Docket: **16-3144-BLS1**
Date: **November 9, 2017**
Parties: **ALEX KANTZELIS, on behalf of himself and all others similarly situated, VS. THE COMMERCE INSURANCE COMPANY**
Judge: **Mitchell H. Kaplan**

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO STRIKE CLASS ALLEGATIONS

In this action, the plaintiff, Alex Kantzelis, asserts claims arising out of the defendant, The Commerce Insurance Company's (Commerce), failure to make payments directly to a secured lender that financed the plaintiff's purchase of his automobile after Commerce denied coverage for the plaintiff's collision claim because of misrepresentations in the plaintiff's application for insurance. He brings this action on his own behalf as well as on behalf of a putative class of similarly situated Commerce insureds.

The operative complaint governing the plaintiff's claims is his Third Amended Class Action
Complaint (the Complaint). The original complaint was filed on October 13, 2016. It was amended once as a matter of right and once with Commerce's assent. Commerce answered this second amended complaint, and also moved to dismiss on the grounds that the plaintiff lacked standing to bring the claims he asserted because he had suffered no damages. At a hearing on that motion, the court noted that the plaintiff's contention that his debt to the finance firm that financed his purchase of the car would have been extinguished if Commerce had paid

the secured lender, as it was allegedly required to do under the insurance policy, was not supported by the policy language—if Commerce paid the loss to the lender it would be substituted as the creditor for the amount of the loss so paid.[1] The court went on to comment that it was conceivable that a person in the plaintiff's position might have suffered some other loss because Commerce did not pay the lender, for example if the car was repossessed and this caused consequential damages to the insured. Plaintiff's counsel suggested that he could allege these kinds of special damages. The court gave the plaintiff an opportunity to file the third amended complaint, which, as noted above, is now the operative complaint in this case.

The case is now before the court on Commerce's "Motion to Strike Class Allegations." Commerce contends that because the plaintiff's claims rest on his allegations of special consequential damages unique to him, they cannot be the predicate for class-based claims. Whether such a motion to strike may be brought under Massachusetts jurisprudence is a question of first impression and discussed below. Of course, a denial of this motion would not be tantamount to the certification of a class, the plaintiff would still have to move for class certification under Mass.R.Civ.P. 23 and provide evidentiary support for class treatment. Rather, the practical issue raised by this motion is whether there are sufficient facts pled in the Complaint to permit the class claims to proceed and the plaintiff to take class discovery from Commerce.

FACTS

The following facts are taken from the allegations in the Complaint and the several exhibits attached to it. They are assumed to be true for the purposes of this motion.

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[1] This point is further discussed infra.

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Additionally, in prior proceedings the plaintiff, through counsel, conceded that he could not challenge Commerce's decision to deny his claim based on a false statement in his insurance application and prosecute claims on behalf of a class. He explained that he was not contesting the denial of coverage of his claim. In consequence, the court also assumes that, for the purposes of this motion, the facts underlying Commerce's denial of coverage are true.

In 2013, the plaintiff purchased a 2010 BMW 535X1 Sedan (the BMW). The purchase was financed by BMW Bank of North America (BMW Bank) which obtained a lien on the car. On November 12, 2013, the plaintiff applied to Commerce for an auto insurance policy (the Policy). The Policy issued for the period November 14, 2013 to November 14, 2014. The coverage page reflected that the plaintiff resided in Massachusetts. The BMW was involved in an accident on September 5, 2014 in Fort Lauderdale, Florida, and the plaintiff submitted a damages claim to Commerce for collision/comprehensive coverage.

Commerce assigned an appraisal service to inspect the car. By letter dated September15, 2014, Commerce notified the plaintiff that the BMW had been inspected and found to be a total loss. It recommended that it be moved from the BMW dealership where it was then being stored to a salvage facility. It also stated: "if you have a loan on your vehicle, please contact the bank or lien holder to give them permission to speak with Commerce." There is no allegation that the plaintiff did this.

The appraisal service that inspected the BMW notified Commerce that this was the third time that the BMW had been appraised and it believed that the plaintiff lived in Florida. This prompted an investigation by Commerce which confirmed that the plaintiff did live in Florida. By letter dated, October 7, 2014, Commerce informed the plaintiff of the results of its investigation and that it was denying the claim. The letter noted that the BMW was still being

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stored at the BMW dealership in Fort Lauderdale and recommended that the plaintiff contact the dealership to have the car returned to him.

At the time of the accident, the plaintiff owed BMW Bank $25,390 on the loan secured by the BMW. "Commerce determined that [the BMW] suffered a loss less than the full amount of the loan."[2] Commerce did not advise the plaintiff that Commerce would not pay the secured lender, unless the lender made a demand on Commerce. Commerce also did not notify BMW Bank when it cancelled the plaintiff's auto insurance Policy. There is no allegation that the plaintiff notified BMW Bank of the accident or the denial of coverage, or that BMW Bank made a demand on Commerce for payment under the policy.

The plaintiff made payments to BMW of $4,359 after his claim was denied, including $60 in late payment charges. He was also assessed an $850 repossession fee.[3]

The Complaint alleges that the plaintiff suffered various losses because Commerce did not tender payment in the amount of the lien to Commerce.[4] They can be summarized as follows:

- The plaintiff's defense against BMW Bank for non-payment of the loan was weaker.
- The plaintiff was deprived of multiple defenses and counterclaims which he would have had against Commerce, but not against BMW Bank.
- The plaintiff was dunned by creditors for failure to make payment of the BMW Bank loan.
- The BMW was repossessed and he was assessed a fee.

[2] The Complaint does not allege the actual amount at which Commerce valued the plaintiff's loss, which was presumably the value of the BMW at the time of the accident. Obviously, the BMW itself could not suffer a loss.
[3] The Complaint does not allege that this fee was paid.
[4] The Complaint does not explain why Commerce would pay BMW Bank the outstanding balance on the loan as opposed to the amount of the loss.

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- The plaintiff suffered negative credit consequences.
- The amount of plaintiff's liability to BMW increased.
- The plaintiff suffered a loss of time and money.
- The plaintiff has an outstanding debt to BMW Bank, or its assignee.
- The plaintiff's credit rating has been adversely affected.
- Commerce has been unjustly enriched.

The Definition of the Putative Class

The plaintiff defines the proposed class as follows:
All persons insured under a Massachusetts policy of auto insurance issued by Commerce:
A. Who reported to Commerce a first-party Collision, Limited Collision and/or Comprehensive claim; and
B. Who had said first-party claim(s) for coverage denied, and said denial was not based upon any allegation of conversion, embezzlement, or secretion by the insured or any household member of the insured, nor was the denial based upon any allegation of loss of or damage to the insured's auto resulting from arson, theft, or any other means of disposal committed by you or at your direction; and
C. On whose behalf Commerce failed/refused to make a claim settlement payment to the secured lender identified on the insureds' application and/or coverage selections page.

The Policy Provision

The relevant provision of the Policy is entitled "Secured Lenders" and states as follows:
When your Coverage Selections Page shows that a lender has a secured interest in your auto, we will make payments under Collision and Comprehensive according to the legal interests of each party.
The secured lender's right of payment will not be invalidated by your acts or neglect except that we will not pay if the loss of or damage to your auto is the result of conversion, embezzlement, or secretion by you or any household member. Also, we will

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not pay the secured lender if the loss of or damage to your auto is the result of arson, theft, or any other means of disposal committed by you or at your direction.
When we pay any secured lender we shall, to the extent of our payment have the right to exercise any of the secured lender's legal rights of recovery. If you do not file a proof of loss as provided in this policy, the secured lender must do so within 30 days after the loss or damage becomes known to the secured lender.

DISCUSSION

A. The Court May Entertain Motions to Strike Class Allegations

There are no Massachusetts cases addressing motions to strike class action allegations from a complaint. Federal courts have, however, addressed motions to dismiss allegations that a case should proceed as a class action on a number of occasions. In a fairly recent case, Manning v. Boston Medical Center Corp.. 725 F.3d 34 (1st. Cir. 2013), the First Circuit Court of Appeals addressed the issue as follows:

The dispositive question for purposes of this appeal is whether the complaint pleads the existence of a group of putative class members whose claims are susceptible of resolution on a classwide basis. See Wal-Mart Stores, Inc., v. Dukes, U.S. , 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) (holding that common issue of fact "must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke"). The Supreme Court has recognized that "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiffs claim." Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). If it is obvious from the pleadings that the proceeding cannot possibly move forward on a classwide basis, district courts use their authority under Federal Rule of Civil Procedure 12(f) to delete the complaint's class allegations.16 See, e.g., Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 949 (6th Cir.2011) (upholding striking of class allegations prior to close of discovery and motion to certify class).

Nonetheless, courts should exercise caution when striking class action allegations based solely on the pleadings, for two reasons. First, while ruling on a motion to strike is committed to the district court's sound judgment, "such motions are narrow in scope, disfavored in practice, and not calculated readily to invoke the court's discretion." Boreri v. Fiat S.p.a., 763 F.2d 17, 23 (1st Cir.1985). This is so because "striking a portion of a

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pleading is a drastic remedy and ... it is often sought by the movant simply as a dilatory or harassing tactic." 5C Charles Alan Wright, et. al., Federal Practice & Procedure § 1380 (3d ed.2011). Second, courts have repeatedly emphasized that striking class allegations under Rule 12(f) is even more disfavored because it requires a reviewing court to preemptively terminate the class aspects of ... litigation, solely on the basis of what is alleged in the complaint, and before plaintiffs are permitted to complete the discovery to which they would otherwise be entitled on questions relevant to class certification. Mazzola v. Roomster Corp., 849 F.Supp.2d 395, 410 (S.D.N.Y.2012) (citations omitted) (internal quotation marks omitted); see also Cholakyan v. Mercedes-Benz USA, LLC, 796 F.Supp.2d 1220, 1245 (C.D.Cal. 2011) (noting that "it is in fact rare to [strike class allegations] in advance of a motion for class certification" and collecting cases). Accordingly, a court should typically await the development of a factual record before determining whether the case should move forward on a representative basis.

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Accepting the complaint's allegations as true, as we must, these facts support the plausible inference that this combination of policies affected BMC's employees across the board, notwithstanding their different roles within the company. Even if the court had concerns about plaintiffs' ability to represent such a diverse group of employees, those concerns do not justify the drastic measure of striking the class allegations in their entirety. Cf. Twombly, 550 U.S. at 563 n. 8, 127 S.Ct. 1955 ("[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder."). Moreover, the district court has many tools at its disposal to address concerns regarding the appropriate contours of the putative class, including redefining the class during the certification process or creating subclasses. Cf.

Fengler v. Crouse Health Found., Inc., 595 F.Supp.2d 189, 197 (N.D.N.Y.2009) (granting class certification in hospital compensation case, but excluding "non-patient care workers," such as cafeteria workers and security staff, because plaintiffs failed to show that these employees worked without pay with hospital administrators' knowledge). Therefore, plaintiffs should have the chance to prove their assertions through discovery and a properly-brought motion for class certification.

In reliance of the federal court decisions interpreting Rules 23 and 12(f), this court concludes that, in appropriate circumstances, a Massachusetts trial court can dismiss class allegations under Mass.R.Civ.P. 12(f). The standard to be applied in determining whether to grant such a motion is, however, the standard to be applied for motions to dismiss brought under Mass.R.Civ.P. 12(b)(6), i.e., the court must "take as true the allegations of the complaint, as well as the reasonable inferences as may be drawn therefrom in plaintiffs favor. . . . What is required

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at the pleading stage are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . based on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Golchin v. Liberty Mutual Ins. Co., 460 Mass. 222, 223 (2011) (Internal citations and quotations omitted). In the context of a motion to dismiss claims that a case proceed as a potential class action, this means that, accepting as true all factual allegations (as opposed to legal conclusions), the court concludes that it is nonetheless "obvious from the pleadings that the proceeding cannot possibly move forward on a classwide basis" because one of the requirements for class certification defined in Mass.R.Civ.P. 23(a) and (b) cannot be established.[5]

B. Do the Class Allegations Support A Plausible Claim for Class Treatment?

1. Claims that are not consistent with the Policy or the plaintiff cannot assert.

The plaintiffs second amended complaint, which Commerce moved to dismiss for lack of standing, was predicated on plaintiff's apparent contention that if Commerce paid BMW Bank, he would be relieved of his obligations under the loan he had obtained to purchase the BMW. That contention is unsupported by the language of the Policy. The "Secured Lender" provision in the Policy makes clear that while BMW Bank's right to payment of the amount of the loss is not "invalidated" by an insured's false statements in an insurance application, Commerce steps into the position of the secured lender when it pays the lender under this provision: "to the extent of

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[5] The motion now before the court should be distinguished from motions brought by defendants to deny class certification after the plaintiff has had an adequate time to undertake class discovery. Federal Courts have held that Fed.R.Civ.P. 23 should not be read to permit only a plaintiff to file a motion for class certification, thereby requiring defendants to wait until the plaintiffs act before requesting a court to address the issue of whether the case can proceed as a class action. See Vinole v. Countrywide Home Loans, Inc. 571 F.3d 935 (9th Cir. 2009) and cases there cited. However, in those cases the Federal Courts have distinguished motions brought under Rule 12(f) predicated on the inadequacy of the pleadings from those brought after the plaintiffs have had an adequate time to conduct discovery and present a factual record supporting their claim to proceed on behalf of a class of similarly situated individuals. Id. at 940-941.

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our payment [we] have the right to exercise any of the secured lender's legal rights of recovery." In other words, from the perspective of the insured there is no transfer of risk of loss; there is only a change of creditors with Commerce substituted for the financing firm. In consequence, there is no class of insured's that suffered economic loss simply because Commerce did not pay the finance company that held a disclosed lien on its insured's automobile. While this theory of loss could be applied to a class of insureds, it is not supported by the language of the Policy.

In the operative third amended complaint the plaintiff also alleges that Commerce is unjustly enriched when it fails to pay a secured lender which has not made a claim under the policy. However, an insurance policy is a contract between the insurer and the insured. See Cody v. Connecticut Gen. Life Ins. Co., 387 Mass. 142, 146 (1982). And, a claim of unjust enrichment cannot be asserted when the parties' obligations to one another are covered by a contract. See, e.g., Bosewell v. Zephyr Lines, Inc. 414 Mass. 241, 250 (1993) (Where the court held that recovery for unjust enrichment or other quasi contract theories "presupposes that no valid contract covers the subject matter of a dispute."). Moreover, it should be noted that the right of a secured lender to recover the amount of the loss when the insurer has properly denied the policy holder's claim is not a "coverage" described in the coverage section of the Policy or listed on the policy holder's Coverage Selection Page. No part of the premium is calculated based on this policy provision, and it is included in every policy regardless of whether there is a lien on a covered automobile. In any event, no claim for unjust enrichment can be brought by the plaintiff in this case or by a class of plaintiffs.

The plaintiff also alleges an element of damages in the Complaint that could, in theory, be asserted by him and other policy holders, but which he has specifically represented to the court he is not pursuing. The plaintiff contends that he has defenses and counterclaims that he

could assert against Commerce, if Commerce had paid BMW Bank and sued him as successor to BMW Bank's rights under the loan. However, the plaintiff has stated that he is not contesting Commerce's decision to deny his direct claim because of misrepresentations concerning his residence and where the BMW was garaged. Clearly, the only defense (or counterclaim) that the plaintiff could assert against Commerce that would not lie against BMW Bank would arise from assertions that Commerce wrongfully denied coverage for the loss sustained when the BMW crashed. Presumably, the plaintiff renounced any claims based on a wrongful denial of coverage because the coverage question would involve facts unique to any policyholder and would not be susceptible to class treatment. In any event, the plaintiff cannot reintroduce wrongful denial of coverage into this litigation by alleging that an inability to defend against claims under the loan based on a denial of coverage is as an element his damages.

It may be noted that an insurer's refusal to pay a secured lender when the insured is validly contesting a denial of coverage on the grounds of misrepresentation might well cause damages to the insured, who might not have the funds to obtain substitute transportation and pay the existing loan while contesting the insurer's position. Whether such claims could be asserted on behalf of a class is unclear. In such circumstances, the validity of the insured's position would likely turn on facts unique to each insured. This is likely why, in this case, the plaintiff made clear that he was not contesting Commerce's denial of coverage.[6]

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[6] The prerequisite for class certification that common questions of

law and fact predominate over individualized questions is discussed infra. See Mass. R. Civ. P. 23(b). The court also notes that, having reviewed the October 7, 2014 letter to plaintiff in which Commerce informed the plaintiff of the results of its investigation concerning his residence, the court has some question as to whether the plaintiff would be an adequate class representative of a class of plaintiffs who had valid reasons to contest a denial of coverage on the grounds of misrepresentations in the insurance application.

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2. Claims in which common questions of fact are not predominant.

Under Mass. R. Civ. P. 23, in order for a class to be certified by the court, a plaintiff must demonstrate that (1) the class is sufficiently numerous to make joinder of all parties impracticable, (2) there are common questions of law and fact, (3) the claims or defenses of the representative party are typical of the claims or defenses of the class, and (4) the named plaintiff will fairly and adequately protect the interests of the class. See Mass. R. Civ. P. 23(a). Additionally, a plaintiff must show that common questions of law and fact predominate over individualized questions and that the class action is superior to other available methods for fair and efficient adjudication of the controversy. See Mass. R. Civ. P. 23(b). It is the "predominance" test which arises under Rule 23(b) that requires close attention in addressing the pending motion to strike.

"The predominance test expressly directs the court to make a comparison between the common and individual questions involved in order to reach a determination of such predominance of common questions in a class action context" Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 363 (2008) (citation omitted). The predominance requirement is satisfied by a sufficient constellation of common issues between class members and cannot be reduced to a mechanical, single-issue test. See Weld v. Glaxo Wellcome Inc., 434 Mass. at 92. See also Waste Mgt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 (1st Cir. 2000).

There is, of course, a predominant issue of law raised by the Complaint and common to any policyholder: (1) who disclosed a lien on a covered automobile in her/his insurance application; (2) subsequently had a claim denied based on the insured's "acts or neglect" (other than loss to the insured's auto that "is the result of conversion, embezzlement, or secretion by you or any household member"); (3) where the lien holder did not make a demand for payment

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of the loss,[7] and (4) Commerce did not tender payment in the amount of the loss to the lien holder. It is the court's understanding that Commerce's position is that the Policy does not require it to tender payment under these circumstances. Whether that interpretation of the Policy is correct raises a common and predominant question of law. However, for a putative class member to have a claim and therefore to be a member of a class, he/she must have suffered a loss. The question of whether an insured suffered damage as a result of Commerce's position on the Secured Lender provisions of the Policy appears to introduce individualized and predominant questions of fact. A review of the overbroad class definition alleged in the Complaint makes this clear.

The plaintiff contends that every insured whose collision/comprehensive coverage claim was denied for the reasons stated above and whose lender was not paid the loss that would have been paid to the insured, but for the denial of coverage, is a member of the class. It is, however, evident that many insureds, if not most of them, would not have suffered any loss as a result of Commerce's failure to pay the secured lender, have no claim, and consequently not be a member of the proposed class.

For example, the proposed class definition included claims like the one asserted in this case in which the car was a total loss, as well as claims in which the car was capable of repair. An insured who fixed the car and kept-up payments on the loan will have suffered no loss. Indeed, an insured who knew that he had no basis for contesting the denial of coverage might well not want the finance company which financed the purchase of his car to know that he had made misrepresentations on his insurance application. Even when the car is a total loss, many

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[7]The Complaint does not allege that the plaintiff made a demand on Commerce to pay BMW Bank. It is not clear from any pleading filed in this case, if Commerce has a practice of refusing to pay the lien holder if the insured directs Commerce to make the payment.

insureds might prefer to deal with a finance company, as opposed to creating a financial obligation to Commerce. For instance, where the amount of the loss is far less than the amount still due on the loan, the insured might prefer to have one creditor to negotiate with rather than owing the finance company the balance due on the loan and Commerce the amount of the loss paid to the finance company. And, of course, where an at-fault driver of another car caused the loss, the insured may suffer no loss.

Because Commerce's payment to the lien holder only causes a substitution of Commerce as creditor, it is manifest that a special set of events has to occur as a consequence of Commerce's failure to pay the loss to the finance company for Commerce's conduct to have caused its insured to sustain damages. These events would have to be proven by any insured making a claim against Commerce, as the plaintiff himself must do to prevail in his own individual claims against Commerce in this litigation.[8]

The plaintiff argues that: "[t]he particular nature of the damages flowing from the same [sic, presumably wrongful act] are irrelevant for the purposes of certification," citing Weld v. Glaxco Wellcome Inc., 434 Mass. 81, 92 (2001). However, in Weld, the Supreme Judicial Court (SJC) noted that the allegedly wrongful course of conduct engaged in by the defendants involved a per se violation of the privacy of each class member and whether there would even be differences in potential damages among class members was not clear. By contrast, in the instant case, it is evident that a factual inquiry as to whether a potential class member suffered any

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[8] In this case, the plaintiff alleges as damages that he paid $4,359 to BMW Bank after the accident, but he also alleges that Commerce informed him that the amount of the loss on the BMW was less than the amount still due on the loan at the time of the accident. It may be that the amount he paid BMW Bank was not in excess of the balance of the loan less the amount of the loss. Additionally, he alleges that the BMW was repossessed, but also that it was a total loss. The correspondence that he attached to the Complaint suggests that he may have simply left the vehicle at the BMW dealership in Fort Lauderdale. In addressing the pending motion all plausible factual inferences must, of course, be drawn in favor of the plaintiff. Nonetheless, the nature of these factual allegations underscore the individualized factual issues that would have to be resolved in ruling on each putative class member's claim.

damage is required. In Aspinall v. Philip Morris Cos., 442 Mass. 381, 397 n.19, (2004), the SJC explained that: "The plaintiffs do not seek damages for personal injuries. Were it otherwise, unique and different experiences of each individual member of the class would require litigation of substantially separate issues and would defeat the commonality of interests in the certified class." Again, this case requires individual fact finding not only to determine the amount of damages, but whether a claimant suffered any damages and therefore could be a member of the class.

There is another way to think about the problems that arise when individualized fact finding is required to determine who is a member of a putative class. Federal case law suggests that there is another implicit element that must be established before a class may be certified, that is that the class is "ascertainable." In Dononvan v. Philip Morris USA, Inc., 268 F.R.D. 1, 9 (D. Mass. 2010), a Federal District Court described this requirement as follows: "While not explicitly mentioned in Rule 23, an implicit prerequisite to class certification is that a 'class' exists—in other words, it must be administratively feasible for the court to determine whether a particular individual is a member . . . . To be ascertainable, all class members need not be identified at the outset; the class need only be determinable by stable and objective factors." Dononvan v. Philip Morris USA, Inc., 268 F.R.D. at 9 (internal quotations and citations omitted). However, when "class members [are] impossible to identify prior to individualized fact-finding and litigation, the class fails to satisfy one of the basic requirements for a class action under Rule 23." Shanley v. Cadle, 277 F.R.D. 63, 68 (D. Mass 2011). See also Kwaak v. Pfizer, Inc., 71 Mass. App. Ct. 293, 300-301 (2008) (where class certification was reversed when individual proof would be required to determine whether a particular purchaser of Listerine was exposed to

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deceptive advertising that affected the decision to purchase the product as the advertising was not uniform during the class period).

In this case, while Commerce's own records might be adequate to identify insureds who had their collision/comprehensive claims denied because of their own conduct or neglect, had disclosed liens on their covered automobiles, and the lien holders were not paid the amount of the loss, those records would be inadequate to identify which of those insureds suffered a loss—that would require individualized fact finding concerning what thereafter happened to these insureds, more specifically whether they then suffered some manner of loss attributable to a failure to pay the lien holder. In Carrera v. Bayer Corp., 727 F.3d 300, 306-307 (3rd Cir. 2013), the Third Circuit Court of Appeals explains the concept of ascertainability at length and its importance in determining whether a class may be certified. Of relevance to this case, the Third Circuit explains: "A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues . .. A defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim." Id. at 307. No Massachusetts appellate decision has yet specifically addressed the question of whether ascertainablity should be considered in determining whether a class may be certified, but these concerns appear to underlay the Appeals Court's decision in Kwaak cited above.

C. Applying the Rule 12(b)(6) Standard.

The standard to be applied in deciding whether to strike class action allegations from a complaint is a rigorous one. Nonetheless, in this case the factual allegations of the complaint do not support a plausible claim that the plaintiff may proceed on behalf of a class of similarly

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situated individuals. In order to avoid dismissal of his own claim, the plaintiff amended his complaint to assert special damages allegedly incurred because Commerce did not pay BMW Bank the amount of the loss occasioned by the crash of his BMW. The plaintiff will have to prove these consequential damages to recover against Commerce. Any other plaintiff would similarly have to prove such damages to recover—or be a member of a class. No discovery obtained from Commerce could cure the inherent shortcomings in the class allegations.

ORDER

For the foregoing reasons, the defendant's motion to strike the class action allegations is ALLOWED.

Mitchell H. Kaplan
Justice of the Superior Court

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