohibited only "fraudulent conduct, which creates a likelihood of confusion or of misunderstanding"[24] and required plaintiffs pleading a violation of the Catchall Provision to prove all of the elements of common law fraud, including reliance. See, e.g., Prime Meats, Inc. v. Yochim, 422 Pa. Super. 460, 469-71, 619 A.2d 769, 773-74 (1993) ("[T]o recover under 73 Pa. C.S. § 201-2(4)(xvii), the elements of common law fraud must be proven."). In 1996, however, the Catchall Provision was amended to prohibit deceptive conduct in addition to fraudulent conduct as follows:

> [**(xvii)**] **(xxi)** Engaging in any other fraudulent **or deceptive** conduct which creates a likelihood of confusion or of misunderstanding.

Act 146, P.L. 906, § 1, Dec. 4, 1996, eff. Feb. 2, 1997.

The Court considered the effect of this amendment in Weiler v. SmithKline Beecham, __ Pa. D. & C.4th __ (C.P. Phila. 2001) (available at http://courts.phila.gov/cptcvcomp.htm), and reasoned that the current version of the Catchall Provision requires proof of a causal link between the specific misconduct and the harm suffered but does not require evidence of each element of common law fraud, including reliance:

> When construing a statute, "the legislature is presumed to have intended to avoid mere surplusage; thus, whenever possible, courts must construe a statute so as to give effect to every word contained therein." Berger v. Rinaldi, 438 Pa. Super. 78, 86, 651 A.2d 553, 557 (1994). If the legislature modifies the language of a given statute, the amendment "ordinarily indicates a change in the legislative intent." Commonwealth v. Pierce, 397 Pa. Super. 126, 130, 579 A.2d 963, 965 (1990) (citing Masland v. Bachman, 473 Pa. 280, 289, 374 A.2d 517, 521 (1977)).

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[24] Before 1996, the Catchall Provision was numbered as 73 Pa. C.S. 201-2(4)(xvii).

Here, the insertion of the phrase "or deceptive" implies that either deceptive or fraudulent conduct constitutes a violation of the Catchall Provision and that deceptive conduct is not the same as fraudulent conduct. Moreover, it is clear from the legislative history of the Catchall Provision amendment that the General Assembly's intent was to expand the scope of the UTPCPL. See, e.g., Pa. Legis. Journal - Senate 1996, v. II, p. 2427-28 (discussing general motivations for UTPCPL amendments). This conclusion also comports with the Pennsylvania Supreme Court's instructions that the UTPCPL "is to be construed liberally to effect its object of preventing unfair or deceptive practices." Commonwealth v. Monumental Props., 459 Pa. 450, 460, 329 A.2d 812, 817 (1974). See also Wallace v. Pastore, 742 A.2d 1090, 1093 (Pa. Super. Ct. 1999) (citing Monumental Properties and applying the UTPCPL liberally in a private action context). Given these circumstances, the Court must conclude that the purpose of the 1996 amendment was to eliminate the requirement that a plaintiff plead all the elements of fraud to sustain a claim under the Catchall Provision. To hold otherwise would be to find the word "deceptive" redundant and would clash with the rules of statutory interpretation.

This holding finds support in Booze v. Allstate Insurance Company, 750 A.2d 877 (Pa. Super. Ct. 2000).[25] In Booze, the court stated that "to state a claim under the catchall provision of the Unfair Trade Practices and Consumer Protection Law, a plaintiff must prove the elements of common law fraud." 750 A.2d at 880. However, this conclusion was based on Section 201-2(4)(xvii), the pre-1996 version of the Catchall Provision, and the Court specifically noted that the Catchall Provision had been amended. Cf. In re Patterson, 263 B.R. 82, 92 n.17 (Bankr. E.D. Pa. 2001) (concluding that "the addition of the word 'deceptive' was . . . intended to cover conduct other than fraud which was clearly embraced by the pre-amendment statute").[26]

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[25] This conclusion does not conflict with Weinberg v. Sun Co., __ Pa. __, 777 A.2d 442 (2001). In Weinberg, the court examined a claim brought under the false advertising provision of the UTPCPL and did not address either the old or amended version of the Catchall Provision. Accordingly, the court's comment that "[n]othing in the legislative history suggests that the legislature ever intended statutory language directed against consumer fraud to do away with the traditional common law elements of reliance and causation" would not be applicable to claims brought under the revised Catchall Provision. 777 A.2d at 446.

[26] Ironically, Patterson reads Booze as interpreting the post-1996 version of the Catchall Provision. 263 B.R. at 92 & 92 n.17. For the reasons set forth supra, the Court must respectfully disagree with Patterson's reading.

. . .

> Of course, the fact that the Catchall Provision does not require proof of common law fraud does not obviate the need to establish a causal connection between SmithKline's allegedly deceptive conduct and the harm the Plaintiffs have suffered. As noted by several Pennsylvania appellate court decisions, a private plaintiff, whose right to act arises under UTPCPL Section 9.2, must show that he or she was damaged as a result of a defendant's unlawful act.[27] Weinberg v. Sun Co., __ Pa. __, __, 777 A.2d 442, 446 (2001) (Section 9.2 "clearly requires, in a private action, that a plaintiff suffer an ascertainable loss as a result of the defendant's prohibited action"); DiLucido v. Terminix Int'l, Inc., 450 Pa. Super. 393, 401-02, 676 A.2d 1237, 1241 (1996) (Section 9.2's "use of the phrase 'as a result of' indicates the intent of the Legislature to require a causal connection between the unlawful practice and a plaintiff's loss"). These interpretations of Section 9.2 are unaffected by the 1996 modifications of the Catchall Provision. As a result, the Plaintiffs must plead that they suffered harm as a result of SmithKline's deceptive conduct.

Slip op. at 3-6 (footnote omitted). See also Carolyn L. Carter, ed., Pennsylvania Consumer Law § 2.5.4.21(B) (stating that the 1996 Amendment allows Catchall Provision claims without proof of each element of common law fraud).

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[27] In its entirety, UTPCPL Section 9.2(a) reads as follows:

> (a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

73 Pa. C.S. § 201-9.2.

The Plaintiff's UTPCPL claim is based, in part, on the Catchall Provision, which has eliminated the requirement of establishing reliance and more readily allows the presentation of common questions of fact and law. To the extent that a portion of a potential Pennsylvania subclass has claims that arose prior to the effective date of the Catchall Provision amendment, it may be appropriate to decertify this segment of the Class at a later point in time. However, in the interim, there is no basis for denying certification as to the entire Class based solely on the potential that such individual questions may exist.

Similarly, the Plaintiff's insurance bad faith claim is suitable for certification. The Pennsylvania Superior Court has spoken on what is necessary to establish for a bad faith insurance claim:

> In the insurance context, the term bad faith has acquired a particular meaning:
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> > Insurance. "Bad faith" on part of insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith.
>
> Black's Law Dictionary 139 (6th ed. 1990) (citations omitted). Further, bad faith must be proven by clear and convincing evidence and not merely insinuated. Finally, to recover under a claim of bad faith, the plaintiff must show that the defendant did not have a reasonable basis for denying benefits under the policy and that defendant knew or recklessly disregarded its lack of reasonable basis in denying the claim.

Terletsky v. Prudential Prop. & Cas. Ins. Co., 437 Pa. Super. 108, 124-25, 649 A.2d 680, 688 (1994) (citations omitted).[28] It appears that this may raise common questions, as Erie's basis for using and knowledge about the Contested Crash Parts affected the Class as a whole.

The Court is unaware of, and the Parties have been unable to find, a case either certifying or refusing to certify an insurance bad faith claim under Pennsylvania's statute.[29] However, this alone should not preclude certification. This is especially true when Erie's alleged bad faith is based on actions it took with regard to each of the Class Members, including its use of the Contested Crash Parts despite its awareness of the inferiority of these parts and their failure to meet the standards set forth in the Policy. Cf. Wojtkiewski v. Blue Cross & Blue Shield, No. 354993, 1996 WL 640438 (Ohio Com. Pl. Ct. Oct. 21, 1996) (certifying bad faith claim where insurer's alleged bad faith was predicated on common course of conduct). Under these circumstances, the bad faith claim may be certified.

III. The Plaintiff's Claims Are Typical of Those of the Class

As a third step in the certification test, a class action plaintiff must show that the class action parties' claims and defenses are typical of the entire class. The purpose behind this requirement "is to determine whether the class representatives' overall position on the common issues is sufficiently aligned

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[28] The Court does not intend for this citation to indicate that all of the Class's claims will be subject to Pennsylvania's bad faith statute. Rather, this citation is intended to provide a basis to discuss what may constitute insurance bad faith for the purposes of certification only.

[29] Indeed, there are few cases in other jurisdictions that address class certification of insurance bad faith claims. For examples of such cases, see Pollet v. Property Casualty Insurance Co., No. 01-863, 2001 WL 1471724 (E.D. La. Nov. 16, 2001) (refusing to certify bad faith claim where underlying breach of contract claim based on denial of insurance coverage for hail storm damage did not present common questions); Van Noy v. State Farm Mutual Automobile Insurance Co., 16 P.3d 574 (Wash. 2001) (reversing trial court's granting of insurer's post-certification motion for summary judgment on bad faith claim and remanding for trial as a class action).

with that of the absent class members, to ensure that the pursuit of their interests will advance those of the proposed class members." DiLucido v. Terminix Int'l, Inc., 450 Pa. Super. 393, 404, 676 A.2d 1237, 1242 (1996).

To support her assertion that their claims are typical of the entire Class, the Plaintiff points to the following:

- The Plaintiff had a Policy with Erie.
- Contested Crash Parts were used in repairing the Plaintiff's vehicle.
- The Plaintiff suffered damages as a result of the use of these Contested Crash Parts.

Erie disputes the Plaintiffs' claims of typicality by pointing out that the Plaintiff's repairs used only two Contested Crash Parts and that her claims therefore extend only to those two types of Contested Crash Parts manufactured by that supplier for her type of vehicle. This is nothing more than a new spin on the question of whether the Plaintiff can establish the inferiority of the Contested Crash Parts on a class-wide level, a question that has been addressed at length supra. Once again, the Court must presume that the Plaintiff will be able to support her generalizations about the quality of OEM parts and the Contested Crash Parts, and, assuming this can be done, the Plaintiff's claims are typical of those of the Class.

IV. The Plaintiff Is a Fair and Adequate Representative of the Class

When reviewing whether a class action plaintiff will fairly and adequately represent the class's interests, a court must consider, among other matters,[30] the criteria set forth in Rule 1709:

[30] Courts considering "other matters" have looked at the following:

> (1) whether the attorney for the representative parties will adequately represent the interests of the class,
> (2) whether the representative parties have a conflict of interest in the maintenance of the class action, and
> (3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

It is generally presumed that no conflict of interest exists and that the plaintiff's attorney is adequate. Janicik, 305 Pa. Super. at 136-37, 415 A.2d at 458-59.

Erie makes three attacks on the Plaintiff's ability to represent the Class fairly and adequately: (1) the Plaintiff has admitted that she was not misled; (2) the Plaintiff has no financial exposure in pursuing this lawsuit; and (3) the Plaintiff has refused to answer questions about her financial resources. In light of Plaintiff's Counsel's agreement to advance litigation costs and the Plaintiff's actual statements, none of these concerns is particularly valid. First, the Plaintiff's "admission" is nothing more than the Plaintiff's concession that she did not read the entire Policy. This alone does not automatically undermine her claims or preclude her from serving as an adequate representative of the Class.

> Evidence of dishonesty, bad character, disregard of duties, abdication to the unfettered discretion of class counsel, or of having been solicited to be class representative by counsel who are conducting the suit for their own gain, will all weigh against the named party's adequacy as a representative. In contrast, evidence of honesty, willingness to pursue the matter, knowledge of facts underlying the action, understanding of the essence of the legal claim, a desire to right a perceived wrong, or the hope of recovery will all support a named party's adequacy as a representative.

Janicik, 305 Pa. Super. at 140, 451 A.2d at 461 (citations omitted). Neither side has brought any "other matters" to the Court's attention.

The second and third objections may be addressed together and dismissed. In Janicik, the Pennsylvania Superior Court spoke to the many alternatives available for funding class actions, including the option of advancement of costs by class counsel:

> Initial funding by the class representative's attorney is not uncommon in class suits, nor is it barred by the Code of Professional Responsibility. Some courts have held that theorizing on whether the representative party will repay the class attorney if the class loses is irrelevant to the sole question of whether the interests of the class are being adequately protected. Others, however, have held that considerations analogous to the Code of Professional Responsibility's prohibiting an attorney from maintaining an action--to prevent the attorney from acquiring such a financial stake in the litigation that he may be induced to compromise his client's interests by settling the action prematurely--apply also to protect the absent class members' interests. The dangers of the potential conflict of interest arising from counsel's financing a class suit, however, must be viewed realistically in light of the circumstances and the procedural safeguards inherent in class suits. Overly strict financing requirements would limit the class action to wealthy litigants, contrary to its purposes. A lack of funding by the representative plaintiff, without more, is not sufficient to warrant denial of class certification. When a member of a generally impecunious group advances a class action for relatively small individual claims, denying the class action for lack of financial resources might result in a denial of any recovery to members of the class. The danger of premature settlement arising from an attorney's advancing costs is minimized in class actions, however, because the court must approve any settlement agreement or award of attorney's fees, and can take appropriate action if counsel's representation proves inadequate. Under the circumstances, particularly the nature of the class and appellant's counsel's agreement and apparent ability to ethically advance costs, we hold that appellant's own limited financial resources are not necessarily fatal to her adequacy as a class representative.

305 Pa. Super. at 138-39, 451 A.2d at 459-60 (citations and footnotes removed).

In this instance, Plaintiff's counsel agreement to advance litigation costs renders the Plaintiff's individual financial resources irrelevant. Moreover, there is no reason that this financing arrangement

compromises the Plaintiff's ability to represent the Class. Consequently, the Plaintiff may be considered a fair and adequate representative of the Class.

V. A Class Action Is a Fair and Efficient Method of Resolving the Class's Claims

To determine if a class action would constitute a fair and efficient method of resolving the issues in dispute, a court must look for the following criteria:

> (1) whether common questions of law or fact predominate over any question affecting only individual members;
> (2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;
> (3) whether the prosecution of separate actions by or against individual members of the class would create a risk of
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> > (i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;
> > (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;
> (5) whether the particular forum is appropriate for the litigation of the claims of the entire class;
> (6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
> (7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

Rule 1708.

Several of these factors can be addressed without substantial discussion. The Plaintiffs state that they are unaware of any other litigation involving the issues presented in this matter, and the Court

has previously ruled that Philadelphia is a proper forum for this action. In addition, the issues regarding common questions of law have been discussed supra.

A. This Case Presents No Insurmountable Management Difficulties

While a court must consider the potential difficulties in managing the class action, any such difficulties generally are not accorded much weight:

> Problems of administration alone . . . ordinarily should not justify the denial of an otherwise appropriate class action, for to do so would contradict the policies underlying this device. Yaffe v. Powers, 454 F.2d 1362, 1365 (1st Cir. 1972). Accord, Explanatory Note to Pa. R. Civ. P. 1708 (manageability criterion should not be employed as an "escape hatch" to defeat otherwise proper class action); Manual for Complex Litigation, § 1.43 (1981). Rather, the court should rely on the ingenuity and aid of counsel and upon its plenary authority to control the action to solve whatever management problems the litigation may bring. Buchanan v. Brentwood Federal Savings & Loan Ass'n, 457 Pa. 135, 161, 320 A.2d 117, 131 (1974); In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 282-83 (S.D.N.Y. 1971); Newberg, Newberg on Class Actions, § 2100.

Janicik, 305 Pa. Super. at 142, 451 A.2d at 462.

Erie fears that the large size of the Class, the need for individualized proof of each Contested Crash Part's defect and each Class Member's damages would make this case unmanageable. These issues have been discussed supra. Erie also presents difficulties in tracking down those persons who had repairs using Contested Crash Parts, but this concern is unwarranted, as each estimate in Erie's possession sets forth whether OEM parts were used or not. In addition, any complications arising from conflicting laws from different jurisdictions could be resolved by dividing the Class into subclasses.

The manageability issue that has the potential to create problems is Erie's threat to join as additional defendants those manufacturers of the Contested Crash Parts. As the Court held in an

earlier opinion, such a joinder is generally permissible under the Pennsylvania Rules of Civil Procedure so long as the additional defendants would be liable on the Class Members' claims. Foultz v. Erie Ins. Exch., February Term, 2000, No. 3053 (C.P. Phila. June 26, 2001) (Herron, J.).[31] This has the potential to involve numerous additional defendants, as well as any parties that would be joined by such additional defendants,[32] and could make this action unmanageable. However, this threat of joining multiple parties is insufficient to preclude certification, especially given the fact that no such joinder has been presented to the Court as yet. In the event that Erie and the Additional Defendants make good on their threat, the Court has sufficient faith in Counsel's ingenuity to find other ways to combat the challenges posed by the joinder of additional parties that would not require decertification, including severing the Class portion of this matter from any joinder actions. Cf. Didio v. Philadelphia Asbestos Corp., 434 Pa. Super. 191, 203, 642 A.2d 1088, 1094 (1994) (affirming severance of defendant's cross-claims where they "were most likely a delay tactic which would only serve to unduly prolong [plaintiff's] action"); Foultz, slip op. at 18 (denying Plaintiff's motion to sever "based on the information currently before" the Court). As such, there are no manageability issues that preclude the certification of the Class.

B. The Risks of Separate Actions Are Considerable

In considering the effect of separate actions, a court should not limit its review to questions of issue and claim preclusion:

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[31] Available at http://courts.phila.gov/cptcvcomp.htm.

[32] Indeed, TYC and Genera have threatened to join additional defendants as well.

> The precedential effect of a decision, even if incorrect, may have a chilling effect on the assertion of similar claims, and, combined with the expiring of statutes of limitation, may often "substantially impair or impede" potential litigants' ability to protect their interests. Moreover, as with the related criteria concerning the complexity and expenses of litigation, the court may consider the parties' circumstances and respective ability to pursue separate actions.

Janicik, 305 Pa. Super. at 143, 415 A.2d at 462.

Here, the risk of inconsistent decisions and corresponding adverse consequences is high. If the Class as a whole is not certified, each Class Member will have to pursue a claim against Erie individually, possibly with differing conclusions as to what constitutes LKQ Parts. Erie's suggestion that this matter be referred to small claims court is untenable and could result in a flooding of the court system. Moreover, different results in each case could present Erie with potentially inconsistent standards of conduct.

C. The Amount of Recovery for Each Class Member Makes Separate Actions Impracticable and Justifies Certification

The Plaintiff asserts that the average payment for each claim is $136.78. This appears to be high enough to justify the expenses of carrying on a class action suit and low enough to preclude separate actions for each Class Member. Cf. Kelly v. County of Allegheny, 519 Pa. 213, 223-24, 546 A.2d 608, 613 (1988) (recovery of $13.61 per plaintiff was neither "trivial" nor "de minimis" and justified class action).

CONCLUSIONS OF LAW

1. The Class is sufficiently numerous that joinder of all members is impracticable.

2. There are questions of law and fact common to the Class.

3. The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the Class.

4. The representative plaintiffs will fairly and adequately assert and protect the interests of the Class.

5. The attorney for the representative plaintiffs will adequately represent the interests of the Class.

6. There is no conflict of interest between the representative plaintiffs and the Class members which would impede the maintenance of a class action.

7. The representative plaintiffs have or can acquire adequate financial resources to assure the Class interests will not be harmed.

8. The class action will provide a fair and efficient method for adjudicating this controversy.

9. Common questions of law or fact predominate over any question affecting only individual members.

10. There are no difficulties in case management which would preclude litigating this matter as a class action.

11. Prosecution of separate actions by Class members would create a risk of inconsistent and varying adjudications and might confront First Union with incompatible standards of conduct.

12. Individual adjudications would, as a practical matter, dispose of the interests of other Class members not parties to the adjudication, or would substantially impair their ability to protect such interests.

13. This particular forum is appropriate for the litigation of the entire Class's claim.

14. The complexities of the issues, the expenses of litigation and the small amount of each individual Class member's claim make it impossible to support or justify the presentation of separate claims.

For these reasons, the Court is satisfied that the instant case is appropriate for disposition as a class action and has certified the Class.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: March 13, 2002

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

BRENDA L. FOULTZ,	:	February Term, 2000
Plaintiff	:	
	:	No. 3053
v.	:	
	:	Commerce Case Program
ERIE INSURANCE EXCHANGE, et al.	:	
Defendants	:	Control No. 071970

ORDER

AND NOW, this 13th day of March, 2002, upon consideration of Plaintiff Brenda L. Foultz's Motion for Class Certification, Defendant First Union Corporation's opposition thereto, oral argument before the Court and all other matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Plaintiffs Revised Motion for Certification is GRANTED.

2. A Class is hereby certified and defined as follows:

> All persons in the United States (1) who have been insured by an automobile policy issued by Erie Insurance Company or any other member of the Erie Insurance Exchange; (2) who have made a claim at any time on or after February 2, 1994 for vehicle repairs pursuant to their Erie insurance policies; and (3) have had non-OEM crash parts specified for their repairs. Excluded from the Class are officers, directors and employees of Erie Insurance Company, Erie Insurance Exchange, and their subsidiaries.

3. Plaintiff Brenda L. Foultz shall serve as Class Representative.

4. Plaintiff's Counsel are appointed as counsel for the Class.

5. The Parties shall submit proposals for a notification procedure and proposed forms of notice for class members within thirty days from the date of this Order.

BY THE COURT:

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JOHN W. HERRON, J.