IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

DENNIS ARMON, SR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Case No. 1016-CV38265
UNITED FINANCIAL CASUALTY	)	
COMPANY d/b/a	)	Division No. 17
PROGRESSIVE INSURANCE	)	
COMPANY,	)	
	)	
Defendant.	)	

ORDER GRANTING PLAINTIFF'S
MOTION FOR CLASS CERTIFICATION

Before the Court is Plaintiff Donald Armon's Motion for Class Certification. Having carefully reviewed the record and pleadings, the parties' written briefs and arguments, and the transcript of the April 3, 2013 hearing, the Court now makes the following findings of fact, conclusions of law and orders.

The Court has previously determined that there are three issues of fact and/or law: (1) there is an issue of fact with regard to whether the Commercial Insurance Policy is a stated value policy, (2) there are several issues of fact regarding the expectation and context of the agreement, and (3) there is an issue of law whether RSMo. §379.160 applies to insurance policies where the loss is other than by fire. For the reasons set forth below, the Court finds that each of these issues is common to the members of the Class, defined below, and predominate over any questions which might exist that affect only individual members. The Court further finds that the class is so numerous that joinder of all members is impracticable; that the claims of the plaintiff are typical of the claims of the class; and that the plaintiff and his counsel will fairly and adequately protect the interests of the class.

Background

Plaintiff brings the present action for damages and injunctive relief on behalf of a putative class of Missouri residents. The proposed class that Plaintiff seeks to certify is defined by him as follows:

> All individual persons, corporations, partnerships, associations and other entities who insured a vehicle during the Class Period from January 1, 2006 to the present under a "MISSOURI COMMERCIAL AUTO POLICY," Form 6912, issued by Defendant, and who suffered a "total loss" of said vehicle, as defined in Form 6912, and who recovered from Defendant for such loss an amount that was less than the "Stated Amount" for said vehicle minus any applicable deductible.
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> Excluded from the Class are those persons who have lawsuits pending against, or who have settled their claims against, United Financial Casualty Company for the same or similar claims as set forth herein, members of the Missouri state judiciary, Defendant, Defendant's employees, any entities in which either Defendant has a controlling interest, and the parents, subsidiaries, affiliates, and their officers and directors of Defendant and the members of their immediate families.

Parties' Contentions

In support of his motion, Plaintiff contends that Progressive's "MISSOURI COMMERCIAL AUTO POLICY," Form 6912, is a valued policy by application of Missouri's valued policy statute, Mo.Ann.Stat. § 379.160, and/or by the intent of the parties. (See Plaintiff's Reply to Defendant's Suggestions in Opposition to Plaintiff's Motion for Class Certification, pg. 2.) Plaintiff contends that the questions of whether Missouri's valued policy statute applies to Defendant's Missouri Commercial Auto Policy and whether Defendant's Missouri Commercial Auto Policy is a valued policy created by contract are questions common to all putative class members. (*Id.*)

To determine whether Defendant's Missouri Commercial Auto Policy is a valued policy created by contract, Plaintiff contends that the fact-finder must look to the policy, itself, and to the intent of the parties as reflected in the average transaction. (*Id.* at pgs. 2-3.) Plaintiff further

contends that because Defendant's Missouri Commercial Auto Policy is an insurance policy of adhesion, the policy must be interpreted as treating alike all those similarly situated. (*Id.* at pg. 3.) Plaintiff therefore contends that the question of whether Defendant's Missouri Commercial Auto Policy is a valued policy created by contract must be resolved, one way or the other, objectively and for the Class as a whole. (*Id.*)

Plaintiff also contends that, notwithstanding the question of whether Defendant's Missouri Commercial Auto Policy is a valued policy created by contract, the law must protect the objective reasonable expectations of the policyholders, even those who may have known of its restrictive terms. (*Id.* at pgs. 3-4) Plaintiff contends that in determining the reasonable expectations from the point of view of the policyholders, the fact-finder must consider what a reasonable layperson would have expected from a typical transaction. (*Id.* at pg. 4.) Plaintiff therefore contends that the determination by the fact-finder as to the reasonable expectations of the objective, reasonable lay person as policyholder applies to the Class as a whole. (*Id.*)

Finally, Plaintiff contends that the class is so numerous that joinder of all members is impracticable; that his claims are typical of the claims of the class; and that he will fairly and adequately protect the interests of the class.

Defendant does not contest numerosity nor does it seriously contest the requirements of typicality and adequacy as set forth in Rule 52.08(a).[1] Defendant does oppose certification,

[1] Progressive insists that Mr. Armon is inadequate as a class representative because "he admits the Policy is unambiguous and that he was not entitled to receive the Stated Amount after the property's total loss. (*See* Defendant's Suggestions at pg. 20). As Defendant's Ex. B itself reveals, Mr. Armon did not admit nor was he asked whether the policy was unambiguous or, more importantly, what the reasonable expectations of the great majority of policyholders was. *See Estrin*, 612 S.W.2d at 426. Mr. Armon simply stated at his deposition that he figured, prior to talking with his attorney, that there was nothing he could do about Progressive paying him "the value of the truck according to what Progressive said." In effect, Mr. Armon was conceding only that he had no bargaining power and that his reasonable expectations had been defeated.

Progressive also insists that Mr. Armon is not typical of the class he seeks to represent since his damages, in the event he should succeed at trial, are larger than those of a typical class member. All members of the class, including Mr. Armon, were required to provide a "stated amount" for each vehicle they wished to insure. That Mr.

however, on the grounds that there are not common issues of fact that predominate. Defendant contends that resolution of Plaintiff's and each individual class member's claim would necessarily require an extensive and detailed factual inquiry into each individual transaction. Thus, as to the question of whether Defendant's Missouri Commercial Auto Policy is a valued policy created by contract, Defendant contends that is an individual question that must be determined on a case-by-case basis. Defendant does not, however, show how the answer to this question might vary from class member to class member. Likewise, Defendant contends that in determining what are the reasonable expectations arising from the transaction, the fact-finder must look separately at each individual transaction to determine first, what was expected by the parties, and second, whether that expectation was reasonable. (*See* Defendant's Suggestions in Opposition to Plaintiff's Motion for Class Certification at pgs. 9, 25-26.) Plaintiff counters that this misstates the law and that the reasonable person standard universally applies. Finally, Defendant contends that Missouri's valued policy statute, Mo.Ann.Stat. § 379.160, does not apply, but cites no case decided by a Missouri state court as authority for that proposition. If it does apply, then clearly the class must be certified.

Standards for Determining Class Certification

Rule 52.08 addresses a court's determination as to whether an action is to be maintained as a class action. *State ex rel. Am. Family Mut. Ins. Co. v. Clark,* 106 S.W.3d 483, 486 (Mo. banc 2003). These requirements are, first, that: (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

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Armon provided an amount which may ultimately result in damages that are larger than most class members' damages does not defeat typicality. The typicality requirement is met even if there are variances in the underlying facts, if: (1) the representative's and the class members' claims arise from the same event or course of conduct by the defendant, (2) the conduct and facts give rise to same legal theory, and (3) the underlying facts are not "markedly different." *Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 715 (Mo. App. W.D. 2009) (citation omitted). "Speculative variations in the class claims are not enough to defeat typicality." *Id.*

defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Id.*

Of these requirements, commonality is the only requirement that is seriously contested by the Defendant. Commonality is shown, among other ways, when all class members are aggrieved based on the same or similar course of misconduct, *Senn v. Manchester Bank of St. Louis*, 583 S.W.2d 119, 132 (Mo. banc 1979), or when the same evidence on a given question will suffice to show the allegations of the petition for each class member. *Ogg v. Mediacom, LLC*, 382 S.W.3d 108, 113 (Mo. Ct. App. 2012), reh'g and/or transfer denied (Oct. 2, 2012), transfer denied (Nov. 20, 2012). In a nutshell, the commonality question is whether the same evidence will suffice to prove the legal claim of each class member. The answer here is "yes," for the reasons stated below.

In addition to meeting the requirements of Rule 52.08(a), a plaintiff must also satisfy at least one of the three requirements of Rule 52.08(b). In this case, Plaintiff seeks class certification based on Rule 52.08(b)(3), which requires a finding that (i) the questions of law or fact common to members of the class "predominate over any questions affecting only individual members", and (ii) that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." *Clark,* 106 S.W.3d at 487-488; Rule 52.08(b)(3). Since the fundamental, or "core," issue is one which applies to all Class members, and re-litigation of that issue over and over again would be a central element of each case, these requirements are satisfied.

Discussion and Order

I. <u>Whether Defendant's Missouri Commercial Auto Policy is a Stated Value Policy is a Predominant Common Question.</u>

Value policies can be created by contract. *Huth v. Gen. Accident & Life Assurance Corp.*, 536 S.W.2d 177 (Mo. App. E.D. 1976). This occurs where the value of the subject matter is decided beforehand, and it is the intent of the parties to create such a contract. *Id.* In determining the intent of the parties, the fact-finder looks to the policy itself for any indication on the part of the insurer to value the risk and loss, in whatever words expressed, and to the reasonable expectations of the ordinary person of average understanding. *Id.*, *Schmitz v. Great Am. Assur. Co.*, 337 S.W.3d 700, 706 (Mo. 2011), reh'g denied (May 31, 2011), *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007); *Estrin Const. Co., Inc. v. Aetna Cas. & Sur. Co.*, 612 S.W.2d 413, 426 (Mo. Ct. App. 1981). One indication of the intent of the parties to create a valued policy is that the premium amount charged to the insured is based upon a percentage of the total insurance provided. *Huth*, 536 S.W.2d at 181. During oral argument on its Motion for Summary Judgment, defendant admitted that the stated value is requested and required beforehand and is a "significant part" of the premium calculation. This issue and the above key fact are common to the claims of all Class Members.

Case law is also clear that in the case of an adhesion insurance policy, the insured's intent is derived by determining what a "reasonable layperson" in the position of the insured would have thought was intended by looking at the policy as a whole. *Niswonger v. Farm Bureau Town & Country Ins. Co. of Missouri*, 992 S.W.2d 308, 316 (Mo. App. S.D. 1999), *Barron v. Shelter Mut. Ins. Co.*, 230 S.W.3d 649, 652-653 (Mo. App. W.D. 2007). This is a common issue for all Class Members. The standard is the same and the evidence will be the same.

The rationale for using an objective standard derives from the nature of an adhesion contract, and in particular, of an insurance policy of adhesion, which are the same in all relevant particulars for each Member of the Class. The policy addresses the mass of people, not the individual adherent, and so relies for validity on the reasonable expectations and intentions not of the adherent, but of the mass of adherents or the so-called "reasonable person." *Estrin*, 612 S.W.2d at 426. Moreover, an insurance policy of adhesion **"is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing."** *Id.* (internal citation omitted) (emphasis added).

Accordingly, to determine whether defendant's Missouri Commercial Auto Policy is a stated value policy by contract, the fact-finder need not resort to individual mini-trials to determine the intent of the parties. Rather, the fact-finder need only look to the policy itself, which is the same for all members of the class, and to the reasonable intentions of the "ordinary policyholder." The evidence and issues are common for all Class Members. Thus, once this issue is resolved, it is resolved for all Members of the Class.

II. The Question of what are the Reasonable Expectations of the Insured is a Predominant Common Question.

As for the closely related issue of what are the reasonable expectations arising from the transaction, that too is resolved without resort to individual inquiry. In construing an adhesion insurance policy, courts seek to effectuate the reasonable expectations of the "ordinary person of average understanding." *See Id.* at fn. 4, *Jensen v. Allstate Ins. Co.*, 349 S.W.3d 369, 375 (Mo. Ct. App. 2011), reh'g and/or transfer denied (Aug. 30, 2011), transfer denied (Oct. 25, 2011). And, while the Court construes the legal operation of the contract from the words, it is the finder of fact who interprets the context of the agreement to determine the reasonable expectations of

the ordinary person. *Estrin*, 612 S.W.2d at 421. Since the finder of fact is to determine the expectations of the "ordinary person," and not of each individual insured, the evidence and issues are common for all Class Members. Indeed, "[i]f the enforcement of a policy provision would defeat the reasonable expectations of the great majority of policyholders to whose claims it is relevant, it will not be enforced *even against those who know of its restrictive terms*." *Estrin*, 612 S.W.2d at 426 (quoting Keeton, Insurance Law Rights at Variance With Policy Provisions, 83 Harv.L.Rev. 961, 974 (1970)) (emphasis added). Again, the rationale for using an objective standard rests on the nature of an insurance policy of adhesion. The policy addresses the mass of people, not the individual adherent, and, for validity, relies on the reasonable expectations of the "ordinary" or "reasonable person." *Id*. (internal citation omitted.)

Finally, an insurance policy of adhesion is construed in accordance with the principle that the test is not what the *insurer* intended the words to mean, but rather, what a *reasonable layperson* would have thought the words meant. *Niswonger*, 992 S.W.2d at 317. The test is an objective one that, once resolved for one Member of the Class, is resolved for all. Accordingly, the question of fact regarding the reasonable expectations arising from the transaction is a predominate question common to all members of the class and its resolution depends upon evidence and findings common to all.

III. All Class Members are Alleged to have been Aggrieved Based on the Same or Similar Course of Misconduct and the Same Evidence Will Suffice to Show the Allegations for Each Class Member.

There is no question that the alleged policy and practice of Progressive to pay an amount less than the stated amount, if it is proven at trial that Progressive should have paid the stated amount, will have aggrieved all class members similarly. The question of whether this conduct was a breach of the policy is the predominate question. *See Clark*, 106 S.W.3d 483.

Accordingly, the court finds that there are questions of fact common to the class which predominate. The court also finds that the class action method is superior to other available methods for the fair and efficient adjudication of the controversy. In making this determination the Court has considered the above and, *inter alia:*

1. The interest of members of the class in individually controlling separate actions;

2. The desirability or undesirability of concentrating the litigation of the claims in this particular forum;

3. The difficulties likely to be encountered in the management of a class action; and

4. The various grounds argued by Defendants as reasons why this action allegedly is not appropriate for class action treatment.

WHEREFORE, in accordance with the above findings and opinion, it is **ORDERED** as follows:

1. Plaintiff Donald Armon's motion for class certification is **GRANTED**.

2. The Court certifies a class herein defined as:

> All individual persons, corporations, partnerships, associations and other entities who insured a vehicle during the Class Period from January 1, 2006 to the present under a "MISSOURI COMMERCIAL AUTO POLICY," Form 6912 issued by Defendant, and who suffered a "total loss" of said vehicle, as defined in Form 6912, and who recovered from Defendant for such loss an amount that was less than the "Stated Amount" for said vehicle minus any applicable deductible.
>
> Excluded from the Class are those persons who have lawsuits pending against, or who have settled their claims against, United Financial Casualty Company for the same or similar claims as set forth herein, members of the Missouri state judiciary, Defendant, Defendant's employees, any entities in which either Defendant has a controlling interest, and the parents, subsidiaries, affiliates, and their officers and directors of Defendant and the members of their immediate families.

3. Damages sought by this class do not include any claims for bodily injury, and claims for personal injury are expressly not a part of this lawsuit.

4. Plaintiff Donald Armon is appointed as class representative for the above-named class. The Meyers Law Firm and The Klamann Law Firm are appointed Class Counsel.

5. The Court finds, pursuant to Rule 52.08(c)(2), that the best notice practicable under the circumstances is individual notice to all members who can be identified through reasonable effort, and notice by publication to all other class members.

6. Within 30 days of the date of this order, Class Counsel and Defendant's counsel shall each submit to the Court for its review and consideration their respective memorandums containing (a) the parties' suggestions as to how, practically, to identify the names and current addresses of as many Class Members as may reasonably be possible; (b) a draft of the proposed Notice of Class Action, to be mailed directly to those Class Members who have been or can be identified within a reasonable time; (c) a draft of the proposed Published Notice of Class Action; (d) suggestions as to the appropriate timing and length of time period for publication of the Published Notice, and number and sources of publication; (e) the proposed processes for objections to the Class, Class Definition, Class Representative and/or Class Counsel; (f) the proposed process for "opt-outs," if any, to withdraw from the Class; and any other issues the parties deem relevant to the issue of proper and adequate Notice.

SO ORDERED:

5-3-13

Jack Grate

DATE

JACK GRATE, Circuit Judge