No. 24-5421

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JESSICA CLIPPINGER,
on behalf of herself and all others similarly situated,

Plaintiff-Appellee,
v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Defendant-Appellant.

On Appeal from the United States District Court for the
Western District of Tennessee, No. 2:20-cv-02482

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 24-5421 Case Name: Clippinger v. State Farm Auto. Ins. Co.

Name of counsel: Adam G. Unikowsky

Pursuant to 6th Cir. R. 26.1, The Chamber of Commerce of the United States of America
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

The Chamber of Commerce of the United States of America has no parent companies, subsidiaries, or affiliates whose listing is required by Federal Rule of Appellate Procedure 26.1 or Sixth Circuit Rule 26.1.

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Not applicable.

CERTIFICATE OF SERVICE

I certify that on July 2, 2024 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Adam G. Unikowsky

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 24-5421 Case Name: Clippinger v. State Farm Auto. Ins. Co.

Name of counsel: Adam G. Unikowsky

Pursuant to 6th Cir. R. 26.1, The American Property Casualty Insurance Association
Name of Party

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2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Not applicable.

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s/Adam G. Unikowsky

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STATEMENT REGARDING CONSENT

All parties consent to the filing of this amicus brief.[1]

IDENTITY AND INTEREST OF AMICI

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases involving class actions.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent 65% of both the overall U.S. property-casualty insurance

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no party's counsel authored this brief in whole or in part and that no person or entity other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

market and Tennessee's personal automobile insurance market. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts.

The District Court's class-certification order contradicts hornbook class-action law. State Farm's insurance contracts require it to pay the "actual cash value" (ACV) of its insureds' totaled cars. Plaintiff contends that one component of State Farm's "actual cash value" valuation—its application of a "Typical Negotiation Adjustment" (TNA)—is inaccurate. The District Court certified a class of insureds, finding that whether "State Farm's application of the TNA was wrong" is a question that satisfies Rule 23's commonality and predominance requirements. Order, RE 202, Page ID # 6933, 6943. This reasoning is wrong. Commonality requires not "the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Here, whether "State Farm's application of the TNA was wrong" cannot generate any common answers because even if TNAs are inaccurate, a court would still have to determine, in every individual insured's case, whether the

insured was paid less than ACV. In an effort to elide this reasoning, Plaintiff claims that State Farm breached the contract merely by *using* TNAs in its ACV calculations, regardless of whether the insured ultimately received ACV. But this reasoning is irreconcilable with the plain text of the insurance policy and contradicts Plaintiff's own damages model.

Further, as Plaintiff herself received the appraised value of her car and sustained no damages, she has no particularized injury and thus lacks standing to bring her claims. At the very least, she is atypical of the class she seeks to represent. Thus, class certification violated Rule 23's typicality requirement.

The District Court's certification order contradicts the Supreme Court's decisions establishing rigorous standards for class certification. The Chamber, APCIA, and their members have a strong interest in ensuring that courts comply with those standards.

SUMMARY OF ARGUMENT

The District Court erred in finding that Plaintiff satisfies Rule 23's commonality and predominance requirements. Plaintiff claims that State Farm failed to pay the ACV of class members' totaled cars. Her theory is that State Farm's use of the TNA—which is just one adjustment used by third-party Audatex's Autosource reports that State Farm used to estimate ACV—rests on outdated assumptions. But that showing, even if it could be made, would not establish State

Farm's liability to any—much less every—class member. Plaintiff would still have to prove that she and every class member received less than ACV.

The District Court certified the class on the assumption that the question at issue is whether the mere use of TNAs *in and of itself* is a contractual breach. But nowhere does the contract prohibit the mere use of TNAs, and the District Court should not have certified a class based on a plainly incorrect legal theory. Moreover, Plaintiff's damages model does not correspond to that theory of liability.

The District Court also erred in finding that Plaintiff satisfies Rule 23's typicality requirement. Plaintiff received the appraised value of her car so she cannot prove breach, and she indisputably has sustained no injury and no damages. As a result, she lacks standing. At a minimum, the serious questions about Plaintiff's standing render her atypical. Even if Plaintiff had standing, her claim for nominal damages is radically different from absent class members' claims for actual damages.

ARGUMENT

I. Plaintiff Failed to Prove Commonality and Predominance.

The District Court concluded that there was a question "common to the class," Fed. R. Civ. P. 23(a)(2), which "predominate[d] over any questions affecting only individual members." Fed. R. Civ. P. 23(b). Those conclusions were wrong. No common question exists. Even if one did, individual questions would predominate.

The District Court's reasoning fundamentally misunderstands Rule 23 and, if adopted by this Court, would profoundly distort class-action practice in this circuit.

A. Common questions do not exist—and certainly do not predominate—because ACV must be assessed on a vehicle-by-vehicle basis.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (citation omitted). "[P]laintiffs wishing to proceed through a[n opt-out] class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement" of Rule 23(b)(3)—commonality, predominance, and superiority. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014). "[C]ertification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of [Rule 23] have been satisfied.'" *Comcast*, 569 U.S. at 33 (quoting *Dukes*, 564 U.S. at 350-51).

In this case, Plaintiff did not prove that any common question exists, much less that it predominates over individualized questions. Plaintiff seeks to certify a class of State Farm's insureds who purchased an insurance policy that promises to pay "actual cash value" (ACV) of totaled automobiles. In order to estimate ACV, State Farm uses a system designed by third-party Audatex. When estimating ACV, Audatex applies an adjustment known as the "typical negotiation adjustment" ("TNA") to account for the fact that many used cars sell for less than list price. Order, RE 202, Page ID # 6923. Plaintiff claims that TNAs are "not fair" because

they are "not based on current market realities," given that "the internet has changed how people sell used cars." Order, RE 202, Page ID # 6924.

But even if that were true, the use of TNAs does not necessarily result in a payment below ACV for any class member, let alone *all* of them. The insurance policy contemplates that if there is a dispute over ACV, three appraisers will be selected—one by the plaintiff, one by the defendant, and absent agreement, one by the court—and their appraisals will be used to determine the amount State Farm owes. Order, RE 202, Page ID # 6925. These appraisers are not bound by the Audatex valuation. As such, they are free, when appropriate, to determine a valuation that is lower than the Audatex valuation would have been even without the use of TNAs. Moreover, in some cases—such as the case of Plaintiff herself—an appraisal will occur and the insured will receive all that she is entitled to under the contract. In that scenario, State Farm's use of TNAs to establish an initial estimate will not cause any financial harm to the insured.

Therefore, no common question exists. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 564 U.S. at 350-51 (citation omitted). Commonality also requires not just "the raising of common 'questions'—even in droves—but rather, the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, *supra* at

132). Here, Plaintiff contends that TNAs are based on outdated assumptions and should not be used. In other words, she contends that the common question is: "should State Farm have used TNAs?" But no common answer to that question could drive the resolution of the litigation. Suppose Plaintiff proves that TNAs are systematically inaccurate and should never be applied. That finding would still not drive the resolution of the litigation with respect to *any* class member, because that finding would not answer the question that matters: did State Farm breach the contract by paying less than ACV? For every class member, the determination of whether State Farm breached the contract would still require an individualized analysis of whether the amount of money the class member received is lower than ACV. Plaintiff therefore cannot show any common questions in the sense relevant to Rule 23.

Even if Plaintiff could prove commonality, she could not prove predominance. "[T]he predominance requirement demands more than the commonality requirement." *Fox v. Saginaw County*, 67 F.4th 284, 301 (6th Cir. 2023). To determine whether the predominance requirement is satisfied, the court must "add up all the suit's common issues (those that the court can resolve in a yes-or-no fashion for the class) and all of its individual issues (those that the court must

resolve on an individual-by-individual basis)." *Id.* at 300. "The court must then qualitatively evaluate which side 'predominates' over the other." *Id.*

Here, individualized issues predominate for a straightforward reason: it is *inevitable* that there will be individual liability trials with respect to *every single* class member. As already explained, even if Plaintiff were to prove, following class certification, that TNAs rest on outdated assumptions about the market for used cars, that fact would teach precisely nothing about whether State Farm is liable to any particular class member. For every single class member, the court would still have to ask the question: was the payment *in fact* lower than ACV? Under the insurance policy's appraisal provision, that question would depend on the outcome of the appraisal of each class member's car.

Even if State Farm did not demand an appraisal as to some class members and left the jury to determine ACV, individualized case-by-case assessments would still be needed. The asserted flaw in TNAs, if proven, might be one piece of relevant evidence supporting the insured's case, but a jury would still have to weigh that evidence alongside all the other insured-specific evidence before making a determination regarding that particular insured. Because the court would need to review particularized evidence with respect to every putative class member before

determining whether any of them were entitled to damages, individualized questions predominate.

B. The District Court's reasoning is wrong.

The District Court found that Rule 23's commonality and predominance requirements were satisfied. The court's reasoning was misguided.

According to the District Court, "Plaintiff argues that she and all putative class members suffered a legal injury—breach of contract—when State Farm paid them an improperly reduced actual cash value of their total loss vehicles using the Audatex valuation report that applied a TNA." Order, RE 202, Page ID # 6936. "And assuming Plaintiff is successful on the merits, this legal injury would exist whether or not State Farm's actual cash value payment—calculated under the Policy's appraisal provision or through some other method appropriate under the Policy—was more than, less than, or the same as the value of an insureds' TNA." *Id.* Thus, in the District Court's view, whether "State Farm's application of the TNA was wrong" is a common question that predominates over individualized questions. Order, RE 202, Page ID # 6943. "Plaintiff's theory of legal injury—a breach of contract—survives even if State Farm's ACV payment was more than, less than, or

the same as the TNA applied to the comparable vehicles in an insured's Audatex report." Order, RE 202, Page ID # 6941.

This reasoning is irreconcilable with the plain language of the insurance policy. The insurance policy states that State Farm will pay the actual cash value of a car—not that State Farm will employ any particular methodology in doing so. Order, RE 202, Page ID # 6921. Thus, if State Farm pays the actual cash value of the car to an insured—as it undisputedly did to Plaintiff—there is no breach. Nothing in the contract suggests that the mere use of TNAs—untethered from any actual undervaluation—is a breach. Indeed, the contract is silent on TNAs. Nor would any insured have any reason to care whether State Farm uses TNAs, so long as the insured ultimately receives ACV. A breach-of-contract theory hinging on State Farm's mere use of TNAs would require rewriting the contract.

To be sure, Plaintiff *argues* that the bare use of TNAs would constitute a breach of contract. But under Rule 23, a court may not accept a plaintiff's legal theory as gospel. "The Rule does not set forth a mere pleading standard." *Comcast*, 569 U.S. at 33 (internal quotation marks omitted). "Rather, a party must not only be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)." *Id.* "The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Id.*; *accord Weidman*

v. Ford Motor Co. (In re Ford Motor Co.), 86 F.4th 723, 726 (6th Cir. 2023) (per curiam) (noting that "significant evidentiary proof" is needed to satisfy Rule 23 (internal quotation marks and brackets omitted)). "Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011) (quoting Rule 23(b)(3)).

Plaintiff claims that this case presents the common question whether the mere use of TNAs, untethered from any financial injury, is a breach of contract. But in order to decide whether that is a common question, the court must decide whether such a finding would *in fact* be a sufficient basis to find a breach of contract with respect to each class member—not merely that Plaintiff *claims* that it would. And it would not. The contract's plain language makes clear that each case turns on whether State Farm paid ACV, not on whether TNAs are accurate. Under *Comcast*, the District Court erred in certifying the class without scrutinizing the legal theory underpinning—and ultimately, defeating—Plaintiff's theory of classwide liability. *See Ford*, 86 F.4th at 728 (reversing class-certification order when district court's "surface-level approach" failed to analyze plaintiffs' "distinct … theories").

This may result in a partial analysis of the merits of the plaintiff's claim at the class-certification stage. But that is an inevitable and common feature of class-action litigation. The Supreme Court has repeatedly "emphasized that it may be

necessary for the court to probe behind the pleadings before coming to rest on the certification question," and "[s]uch an analysis will frequently entail overlap with the merits of the plaintiff's underlying claim." *Comcast*, 569 U.S. at 33-34 (internal quotation marks omitted). "That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 34 (quotation marks omitted); *see Ford*, 86 F.4th at 729 ("That [the Rule 23] inquiry might overlap with the merits of the underlying claims cannot be helped … Rather, it is a crucial part of avoiding the procedural unfairness to which class actions are uniquely susceptible" (internal quotation marks omitted)). That is precisely the case here. The question "would proof that TNAs are generally inaccurate establish State Farm's liability with respect to each class member?"—the relevant inquiry for commonality under Rule 23—overlaps with the question "did State Farm breach the contract by using TNAs?"—the relevant inquiry for liability. But notwithstanding this overlap, the Court must resolve the commonality question prior to class certification.

Even if there were a common question of liability in this case, the District Court's predominance ruling would still be wrong. "[I]f fact-specific damage trials 'will inevitably overwhelm' common liability questions, individual issues may predominate." *Fox*, 67 F.4th at 301 (internal quotation marks omitted). That is the case here. The District Court concluded that the question "did State Farm breach

the contract by using TNAs?" is a common question as to liability. But individualized damages disputes will predominate over that assertedly common liability question. If Plaintiff merely sought nominal damages for each class member, then damages would not present individualized inquiries. Not surprisingly, however, Plaintiff's damages theory is more ambitious than that. For each class member, Plaintiff seeks to recover the delta between the amount each class member actually received and the ACV to which the class member was allegedly entitled. For Plaintiff herself, that amount is $0, but for other class members, that amount will be higher. Because determining ACV will require class-member-by-class-member damages calculations, individual issues predominate.

The District Court credited Plaintiff's assertion that "each total loss vehicle should be valued by running every step of State Farm's methodology except the TNA." Order, RE 202, Page ID # 6941. Of course, that methodology will be inaccurate with respect to Plaintiff herself, because Plaintiff has already received the appraised value of her car. But even setting that point aside, Plaintiff's damages model cannot possibly produce an accurate result with respect to every class member. Again, while Plaintiff has *asserted* that "each total loss vehicle should be valued by running every step of State Farm's methodology except the TNA," *id.*, Plaintiff has not *defended* the proposition that this means of calculating damages would be accurate. And the proposition is indefensible. A fact-finder could not

possibly assume that, in every single case, the appraised value of a car will be identical to the Audatex valuation without the use of the TNA. The District Court did not hold otherwise. Instead, it simply credited Plaintiff's assertion that this damages model, *if correct*, could be used to determine each class member's damages—without addressing whether the model *was in fact* correct.

If the District Court's reasoning is upheld, enterprising plaintiffs could extend this Court's precedent to manufacture class certification in every single case. They could simply assert that a legal theory exists that would allow the defendant's liability to be adjudicated on a classwide basis—and if the defendant argues that the legal theory was faulty, the plaintiffs could say that this is an issue to be resolved after class certification.

This outcome would violate the letter and spirit of Rule 23 and would result in serious harm to class-action defendants. Even if a legal theory undermining a class claim appears meritless, class certification is still a pivotal event. "'[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight.'" *In re National Prescription Opiate Litigation*, 976 F.3d 664, 671 (6th Cir. 2020) (quoting *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999)). "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Nagareda,

Class Certification in the Age of Aggregate Proof, *supra*, at 99. In the typical case, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Sci.–Atlanta, Inc.*, 552 U.S. 148, 163 (2008). "Certification of a large class may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978), *superseded by rule as stated*, *Microsoft Corp. v. Baker*, 582 U.S. 23 (2017); *accord Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023) ("[T]he possibility of colossal liability can lead to what Judge Friendly called 'blackmail settlements.'" (quoting H. Friendly, *Federal Jurisdiction: A General View* 120 (1973)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). This is why "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010). Given that reality, the Court should reaffirm that classes may not be certified based on manifestly faulty legal theories.

II. Plaintiff Failed to Prove Typicality.

State Farm paid Plaintiff the appraised value of her car. Plaintiff therefore cannot prove breach, and she indisputably sustained no injury and no damages. By contrast, Plaintiff intends to argue that other class members were financially harmed through the use of TNAs. The District Court nonetheless concluded that "the claims … of the representative parties are typical of the claims … of the class." Fed. R. Civ. P. 23(a)(3). That conclusion was incorrect.

Rule 23's typicality requirement ensures that the class representative has "the same interest and suffer[s] the same injury as the class members." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotation marks omitted). "[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996)). "The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998).

Plaintiff is not typical of the class—indeed, she is not even a member of it. Plaintiff contends that other class members were financially injured by receiving the Audatex valuation with the TNA adjustment and should receive, as damages, the

difference between that valuation and the Audatex valuation without the TNA adjustment. But as to her own claim, Plaintiff acknowledges she received the appraised value of her car and therefore suffered no injury and no damages. She instead claims to have experienced an abstract *legal* injury based on the supposedly incorrect initial calculation.

As an initial matter, *amici* agree with State Farm that Plaintiff's liability theory is insufficient to establish injury and standing. In *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), the Supreme Court held that a plaintiff cannot establish injury and standing based on a pure injury in law. Instead, "the plaintiff must have a 'personal stake' in the case." *Id.* at 423. "To demonstrate their personal stake, plaintiffs must be able to sufficiently answer the question: 'What's it to you?'" *Id.* In this case, for Plaintiff, the answer to that question is "nothing." Although *TransUnion* involved a statutory claim, State Farm persuasively explains that *TransUnion*'s reasoning applies with equal force to breach-of-contract claims. An injury in law is insufficient for standing, regardless of whether the "law" at issue is public or private.

At the Rule 23(f) stage, Plaintiff argued that even if she is not entitled to actual damages, she can still seek nominal damages and hence establish standing under *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021). Plaintiff misunderstands *Uzuegbunam*. In that case, it was "undisputed that Uzuegbunam experienced a

completed violation of his constitutional rights when respondents enforced their speech policies against him." *Id.* at 292-93. The Court held that when a plaintiff actually *is* injured, a request for nominal damages satisfies Article III's redressability requirement. *Id.* But the Court underscored that a "a request for nominal damages" does not "guarantee[] entry to court." *Id.* The Court's "holding concern[ed] only redressability." *Id.* "It remains for the plaintiff to establish the other elements of standing (such as a particularized injury) …." *Id.* Here, Plaintiff has not established a particularized injury, and hence lacks standing.

At a minimum, this standing issue renders Plaintiff an atypical class representative. It is plainly *not* the case that "as goes the claim of the named plaintiff, so go the claims of the class," *Sprague*, 133 F.3d at 399.

Even setting aside the standing issue, Plaintiff is atypical because her damages theory is completely different from the damages theories of the class members she purports to represent. Because Plaintiff has received the appraised value of her car, the best-case scenario for Plaintiff is that she will obtain nominal damages. If other class members receive nominal damages, they would view the litigation as a loss rather than a win. Thus, for this reason as well, it is not the case that "as goes the

claim of the named plaintiff, so go the claims of the class." *Sprague*, 133 F.3d at 399.

Permitting Plaintiff to serve as the class representative would also conflict with the purpose of the typicality requirement. Both the commonality and typicality requirements "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 564 U.S. at 349 n.5 (quoting *Falcon*, 457 U.S. at 157-58 n.13). Here, Plaintiff is so atypical that the class members' interests will not be protected. Because class counsel's sole actual client has already been paid in full, class counsel is forced to characterize the breach of contract at issue as the use of TNAs in the *initial* Audatex calculation, as opposed to the failure to pay ACV. No lawyer would ever make this argument if she was representing a client who failed to receive the appraised value of her car. Instead, the lawyer would argue that the breach of contract was the failure to pay ACV—a theory that is both grounded in the insurance policy's language and more likely to generate damages.

The District Court recognized that Plaintiff's claim differed from the claims of other class members, but brushed this problem aside by declaring that "the Court has the power to adjust the class definition or create sub-classes as necessary … If

invoking the appraisal provision becomes an issue, the Court will deal with it then." Order, RE 202, Page ID # 6944 n.7. Rule 23 does not authorize the District Court to "kick the can down the road" in this manner. As this Court recently recognized, Rule 23(a) "erects four threshold safeguards: numerosity, commonality, typicality, and adequacy. Satisfying the Rule requires a named plaintiff to offer significant evidentiary proof that he can meet all four of those criteria, where they are contested." *Ford*, 86 F.4th at 726 (citation, internal quotation marks, and brackets omitted). Here Plaintiff has not advanced significant evidentiary proof that she satisfies the typicality requirement for the class she seeks to represent. Hence, the class should not have been certified. A court cannot evade Rule 23's requirements by promising to comply with Rule 23 at an unspecified later point.

CONCLUSION

The District Court's class-certification order should be reversed, and the case remanded for further proceedings.

Dated: July 2, 2024

Respectfully submitted,

/s/ Adam G. Unikowsky

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This brief complies with the type-volume limitation of Rule 29(a)(5) because the brief contains 4,672 words, excluding the parts of the brief exempted by Rule 32(f).

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/s/ Adam G. Unikowsky

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I hereby certify that on this 2nd day of July, 2024 a true and correct copy of the foregoing Brief was served via the court's CM/ECF system.

/s/ Adam G. Unikowsky