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SUPREME COURT

No. 91494

In the
Supreme Court of Illinois

MICHAEL E. AVERY, et al., on behalf of themselves and all others similarly situated, *Class Plaintiffs – Appellees - Petitioners,*	) On Appeal from Appellate Court) of Illinois, Fifth Judicial District,) No. 5-99-0830, there heard on) Appeal from Circuit Court, First
v.	) Judicial Circuit, Williamson) County, Illinois, No. 97-L-114
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Defendant-Appellant-Respondent.*	) Hon. John Speroni,) Judge Presiding)

PETITION TO RECALL MANDATE AND VACATE AUGUST 18, 2005 JUDGMENT

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ORAL ARGUMENT REQUESTED

MAY IT PLEASE THE COURT:

Petitioners, pursuant to the Court's inherent powers to correct a judgment obtained through fraud and concealment, 735 ILCS 5/2-1401(f), and Rule 366(a)(5) of Article III of the Illinois Civil Appeals Rules, seek an order vacating this Court's August 18, 2005 judgment in this matter and determining – *for the first time* – that State Farm's extraordinary financial and political support for Justice Karmeier's 2004 campaign created a constitutionally-unacceptable risk of bias such that his participation and vote to reverse the *$1.05 billion* judgment deprived Petitioners of their due process rights under the Fourteenth Amendment to the United States Constitution, Article II, § 2 of the Illinois Constitution, and well-established United States and Illinois Supreme Court precedent. *See Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009); *Aetna Life Ins. Co. v. Lavoie,* 106 S. Ct. 1580 (1986); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *In re Murchison,* 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *In re Marriage of O'Brien*, 2011 IL 109039, ¶48.[1]

1. This petition is based upon newly-discovered evidence (coupled with facts previously presented to this Court) which recently came to light after key individuals who were involved in or supported that campaign finally broke their silence regarding the extraordinary efforts and substantial funding made by State Farm to Justice Karmeier's[2] 2004 campaign while the appeal of this matter was pending. This new evidence was predominantly accumulated through person-to-person interviews by Daniel L. Reece, a

[1]A copy of the August 18, 2005 judgment is attached hereto as Exhibit 1.

[2]Prior to being elected to this Court in 2004, Justice Karmeier was a Circuit Judge in Washington County. For consistency, while some references to Justice Karmeier below refer to matters which preceded his election, Justice Karmeier will be referred to hereafter according to his current appellation.

retired 28-year Special Agent for the Federal Bureau of Investigation ("FBI"), who spent his career investigating and unraveling cases of public corruption and fraud in California, North Carolina, Tennessee, West Virginia, and Illinois.

2. In the final analysis, this evidence not only substantiates, but confirms, once and for all, that State Farm deliberately lied to and misled this Court, and concealed information from this Court in 2005 in an effort to conceal its extraordinary support of Justice Karmeier's campaign and to thwart Justice Karmeier's disqualification.

PRELIMINARY STATEMENT

3. Retired FBI Special Agent Reece conducted a six-month long investigation into State Farm's involvement in the 2004 campaign of Justice Karmeier for a seat on this Court. Agent Reece's interviews confirmed the following facts:

- State Farm lawyer and lobbyist William G. ("Bill") Shepherd[3] was on the Executive Committee of the Illinois Civil Justice League ("ICJL") that recruited Justice Karmeier to run for the seat;

- Shepherd and CNA's Karen Melchert chose Ed Murnane to head the ICJL in 1993, and also selected Murnane to run Judge Karmeier's 2004 Illinois Supreme Court campaign;

- State Farm, through Shepherd and Murnane, used the ICJL's PAC (JUSTPAC) to raise $1,191,453 and funnel that money to Justice Karmeier's campaign;

- Nearly 90% of the contributions made to JUSTPAC in 2004 went to Justice Karmeier's campaign;

[3]According to the Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois ("ARDC"), William G. Shepherd, whose registered business address is "State Farm Insurance Companies, 1 State Farm Plz, 1 State Farm Plz Corporate Law A3 Bloomington, IL 61710-0001," was admitted as a lawyer by the Illinois Supreme Court on November 1, 1977. *See* ARDC Individual Attorney Record of Public Registration and Public Disciplinary and Disability Information as of August 24, 2011 at 1:17:10 PM, Separate Appendix of Exhibits to Petition ("Separate Appendix").

- State Farm was responsible for at least $2.5 million of Judge Karmeier's campaign contributions;

- Justice Karmeier's campaign consultant, Al Adomite, and ICJL Executive Committee members Melchert and Kim Maisch stated that State Farm gave Justice Karmeier's campaign "***significant***" or "***tremendous***" support; and

- Justice Karmeier knew the extent of State Farm's involvement in his campaign.

See Affidavit of Daniel L. Reece, ¶ 33, 65 (Separate Appendix, Exhibit 2).

4. As Petitioners, named representatives for millions of State Farm policyholders, demonstrate, the judgment in this case was procured through State Farm's concealment of a fraud on this Court, including misleading statements attempting to conceal the significant role State Farm played in the campaign and election of Justice Karmeier. Accordingly, Petitioners ask this Court to recall the mandate, vacate the fraud-induced August 18, 2005 judgment, and reinstate the judgment of the Appellate Court.

5. The issues raised by Petitioners go well beyond the interests of the private parties, being of exceptional importance to millions of State Farm policyholders all across the United States, as well as the general public – for the conduct of State Farm, as described below, "is a wrong against the institutions set up to protect and safeguard the public." *See Skelly Oil Co. v. Universal Oil Products Co.*, 338 Ill. App. 79, 87 (Ill. App. 1949).

6. While this appeal was pending, State Farm engineered the candidacy and election of Justice Karmeier to this Court in 2004. State Farm – acting through its lawyer and lobbyist Shepherd, Murnane, the Illinois Civil Justice League, and JUSTPAC – was ultimately responsible for recruiting Justice Karmeier to run for the seat, for pushing Justice Karmeier as the "pro-business" candidate, for running his campaign, and above

all, for infusing not just $350,000 (as initially believed), but well over ***$2.5 million*** – and perhaps as much as or more than ***$4 million*** – into the campaign. Nine months after his election, unmoved by requests for his recusal in the appeal based on State Farm's substantial support of his campaign, Justice Karmeier voted in favor of State Farm to overturn the $1.05 billion judgment of the Appellate Court.

7. It is now unmistakably certain that State Farm deliberately (and successfully) deceived members of this Court in 2005 into believing that its support of Justice Karmeier was "quite modest" when, in fact, as retired Special Agent Reece's extensive investigation has established, its financial and political support of Justice Karmeier was nothing short of "tremendous." *See* Reece Affidavit, ¶¶ 57-59.

8. Foremost among the newly-discovered facts unearthed by retired Special Agent Reece is that State Farm failed to disclose the prominent role played by State Farm lawyer and lobbyist Shepherd in creating the ICJL, in hiring Murnane to head that organization, and as a charter member of the politically-powerful ICJL Executive Committee. Contrary to State Farm's efforts to downplay its own role in Justice Karmeier's campaign as "quite modest," it now appears certain that the ICJL and its Executive Committee functioned throughout the 2004 campaign as State Farm's "vehicle" to: (1) help recruit Justice Karmeier, (2) manage his campaign, (3) lend credibility to his campaign via endorsement, and (4) assure that Justice Karmeier's campaign was incredibly well-funded. *See* State Farm's Opposition to Appellees' Conditional Motion for Non-Participation ("State Farm's Opposition"), at pp. 12-13 (Separate Appendix, Exhibit 3). Led by Murnane, the ICJL was the "glue" that held together the pieces of State Farm's extraordinary efforts to have Justice Karmeier elected.

9. The extraordinary support State Farm allocated to Justice Karmeier's campaign – all while its appeal remained pending in this Court – is evidenced not only by the Affidavit of retired Special Agent Reece, but also by the Affidavit of former Murnane associate and Illinois tort reform-insider Douglas B. Wojcieszak, by campaign finance disclosures and discarded emails, and by the statements of key individuals with joint-interests in electing Justice Karmeier, including CNA's Karen Melchert, tort-reform insider Kim Maisch, and campaign consultant Al Adomite. This information demonstrates the immensely powerful magnitude of State Farm's control over and support of Justice Karmeier's campaign. *See* Reece Affidavit, ¶¶ 57-59; Affidavit of Douglas B. Wojcieszak, ¶ 13 ("Wojcieszak Affidavit") (Separate Appendix, Exhibit 4).

10. Finally, one of Justice Karmeier's key campaign consultants (Adomite) candidly acknowledged that Justice Karmeier was undoubtedly aware of the sources of his campaign funds. Still, Justice Karmeier chose to participate in *Avery* and vote in State Farm's favor. Along the way, however, Justice Karmeier had a number of opportunities to disqualify himself from participating. For instance, he could have entered a voluntary non-participation order, as did Justice Thomas; or he could have granted Petitioners' initial conditional motion for non-participation; or entered a non-participation order in response to Petitioners' motion for recusal to the full Court; or he could have simply declined to participate in the opinion.

11. Asked to disqualify Justice Karmeier, the full Court declined. Ultimately, knowing he was being called upon to decide an appeal which could restore over ***$1.05 billion*** to his principal supporter, Justice Karmeier opted to do just that, voting in State Farm's favor in all parts of the Court's decision.

12. Almost six years later – on August 4, 2011 – in a special concurring opinion, Justice Karmeier belatedly endorsed Petitioners' view from 2005, observing:

> The notion that individual judges have sole and exclusive authority for determining whether they should continue to participate in a given case is untenable for another reason as well. It would enable judges to continue to sit on cases even where their participation in the case would deprive one of the litigants of a fair trial. Such a result is impermissible under the due process clause of the United States Constitution. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. __, 129 S. Ct. 2252 (2009) (reversing judgment of the Supreme Court of Appeals of West Virginia on federal due process grounds where one of the participating justices should have recused himself but refused to do so).
>
> Not only should judges not be the sole and exclusive arbiters of whether they should continue to participate in a case, some have questioned whether they should *ever* be permitted to sit in judgment of requests for their own disqualification.

In re Marriage of O'Brien, 2011 IL 109039, ¶ 122-23 (Karmeier, J., specially concurring).

13. In the final analysis, the evidence of State Farm's actions - through Shepherd, Murnane and others - in recruiting Justice Karmeier, providing him substantial financial support and managing his campaign, paired with Justice Karmeier's decision to participate in the appeal, created a constitutionally – unacceptable risk of bias which deprived Petitioners of their due process rights. This evidence also requires the recall of the mandate in this case, an order vacating that judgment, an order quashing the grant of State Farm's petition for leave to appeal, and finally, reinstatement of the Appellate Court's decision.

JURISDICTIONAL STATEMENT

14. This Court has jurisdiction over this matter because, as established above, State Farm committed an extrinsic fraud on this Court through concealment of its extraordinary support of Justice Karmeier's election campaign. This extrinsic fraud renders the Court's judgment void and reviewable pursuant to this Petition. This is especially true here, where State Farm actively concealed facts which, if known, would have shown the severe risk of bias and thus, violation of Petitioners' constitutional protections. Illinois has a strong policy against concealment of evidence in legal proceedings. *See e.g. Lubbers v. Norfolk & Western Ry. Co.,* 105 Ill.2d 201, 209-10 (1984), affirming 118 Ill.App.3d 705, 708-10 (1983).

15. A petition to vacate may be filed in any proceeding "regardless of the nature of the order or judgment from which relief is sought; or of the proceedings in which it was entered." 735 ILCS 5/2-1401(f). While the petition "must be filed in the same proceeding in which the order or judgment was entered," it "is not a continuation thereof." 735 ILCS 5/2-1401(b). Such a motion or petition to vacate a void judgment can be brought in any court. *Evans v. Corporate Services*, 207 Ill. App. 3d 297, 565 N.E.2d 724 (1990) ("a void judgment, order or decree may be attacked at any time or in any court, either directly or collaterally"). "The duty to vacate a void judgment is based on the inherent power of the court to expunge from its records void acts of which it has knowledge." *People v. Magnus*, 262 Ill. App. 3d 362, 365 (1st Dist. 1994).

16. Moreover, no time limit exists within which such a petition must be filed. *People v. Wade*, 116 Ill. 2d 1, 6 (1987) ("A void judgment may be attacked at any time, either directly or collaterally."). Finally, the proponent of the petition does not have to demonstrate due diligence in seeking such relief. 735 ILCS 5/2-1401.

PROCEDURAL BACKGROUND IN COURTS BELOW

17. The proceedings below were extensive and resulted in the largest class action judgment in Illinois history. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 321 Ill. App. 3d 269, 275 (Ill. App. Ct. 5th Dist. 2001). The judgment included an award of $456,636,180 in breach of contract damages, punitive damages of $600,000,000, and disgorgement damages of $130,000,000. State Farm appealed. The Appellate Court upheld the jury verdict in all respects, upheld a $1.05 billion judgment for the Class, but disallowed the award of disgorgement damages. *Id.* at 292.

18. Petitioners provide the following summarized procedural chronology:

July 1997	Class Action Complaint filed.
August 16, 1999	Trial begins, ending in $1.18 billion judgment.
April 05, 2001	Illinois Appellate Court reverses jury's award of disgorgement damages ($130,000,000) but affirms judgment in all other respects ($1.05 billion).
October 2, 2002	Illinois Supreme Court granted leave to appeal.
May 2003	Oral Argument in *Avery* heard in the Illinois Supreme Court.
May 2003 – Nov. 2004	*Avery* case left pending before Supreme Court during Justice Karmeier's campaign.
2004	Illinois Supreme Court campaign.
November, 2004	Justice Karmeier prevails in election.
January 26, 2005	Avery asked Justice Karmeier to recuse himself because much of his $4.8 million in campaign funds came directly from State Farm and its agents or from groups of which State Farm was an active member and supporter.
March 16, 2005	Justice Karmeier took no action on Avery's motion to recuse. The Illinois Supreme Court denied Avery's motion, ruling that the subject of Justice Karmeier's recusal was up to Justice Karmeier, and not subject to further review by the Illinois Supreme Court.
May 20, 2005	Illinois Supreme Court issued a second order stating that, because Justice Karmeier had declined to recuse himself, Avery's recusal motion was "moot."
August 18, 2005	Well over two years after the case was argued, Justice Karmeier casts his vote to overturn $1.05 billion judgment against State Farm. (Justice Thomas did not participate in the case). Absent Justice Karmeier's participation, only those portions of the court's opinion joined by one of the two dissenting Justices would have had the votes required by law to overturn the judgment, and part of the judgment would have stood.
September 8, 2005	Avery moved for rehearing and again challenged Justice Karmeier's participation.
September 26, 2005	Avery's petition for rehearing was denied without comment, with Justice Thomas again not participating, but Justice Karmeier sitting.
March, 2006	U.S. Supreme Court denied certiorari.
December 2010 May 2011	Counsel for Avery retained retired FBI Agent who conducts a 6-month investigation regarding the role State Farm played in Justice Karmeier campaign/election.

19. Undoubtedly, the stakes in this appeal were huge, and State Farm ultimately asked this Court to review the Appellate Court's decision. On October 2, 2002, this Court accepted State Farm's appeal. And although the Court heard oral argument seven months later, from October 2, 2002 to August 18, 2005 – a period of thirty-four (34) months – the appeal remained pending before this Court.

20. It was during the latter part of this period – in 2004 – when the campaign between Justice Karmeier and Judge Gordon Maag was waged, with State Farm exerting its powerful and tremendous financial and political influence to support Justice Karmeier's election. The actions by State Farm created a constitutionally–unacceptable risk and/or intolerable probability of bias.

21. Several individuals and entities were key players in State Farm's record-breaking support of Justice Karmeier in the 2004 Supreme Court election, including:

> • William G. ("Bill") Shepherd. Shepherd is a State Farm lawyer and lobbyist (a direct employee of State Farm). He was also a member of the Illinois Civil Justice League ("ICJL") and sat on ICJL's unpublicized "Executive Committee." Shepherd's membership on the Executive Committee was unknown to Avery's attorneys until discovered by retired FBI agent Daniel L. Reece. *See* Reece Affidavit, at ¶¶ 20, 33-34, 40; Wojcieszak Affidavit, at ¶¶ 11-12, 34, 60-61.
>
> • Ed Murnane. Murnane is the head of the ICJL and treasurer of its political action committee ("JUSTPAC"). He was hired by Shepherd and co-founding ICJL-member and Executive Committee member, Karen Melchert; and
>
> • The Illinois Civil Justice League and JUSTPAC.

JUSTICE KARMEIER'S ELECTION AND DENIAL OF PETITIONERS' REQUEST FOR RECUSAL

22. While the appeal was pending, the ICJL's Ed Murnane evaluated possible candidates for the open Fifth District Supreme Court seat. Working at the direction of Shepherd and the IJCL Executive Committee, Murnane was the principal recruiter of Justice Karmeier to run for that seat.

23. Ultimately, Murnane, Shepherd, and other members of the Executive Committee "vetted" and placed the considerable support of the State Farm-backed ICJL and JUSTPAC behind Justice Karmeier. *See* Reece Affidavit, at ¶¶ 32-59; Wojcieszak Affidavit, at ¶¶ 27, 34, 61. Backed by State Farm's "tremendous" financial and political support, Justice Karmeier's campaign culminated in his election in November 2004. *See* Reece Affidavit, at ¶¶ 57-59; Wojcieszak Affidavit, at ¶ 13.

24. Petitioners learned that Justice Karmeier had received as much as $350,000 in contributions from employees, lawyers, and others involved with State Farm and its appeal. Once the appeal came before the newly-reconstituted Court, Petitioners sought Justice Karmeier's recusal, pointing to evidence that suggested State Farm had a huge financial stake in the appeal. *See* "Appellees' Conditional Motion for Non-Participation" ("Recusal Motion") and "Memorandum in Support of Appellees' Conditional Motion for Non-Participation" (Separate Appendix, Collective Exhibit 5) filed on January 26, 2005.

25. Predictably, State Farm opposed the request for recusal, arguing Justice Karmeier had a "right, duty and obligation to participate" in pending appeals, that his "impartiality" had "not been questioned," and that "no appearance of partiality" had been shown or existed. *See* State Farm's Opposition (Separate Appendix, Exhibit 3). State

Farm deceptively understated and downplayed not only the magnitude of its financial support, but also the degree of participation by its executives, surrogates, lawyers, and employees in the minutiae of the campaign. *See* State Farm's Opposition, at pp. 10-18 (Separate Appendix, Exhibit 3).

26. Petitioners fully expected Justice Karmeier to recuse himself under Ill. Sup. Ct. Rule 63(C)(1) and controlling due process principles. Surprisingly, he did not. In the end, Justice Karmeier simply took no action on Petitioners' motion and the full-Court declined to intercede. *See* Supreme Court Notice of Order (Separate Appendix, Exhibit 6). Reversal of the $1.05 billion judgment followed, with Justice Karmeier presumably participating in the Court's deliberations and ultimately casting his vote in State Farm's favor. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 835 N.E.2d 801 (Ill. 2005).

27. Under the Illinois Constitution, the Illinois Supreme Court "shall consist of seven judges." Three are selected from the First Judicial District (comprising Cook County), the other four are selected from each of the other four judicial districts. Ill. Const. Art. VI, §§ 2-3. Absent concurrence of four justices, no Appellate Court opinions can be overturned. Ill. Const. Art. VI, § 3. Thus, as to the 4-2 part of the opinion, his vote was the decisive vote, since a 3-2 decision, as the Court well knows, is constitutionally insufficient to overturn the Appellate Court's judgment. Significantly, the opinion *made no reference whatsoever to Petitioners' request for recusal or their due process concerns. See Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 835 N.E.2d 801 (Ill. 2005). For all of this, Petitioners were deprived of their due process rights under the federal and Illinois Constitutions.

28. Justice Karmeier's special concurring opinion in *O'Brien* illustrates the imminent danger posed when recusal rests exclusively with the challenged judge:

> Recusal motions are not like other procedural motions. They challenge the fundamental legitimacy of the adjudication. They also challenge the judge in a very personal manner; they speculate on her interests and biases; they may imply unattractive things about her. Allowing judges to decide on their own recusal motions is in tension not only with the guarantee of a neutral decision-maker, but also with our explicit commitment to objectivity in this arena. 'Since the question whether a judge's impartiality "might reasonably be questioned" is a "purely objective" standard, it would seem to follow logically that ***the judge whose impartiality is being challenged should not have the final word on the question whether his or her recusal is "necessary" or required.'"***

Id., at ¶ 123 (citing Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 Washburn L. J. 503, 530 (2007)) (hereinafter, "*Goldberg*") (emphasis added).

29. Justice Karmeier's citation to the *Goldberg* article is perhaps the most telling aspect of his special concurrence, as the authors of that article had criticized Justice Karmeier's participation in the *Avery* decision, remarking that because of his participation, "public trust in the courts invariably suffers":

> In the end, Karmeier won both the fundraising battle and the election. Karmeier described the expense of the campaign as "obscene" and expressed unease about its impact on public trust in the courts, but his concern for appearances waned almost immediately upon election. Once seated on the Illinois high court, he refused to recuse himself from the Avery appeal. Karmeier then cast the deciding vote on the breach of contract claims, overturning that verdict against State Farm. The public, not to mention the opposing litigants, could be forgiven for questioning whether justice was truly served.

> Was Justice Karmeier's decision unbiased? Very possibly yes, but we will never know. Overshadowing the merits of his decision is a single stark fact: without Karmeier's vote, State Farm would have faced further proceedings on claims valued at up to $ 456 million. That result is either a coincidence or an impressive rate of return on State Farm's investment. Because we cannot know which it is, public trust in the courts invariably suffers.

Goldberg, 46 Washburn L. J. at 510-11 (footnotes omitted).

30. State Farm's extraordinary efforts to secure Justice Karmeier's election – undertaken in the midst of State Farm's appeal of a *$1.05 billion* judgment before the very Court to which Justice Karmeier sought election – are fully-described in the following pages and in the Affidavit of retired Special Agent Reece and the Affidavit of Douglas B. Wojcieszak. Significantly, three Illinois tort reform-insiders – Justice Karmeier's 2004 campaign consultant, Al Adomite, and ICJL Executive Committee members Karen Melchert and Kim Maisch – candidly explained to Reece that State Farm's support of Justice Karmeier's campaign was considerable, referring to State Farm's support as either "***significant***" or "***tremendous***." Such a level of support unquestionably created a constitutionally-unacceptable risk of bias. As the foregoing excerpts from Justice Karmeier's special concurring opinion in *O'Brien* suggest, that Justice Karmeier's decision to participate in the appeal was not subject to review by any other Supreme Court Justice further bolstered this risk. *See* Reece Affidavit, ¶ 57-59.

31. The prime inquiry – neither addressed nor answered by the Court – was posed succinctly by Theodore B. Olson, counsel for Hugh Caperton, at oral argument before the United States Supreme Court in *Caperton v. A. T. Massey Coal Co., Inc.*:

> Would a detached observer conclude that a fair and impartial hearing would be possible? . . . I would like to ask

> you to ask this question: If this was going to be the judge in your case, would you think it would be fair, and would it be a fair tribunal, if the judge in your case was selected with a $3 million subsidy by your opponent?

See Transcript of Oral Argument, at p. 55-56, *Caperton v. A. T. Massey Coal Co., Inc.*, No. 08-22 (Separate Appendix, Exhibit 7).

32. From the facts presented to this Court, it is clear that genuine federal and Illinois constitutional due process implications exist and the integrity of the Illinois judicial system is at stake in these proceedings. The Illinois Constitution requires the same due process considerations.

STATE FARM'S EFFORTS ON BEHALF OF JUSTICE KARMEIER'S ELECTION DURING ITS APPEAL CREATED AN UNACCEPTABLE "RISK OF BIAS"

33. Settled United States Supreme Court precedent – endorsed by this Court in *People v. Hawkins*, 181 Ill. 2d 41, 51, 690 N.E.2d 999, 1003 (Ill. 1998) – has long mandated that "fairness at trial requires not only the absence of actual bias *but also the absence of the probability of bias*." *See e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *see also In re Marriage of* O'Brien, 2011 IL 109039, ¶ 48.

34. These same basic principles were extended in 2009 by the U.S. Supreme Court in *Caperton v. Massey Coal Co., Inc.* to apply to a situation where someone with a personal stake in an imminent appeal had used his financial and political influence to place a judge on West Virginia's Supreme Court of Appeals. In contrast to *Caperton*, where the judicial campaign occurred ***before*** Massey Coal's appeal had even reached the West Virginia Supreme Court of Appeals, Justice Karmeier was elected to this Court in

November 2004, a full twenty-five (25) months ***after*** State Farm's petition for leave to appeal to this Court was granted. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 201 Ill.2d 560 (Oct. 2, 2002). There, writing for the majority, Justice Kennedy opined:

> "We conclude that there is a ***serious risk of actual bias – based on objective and reasonable perceptions*** – when a person with a personal stake in a particular case had a ***significant and disproportionate influence*** in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Caperton*, 129 S. Ct. at 2263-64.

35. Here, Justice Karmeier's participation and the *serious risk of actual bias* precipitated by that participation (and his vote) deprived Petitioners of their basic federal and Illinois constitutional due process rights, especially in view of the United States Supreme Court's adherence in *Caperton* to the long-established precedent that a "risk of actual bias – based on objective standards and reasonable perceptions" is the standard for finding a due process violation. As recently as August 2011, this Court recognized the importance of these principles in *In re Marriage of O'Brien*, 2011 IL 109039, at ¶ 48.

36. To be sure, while the facts presented in *Caperton* were unusually "extreme," the facts presented by Petitioners to this Court in 2005 – bolstered by the newly-discovered evidence and now-unmasked efforts by State Farm to lie to, deliberately mislead, and conceal facts from this Court in 2005 – surpass even the facts in *Caperton*. Comparing the two cases, former Justice Sandra Day O'Connor observed:

> In 2004, there was a race for the Illinois Supreme Court, right here. It cost just over $9 million for that race. As you might have guessed, the winner of that race got his biggest contributions from a company that had an appeal pending before the Illinois Supreme Court. You like that? Sounds a lot like the Caperton case, doesn't it?[4]

[4]*See* A.M. Pallasch, *O'Connor Urges Illinois to Select Judges by Merit*, Chi.Sun-

37. Based on what was known in 2005, Justice O'Connor's comparison is compelling:

> ■ the 2004 Karmeier-Maag race for the 5th District seat on the Illinois Supreme Court had been the most expensive judicial race in United States history;
>
> ■ State Farm – a principal contributor to/supporter of Justice Karmeier's campaign – had a substantial pecuniary interest (an adverse judgment of $1.05 billion) in an appeal pending before the Court;
>
> ■ State Farm's appeal was pending before this Court throughout the 2004 judicial campaign (and had been since October 2002); and
>
> ■ Justice Karmeier did not disqualify himself, the full Court declined to review that decision, and Justice Karmeier then cast his vote in favor of State Farm.

NEWLY-DISCOVERED EVIDENCE OF STATE FARM'S EXTRAORDINARY EFFORTS IN SUPPORT OF JUSTICE KARMEIER

38. However, in addition to the foregoing facts (first presented to the Court in 2005), Petitioners have recently uncovered substantial evidence – described in the affidavits of Reece and Wojcieszak – which establishes that State Farm concealed from this Court its ***significant and disproportionate influence*** in Justice Karmeier's campaign and played a pivotal role in Justice Karmeier's election in 2004 while State Farm's appeal was pending. Among other things, Petitioners demonstrate:

> ■ State Farm and CNA Insurance Companies ("CNA") helped organize the ICJL in the early 1990's;
>
> ■ State Farm lawyer and lobbyist Bill Shepherd was a founding member of the ICJL's Executive Committee and along with founding member Karen Melchert ("Melchert") of CNA, hired Murnane to head the ICJL in 1993;

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times, May 20, 2010, available http://www.suntimes.com/news/politics/2295078, CST-NWS-oconnor20.article.

- The Executive Committee endorsed Justice Karmeier's candidacy, raised funds for his campaign, and chose Murnane to direct his campaign;

- ICJL-head Murnane ran all phases of Justice Karmeier's campaign, including hiring staff and directing day-to-day operations, media relations, and fund raising;

- Shepherd was in weekly-contact with Murnane during the race, engaging in weekly conference calls;

- Justice Karmeier – who was on the campaign's inter-office email list, was informed of significant campaign events by Murnane, and was aware of the source of his campaign contributions;

- Executive Committee members Melchert and Kim Maisch confirmed that State Farm's support of Justice Karmeier in 2004 was "tremendous;"

- ICJL Vice President Allen Adomite stated that State Farm gave "significant" financial support to Karmeier;

- State Farm, through Shepherd and Murnane, used the ICJL's political action committee (JUSTPAC) as a vehicle to raise $1,191,453 and funnel that sum to "Citizens for Karmeier"; and

- State Farm-influenced contributions to Justice Karmeier's campaign easily surpassed $2.5 million and State Farm and its corporate/political partners may have provided Justice Karmeier's campaign as much as or more than $4 million in direct, indirect, and in-kind support.

STATE FARM'S EFFORTS TO MISLEAD THE COURT

39. State Farm's lies, deliberate misrepresentations, and concealment, committed through a series of intentionally-misleading statements and deliberate omissions in its court-filing, grossly understated State Farm's "tremendous" support of Justice Karmeier's campaign. Statements contained in State Farm's court-filing opposing Petitioners' recusal motion best exemplify these efforts to mislead and conceal the truth

from this Court. There, State Farm falsely represented its support of Justice Karmeier as consisting of "quite modest contributions" and characterized as "incorrect and meritless" Petitioners' claim that State Farm had funneled substantial cash contributions and peddled its enormous political influence to Justice Karmeier's benefit. *See* State Farm's Opposition, at pp. 12-13 (Separate Appendix, Exhibit 3).

State Farm failed to disclose Bill Shepherd's prominent role with the ICJL

40. Foremost among its concealment and misleading statements is State Farm's failure to disclose to the Court the prominent role played by its lawyer and lobbyist, Bill Shepherd, in forming the ICJL, as a member of the ICJL Executive Committee, and more specifically, as a central figure in Justice Karmeier's campaign. It was unknown to Petitioners in 2005 that State Farm's Shepherd had helped found the ICJL and was a charter member of its "Executive Committee" which engineered Justice Karmeier's candidacy – through ICJL-head Murnane, "vetted" Justice Karmeier, endorsed his candidacy, and insured a substantial flow of cash to Justice Karmeier's campaign from State Farm executives, employees, and corporate and political partners. *See* Reece Affidavit, at ¶¶ 32-59.

State Farm falsely denied that Murnane ran all phases of Justice Karmeier's campaign

41. The newly-discovered evidence further demonstrates that ICJL-head Ed Murnane ran Justice Karmeier's campaign, with the help of the ICJL's Al Adomite, Steve Shoeffel from I-LAW, and Steve Tomaszewski from Congressman Shimkus' office. State Farm's Shepherd discussed campaign developments with Murnane via weekly-Friday conference calls through the duration of the campaign. *See* Reece Affidavit, at ¶¶ 42-43. Yet, in opposing recusal, not only did State Farm deny Murnane's involvement in

Justice Karmeier's campaign but it boldly and flippantly declared "Mr. Murnane . . . was not Justice Karmeier's campaign manager or campaign finance chairman and was not employed by Justice Karmeier's campaign . . . ." *See* State Farm's Opposition, at pp. 15-16 (Separate Appendix, Exhibit 3). However, several lawfully obtained e-mails generated within Justice Karmeier's campaign organization unmistakably show that Murnane directed Justice Karmeier's fund raising, media relations, and speeches. *See* Reece Affidavit, at ¶¶ 20, 47. In fact, Adomite, a consultant with Justice Karmeier's campaign, flatly confirmed that it was Murnane who actually ran the campaign.

42. In the fall of 2003, Douglas B. Wojcieszak, whose affidavit is attached hereto (Separate Appendix, Exhibit 4), was contacted by Murnane, who said that he had been asked by State Farm's Shepherd to approach Wojcieszak about filling the role of campaign manager for Justice Karmeier's 2004 Supreme Court. Wojcieszak was contacted by State Farm's Shepherd, who offered him still another job, this time with a non-profit group that supported tort reform. *See* Reece Affidavit, ¶¶ 43-44.

43. In truth, it was Murnane who advised Justice Karmeier of campaign details, including the source of contributions (assuring that Justice Karmeier had knowledge of State Farm's "tremendous support"). *See* Reece Affidavit, at ¶¶ 55-59. The "Citizens for Karmeier" campaign disclosure reports to the Illinois State Board of Elections show that Murnane's professional time and expenses were not declared as in-kind contributions to Justice Karmeier campaign. *See* Wojcieszak Affidavit, at ¶¶ 41-47.

44. What's more, hard copies of discarded emails lawfully obtained by investigators clearly listed Murnane's ICJL email address as "sender" and Justice Karmeier as "recipient" (a) stated that Murnane would be recommending Justice

Karmeier's campaign to the ICJL Executive Committee which, along with the ICJL, had been "actively supporting" Justice Karmeier's candidacy from "Day One," (b) discussed how the Executive Committee voted to endorse Justice Karmeier's candidacy, and (c) confirmed to Justice Karmeier that ***"You've passed all the tryouts we need."*** *See* Reece Affidavit, ¶ 41; Wojcieszak Affidavit, ¶ 33.

State Farm grossly misrepresented and understated its financial support of Justice Karmeier

45. State Farm's extraordinary financial support of Justice Karmeier's campaign evokes obvious comparisons to the level of support Massey Coal Co. executive Don Blankenship heaped on West Virginia Supreme Court of Appeals candidate Brent Benjamin, as discussed in the *Caperton* decision. In an amicus brief submitted in support of Hugh M. Caperton, a group of former Chief Justices and Justices successfully prevailed on the Court to understand that:

> Substantial financial support of a judicial candidate – whether contributions to the judge's campaign committee or independent expenditures – can influence a judge's future decisions, both consciously and unconsciously.

See Brief Amicus Curiae of 27 Former Chief Justices and Justices in Support of Petitioner Hugh M. Caperton, at p. 5.

46. In 2005, Petitioners charged State Farm with giving this very type of support to Justice Karmeier's campaign. Responding, State Farm flatly denied "engineering contributions" to Justice Karmeier's campaign "for the purpose of impacting the outcome of this case" (*see* State Farm's Opposition, at p. 11, Separate Appendix, Exhibit 3) and saw fit to downplay Petitioners' charge that it was responsible for $350,000 in direct contributions to Justice Karmeier's campaign by suggesting that

Petitioners' counsel had presented "no evidence whatsoever to back up" their claim that those contributions were made by State Farm "front groups." *See* State Farm's Opposition, at p. 11 (Separate Appendix, Exhibit 3).

47. The following is illustrative of how State Farm downplayed its financial support for Justice Karmeier:

> Although plaintiffs attempt to link large sums in contributions by a variety of persons and organizations to Justice Karmeier's campaign to state Farm, their moving papers and supporting documentation in fact reveal that a limited number of State Farm officers and employees made ***quite modest contributions*** to the Justice Karmeier's campaign.

See State Farm's Opposition, at p. 13 (emphasis added) (Separate Appendix, Exhibit 3).

48. In truth, the supporting submissions make it readily clear that although Petitioners' 2005 evidence was compelling, a significant amount of "evidence to back up" Petitioners' 2005 claim was concealed and even suppressed by State Farm until recently.

49. For certain, retired Special Agent Reece's investigation accumulated substantial evidence to "back up" Petitioners' original claims of State Farm support. More importantly, that investigation unraveled the true extent of State Farm's financial support for Justice Karmeier by establishing the ICJL's role as State Farm's vehicle to control the campaign. At bottom, State Farm's 2005 representations to the Court of "quite modest" support could hardly be more misleading. For example, in view of State Farm's Shepherd's prominent role with the ICJL, the $1,191,453 contributed by the ICJL's PAC (JUSTPAC) to Justice Karmeier's campaign may now be attributed to State Farm, as State Farm controlled the ICJL and JUSTPAC and used those entities as its

vehicles to support Justice Karmeier's campaign. And while Avery's counsel were aware of Justice Karmeier's campaign disclosures in January 2005, as well as the $1.19 million in contributions by JUSTPAC, they were not aware of Shepherd's affiliation with the ICJL (as a founder and Executive Committee member), or that Shepherd had helped choose Murnane – JUSTPAC's treasurer – as head of the ICJL.

50. Moreover, deposition testimony in unrelated litigation identified State Farm CEO Ed Rust as part of U.S. Chamber of Commerce leadership team that selected judicial races to target in 2004. Illinois was prioritized as a "Tier I" race. The Karmeier-Maag race was the *only* major judicial race in Illinois that year, thus making that race the "Tier I" priority race. *See* Wojcieszak Affidavit , ¶¶ 48-50. State Farm contributed $1 million to the U.S. Chamber, which contributed $2.05 million to the Illinois Republican Party, and the Illinois Republican Party contributed $1,922,294 to Justice Karmeier's campaign. State Farm's $1 million donation to the United States Chamber of Commerce ("U.S. Chamber") in Washington DC wound up back in Illinois after the U.S. Chamber contributed more than twice that sum to the Illinois Republican Party, which promptly paid the bill for nearly $2 million in media advertisement for Justice Karmeier. *See* Wojcieszak Affidavit , ¶¶ 50-55.

51. Significantly, the "round-trip" made by State Farm's $1 million U.S. Chamber donation was not disclosed by State Farm as part of its claim of "quite modest" support toward Justice Karmeier's campaign. *See* Wojcieszak Affidavit, ¶¶ 50-55.

52. *Three* contributions – the combined $350,000 in direct State Farm-influenced contributions, the $1,191,453 JUSTPAC contribution, and the $1 million U.S. Chamber contribution – alone surpass ***$2.5 million in State Farm-influenced***

contributions (fully 56% of Justice Karmeier's contributions). However, yet a fourth set of State Farm-influenced contributions may be added to this already extraordinary total.

53. Along with the foregoing contributions, Petitioners have uncovered nearly $719,000 of unreported in-kind contributions from the ICJL to Justice Karmeier's campaign which can be added to the $2.5 million, raising the State Farm-influenced contributions to over $3.2 million. Specifically, the Internal Revenue Service Form 990 report from 2004 for the ICJL (which was not available to Petitioners' counsel when the 2005 recusal motions were filed) shows that the ICJL had a grand total of $718,965 for expenditures, including Murnane's salary, benefits, and expenses ($177,749), as well as media, advertising, and fundraising, and other managerial expenses that almost exclusively benefitted Justice Karmeier's campaign, yet were unreported as in-kind donations by Citizens for Karmeier. *See* Wojcieszak Affidavit, ¶ 47.

54. Justice Karmeier's campaign financial disclosures reveal that while Murnane was "running the campaign," and using his ICJL e-mail address for campaign activities, his professional time and expenses went unreported, undisclosed, and otherwise undeclared as "in-kind" contributions to the campaign. Other major expenses of the ICJL were also unreported as in-kind contributions in Justice Karmeier's financial disclosures. *See* Wojcieszak Affidavit, ¶¶ 42-43. According to disclosures submitted by "Citizens for Karmeier" and Internal Revenue Service forms filed by the ICJL, Justice Karmeier's campaign failed to disclose nearly $719,000 in *unreported* in-kind contributions from the ICJL for Murnane's and others' professional time managing the campaign, advertising, and operational expenses. *See* Wojcieszak Affidavit, at ¶ 52.

55. Beyond even this, Petitioners have uncovered additional evidence that shows State Farm-influenced contributions to Justice Karmeier's campaign – including direct, indirect, and in-kind support – exceeded *$4 million*. *See* Wojcieszak Affidavit, ¶¶ 62-66.

56. For all of this, when State Farm opposed Petitioners' recusal motion in January 2005 and belittled Petitioners' evidence of financial support, State Farm gave not so much as a hint from that it was responsible – directly or indirectly – for giving such extraordinary aid to Justice Karmeier's campaign.

57. Petitioners were – and remain – entitled, on due process grounds, to have all of these facts considered by this Court. Such consideration would have likely eliminated any possibility of Justice Karmeier's influence over the Court's decision as a whole and would have left the portions of the Appellate Court judgment that were reversed by a mere 4-2 vote (with Justice Karmeier being one of the 4) unimpaired. Simply put, State Farm's lies, omissions, and deliberate concealment were so well-disguised and potent that they interfered with the Court having the necessary information to effectively address Petitioners' due process claim.

58. There can be no dispute that this level of support for Justice Karmeier during his campaign by a litigant in a pending appeal must not only be condemned, but required his disqualification. Significantly, the Conference of Chief Justices submitted an amicus brief in *Caperton* which was mentioned no fewer than ten times by Justices during oral argument, which strongly suggested that State Farm's actions in 2005 required Justice Karmeier to disqualify himself:

> ". . . the Constitution may require the disqualification of a judge in a particular matter because of ***extraordinarily out-of-line campaign support*** from a source that has a ***substantial stake*** in the proceedings."

See Brief of Conference of Chief Justices as Amicus Curiae in Support of Neither Party, at p. 4, *Caperton v. A.T. Massey Coal Co.*, No. 08-22 (U.S. Jan. 5, 2009) (emphasis added) (Tab/Exhibit 8 to Supplemental Appendix).

59. As the Chief Justices suggest, State Farm's role in substantially facilitating Justice Karmeier's election – just like Massey CEO Don Blankenship's role in facilitating Justice Benjamin's election in *Caperton* – "created a constitutionally intolerable probability of actual bias. Though not a bribe or criminal influence, Justice [Karmeier] would nevertheless feel a debt of gratitude to [State Farm] for [its] extraordinary efforts to get him elected." *See Caperton*, 129 S. Ct. at 2262. And while

> there is no allegation of a quid pro quo agreement, the fact remains that [State Farm's] extraordinary contributions were made at a time when [it] had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when – without the consent of the other parties – a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice [Karmeier's] recusal.

Id. at 2264-65.

JUSTICE KARMEIER'S PERSONAL AND CAREER INTERESTS WERE PECUNIARY INTERESTS WHICH REQUIRED DISQUALIFICATION

60. In addition to Petitioners' claim that a constitutionally intolerable probability of bias required Justice Karmeier's disqualification, Petitioners were also denied a "fair trial before an impartial trier of fact." The Court in *People v. Hawkins*, 181 Ill. 2d 41, 51, 690 N.E.2d 999, 1003 (Ill. 1998) observed, "Fairness at trial requires not

only the absence of actual bias but also the absence of the probability of bias." *Id.* After all, "no person is permitted to judge cases in which he or she has an interest in the outcome." *Id.* (citations omitted). In the final analysis, as this Court recognized, the inquiry is whether the judge "could have been tempted not to hold the balance between the parties 'nice, clear and true.'" *Id.* (citing *Lavoie*, 475 U.S. at 822; *Ward*, 409 U.S. at 60; *Tumey*, 273 U.S. at 532).

61. Importantly, to show a due process violation here, Petitioners "need not show actual bias" on the part of Justice Karmeier. *Id.* At bottom, the interest was that Justice Karmeier – a Circuit Judge from a rural county in southern Illinois – needed State Farm's enormous financial and powerful political support to secure election to a seat on this Court and to retain that seat in the future. After all, career interests are also pecuniary objectives. As one commentator has observed with reference to Justice Benjamin's interests in *Caperton*:

> Judges who are not reelected lose their jobs and their income. Although the Court focused on Justice Benjamin's potential gratitude toward Blankenship, the opposite side of the coin is relevant. Just as Blankenship could be instrumental in advancing a Benjamin candidacy, he could also just as easily turn and help defeat a Benjamin reelection campaign if displeased with his protegee's failure to perform as anticipated. ***Career objectives are pecuniary objectives.*** Even though Justice Benjamin would not directly benefit from the outcome of *Caperton v. Massey* on the merits, it is only a small step to an impact on his career and compensation should he support an outcome adverse to Blankenship.

Stempel, Jeffrey W., *Playing Forty Questions: Responding to Justice Roberts's Concerns in Caperton and Some Tentative Answers about Operationalizing Judicial Recusal and Due Process,* 39 Sw. L. Rev. 1, n. 87 (2009).

62. Just as this Court observed in *Hawkins*, citing precedent by the United States Supreme Court,

> due process will sometimes "bar trial by judges who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'"

181 Ill. 2d at 51.

63. In the end analysis, State Farm's immense efforts on behalf of Justice Karmeier's campaign, undertaken while State Farm's appeal was pending before this Court, engendered an overpowering risk that Justice Karmeier was biased in favor of State Farm, and thus violated Petitioners' due process rights. Petitioners' new evidence of State Farm's extraordinary efforts to support Justice Karmeier and State Farm's lies, misleading statements, omissions, and concealment to cover-up that extraordinary support justifies a critical examination of whether Petitioners were denied their fundamental due process rights.

64. If this Court finds that there was a serious risk of actual bias and that recusal of Justice Karmeier was warranted, it necessarily follows that the entire decision must be set aside, as it must be assumed that the presence and participation of Justice Karmeier had, or could have had, from an objective observer's viewpoint, some influence on the panel. Put another way, where in a deliberation it is discovered that for extensive reasons that an individual should not have participated, it is presumed that such person had an influence on the entire outcome.

65. For all of this, Petitioners request that the mandate be recalled, that the August 18, 2005 decision of the Court be vacated, that the October 2, 2002 order granting

State Farm leave to appeal be quashed, and that the April 5, 2001 judgment of the Appellate Court be fully reinstated. These sanctions are the only ones appropriate to deter State Farm from future misconduct while at the same time protecting Petitioners and adequately remedying their harm.

66. Alternatively, Petitioners request that the entire decision of this Court be vacated and that the Court decide the matter without the presence and/or influence of Justice Karmeier. Alternatively, Petitioners request that the portions of the opinion to which there would not be the Constitutionality required concurrence of four Justices of the Court, absent Justice Karmeier's decision vote to overturn the Appellate Court opinion be reinstated.

67. Petitioners would respectfully ask the Court to decide all remaining proceedings in the case without the participation of Justice Karmeier. A motion for Justice Karmeier's recusal is separately submitted, in conjunction with this Petition.

The Affidavits of Daniel L. Reece and Douglas B. Wojcieszak, Separate Appendix, Exhibits 2 and 4, are also incorporated herein by reference. The Affidavit of Gordon Ball is annexed hereto as Exhibit 2 to this Petition.

WHEREFORE, Petitioners respectfully submit that the integrity of the judicial process has been fatally compromised by Justice Karmeier's participation in the August 18, 2005 decision. Accordingly, under this Court's inherent powers, Petitioners seek all appropriate relief, including, but not limited to:

(1) recalling the mandate;

(2) vacating the August 18, 2005 opinion and judgment of this Court;

(3) quashing the October 2, 2002 order granting State Farm's petition for leave to appeal;

(4) reinstating in full the April 5, 2001 opinion and judgment of the Appellate Court;

(5) entering an order of disqualification as to Justice Karmeier if Justice Karmeier chooses to participate in these proceedings; and

(6) granting such other relief as proper under the Court's inherent powers.

Respectfully submitted, this 8th day of September, 2011.

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216 Ill. 2d 100, *; 835 N.E.2d 801, **;
2005 Ill. LEXIS 959, ***; 296 Ill. Dec. 448

1 of 6 DOCUMENTS

MICHAEL AVERY et al., Appellees, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant.

Docket No. 91494

SUPREME COURT OF ILLINOIS

216 Ill. 2d 100*; *835 N.E.2d 801*; *2005 Ill. LEXIS 959*; *296 Ill. Dec. 448

August 18, 2005, Opinion Filed

SUBSEQUENT HISTORY: [***1]
Rehearing denied by *Avery v. State Farm Mut. Auto. Ins. Co., 2005 Ill. LEXIS 970 (Ill., Sept. 26, 2005)*
US Supreme Court certiorari denied by *Avery v. State Farm Mut. Auto. Ins. Co., 126 S. Ct. 1470, 164 L. Ed. 2d 248, 2006 U.S. LEXIS 2047 (U.S., Mar. 6, 2006)*

PRIOR HISTORY: Appeal from the Appellate Court for the Fifth District.
Avery v. State Farm Mut. Auto. Ins. Co., 321 Ill. App. 3d 269,. 746 N.E.2d 1242, 2001 Ill. App. LEXIS 249, 254 Ill. Dec. 194 (Ill. App. Ct. 5th Dist., 2001)

DISPOSITION: The portion of the circuit court's judgment which denied the policyholders' request for equitable relief was affirmed. All other portions of the circuit court's judgment were reversed. Those portions of the appellate court judgment which affirmed the denial of equitable relief and which reversed the circuit court's award of disgorgement damages were affirmed. All other portions of the appellate court's judgment were reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff policyholders brought a class action against defendant insurance company, for breach of contract and statutory consumer fraud, seeking declaratory and injunctive relief. The jury found in their favor on the breach of contract and fraud claims. The circuit court granted declaratory relief but not injunctive relief. The Appellate Court (Illinois) affirmed, but reversed a part of the damages. The company's petition to appeal was allowed.

OVERVIEW: The policyholders disputed the propriety of the company's practice of specifying the use of non-"original equipment

manufacturer" crash parts to repair its policyholders' cars when such cheaper parts were available. The appeals court found the jury verdict on the breach of contract claim could not be affirmed. The jury was incorrectly instructed that the operative language in the insurer's various policy forms could be given a uniform interpretation. Further, the verdict could not be affirmed for any subclass of policyholders who were insured under any of the relevant individual policy forms. There was no basis in the law for specification damages. As to the Consumer Fraud and Deceptive Business Practices Act, the supreme court found that the circuit court erred in certifying a nationwide class that included class members whose claims proceedings took place outside Illinois. The only putative class that could exist was a class consisting of policyholders whose vehicles were assessed and repaired in Illinois. Because the representative policyholder had not proven his claim for consumer fraud, there could be no Illinois class for the policyholders' consumer fraud count.

OUTCOME: That portion of the circuit court's judgment which denied the policyholders' request for equitable relief was affirmed. All other portions of the circuit court's judgment were reversed. Those portions of the appellate court judgment which affirmed the denial of equitable relief and which reversed the circuit court's award of disgorgement damages were affirmed. All other portions of the appellate court's judgment were reversed.

COUNSEL: For State Farm Mutual Automobile Insurance Co., APPELLANT: Mr. Wayne W. Whalen, Mr. Gregory S. Bailey, Mr. Edward M. Crane, Skadden, Arps, Slate, Meagher & Flom, Chicago, IL. Ms. Michele Odorizzi, Mayer, Brown, Rowe & Maw, Chicago, IL. Mr. William R. Quinlan, Quinlan & Carroll, Ltd., Chicago, IL. Ms. Marci A. Eisenstein, Schiff Hardin & Waite, Chicago, IL. Mr. Robert H. Shultz, Jr., Heyl, Royster, Voelker & Allen, Edwardsville, IL. Mr. Gino L. DiVito, Tabet DiVito & Rothstein LLC, Chicago, IL. Ms. Sheila L. Birnbaum, Skadden, Arps, Slate, Meagher & Flom, New York, NY. Mr. John O. Langfelder, Heyl, Royster, Voelker & Allen, P.C., Springfield, IL.

For Michael E. Avery, APPELLEE: Mr. Edward J. Kionka, Attorney at Law, Carbondale, IL. Mr. Michael B. Hyman, Much, Shelist, Freed, Denenberg, Ament & Rubenstein, P.C., Chicago, IL. Ms. Patricia S. Murphy, Murphy Law Office, Energy, IL. Mr. Robert A. Clifford, Clifford Law Offices, Chicago, IL. Ms. Elizabeth Cabraser, Mr. Morris Ratner, Mr. Scott P. Nealey, Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA.

For National Association of Insurance Commissioners, AMICUS CURIAE: Mr. John W. Bauer, National Association of Insurance Commission, Kansas City, MO.

For Dept. of Insurance of the State of North Carolina, Department of Business and Industry, Division of Insurance of the State of Nevada, Division of Insurance of the State of Colorado, AMICUS CURIAE: Mr. Richard F. Record, Jr., Craig & Craig, Mattoon, IL.

For Citizens for a Sound Economy Foundation, AMICUS CURIAE: Mr. James K. Horstman, Iwan Cray Huber & Horstman, Chicago, IL. Mr. Michael D. Huber, Iwan Cray Huber Horstman & VanAusdal, LLC, Chicago, IL.

For National Association of Independent Insurers, American Insurance Association, National Association of Mutual Insurance Companies, Health Insurance Association of

America, American Council of Life Insurer, AMICUS CURIAE: Mr. Richard Hodyl, Jr., Williams Montgomery & John Ltd., Chicago, IL.

For Illinois Department of Insurance, AMICUS CURIAE: Mr. Robert E. Wagner, Illinois Department of Insurance, Chicago, IL.

For Chamber of Commerce of the United States, AMICUS CURIAE: Mr. Brian L. Crowe, Shefsky & Froelich Ltd., Chicago, IL.

For Illinois Chamber of Commerce, AMICUS CURIAE: Mr. Norman K. Beck, Winston & Strawn, Chicago, IL.

For Illinois Manufacturers' Association, AMICUS CURIAE: Mr. David E. Bennett, Vedder Price Kaufman & Kammholz, Chicago, IL.

For National Conference of Insurance Legislators, AMICUS CURIAE: Mr. J. Timothy Eaton, Ungaretti & Harris LLP, Chicago, IL.

For Public Citizen, Inc., AMICUS CURIAE: Mr. Richard J. Rappaport, Ross & Hardies, Chicago, IL.

For Allstate Insurance Co., AMICUS CURIAE: Mr. Richard L. Fenton, Sonnenschein Nath & Rosenthal, Chicago, IL.

For Ohio Department of Insurance, AMICUS CURIAE: Mr. Mitchell A. Orpett, Tribler Orpett & Meyer, P.C., Chicago, IL.

For Alliance of American Insurers, AMICUS CURIAE: Mr. Robert H. King, Jr., Greenberg Traurig, LLP, Chicago, IL.

For Government Employees Insurance Co., AMICUS CURIAE: Mr. J. William Lucco, Lucco, Brown & Mudge, Edwardsville, IL.

For General Motors Corporation, Washington Legal Foundation, AMICUS CURIAE: Mr. John Beisner, O'Melveny & Meyers LLP, Washington, DC.

For Coalition for Consumer Rights, AMICUS CURIAE: Mr. Dmitry N. Feofanov, Attorney at Law, Dixion, IL. Mr. F. Paul Bland, Jr., Trial Lawyers for Public Justice, Washington, DC. Mr. Richard L. Pullano, Law Offices of Richard L. Pullano, P.C., Chicago, IL.

For Alliance of Automobile Service Providers National, AMICUS CURIAE: Mr. Jerome F. Crotty, Rieck & Crotty, P.C., Chicago, IL.

For Illinois Trial Lawyers Association, AMICUS CURIAE: Mr. William J. Harte, William J. Harte, Ltd., Chicago, IL.

For United Policyholders', AMICUS CURIAE: Mr. Lawrence S. Fischer, Anderson Kill & Olick, P.C., Chicago, IL.

JUDGES: CHIEF JUSTICE McMORROW delivered the opinion of the court. JUSTICE THOMAS took no part in the consideration or decision of this case. JUSTICE FREEMAN, concurring in part and dissenting in part. JUSTICE KILBRIDE joins in this partial concurrence and partial dissent.

OPINION BY: McMORROW

OPINION

[**810] [*109] CHIEF JUSTICE McMORROW delivered the opinion of the court:

Michael Avery and other named plaintiffs brought a class action in the circuit court of

Williamson County against defendant, State Farm Mutual Automobile Insurance Company (State Farm). Representing a nearly nationwide class of State Farm policyholders, plaintiffs alleged claims sounding in breach of contract and statutory consumer fraud, in addition to a claim seeking declaratory and injunctive relief.

The circuit court certified the class. The breach of contract claim was tried before a jury, and the remaining claims received a simultaneous bench trial. The jury returned a verdict in favor of plaintiffs on the breach of contract claim, and the circuit court entered judgment in favor of plaintiffs on the consumer fraud claim. With regard to the third [***2] count, the circuit court granted declaratory relief but declined to grant injunctive relief. The damages awarded to plaintiffs totaled $ 1,186,180,000.

The appellate court affirmed the judgment, with one exception. The appellate court reversed a portion of the damages, lowering the total award to $ 1,056,180,000. *321 Ill. App. 3d 269, 746 N.E.2d 1242, 254 Ill. Dec. 194.* We allowed State Farm's petition for leave to appeal. 177 Ill. 2d R. 315(a).

Plaintiffs' suit centers on certain automobile repair part categories which have been identified in the record and to which we refer throughout our discussion. "Crash parts" refers to automobile components that are used to [*110] replace parts damaged in a crash, rather than parts that have failed mechanically. They are primarily sheet metal and plastic parts that are attached to the outer shell of the car. Crash parts consist of two categories. The first category is comprised of new parts made by or on behalf of the automobile's original manufacturer. These parts are commonly referred to as "Original Equipment Manufacturer" parts, or "OEM" crash parts. The second class includes [**811] aftermarket parts made by companies not affiliated with original equipment manufacturers. [***3] These parts are referred to as "non-OEM" crash parts. [1]

1 The non-OEM crash parts involved in this case are: (1) fenders; (2) hoods; (3) doors; (4) deck lids; (5) luggage lid panels; (6) quarter panels; (7) rear outer panels; (8) front-end panels; (9) header panels; (10) filler panels; (11) door shells; (12) pickup truck beds, box sides, and tail gates; (13) radiator/grill support panels; (14) grilles; (15) headlamp mounting panels/brackets/housings/lenses/doors; (16) tail-light mounting panels/brackets/housings/lenses; (17) outer body moldings; (18) door body side moldings; (19) front wheel opening moldings; (20) side moldings; (21) front and rear fascias; (22) outer panel mounting brackets, supports, and surrounds; (23) bumpers (excluding chrome bumpers); (24) bumper covers/face bars; and (25) bumper brackets/supports.

A succinct general overview of plaintiffs' theory of the case may be found in "Plaintiff's Memorandum in Support of Application of Illinois Law to the Claims of Class Members Under Illinois [***4] Choice of Law Doctrine":

> "In this case, plaintiffs have placed at issue the propriety of State Farm's uniform practice of specifying the use of non-OEM crash parts to repair its policyholders' cars in every instance in which such cheaper parts are available. *** Plaintiffs contend that this policy breaches State Farm's standard contract

> because it is not designed to restore policyholders' cars to their pre-loss condition by using parts of like kind and quality. Plaintiffs further contend that this practice violates Illinois' consumer law because the practice itself and its economic ramifications constitute a violation of Illinois consumer statutes, which prohibit[] misrepresentations as to the 'standard, quality, or grade' of [*111] the goods and services provided under State Farm's policies. [Citation.] At trial, the Court and jury must resolve the classwide question of whether State Farm, by requiring the uniform use of non-OEM crash parts, and through the course of conduct it designed to conceal the true import of this practice from its policyholders, breached its contractual obligations and committed consumer fraud."

This opinion is divided into two principal sections: [***5] "Breach of Contract" and "Consumer Fraud." In a third section, we deal with plaintiffs' claims for declaratory and injunctive relief. These sections are further subdivided, as required by the various arguments and issues, as follows:

I. Breach of Contract

A. *Propriety of the Nationwide Contract Class*

B. *Whether the Verdict May Be Affirmed with Respect to Subclasses*

1. The Massachusetts and "Assigned Risk" Policies

2. The "You Agree" Policies

3. The "Like Kind and Quality" Policies

4. Damages

a. *Specification Damages*

b. *Installation Damages*

II. *Consumer Fraud Act*

A. *Plaintiffs' Consumer Fraud Claim*

1. Plaintiffs' Consumer Fraud Claim May Not Be Based on a Breach of a Promise Contained in Their Insurance Policies

2. This Case Is Not About the Specification of Defective Parts

3. The Representations Which Form the Basis of Plaintiffs' Cause of Action for Consumer Fraud Do Not Include the Statement That Non- [**812] OEM Parts Are as Good as

OEM Parts

4. Describing a Non-OEM Part as a "Quality Replacement Part" Is Puffing and, Hence, Not Actionable

5. The Guarantee Provided by State Farm Cannot Form a Basis for Plaintiffs' [***6] Consumer Fraud Claim

[*112] 6. The Crux of Plaintiffs' Consumer Fraud Claim Is a Failure by State Farm to Disclose the Categorical Inferiority of Non-OEM Parts During the Claims Process

B. *Propriety of the Nationwide Consumer Fraud Class*

1. Scope of the *Consumer Fraud Act*

2. Whether the *Consumer Fraud Act* Applies to the Transactions at Issue in This Case

C. *Propriety of Judgment: Named Plaintiff*

1. Burden of Proof

2. The *Deceptive Act or Practice*3. Actual Damage

4. Proximate Cause-Actual Deception

D. *Other Issues*

III. Equitable and Declaratory Relief

We begin with plaintiffs' breach of contract count.

I. Breach of Contract

Plaintiffs' original class action complaint, which was filed in July 1997, was amended several times. The trial, which took place in 1999, was predicated upon plaintiffs' third amended class action complaint. Count I (breach of contract) of the third amended complaint alleged that State Farm breached its "uniform insurance contract" with its policyholders. Plaintiffs alleged that, under the terms of this contract, State Farm promised "to restore plaintiffs' vehicles to their [***7] pre-loss condition using parts of like kind and quality." According to plaintiffs, the term "like kind and quality," as stated in this promise, meant "like kind and quality to OEM parts." However, plaintiffs also alleged that the non-OEM parts at issue in this case were categorically inferior to their OEM counterparts. Under plaintiffs' view, non-OEM parts could *never* satisfy State Farm's "like kind and quality" obligation. Plaintiffs alleged: "As

a practical matter, [State Farm's] obligation could be met *only* by requiring the *exclusive use* in repairs *of factory-authorized or OEM parts*." (Emphases added.)

[*113] In urging the certification of their claim as a class action, plaintiffs alleged that State Farm's contractual agreement with its policyholders was a uniform "Policy," in the singular, with "the same or common general terms." State Farm argued, to the contrary, that there was no uniform State Farm automobile insurance policy nationwide, and individual issues therefore would dominate the contract claims, rendering classwide determinations impossible. See *735 ILCS 5/2-801(2)* (West 1998). According to State Farm, some of its policies included [***8] a promise to pay to repair the vehicle with parts of "like kind and quality," but other policies did not contain this provision. State Farm added that, in many states, its policies explicitly provided for the specification of non-OEM parts sufficient to restore the vehicle to its "pre-loss condition." Still other State Farm automobile insurance policies contained neither the "like kind and quality" nor the "pre-loss condition" language. State Farm pointed, for example, to its Massachusetts policies, which promised simply to pay "the actual cash value" of "parts at the time of the collision." Another group of policies that contained neither the "like kind and quality" nor the "pre-loss condition" language were the majority of State Farm's [**813] "assigned risk" contracts, which were written for the "residual market" of high-risk consumers whom states *required* insurers to cover. According to State Farm, most of these assigned risk policies promised simply to pay the "amount necessary to repair or replace the property."

State Farm also argued that there were substantive conflicts of law between Illinois and other states, and therefore it would be improper to apply Illinois law to the contract [***9] claims of class members nationwide. State Farm contended, in addition, that Illinois lacked significant contacts with the claims of class members in other states and the imposition of Illinois law with regard to [*114] their claims would violate constitutional rights. See *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985).*

Following a hearing, the circuit court certified plaintiffs' claims as a 48-state class action. The circuit court rejected State Farm's arguments, finding that Illinois law could be applied to the claims of the entire class and that this imposition of Illinois law presented no constitutional difficulties. The court also rejected State Farm's argument that there was no standard form insurance policy. The court took the position that the specific form of the individual policies was immaterial so long as the operative contractual language in each policy was susceptible of uniform interpretation. The court declined to address this issue at the certification stage, maintaining instead that the question of whether the language in State Farm's various policies could be given a uniform interpretation should be resolved at [***10] trial.

In reaching its decision to certify the class, the court concluded that there were questions of fact or law that were common to the class, and these questions predominated over any questions affecting only individual members. *735 ILCS 5/2-801(2)* (West 1998). The court pointed to what it termed State Farm's uniform practice "throughout the United States" of specifying non-OEM parts on policyholders' repair estimates. According to the court, the members of the plaintiff class had a "common interest" in determining whether this practice constituted a breach of State Farm's contractual obligation. In the court's view, this common

interest predominated over questions affecting individual class members.

In an "Order Regarding Law to be Applied to Class Members' Claims," the circuit court explained its reasoning for applying Illinois law to class members' claims nationwide. The court stated:

> "With respect to the breach of contract claims, the court finds that there are no true conflicts of law raised by the [*115] specific claims or facts at issue in this case which require application of the law of any state other than Illinois. Illinois possesses sufficient [***11] contacts such that the application of Illinois law to the breach of contract claims in this case is neither arbitrary nor unfair and comports with due process. Application of Illinois law to the breach of contract claims does not implicate the interests of any other jurisdiction and application of its law to these claims. Finally, the application of Illinois breach of contract standards, which are identical to those in other jurisdictions, does not interfere with any state's legislative or legal choices."

Based on its finding that class members had a "common interest" in determining whether State Farm's "uniform" practice of specifying non-OEM parts breached State Farm's contractual obligation, and that Illinois law could be applied to class members' claims nationwide, the circuit court certified the following class:

> [**814] "All persons in the United States, except those residing in Arkansas and Tennessee, who, between July 28, 1987, and February 24, 1998, (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had non-factory authorized and/or non-OEM (Original Equipment Manufacturer) [***12] 'crash parts' installed on their vehicles or else received monetary compensation determined in relation to the cost of such parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.
>
> In addition, the following persons are excluded from the class: (1) persons who resided or garaged their vehicles in Illinois and whose Illinois insurance policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 26, 1996."

Following entry of the circuit court's order certifying the class, State Farm sought from this court a writ of *mandamus* directing the circuit court to reverse the order. State Farm suggested in the alternative that this court reverse the circuit court's certification order pursuant to our supervisory authority. State Farm also moved [*116] for transfer, consolidation, and a stay of proceedings. This

court entered an order in which we took "no action" on State Farm's various requests because there were insufficient votes either to allow or to deny.

In the circuit court, State Farm subsequently moved for summary [***13] judgment on the class claims and for decertification of the class. The circuit court denied these motions. State Farm also moved for summary judgment against each of the named plaintiffs. This motion was denied as well.

Prior to trial, the parties tendered a number of motions *in limine*. One of plaintiffs' motions sought to bar State Farm from presenting evidence to the jury that the regulation of insurance varied from state to state, and another of plaintiffs' motions sought to prohibit any disclosure of the states where the class members' policies were filed. Still another of plaintiffs' motions sought to preclude the introduction of evidence regarding differences in State Farm's contractual obligations to class members. In opposing these motions, State Farm argued, as it had in opposing class certification, that there were significant variances in its contractual obligations to the members of the class, and these variances resulted, at least in part, from differing insurance regulations in the various states. State Farm asserted:

> "Nothing is more basic in the trial of a contract claim than *** that[] the rights and duties of the parties to a contract are defined by that [***14] specific contract. But plaintiffs ask to exclude that very starting point[,] the contract of the individual class members, a contract which varies *** depending on troublesome differences in State Farm's obligations toward members of the class. The contractual rights of the members of the class, Your Honor, do vary, and those variances are not only relevant but fundamental."

The circuit court granted several of plaintiffs' motions *in limine*, including those barring State Farm from (1) disclosing the states where the class members' policies [*117] were filed, (2) introducing evidence regarding variances in the states' insurance regulations, and (3) introducing evidence regarding differences in State Farm's contractual [**815] obligations to members of the class.

The trial began on August 16, 1999. As previously indicated, the breach of contract claim was tried before the jury, and the remaining claims were tried before the court after the jury had left for the day. At the start of the trial, and over the objection of State Farm, the circuit court gave preliminary jury instructions. In these instructions, the court told the jury that State Farm's contractual obligation was "exactly the [***15] same, whether State Farm promised to pay for crash parts of like kind and quality or promised to pay for crash parts which restore a vehicle to its pre-loss condition." The court added that, under State Farm's policies, the company was allowed to specify either OEM parts or non-OEM parts, "so long as the crash parts are of like kind and quality which restore the damaged vehicle to its pre-loss condition." According to the circuit court, crash parts were of like kind and quality "only if they restored a vehicle to its pre-loss condition," which the court defined as "the condition of the vehicle immediately prior to the time it is damaged."

It is unnecessary to recount in detail the evidence presented at trial. We note that the

trial lasted several days, and involved hundreds of exhibits and testimony by dozens of witnesses. Much of the testimony dealt with whether non-OEM parts were categorically inferior to OEM parts. Each side presented the testimony of experts and bodyshop witnesses in support of their respective positions. At this point, we summarize only the testimony of the named plaintiffs, the testimony of plaintiffs' damages expert, and that of a State Farm claims consultant. [***16] Other facts relevant to our analysis will be introduced as they become pertinent.

Five named plaintiffs testified at trial. Michael Avery, [*118] of Louisiana, testified by video deposition. The remaining four gave their testimony in person: Mark Covington, a resident of Mississippi; Sam DeFrank, who lived in Illinois; Carly Vickers, a resident of Pennsylvania; and Todd Shadle, who was living in Massachusetts when his accident occurred.

Two of the witnesses, Avery and Shadle, did not have non-OEM parts installed on their vehicles. Both testified that before their respective accidents, their cars were in very good condition, and they would not consider non-OEM parts. Accordingly, both had OEM parts installed on their vehicles, rather than the non-OEM parts specified in the estimate, and both paid the difference in cost. For Shadle, the difference was about $ 45, and for Avery it was about $ 155.

Covington, DeFrank and Vickers did have non-OEM parts installed on their vehicles. All three expressed dissatisfaction with the parts. Vickers testified that, following the collision that gave rise to her suit, her car was involved in a subsequent, more serious accident and was declared a total [***17] loss. Vickers admitted that State Farm paid her "book value" for the car. She added that, so far as she knew, State Farm did not value her car any less because of the non-OEM parts that had been used in its repair. DeFrank testified that, several months after his truck was repaired, he sold the vehicle to his brother-in-law for an amount that was slightly below "Blue Book" value. However, DeFrank asserted that, even though the truck had been repaired with non-OEM parts, he did not discount the sale price based on this fact. DeFrank characterized the sale of the truck to his brother-in-law as an "arm's length transaction."

Plaintiffs' damages expert, Dr. Iqbal Mathur, testified that there were two [**816] types of damages being sought for breach of contract. The first was what Mathur termed "direct," or "specification," damages. According to [*119] Mathur, these damages were incurred when State Farm specified a non-OEM part on the repair estimate. Under this theory, everyone in the class was eligible to receive specification damages.

On cross-examination, Mathur acknowledged that a plaintiff would be entitled to receive specification damages even if his car were restored to its preloss condition. [***18] Mathur also conceded that specification damages would apply even if the car were repaired with an OEM part or with a non-OEM part that was of the same quality as an OEM part.

The second type of contract damages, which Mathur described as "consequential," or "installation," damages, was determined by calculating the cost of *replacing* non-OEM parts with OEM parts on a class member's vehicle. Only those class members who actually had non-OEM parts installed on their vehicles were eligible to receive installation damages.

On cross-examination, Mathur acknowledged that, with regard to installation damages, it was necessary to determine

whether a non-OEM part was installed on a class member's vehicle. However, Mathur conceded that he had no way of making this determination. Mathur also acknowledged that he had "no opinion" as to how many class members had non-OEM parts installed on their vehicles but later received fair market value for them. Mathur admitted that his calculations as to installation damages might be incorrect by as much as $ 1 billion.

Among the witnesses appearing for defendant was Don Porter, a State Farm property consultant in auto general claims. Porter's testimony [***19] was directed primarily to State Farm's "basic philosophy" of handling auto damage claims, rather than any specific contractual obligation. In describing this philosophy, Porter testified repeatedly that State Farm's goal was to pay to restore a [*120] policyholder's car to its preloss condition. According to Porter, State Farm has "always had a commitment to restoring the vehicle to its pre-loss condition." Porter also testified that the parts specified "must be as good as the part that was on the car prior to the loss." Porter never mentioned the Massachusetts or assigned risk policies, and never stated that all the State Farm policy forms at issue in this case were uniform.

Following the close of evidence, the circuit court, in conferring with the parties, reiterated the view that State Farm's contractual obligation was the same for each member of the class. In describing this uniform obligation, the circuit court pointed to Porter's testimony. According to the court, Porter testified that State Farm's promise "always was that when the car was repaired, the parts would be of like kind and quality which restores [the vehicle] to its pre-loss condition." The court ruled that this uniform [***20] interpretation of the contractual obligation would apply to all of State Farm's policies, including the "assigned risk" policies and the Massachusetts policies (neither of which contained the "like kind and quality" or the "pre-loss condition" language).

During the conference on jury instructions, State Farm objected to the use of the term "contract" in the instructions. [2] [**817] State Farm argued: "Reference to a singular contract is factually inaccurate. There were numerous contracts." Counsel for State Farm informed the circuit court that, with regard to the court's interpretation of the contractual obligation as uniform, State Farm wanted to preserve its "objections as to variations [*121] in contract terms based on either differing policy language or differing state regulations." Counsel stated:

> "We understand that's not going to be a part of this trial. So we merely want to preserve that for appellate purposes."

2 State Farm made essentially the same objection, in writing, in its "Memorandum Regarding Jury Instructions." Referring to plaintiffs' "substantive proposed contract instructions," State Farm noted that "these instructions speak of a single State Farm 'contract' with the 'class.' " State Farm argued, however, that "there is no one 'contract' with the class."

[***21] The circuit court noted the objection, and subsequently instructed the jury. The instructions regarding State Farm's contractual obligation essentially repeated what the court had given in its preliminary instructions. The essence of these contractual obligation instructions was that State Farm's contractual obligation was the same for every class member.

The verdict form given by the circuit court was general and classwide. It stated, in pertinent part: "Do you find that defendant State Farm failed to perform its obligations under the contract and breached its contract with the plaintiff class?" The circuit court denied State Farm's request to give, in addition, individual verdict forms for each named plaintiff.

The jury found that "defendant State Farm failed to perform its obligations under the contract and breached its contract with the plaintiff class." Contract damages awarded to the plaintiff class totaled $ 456,180,000, which consisted of $ 243,740,000 in specification damages and $ 212,440,000 in installation damages. The circuit court entered judgment on the jury's verdict in favor of plaintiffs on the contract claim. The court also entered judgment in plaintiffs' favor [***22] on the consumer fraud claim, finding that State Farm had, by its practices, violated the *Consumer Fraud Act*. The court awarded plaintiffs an additional $ 130 million in "disgorgement" damages and $ 600 million in punitive damages, resulting in a total award of $ 1,186,180,000 on all claims.

On appeal, State Farm argued that, with regard to plaintiffs' breach of contract claim, individual questions predominated over any purported common questions, and the claim for breach of contract therefore should not [*122] have been certified as a class action. *735 ILCS 5/2-801(2)* (West 1998). In its brief to the appellate court, State Farm contended that, contrary to the conclusion of the circuit court, the operative contractual language in State Farm's policies was *not* susceptible of uniform interpretation. While acknowledging that most of its auto insurance contracts contained the "like kind and quality" or the "pre-loss condition" language, State Farm insisted that "a significant number of policies did not." State Farm pointed, for example, to its policies in Massachusetts, as well as its assigned risk policies in Alaska, Illinois, Indiana, and Minnesota, which State [***23] Farm averred "did not use either the 'like kind and quality' or 'pre-loss condition' language." In its brief to the appellate court, State Farm asserted:

> "Neither of these formulations [the Massachusetts policy provision or the 'assigned risk' policy provision] expressly imposes *any* standard of part quality. In fact, the assigned risk policies deliberately *delete* the 'like kind and quality' and 'pre-loss condition' language that appears in other State Farm policies." (Emphases in original.)

Focusing on the circuit court's interpretation of its contractual obligation as uniform, State Farm told the appellate court:

> [**818] "Rather than trying to deal with the variations in policy language and the governing [state] laws, the circuit court chose to ignore them completely. The court instructed the jury that there was only one policy form, even though there are a number of different forms. Then the court made up its own interpretation of that policy form, without citing any law to support it. Finally, in order to enforce the artificial uniformity it had created, the court barred State Farm from telling the jury about any different contract language or differing state [***24] laws governing the specification of non-OEM parts.

> The circuit court's decision to force this case into the mold of a class action by fabricating a single contract and a single interpretation is an error of law of constitutional dimension that requires reversal by this Court."

[*123] The appellate court affirmed the certification of plaintiffs' breach of contract claim as a class action. The appellate court concluded, as had the circuit court, that State Farm's contractual promise was the same for each member of the class. The appellate court stated:

> "The record demonstrates that plaintiffs presented evidence to show that State Farm made the same promise (*i.e.*, to pay for parts 'of like kind and quality' to restore 'pre-loss condition') to its policyholders throughout the country. State Farm's own witness, Don Porter, a claims consultant, acknowledged that State Farm had a uniform nationwide obligation to policyholders. This promise was to specify parts of like kind and quality *to OEM parts* so as to restore preloss condition." (Emphasis added.) *321 Ill. App. 3d at 280.*

The appellate court also affirmed the circuit court's finding that Illinois law could be [***25] applied to the contract claims of all the class members nationwide and that this imposition of Illinois law presented no constitutional difficulties.

With regard to the merits, the appellate court upheld the circuit court's judgment that State Farm breached its contractual obligation to the plaintiff class. The appellate court stated:

> "Plaintiffs claimed that the non-OEM parts specified by State Farm were categorically inferior and failed to restore the vehicles to their 'pre-loss condition.' The claim was supported with expert testimony, from which it could be reasonably inferred, if accepted as true, that the lot of non-OEM parts specified by State Farm was inferior in terms of appearance, fit, quality, function, durability, and performance." *321 Ill. App. 3d at 280.*

The appellate court also upheld most of the damages awarded for breach of contract. In affirming the award of specification damages, the appellate court explicitly concluded that these damages applied even where (1) an inferior non-OEM part was specified on the estimate, but the body shop provided an OEM part at no additional cost to the class member, and (2) non-OEM parts were [*124] used in the vehicle's [***26] repair, but the class member subsequently sold the vehicle for fair market value with no diminution in value because of the use of non-OEM parts. *321 Ill. App. 3d at 287-88.* The appellate court also upheld the award of installation damages, rejecting State Farm's criticism that these damages were speculative. *321 Ill. App. 3d at 288-90.*

However, the appellate court concluded that the $ 130 million in disgorgement damages constituted an impermissible double recovery, and the appellate court therefore reversed this award. As a result, plaintiffs' [**819] total

award was reduced to $ 1,056,180,000.

State Farm appeals from those portions of the judgment of the appellate court affirming the judgment of the circuit court. [3] We granted State Farm's petition for leave to appeal. 177 Ill. 2d R. 315(a).

3 We granted leave to the following agencies and organizations to file *amicus curiae* briefs in support of State Farm: Alliance of American Insurers, Allstate Insurance Company, the Chamber of Commerce of the United States, Citizens for a Sound Economy Foundation, North Carolina Department of Insurance *et al.*, General Motors Corporation *et al.*, Government Employees Insurance Company *et al.*, Illinois Chamber of Commerce, Illinois Department of Insurance, Illinois Manufacturers' Association, National Association of Independent Insurers *et al.*, National Association of Insurance Commissioners, National Conference of Insurance Legislators *et al.*, the Superintendent of the Ohio Department of Insurance, Public Citizen, Inc., *et al.*, and Washington Legal Foundation. We also granted leave to the following agencies and organizations to file *amicus curiae* briefs in support of plaintiffs: Alliance of Automotive Service Providers National Association *et al.*, Illinois Trial Lawyers Association, Trial Lawyers for Public Justice *et al.*, and United Policyholders. See 155 Ill. 2d *R. 345*.

[***27] A. *Propriety of the Nationwide Contract Class*

Before this court, State Farm argues, as it did before the circuit and appellate courts, that the class should not have been certified. State Farm contends that individual [*125] questions predominate over any questions common to the class and that Illinois law should not have been applied to the contract claims of class members nationwide. With regard to the merits, State Farm argues that plaintiffs failed to establish a breach of State Farm's contractual obligation and plaintiffs failed to establish that they were entitled to damages. We turn first to State Farm's contention that the class should not have been certified.

Class certification is governed by section 2-801 of the Code of Civil Procedure (*735 ILCS 5/2-801* (West 1998)), which is patterned after *Rule 23 of the Federal Rules of Civil Procedure*. See *Getto v. City of Chicago, 86 Ill. 2d 39, 47, 426 N.E.2d 844, 55 Ill. Dec. 519 (1981)*; K. Forde, *Illinois's New Class Action Statute*, 59 Chi. B. Rec. 120, 122-24 (1977). Given the relationship between these two provisions, federal decisions interpreting [***28] *Rule 23* are persuasive authority with regard to questions of class certification in Illinois. See, *e.g.*, *Schlessinger v. Olsen, 86 Ill. 2d 314, 320, 427 N.E.2d 122, 56 Ill. Dec. 42 (1981)* (citing *Fed. R. Civ. P. 23* case in analyzing class certification issue); see K. Forde, *Illinois's New Class Action Statute*, 59 Chi. B. Rec. 120, 122-24 (1977); *Southwestern Refining Co. v. Bernal, 22 S.W.3d 425, 433, 43 Tex. Sup. Ct. J. 706 (Tex. 2000)*. Under *section 2-801*, a class may be certified only if the proponent establishes the four prerequisites set forth in the statute: (1) numerosity ("the class is so numerous that joinder of all members is impracticable"); (2) commonality ("there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members"); (3) adequacy of representation ("the representative parties will fairly and adequately protect the interest of the class"); and (4) appropriateness ("the class action is an

appropriate method for the fair and efficient adjudication of the controversy"). *735 ILCS 5/2-801* (West 1998).

Decisions [***29] regarding class certification are within the [*126] sound discretion of the trial court and should be overturned only where the court clearly abused its discretion or applied impermissible legal criteria. *McCabe v. Burgess, 75 Ill. 2d 457, 464, 389 N.E.2d 565, 27 Ill. Dec. 501 (1979)*; *Eshaghi v. Hanley Dawson Cadillac Co., 214 Ill. App. 3d 995, 1001, 574 N.E.2d 760,* [**820] *158 Ill. Dec. 647 (1991)*. However, "[a] trial court's discretion in deciding whether to certify a class action is not unlimited and is bounded by and must be exercised within the framework of the civil procedure rule governing class actions." 4 A. Conte & H. Newberg, Newberg on Class Actions § 13:62, at 475 (4th ed. 2002); see also *Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 344 (4th Cir. 1998)* (noting that, while a trial court has broad discretion in deciding whether to certify a class, this discretion must be exercised within the framework of *Fed. R. Civ. P. 23*).

In the case at bar, State Farm argues that it was an abuse of discretion to certify the class. State Farm's argument focuses on the commonality and predominance requirement of [***30] *section 2-801*. According to State Farm, it was error for the lower courts to conclude that common questions predominated over questions affecting only individual class members.

With regard to the class that was certified for plaintiffs' contract claim, the common question identified by the circuit court in its certification order was whether State Farm's practice of specifying non-OEM parts on repair estimates constituted a breach of State Farm's contractual obligations. According to the circuit court, this question of "contractual interpretation" predominated over other issues. In reaching this conclusion, the circuit court acknowledged State Farm's argument that its insurance contracts took varying forms and there was thus no standard form contract to be interpreted. However, in the court's view, the specific form of the individual insurance policies was immaterial so long as "the operative contractual language contained in each [*127] policy [was] susceptible [of] uniform interpretation." The court concluded that this question of whether the various policies' language could be given uniform interpretation should be decided at trial, rather than at the class certification stage.

Notwithstanding [***31] this assertion by the court, the issue of uniform contractual interpretation was never decided on the merits. As previously noted, prior to trial the circuit court granted plaintiffs' motions *in limine* barring the introduction of evidence regarding differences in State Farm's contractual obligations and prohibiting any mention of the states where the class members' policies were filed. As a result of these rulings, the jury was prevented from hearing evidence regarding any variations in State Farm's contractual obligations to the class members. Moreover, by the time the trial began, the circuit court itself had decided the issue of whether the contractual language in State Farm's various policies was susceptible of uniform interpretation. In its preliminary instructions to the jury, the court stated: "The contractual obligation of State Farm under its policies or insurance contracts is *exactly the same*, whether State Farm promised to pay for crash parts of like kind and quality or promised to pay for crash parts which restore a vehicle to its pre-loss condition." (Emphasis added.) Following the close of evidence in the jury trial, the circuit court expressed this uniform contractual [***32] interpretation in even

broader terms, ruling that it applied to all of State Farm's policies, including the assigned risk policies and the Massachusetts policies (neither of which contained the "like kind and quality" or the "pre-loss condition" language).

In our view, the circuit court was incorrect in concluding, in the first instance, that the question of uniform contractual interpretation should be decided at trial rather than at the class certification stage. Apparently [*128] the circuit court [**821] came to this realization as well (although belatedly), as is evinced by the court's deciding the uniform interpretation issue prior to trial. The reason why this question should have been resolved during the certification stage is that, had the court answered the question in the negative rather than the affirmative, the class could not have been certified. In order to satisfy the second requirement of *section 2-801* (a common question of fact or law predominates over other questions affecting only individual class members), it must be shown that "successful adjudication of the purported class representatives' individual claims will establish a right of recovery in other class members." *Goetz v. Village of Hoffman Estates, 62 Ill. App. 3d 233, 236, 378 N.E.2d 1276, 19 Ill. Dec. 401 (1978)*; [***33] accord *Society of St. Francis v. Dulman, 98 Ill. App. 3d 16, 18, 424 N.E.2d 59, 53 Ill. Dec. 646 (1981)*; *Hagerty v. General Motors Corp., 59 Ill. 2d 52, 59, 319 N.E.2d 5 (1974)*; see also *Mace v. Van Ru Credit Corp., 109 F.3d 338, 341 (7th Cir. 1997)* (noting that the typicality and commonality requirements of *Fed. R. Civ. P. 23* "ensure that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class"). In the case at bar, if the circuit court had concluded that the operative contractual language in State Farm's various policies was *not* susceptible of uniform interpretation, this would have raised the possibility that there was a breach of contract with some class members but not with others. See *Broussard, 155 F.3d at 340.* In such a situation, the successful adjudication of the claims of some class members would not necessarily establish a right to recovery in others. If there were significant differences in the operative contractual language of the various policies, the commonality and predominance requirement of *section 2-801* could not [***34] be met, and the class could not be certified. Accordingly, the circuit court erred in declining to decide the question of uniform contractual interpretation [*129] at the class certification stage. As noted, the circuit court apparently realized this error and decided the uniform interpretation issue prior to trial.

The question before us is whether the circuit court decided this issue correctly. In other words, was it error for the circuit court to conclude that the operative language in State Farm's various policies could be given a uniform interpretation such that the successful adjudication of the contract claims of some class members would establish a right to recovery in other class members? The determination of this issue requires an examination of the relevant contracts. The starting point of any contract analysis is the language of the contract itself. *Church v. General Motors Corp., 74 F.3d 795, 799 (7th Cir. 1996)*; *Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 403 (7th Cir. 1998).* As a general rule, the construction, interpretation, or legal effect of a contract is a matter to be determined by the court as a question of law. 12A Ill. L. & Prac. [***35] *Contracts* § 264, at 107 (1983); see *Chicago Daily News, Inc. v. Kohler, 360 Ill. 351, 363, 196 N.E. 445 (1935)*; *Sindelar v. Liberty Mutual Insurance Co., 161 F.2d 712, 713 (7th Cir. 1947).* Our review of this issue is

therefore *de novo*. See *Hessler v. Crystal Lake Chrysler-Plymouth, Inc., 338 Ill. App. 3d 1010, 1017, 788 N.E.2d 405, 273 Ill. Dec. 96 (2003)*.

We begin with the two main policy forms at issue in this case. The first includes the "like kind and quality" language and provides, in pertinent part:

> "We have the right to settle a *loss* with *you* or the owner of the property in one of the following ways:
>
> ***
>
> [**822] 2. pay to repair or replace the property or part with like kind and quality. If the repair or replacement results in better than like kind and quality, *you* must pay for the amount of the betterment ***." (Emphases in original.)

The second policy form contains the "pre-loss condition" provision, as well as language expressly providing that State Farm's contractual obligation could be met by [*130] specifying non-OEM parts. This policy form states, in pertinent part:

> "The cost of repair or replacement is based upon one of the following: [***36]
>
> * * *
>
> 3. an estimate written based upon the prevailing competitive price. *** We will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition. *You* agree with us that such parts may include either parts furnished by the vehicle's manufacturer or parts from other sources including non-original equipment manufacturers." (Emphasis in original.)

In our view, these two policy forms are *not* the same. As noted, the second one contains, in addition to the "pre-loss condition" promise, an explicit agreement between State Farm and the policyholder regarding the use of non-OEM parts: "*You* agree with us that such parts may include either parts furnished by the vehicle's manufacturer or parts from other sources including non-original equipment manufacturers." (Emphasis in original.) In its brief to this court, State Farm points in particular to this language, explaining that it "expressly provided that State Farm could meet [the preloss condition] obligation by specifying non-OEM parts." In contrast, the first policy form set forth above, which contains the "like kind and quality" promise, makes no mention of OEM or non-OEM parts, nor does it [***37] expressly allow for the specification of non-OEM parts. If, as plaintiffs claim, the specification of non-OEM parts constitutes a breach of State Farm's contractual obligation, plaintiffs who were insured under policies containing the "like kind and quality" promise would be in a different position regarding this non-OEM-parts claim than would plaintiffs with policies containing the "you agree" language. Class members with a "like kind and quality" policy would have a stronger case for breach of contract than would those whose policies expressly *allowed* [*131] the practice that is alleged to constitute the breach. It follows that the successful adjudication of the claims of class members with the "like kind and quality" language would not necessarily establish a right of recovery in those with the

"you agree" language. See *Hagerty, 59 Ill. 2d at 59*; *Goetz, 62 Ill. App. 3d at 236*; *Dulman, 98 Ill. App. 3d at 18*; *Mace, 109 F.3d at 341*. There is thus a material difference between the policies containing the "you agree" provision and those that do not contain this language. [4]

4 Plaintiffs make no mention of the "you agree" language in their brief to this court.

[***38] This difference between the "like kind and quality" policies, on the one hand, and the "pre-loss condition" policies containing the "you agree" provision, on the other, is not the only instance in this case of material differences in policy language. The putative class also includes State Farm insureds with policies that contain *neither* the "like kind and quality" *nor* the "pre-loss condition" promise. State Farm's Massachusetts policies, for example, simply promise to pay "the actual cash value" of parts at the time of the collision." The same is true of most of State Farm's "assigned [**823] risk" policies, which are used in the "residual market" of high-risk consumers that insurers are required to cover. Just as with the Massachusetts policies, the majority of the "assigned risk" policies contain neither the "like kind and quality" nor the "pre-loss condition" language. Instead, the "assigned risk" policies promise to pay an "amount necessary to repair or replace the property."

As State Farm points out, neither of these formulations-the Massachusetts policy provision or the "assigned risk" policy provision-expressly imposes *any* standard of part quality. It follows that plaintiff [***39] class members who were insured under either of these policies would be in a different position than their "like kind and [*132] quality" and "pre-loss condition" counterparts regarding the claim that the specification of non-OEM parts constituted a breach of their insurance contract. The successful adjudication of the claim of a "like kind and quality" policyholder, for example, would not necessarily establish a right to recovery in a class member with either a Massachusetts or an "assigned risk" policy. See *Goetz, 62 Ill. App. 3d at 236*; *Dulman, 98 Ill. App. 3d at 18*.

Notwithstanding the foregoing, the circuit court, following the close of evidence in the jury trial, reiterated its pretrial conclusion that State Farm's contractual obligation was the same for each member of the class. The circuit court determined that all of State Farm's policies, including the Massachusetts policies and the "assigned risk" policies, conveyed the same contractual promise. The court stated:

> "After having heard all the testimony, and I wrote down in particular when it was done, Mr. Porter's testimony that State Farm's agreement, promise, however you choose to characterize [***40] it, always was that when the car was repaired, the parts would be of like kind and quality which restores [it] to its pre-loss condition."

The appellate court also referred specifically to Porter's testimony in concluding that State Farm's contractual obligation was uniform: "State Farm's own witness, Don Porter, a claims consultant, acknowledged that State Farm had a uniform nationwide obligation to policyholders." *321 Ill. App. 3d at 280*. Plaintiffs take this same position, pointing to Porter's testimony and contending that State Farm's contractual obligations to its policyholders were uniform. We disagree.

First, Porter's testimony about State Farm's "commitment to restoring the vehicle to its pre-

loss condition" referred to a "basic philosophy" goal of the company, rather than a contractual obligation. Porter never testified that all of the policy forms at issue in this [*133] case were uniform. Second, to the extent that his testimony could be read as referring to State Farm's insurance contracts, the most that can be said about this testimony is that Porter was referring to individual policy *terms* rather than all of the relevant policy *forms*. Viewed in [***41] the light most favorable to plaintiffs, Porter's testimony may be read as supporting the position that the "like kind and quality" and the "pre-loss condition" phrases mean the same thing: State Farm promised to pay to restore the policyholder's vehicle to its preloss condition using parts as good as the parts that were on the vehicle at the time of the loss. However, there is nothing to indicate that Porter's testimony encompasses any other policy language.

An example of a policy provision that falls *outside* the scope of Porter's testimony is the "you agree" language, which expressly allows for the specification of non-OEM parts. While Porter made brief mention of the "you agree" language in his [**824] testimony, he discussed this language only as an example of the notice that State Farm provided to policyholders regarding its non-OEM-parts practices. Porter did *not* state in his testimony that a policy containing language that expressly allows for the specification of non-OEM parts is the contractual equivalent of a policy that *omits* this language. His testimony simply contains *no comment* with regard to this matter. Accordingly, with respect to State Farm's allegedly uniform [***42] contractual obligation, Porter's testimony supports *only* the view that the "like kind and quality" phrase and the "pre-loss condition" phrase mean the same thing: that State Farm's obligation was to pay to restore the policyholder's vehicle to its preloss condition. Porter's testimony does *not* support the position of the lower courts, and of plaintiffs, that the presence of the "you agree" language makes no difference and that policies containing this language convey the same contractual promise as do policies that omit it.

[*134] Equally important, Porter's testimony does not encompass State Farm's Massachusetts policies or its "assigned risk" policies, neither of which contain the "like kind and quality" or the "pre-loss condition" language. We have carefully examined the more than 200 transcript pages of Porter's testimony. We find no mention of either the Massachusetts policies or the "assigned risk" policies. The assertion that Porter's "uniform obligation" testimony encompasses these policies is simply not supported by the evidence. Accordingly, Porter's testimony does *not* support the position of the lower courts, and of plaintiffs, that State Farm policies which *omit* [***43] the "like kind and quality" and the "pre-loss condition" language state the same contractual promise as policies that include this language.

Moreover, there is no other record evidence that can sustain the conclusion that material policy differences-*i.e.*, the "you agree" language and the "assigned risk" language-make *no* difference, and that all of State Farm's various policy formulations are the same. Plaintiffs do point to evidence in addition to Porter's testimony, but this other evidence consists essentially of statements that are equivalent to Porter's assertions or reflect them. There is nothing to support the conclusion that the "you agree" language, for example, or the Massachusetts or "assigned risk" policies are irrelevant and that all of State Farm's policy variations therefore are susceptible of the same contractual interpretation. Indeed, State Farm has argued from the beginning of this case that such variances *are* relevant and that they preclude class certification.

In sum, there is simply no evidentiary support for the lower courts' conclusion that *all* of State Farm's various policies are uniform. Where a putative class includes members who are insured [***44] under policies that are materially different, the commonality and predominance [*135] requirement of *section 2-801* cannot be met. *735 ILCS 5/2-801(2)* (West 1998). See *Hagerty, 59 Ill. 2d at 59*; *Goetz, 62 Ill. App. 3d at 236*; *Dulman, 98 Ill. App. 3d at 18*; *Mace, 109 F.3d at 341*. Accordingly, it was an abuse of discretion for the circuit court to certify plaintiffs' breach of contract claim as a class action. See *Broussard, 155 F.3d at 340* ("Plaintiffs simply cannot advance a single collective breach of contract action on the basis of multiple different contracts"). We therefore reverse the certification of the nationwide contract class.

B. *Whether the Verdict May Be Affirmed with Respect to Subclasses*

Having determined that the certification of the nationwide contract class [**825] should be reversed, we note that there remains a question whether the jury's breach of contract verdict may be affirmed with regard to any subclass comprised of policyholders who were insured under any of the relevant individual policy forms. For the reasons set forth below, we answer this question in [***45] the negative.

We note initially that there are serious questions as to whether the breach of contract verdict may be upheld for *any* group of class members. Under the verdict form given by the circuit court, the jury found that "defendant State Farm failed to perform its obligations under *the contract* and breached *its contract* with the plaintiff class." (Emphases added.) This verdict form followed naturally from the jury instructions, which stated that there was a single contract at issue with a uniform contractual obligation.

However, we have concluded, as a matter of law, that this was error. There was no single contract. Rather, there were multiple policy forms which differed materially. On its face, therefore, the verdict is improper. It included no finding, for example, that State Farm breached the policy form containing the "you agree" [*136] language, which *allowed* the practice that plaintiffs claim constituted the breach. Indeed, there could not have been such a finding. The jury was never instructed as to the "you agree" provision. Nor was there any finding in the verdict that State Farm breached its contractual obligation in the Massachusetts policies or the "assigned [***46] risk" policies. Once again, the jury was not instructed as to these policies. The verdict simply stated, incorrectly, that State Farm breached a *single contract* with the plaintiff class.

Accordingly, the breach of contract verdict cannot be upheld with respect to any subclass of policyholders insured under any of the individual policy forms at issue. However, we do not decide this case on this ground alone. Instead, we also look at the individual relevant policy forms and consider whether plaintiffs established a breach of any of them. We also consider whether plaintiffs established damages. For the reasons set forth below, we answer these questions in the negative.

1. The Massachusetts and "Assigned Risk" Policies

With regard to the Massachusetts policies and the "assigned risk" policies, we conclude that there was no breach. Neither of these policy forms contained the "like kind and quality" or the "pre-loss condition" language. The Massachusetts policies promised to pay "the actual cash value" of "parts at the time of the collision," and the "assigned risk" policies

promised to pay an "amount necessary to repair or replace the property." As State Farm has noted, neither of [***47] these formulations-the Massachusetts policy provision or the "assigned risk" policy provision-expressly imposed any standard of part quality. The specification of non-OEM parts would not constitute a breach of these contracts. So long as, with regard to the Massachusetts policies, State Farm paid "the actual cash value" of "parts at the time of the collision," and so long as, with regard to the "assigned risk" [*137] policies, State Farm paid an "amount necessary to repair or replace the property," the contractual obligation would be met. It would not matter whether the parts specified were non-OEM, OEM, or some other type. Thus, the jury's breach of contract verdict may not be affirmed with respect to a subclass consisting of policy holders insured under these provisions.

2. The "You Agree" Policies

We turn next to the policies containing the "pre-loss condition" and the [**826] "you agree" language. As noted, these provisions state:

> "The cost of repair or replacement is based upon one of the following:
>
> * * *
>
> 3. an estimate written based upon the prevailing competitive price. *** We will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition. *You* [***48] agree with us that such parts may include either parts furnished by the vehicle's manufacturer or parts from other sources including non-original equipment manufacturers." (Emphasis in original.)

We cannot affirm the jury's verdict with respect to a subclass of policyholders who were insured under these provisions. First, pursuant to the "you agree" language, the insured expressly agrees that "such parts," *i.e.*, parts sufficient to restore a vehicle to its preloss condition, "may include *** parts from *** non-original equipment manufacturers." In other words, the insured agrees that the "pre-loss condition" promise may be met by specifying non-OEM parts. In their brief to this court, plaintiffs do not explain, in any way, how a contract containing the "you agree" language, which *expressly permits* the specification of non-OEM parts, may be breached by *the specification of non-OEM parts*. Plaintiffs have established, in support of their claim, that non-OEM parts were specified by State Farm in class members' estimates. [*138] However, in view of the "you agree" language, this specification of non-OEM parts, by itself, cannot constitute a breach of the "pre-loss condition" [***49] promise.

Second, in order to establish a breach of the "pre-loss condition" promise, plaintiffs would have to show that the parts specified or used by State Farm, whether OEM or non-OEM parts, did not restore the vehicle to its preloss condition. A necessary first step in making this showing would be to examine each class member's vehicle to determine its preloss

condition. At trial, Timothy Ryles and Paul Griglio, two of plaintiffs' expert witnesses, conceded the necessity for such a determination. The following colloquy took place between State Farm's counsel and Ryles:

> "Q. Good point, Dr. Ryles. To determine whether a particular car has been restored to its pre-loss condition, you'd have to know what the pre-loss condition of that car was; isn't that right?
>
> A. You need to, yes."

Griglio made a similar concession in this exchange with State Farm's counsel:

> "Q. Similarly, sir, to know whether or not a car was restored to pre-loss condition, you would need to know what the pre-loss condition of that car was, wouldn't you?
>
> A. Yes, you would."

In the case at bar, the determination of the preloss condition of each subclass member's vehicle would require the individual [***50] examination of hundreds of thousands, if not millions, of vehicles. Undoubtedly, these examinations would overwhelm any question common to the subclass, rendering it impossible for such questions to predominate. As noted, class certification is improper unless "common questions predominate over any questions affecting only individual members." *735 ILCS 5/2-801(2)* (West 1998). For this reason, a claim for breach of the preloss condition promise cannot be maintained as a class action. See *Augustus v. Progressive Corp., 2003 Ohio 296, P25*; *Schwendeman v. USAA Casualty Insurance* [*139] *Co., 116 Wn. App. 9, 22-23, 65* [**827] *P.3d 1, 8 (2003)*; *Snell v. Geico Corp.*, No. Civ. 202160, slip op. at 6 (Md. Cir. Ct. August 14, 2001). Accordingly, the jury's breach of contract verdict may not be affirmed for a subclass comprised of policyholders insured under the preloss condition provision.

3. The "Like Kind and Quality" Policies

The remaining policy form is the one containing the "like kind and quality" promise. Before analyzing this provision, we note that the record appears to include the policies of only two of the named plaintiffs, DeFrank [***51] and Covington. Both DeFrank's and Covington's policies contain the "pre-loss condition" and "you agree" language. In addition, although we were unable to find a copy of Avery's policy in the record, testimonial evidence indicates that Avery's policy also contained the "pre-loss condition" and "you agree" language.

With regard to the remaining two named plaintiffs-Shadle and Vickers-the record does not appear to include their policies. On this record, therefore, it is unclear that the contracts of *any* of the named plaintiffs contained the "like kind and quality" language. If none of the named plaintiffs' policies contained the "like kind and quality" language, State Farm could not have breached this provision in any of the named plaintiffs' policies. Accordingly, plaintiffs' claim for breach of the "like kind and quality" promise fails for lack of proof. We cannot uphold a subclass based on this policy form. "It is well settled that a class cannot be certified unless the named plaintiffs have a cause of action." *Spring Mill Townhomes Ass'n v. Osla Financial Services, Inc., 124 Ill. App. 3d 774, 779, 465 N.E.2d 490, 80 Ill. Dec. 378 (1983)*, citing *Landesman v. General Motors Corp., 72 Ill. 2d 44, 377 N.E.2d 813, 18 Ill. Dec. 328 (1978)*; [***52] accord, *e.g., Perlman v. Time, Inc., 133 Ill. App. 3d 348,*

354, 478 N.E.2d 1132, 88 Ill. Dec. 524 (1985). Assuming, *arguendo*, that there *were* named plaintiffs with this policy form, we conclude that there was no breach of the "like kind and quality" promise.

[*140] The "like kind and quality" promise states:

> "We have the right to settle a *loss* with *you* or the owner of the property in one of the following ways:
>
> ***
>
> 2. pay to repair or replace the property or part with like kind and quality. If the repair or replacement results in better than like kind and quality, *you* must pay for the amount of the betterment ***." (Emphases in original.)

According to the appellate court (and plaintiffs), "like kind and quality," as stated in this promise, meant "like kind and quality to OEM parts." *Avery v. State Farm Mutual Automobile Insurance Company, 321 Ill. App. 3d 269 at 280, 254 Ill. Dec. 194.* Plaintiffs' contention throughout this case has been that the non-OEM parts that were at issue were categorically inferior to their OEM counterparts. It follows that, under this theory, State Farm's specification of non-OEM parts could *never* satisfy the [***53] obligation to pay for parts of "like kind and quality." In their third amended complaint, plaintiffs alleged: "As a practical matter, [State Farm's] obligation could be met *only* by requiring the *exclusive use* in repairs *of factory-authorized or OEM parts*." (Emphases added.)

In our view, there are several difficulties with this theory that the "like kind and quality" promise is necessarily breached by the specification of non-OEM parts. First, the language of the promise itself contradicts the view that State Farm may meet its contractual obligation *only* by specifying *OEM* parts. If the purpose of State Farm's promise "to repair or replace [**828] the property or part with *like kind and quality*" (emphasis added) were to require the specification of OEM parts, then there is no reason why the indirect phrasing "like kind and quality" would have been used. The provision could simply have promised that OEM parts would be specified. Implicit in the phrase "like kind and quality" is the likeness or similarity of *one thing* to *another*. Common sense indicates that an item that is of "like kind and quality" to another is not that very item, but rather is something of [***54] "like kind and quality" to it.

[*141] Also contradicting the position that "like kind and quality" means OEM parts is the contract language *accompanying* the "like kind and quality" promise. In the "like kind and quality" provision as set forth above, the sentence immediately following the "like kind and quality" promise states: "If the repair or replacement results in *better than like kind and quality* [emphasis added], *you* must pay for the amount of the betterment [emphasis in original] ***." This policy language, which requires an insured to pay for "repair or replacement [which] results in *better than like kind and quality*" (emphasis added), presumes a standard of quality that is "better than like kind and quality." However, under plaintiffs' reasoning, there is nothing better than "like kind and quality."

Recall the position taken by plaintiffs. According to plaintiffs, *all* the non-OEM parts at issue in this case are categorically inferior to OEM parts. This means, of necessity, that OEM parts represent the highest possible standard of quality. In addition, according to

plaintiffs, because non-OEM parts are categorically inferior to OEM parts, the "like kind [***55] and quality" promise can only be met by specifying OEM parts. Thus, because OEM parts are the best possible parts, and because the "like kind and quality" promise means OEM parts, plaintiffs also necessarily take the position that the term "like kind and quality" refers to the highest possible standard of quality.

But this reasoning cannot be correct. State Farm's policy cannot be referring to OEM parts when it uses the term "like kind and quality" because the policy itself says that there is a standard of quality which is *better* than "like kind and quality" parts. Plaintiffs are clearly incorrect in equating "like kind and quality" with OEM parts.

As previously indicated, State Farm defines "like kind and quality" differently from plaintiffs (and the appellate [*142] court). In State Farm's view, "like kind and quality" means "sufficient to restore a vehicle to its pre-loss condition." [5] There is substantial legal support for State Farm's view.

> 5 Plaintiffs point to a 1986 version of an internal State Farm document, General Claims Memo # 430 (GCM # 430), which, according to plaintiffs, contradicts State Farm's position that "like kind and quality" means "sufficient to restore a vehicle to its pre-loss condition." However, as State Farm claims consultant Don Porter stated at trial, GCM # 430 is not contained within the four corners of any State Farm insurance contract. GCM # 430 is therefore extrinsic evidence as to the meaning of the "like kind and quality" contractual promise. Absent a finding that the "like kind and quality" promise is ambiguous, such extrinsic evidence is irrelevant to the meaning of this contractual provision. See *Grzeszczak v. Illinois Farmers Insurance Co., 168 Ill. 2d 216, 223-24, 659 N.E.2d 952, 213 Ill. Dec. 606 (1995)*; *Dempsey v. National Life & Accident Insurance Co., 404 Ill. 423, 426, 88 N.E.2d 874 (1949)*. We make no such finding of ambiguity.

[***56] Courts in other jurisdictions have adopted a similar interpretation of the term "like kind and quality." In *Siegle v. Progressive Consumers Insurance Co., 819 So. 2d 732 (Fla. 2002)*, the issue was whether, [**829] under "like kind and quality" policy language similar to that in the case at bar, an insurer was obligated not only to complete "a first-rate repair which returns the vehicle to its pre-accident level of performance, appearance, and function," but also to compensate the insured in money for any diminution in market value that resulted from the repaired vehicle's status as a wrecked car. *Siegle, 819 So. 2d at 733*. The court ruled that there was no such dual obligation on the part of the insurer. The court explained that, under the policy language at issue, the insurer had a choice of either reimbursing the insured through a money payment or paying to repair or replace the automobile with other property of like kind and quality. If, as in the case that was before the court, the repair option was chosen, "the insurer's liability was limited to the monetary amount necessary to repair the car's function [*143] and appearance, *commensurate with the condition* [***57] *of the auto prior to the loss*." (Emphasis added.) *Siegle, 819 So. 2d at 739*. Thus, in the court's view, a promise to repair damaged property with *like kind and quality* meant that the insurer was obligated to restore the vehicle to its *preloss condition*. See also *Ray v. Farmers Insurance Exchange, 200 Cal. App. 3d 1411, 1418, 246 Cal.Rptr. 593, 596 (1988)* ("To the extent [that plaintiff's]

automobile was repaired to its *pre-accident* safe, mechanical, and cosmetic condition, [defendant's] obligation under the policy of insurance to repair to 'like kind and quality' was discharged" (emphasis added)); *Berry v. State Farm Mutual Automobile Insurance Co., 9 S.W.3d 884, 894-95 (Tex. Ct. App. 2000)* (under court's interpretation of the Texas Insurance Code, whether a part is of "like kind and quality" depends on "the age or condition of the covered vehicle prior to the accident"); *Schwendeman v. USAA Casualty Insurance Co., 116 Wn. App. 9, 22-23, 65 P.3d 1, 8 (2003)* (under the insurance policy at issue, "whether a replacement part is of 'like kind and quality' to the part it replaces necessarily requires ascertaining [***58] the condition of the vehicle before the accident in terms of its age, mileage, and physical condition, and the quality of the replacement part"); *Snell v. Geico Corp.*, No. Civ. 202160, slip op. at 6 (Md. Cir. Ct. August 14, 2001) (preloss condition of each individual vehicle must be established in order to determine whether insurer's "like kind and quality" promise was breached).

State Farm maintains that "pre-loss condition" is what defines "like kind and quality," rather than the other way around. For State Farm it is irrelevant whether non-OEM parts are of like kind and quality to OEM parts. The determinative issue is whether the parts specified are sufficient to restore the vehicle to its preloss condition, *i.e.*, the condition of the vehicle shortly before [*144] the accident. Under this definition of "like kind and quality," the specification of non-OEM parts would not necessarily breach the "like kind and quality" promise.

We agree with State Farm. The term "like kind and quality," as used in the relevant policies, meant "sufficient to restore a vehicle to its pre-loss condition." We therefore conclude that the specification of non-OEM parts would not necessarily constitute [***59] a breach of the "like kind and quality" promise. Thus, we cannot affirm the jury's breach of contract verdict with respect to a subclass consisting of policyholders insured under this provision.

In sum, the jury's breach of contract verdict may not be upheld for any subclass comprised of policyholders insured under any of the individual relevant policy forms. State Farm's specification of non-OEM parts did not constitute a breach of the Massachusetts policies or the "assigned [**830] risk" policies, neither of which expressly imposed any standard of part quality. Nor did the specification of non-OEM parts constitute a breach of the policies containing the "pre-loss condition" and the "you agree" provisions. Under the "you agree" language, the insured *agrees* that the "pre-loss condition" promise may be met by specifying non-OEM parts. Further, the individualized proof needed to establish a breach of the "pre-loss condition" promise would destroy the commonality required of a class action. Finally, plaintiffs' claim for breach of the "like kind and quality" promise fails for a number of reasons. First, the claim fails for lack of proof. In addition, State Farm's specification of non-OEM [***60] parts did not constitute a breach of the policies containing the "like kind and quality" provision. The term "like kind and quality," as used in the relevant policies, meant "sufficient to restore a vehicle to its pre-loss condition." This obligation, which is satisfied so long as the parts are sufficient to restore the vehicle to its [*145] preaccident condition, is not necessarily breached by the specification of non-OEM parts. Moreover, as noted above, the individualized proof required to establish a breach of the "pre-loss condition" promise would overwhelm any questions common to the subclass, thus prohibiting certification of

the claim as a class action.

4. Damages

There is an additional reason why the breach of contract verdict may not be upheld with regard to any subclass. Plaintiffs have failed to establish damages.

a. *Specification Damages*

Two types of damages were awarded to the plaintiff class for breach of contract: (1) direct, or "specification," damages, and (2) consequential, or "installation," damages. The first type of damages, which is based on plaintiffs' theory that the contract was breached by the *specification* of non-OEM parts, was calculated as the cost [***61] difference between the OEM parts that plaintiffs claimed *should* have been specified and the non-OEM parts that State Farm listed on the repair estimate. According to plaintiffs, this figure constituted the amount that State Farm "saved by specifying cheaper [non-OEM] parts." Plaintiffs' damages expert, Dr. Iqbal Mathur, calculated that specification damages for the class as a whole would total $ 243,700,000. Under plaintiffs' theory, everyone in the class was eligible to receive specification damages.

In our view, plaintiffs' theory of "specification damages" has no basis in the law. Under this theory, loss occurs when a non-OEM part is *specified* on the estimate rather than when the part is *installed* on the vehicle. Plaintiffs' damages expert, Dr. Mathur, conceded at trial that specification damages apply to any class member whose repair estimate *specified* a non-OEM part, regardless of whether a non-OEM part was used in the repair [*146] of the vehicle. Thus, a policyholder who had been quoted a non-OEM part on his estimate could receive specification damages even if (1) his vehicle was repaired with an OEM part, or (2) his car was restored to its preloss condition. By [***62] this same reasoning, specification damages would apply where a non-OEM part was specified on the estimate and was used in the repair, but the policyholder subsequently sold his vehicle for fair market value. If it is the simple *specification* of the non-OEM part in a repair estimate that inflicts the damage, it is irrelevant, under plaintiffs' theory, what happens afterwards, even if the policyholder ultimately suffers no actual damage.

It should be noted that, given this focus on the *specification*, rather than the *installation*, [**831] of non-OEM parts, plaintiffs' specification-damages theory stands in contrast to their third amended complaint, as well as to the definition of the plaintiff class as certified by the circuit court. In their third amended complaint, plaintiffs describe State Farm's alleged breach of contract in terms of State Farm's *use* of non-OEM parts in *repairs* that result, *inter alia*, in plaintiffs' *receipt* of such parts:

> "Defendant State Farm's common practice of *using* inferior, imitation parts in *repairs* constitutes a breach of its obligation to all insureds who either *received* such parts or were obligated to pay the difference [***63] in price between imitation parts and the OEM parts actually *installed*." (Emphases added.)

Similarly, the circuit court, in defining the plaintiff class, refers to plaintiffs who had non-OEM parts *installed* on their vehicles. In the judgment in favor of plaintiffs on their breach of contract claim, the plaintiff class was defined, in pertinent part, as:

> "All persons in the United States, except those residing in Arkansas