THE HONORABLE ANDREA DARVAS
Department 23
Noted for Consideration: November 14, 2022
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

JENIFER K. DEMARRE & RYAN A. DEMARRE,

Plaintiffs,

vs.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Defendant.

NO. 21-2-10304-5 SEA

**PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**



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## TABLE OF CONTENTS






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## TABLE OF AUTHORITIES

**Page**

### STATE CASES



### FEDERAL CASES





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**RULES**



**REGULATIONS AND STATUTES**



**OTHER AUTHORITIES**





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## I. INTRODUCTION

Plaintiffs Jenifer and Ryan DeMarre and Defendant Mutual of Enumclaw Insurance Company and related company Enumclaw Property and Casualty Insurance Company (collectively MOE) have reached an agreement to settle this matter on a classwide basis. The proposed settlement will resolve the claims of Washington drivers insured by MOE whose vehicles were declared a total loss and to whose accounts MOE applied a typical negotiation adjustment or "TNA" when offering to settle their total loss claims. MOE has ceased contracting with the vendor who applied the typical negotiation adjustment to claims. The settlement provides for a common fund of $550,000 that will be used to pay settlement awards to the proposed class, service awards, litigation costs, and attorneys' fees as approved by the Court. The settlement is an excellent outcome for the proposed settlement class. The net fund will pay Settlement Awards equal to approximately 60% of each Settlement Class Member's alleged damages.

## II. RELIEF REQUESTED

Plaintiffs request the Court (1) grant preliminary approval of the settlement, (2) preliminarily certify the Settlement Class for settlement purposes, (3) appoint Plaintiffs and their counsel to represent the Class, (4) approve the proposed notice plan, and (5) schedule a final approval hearing.

## III. STATEMENT OF FACTS

### A. Plaintiffs challenge MOE's total loss vehicle claims handling.

MOE sold Plaintiffs an insurance policy for three of their vehicles and a trailer, including their 2015 Chevrolet Silverado. Sub. No. 38 (Chandler Declaration in support of class certification), Ex. 1. On October 31, 2019, Plaintiffs' Silverado burst into flames while parked. Sub. No. 38, Ex. 11 (R. DeMarre Dep. at 12:9-14:7). The cause of the fire was unclear. MOE investigated Plaintiffs' insurance claim, determined that coverage applied, and declared the vehicle a total loss. Sub. No. 38, Ex. 13. MOE's total loss settlement offer calculated the actual cash value of the Plaintiffs' Silverado as $37,908 plus tax, tabs, and transfer fees, reduced by



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Plaintiffs' deductible and a $15,135 salvage deduction. *Id.* MOE gave itself a 6% typical negotiation deduction in calculating the settlement offer. Specifically, the Autosource Report MOE obtained from its vendor Audatex listed four purportedly comparable 2015 Chevrolet Silverados, three in Washington and one in Oregon. The list price of each was reduced by 6% for the "typical negotiation" deduction. Sub. No. 38, Ex. 9 at MOE35-36.

Plaintiffs allege that MOE's "typical negotiation" deduction is impermissible under WAC 284-30-391.[1] An insurer's failure to comply with the WAC constitutes a breach of a contract, violation of the Consumer Protection Act, and insurance bad faith. Sub. No. 1. Specifically, Plaintiffs' allegations are that WAC 284-30-391 entitled "Methods and standards of practice for settlement of total loss vehicle claims," limits the types of reductions an insurer may apply to total loss settlement offers. Under the regulation, the insurer must "base all [settlement] offers on itemized and verifiable dollar amounts for vehicles that are currently available, or were available within ninety days of the date of loss, using appropriate deductions or additions for options, mileage or condition when determining comparability." WAC 284-30-391(4)(b). Other than adjustments for "options, mileage or condition" of the comparator vehicles, the insurer may only adjust the total loss settlement amount by deducting for prior unrepaired damage to the vehicle and the salvage value of owner-retained vehicles. WAC 284-30-391(5).

Plaintiffs allege that the regulation does not allow use of a typical negotiation deduction to reduce the advertised prices of comparable vehicles.

**B. The parties negotiated this settlement with a solid understanding of the strengths and weaknesses of their positions.**

Plaintiffs filed this action in February 2021. After the case was transferred from Pierce County to this Court by agreement of the parties, the court entered a case schedule, Sub. No. 2,

[1] Plaintiffs also alleged in their complaint that MOE used an "anticipated salvage value" for owner-retained vehicles that was not based on an offer from a salvage company to actually purchase the vehicle at that price as required by Washington law. Based on the evidence, Plaintiffs did not seek certification of that claim and the settlement does not include individuals with only salvage value claims.



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and an amended case schedule that allowed time for discovery related to class certification, Sub. No. 26. The parties engaged in discovery including written discovery propounded by both sides. MOE produced over 1,100 pages of documents and responded to interrogatories. Chandler Decl. ¶ 11. Plaintiffs also obtained documents and data from Audatex and Copart, the third parties MOE contracted with to provide services related to the total loss settlement offers. Chandler Decl. ¶ 12. Plaintiffs took a full day Rule 30(b)(6) deposition of MOE's corporate designee. Chandler Decl. ¶ 13.

Plaintiffs responded to MOE's interrogatories and requests for production and MOE deposed both Plaintiffs. Leonard Decl. ¶ 8.

Plaintiffs had filed their motion for class certification when the parties reached an agreement to settle the matter. Sub. No. 38.

**C. The proposed settlement terms.**

The details of the settlement are outlined in the parties' Settlement Agreement and Release, attached as Exhibit 1 to the Chandler Declaration.

1. <u>The proposed settlement class.</u>

The parties propose that the Court provisionally certify the following class under CR 23(b)(3) for settlement purposes only:

> All MOE insureds with Washington policies issued in Washington State, who received compensation for the total loss of their own vehicles under their first party coverages (Coverages Part C and D) and who received a settlement offer from MOE based on a total loss valuation that used a deduction for typical negotiation. Excluded from this proposed class are the assigned judge, the judge's staff and family, MOE employees, and insureds with claims for accidents with dates of loss occurring prior to March 6, 2019, or after March 31, 2020.

SA §§ II.1, III.1.

2. <u>The settlement fund.</u>

The proposed Settlement creates a $550,000 common fund. SA §§ II.18, IV.1. The fund



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will be allocated to pay Settlement Awards, service awards to the class representatives, and attorneys' fees and costs. IV.2. Class members for whom MOE has a deliverable address will automatically receive a payment with no requirement to make claims. IV.2. Each Settlement Award will be calculated based on the typical negotiation discount applied to the Class Member's account. IV.2. Unclaimed settlement funds will revert to MOE's member compassion fund. IV.3.

3. Release.

Under the proposed Settlement, Plaintiffs and each Settlement Class Member release all claims and causes of action, whether known or unknown, alleged or arising out of the allegations in the Amended Complaint, including but not limited to claims for breach of contract, insurance bad faith, and declaratory judgment, as well as claims under the Washington Consumer Protection Act, RCW 19.86 *et seq.* XI.2. The release includes claims against MOE and its related entities. XI.1.

4. The proposed notice plan.

The Settlement Agreement requires MOE to provide direct mail notice to each Class Member. SA § VII.3.a. It also calls for Class Counsel to create a settlement website and provide a toll-free number Class Members may call with questions about the Settlement. SA § VII.3.b.

5. Class Members' rights under the agreement.

Class Members can exclude themselves from the Settlement Class by advising the Class Counsel by mail of their desire to opt out by the Opt-Out Deadline. Any opt-out request must include the individual's name and address and be postmarked no later than the Opt-Out Deadline. Individuals who exclude themselves will not be Settlement Class Members and will not be bound by the Settlement Agreement, its release, or the judgments of the Court. SA § VIII.1.



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Settlement Class Members who do not exclude themselves may file a written objection and may appear at the Final Approval Hearing after filing a notice of appearance with the Court. SA § IX.

## IV. STATEMENT OF ISSUES

Whether the Court should grant preliminary approval of the proposed settlement, preliminarily certify the Settlement Class for settlement purposes, appoint Plaintiffs and their counsel to represent the Settlement Class, direct notice to Settlement Class Members, and schedule a Final Approval Hearing.

## V. EVIDENCE RELIED UPON

Plaintiffs rely on the pleadings on file and the accompanying declarations of Samuel Leonard and Blythe H. Chandler and the exhibits thereto.

## VI. ARGUMENT AND AUTHORITY

### A. The class action approval process

As a matter of "express public policy," Washington courts strongly favor and encourage settlements. *City of Seattle v. Blume*, 134 Wn.2d 243, 258 (1997); *see also Pickett v. Holland Am. Line Westours, Inc.*, 145 Wn.2d 178, 190 (2001). This is particularly true in class actions where the costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

Courts use a three-step process to approve class action settlements: (1) preliminary approval of the proposed settlement; (2) notice of the settlement to all affected class members; and (3) a final approval hearing at which class members may be heard and evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented. William B. Rubenstein, Newberg on Class Actions § 13:1 (5th ed. Dec. 2021 update). This procedure safeguards class members' due process rights and enables the court to fulfill its role as the guardian of class interests.



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Plaintiffs request the Court take the first step in the settlement approval process by granting preliminary approval of the proposed Settlement. The approval of a class settlement is within the Court's sound discretion. *Pickett*, 145 Wn.2d at 190. Because no class has been certified, the Court should also make a preliminary determination that the proposed class may be certified for settlement purposes. Newberg § 13:16.

**B. The settlement satisfies the criteria for preliminary approval.**

Review of a proposed settlement "is a delicate, albeit largely unintrusive, inquiry by the trial court." *Pickett*, 145 Wn.2d at 189. At the preliminary approval stage, courts typically consider whether the proposed settlement appears to be the product of non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible judicial approval. Newberg § 13.10. The proposed settlement satisfies these requirements.

1. <u>The settlement is the product of serious, informed, arms'-length negotiations.</u>

This settlement is the result of adversarial litigation and arms'-length negotiations between attorneys experienced in this type of litigation. *Pickett*, 145 Wn.2d at 200 ("When experienced and skilled class counsel support a settlement, their views are given great weight." (citation omitted)). Plaintiffs' counsel negotiated the settlement with the benefit of many years of prior experience and a solid understanding of the facts and law of this case. Chandler Decl. ¶¶ 2–8, 14. They believe the settlement is fair, reasonable, adequate, and in the best interest of the Settlement Class as a whole. SA § I.7. Plaintiffs' counsel have extensive experience litigating and settling class actions, and consumer class actions in particular. Chandler Decl. ¶¶ 2–8; Leonard Decl. The parties participated in mediation with The Honorable John P. Erlick (Ret.) and also engaged in direct negotiations. SA § I.6.

2. <u>The settlement has no obvious deficiencies and does not grant preferential treatment to any Class Member.</u>

The settlement treats all Class Members the same. Each Settlement Class Member will be paid a Settlement Award reflecting their proportional share of the settlement fund after



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attorneys' fees, service awards, and costs approved by the Court are deducted. SA § IV.2.

Plaintiffs' counsel will request service awards of $7,500 for each Plaintiff in recognition of their efforts on behalf of the Settlement Class, which included assisting counsel with the investigation of the claims, responding to discovery, and sitting for depositions. SA § V.1; Chandler Decl. ¶ 14. Service awards "are intended to compensate class representatives for work undertaken on behalf of a class" and "are fairly typical in class action cases." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (citation omitted); *see also Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329-30 & n.9 (W.D. Wash. 2009) (collecting cases approving awards from $5,000 to $40,000); *Probst v. Wash. Dept. of Ret. Sys.*, 150 Wn. App. 1062, 2009 WL 1863993, at *5-6 (Wash. Ct. App. June 30, 2009) (unpublished opinion) (affirming service award of $7,500). Plaintiffs' support of the settlement is not conditioned on the service award.

The Settlement Fund will also be used to pay attorneys' fees and costs in an amount approved by the Court. Plaintiffs' counsel anticipate filing a motion for court approval of a reasonable attorneys' fees award of 30% of the Settlement Fund ($165,000) and reimbursement of $4,857 in litigation costs. SA § V.2; Chandler Decl. ¶ 16. The requested award is within the range of awards the Washington Supreme Court has approved. *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 72 (1993) (fee awards for common fund cases typically range from 20% to 30%). The Settlement Agreement is not contingent on the amount of attorneys' fees and costs awarded.

3. The settlement falls within the range of possible judicial approval.

This is an excellent settlement in light of the obstacles Plaintiffs' and members of the proposed settlement class faced in litigation, trial, and appeal. MOE's agreement to pay $550,000 is anticipated to result in Settlement Class Members receiving more than 65% of the TNA applied to their accounts.

Plaintiffs and MOE are each confident in the strength of their respective cases, but recognize the significant risks involved in seeing this lawsuit through class certification,



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summary judgment motions, and trial. Class certification is always a hard-fought motion that presents some challenges in this case because MOE would likely have argued that to prove each class member was injured, Plaintiffs would have to present individualized evidence on the fair market value of each class member's vehicle before it was totaled. Federal courts have recently issued orders finding similar claims ill-suited to class certification on those grounds. *See, e.g. Lara v. First Nat. Ins. Co. of Am.*, 25 F.4th 1134 (9th Cir. 2022). While Plaintiffs articulated a number of reasons why those cases would not control in their motion for class certification, *see* Sub. No. 34 at 12–13, class counsel considered the risks those cases created in negotiating the settlement. If the Court denied Plaintiffs' motion for class certification, the other Settlement Class Members would be left without relief.

If Plaintiffs prevailed on class certification, they would likely face a summary judgment motion as Defendants dispute the merits of Plaintiffs' claims. Plaintiffs are also cognizant of the risks inherent in any trial. Defendants would have the option to appeal if Plaintiffs won at trial, which creates additional delay and risk. The Settlement avoids those risks and delays while paying Settlement Class Members a significant percentage of their alleged damages.

**C. Preliminary certification of the proposed Class is appropriate.**

Preliminary certification of the Class for settlement purposes is appropriate and will allow the Class Members to receive notice of the proposed settlement.

1. <u>The proposed Class satisfies the CR 23(a) requirements.</u>

To be certified, a class must satisfy the requirements of CR 23(a): numerosity, commonality, typicality, and adequacy of representation. Numerosity is satisfied because the Class consist of more than 40 individuals. *See* CR 23(a)(1); *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 821 (2003) (numerosity is generally satisfied when a class has at least 40 members). The data produced by MOE and third-party Audatex show there are hundreds of members of the proposed settlement Class. Chandler Decl. ¶ 17.

Commonality is satisfied when there is "a single issue common to all members of the class." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 320 (2002). "[T]here is a low threshold to



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satisfy this test." *Id*. Overarching common questions include whether MOE is permitted to use its "typical negotiation" deduction to reduce its settlement payments under WAC 284-30-391.

Typicality is satisfied because Plaintiffs' claims arise from the same course of conduct and are based on the same legal theory as other Class Members' claims. *See Pellino v. Brink's Inc.*, 164 Wn. App. 668, 684 (2011). Plaintiffs' and Class Members' claims all arise from MOE's standard procedures for handling total loss claims are supported by the same legal theories.

The adequacy of representation requirement is satisfied because Plaintiffs' interests are not antagonistic to those of the Class and the Plaintiffs are represented by qualified counsel. *See Hansen v. Ticket Track, Inc.*, 213 F.R.D. 412, 415 (W.D. Wash. 2003); Chandler Decl. ¶¶ 2-8. Plaintiffs and their counsel vigorously advocated on behalf of the Class throughout this litigation, including during the arms'-length negotiations that resulted in this settlement.

2. The Class satisfies the CR 23(b)(3) requirements.

CR 23(b)(3) requires that common questions predominate over any questions affecting only individual class members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wn.2d 507, 514 (2018). Predominance is satisfied when "there is a common nucleus of operative facts in each class member's claim." *Id.* at 516. "The relevant inquiry is whether the issue shared by class members is the dominant, central, or overriding issue in the litigation." *Id.* The dominant and overriding issue in this litigation is whether MOE's "typical negotiation" deduction violates WAC 284-30-391. This issue would be resolved based on common evidence of MOE's uniform claims-handling practices, including MOE's documents, testimony, and data.

The superiority requirement is satisfied when a class action is superior to other methods of adjudication for resolution of the claims at issue. *Chavez*, 190 Wn.2d at 511. Relevant factors include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or



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undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. CR 23(b)(3).

These factors support certification. While MOE was previously sued for similar conduct and settled without changing its practices, Plaintiffs are not aware of any other pending class case challenging MOE's use of the typical negotiation discount. Because the class consists of Washington insureds, this Court is an appropriate forum. Finally, the manageability of litigation is not relevant to certification for settlement purposes. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems."). The settlement will be easily and fairly managed, as described above.

**D. The proposed notice plan should be approved.**

Notice of a class action settlement must "be given to all members of the class in such manner as the court directs." CR 23(e). To protect class member rights, the Court should ensure that they receive "the best notice practicable under the circumstances." CR 23(c)(2). The best notice practicable is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The parties propose that notice be provided by mailing summary postcards to the most recent address for each Class Member in MOE's records, as updated using commercially reasonable means; and long form notice posted on the Settlement Website. SA § VII.3 & Ex. A (postcard), Ex. B (website). This approach will ensure that notice reaches as many Settlement Class Members as possible.

The language of the proposed notice is straightforward and easily understood and based on models created by the Federal Judicial Center. Each Class Member will receive a personalized notice that provides all information needed to evaluate and respond to the settlement. The notice will inform Class Members of the nature of this litigation, the general



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terms of the proposed settlement, their rights under the settlement, including how to file any objections to the settlement or exclude themselves, the identity of Class Counsel and that Class Counsel will move for approval of payment of attorneys' fees and costs and Plaintiffs' service awards from the Settlement Fund, the Settlement Website, a toll-free number for additional information, and the date and time of the Final Approval Hearing. SA, Exs. A, B; *see also* Newberg § 8:17.

**E. Proposed schedule for final approval**

The last step in the settlement approval process is a fairness hearing at which the Court will decide whether to approve the Settlement. The schedule for final approval is as follows:

| Event | Deadline |
|---|---|
| Plaintiffs' Counsel to establish Settlement Website (SA § VII.3.c) | Within 14 days after issuance of the Preliminary Approval Order |
| Notice Date (MOE to distribute Class Notice) (SA § VII.3) | Within 30 days after issuance of the Preliminary Approval Order |
| Deadline for motion for attorneys' fees, costs, and service award (SA § V.2) | Within 30 days of the Notice Date |
| Opt-Out and Objection Deadline (SA § VI.1) | 60 days after the Notice Date |
| Deadline for motion for final approval (SA § X.2) | No later than 9 judicial days before the Final Approval Hearing |
| Final Approval Hearing (SA § VI.1) | To be set by the Court. Plaintiffs request the first available date on the Court's calendar that is at least 135 days from the date of the preliminary approval order. |



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## VII. CONCLUSION

Plaintiffs respectfully request that the Court: (1) grant preliminary approval of the settlement; (2) certify the Class for settlement purposes; (3) appoint Plaintiffs to serve as class representatives; (4) appoint Plaintiffs' counsel as Class Counsel; (5) approve the proposed notice plan; and (6) schedule the final approval hearing.

## VIII. LCR 7(b)(5)(B)(vi) CERTIFICATION

I certify that the foregoing memorandum contains 3,616 words in compliance with the Local Civil Rules.

RESPECTFULLY SUBMITTED AND DATED this 9th day of November, 2022.

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