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ARTIE'S AUTOBODY, INC., A & R BODY SPECIALTY, SKRIPS AUTO BODY AND THE AUTO BODY ASSOCIATION OF CONNECTICUT, ETC VS HARTFORD FIRE INSURANCE COMPANY

X08 CV 03 0196141 S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF STAMFORD-NORWALK AT STAMFORD

2006 Conn. Super. LEXIS 2838

August 30, 2006, Decided

NOTICE: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, three auto body repair shops and an industry association, filed a complaint against defendant insurance company in which plaintiffs alleged that defendant had violated the Connecticut Unfair Trade Practices Act (CUTPA), *Conn. Gen. Stat. § 42-110a* et seq., and had been unjustly enriched. Plaintiffs filed a motion for class certification under *Conn. Gen. Prac. Book, R. Super. Ct. §§ 9-7* and *9-8*.

OVERVIEW: Plaintiffs alleged that defendant had steered its insureds and other claimants to certain body shops. The court first held that the putative class, which potentially numbered in the hundreds, had satisfied the numerosity requirement. There were common questions of law and fact, and the representative parties would adequately represent the class. Turning to the chief issue here, predominance, the court stated that in demonstrating impact on a class-wide basis, plaintiffs had offered a plausible methodology. Furthermore, common questions predominated, as almost all of the evidence relating to unfair or deceptive trade practices would be evidence about defendant's actions that were common to the entire class of plaintiffs. Next, a class action was superior to other methods of adjudicating the controversy. The presence of the industry association would help to insure that the interests of all putative class members were considered, and the sizes of individual damage claims appeared to militate against an individual body shop's interest in pursuing a separate claim. A class action would eliminate duplication and make inconsistent judicial decisions unlikely.

OUTCOME: The court granted the motion for class certification.

LexisNexis(R) Headnotes

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN1] *Conn. Gen. Prac. Book, R. Super. Ct. § 9-7* states that one or more members of a class may sue or be sued as representatives of the class only if (1) the class is so numerous as to make joinder of all members impracticable; (2) there are questions or issues of fact or law common to the class; (3) the claims or defenses of the proposed class representative are typical of the claims or defenses of the class as a whole, and (4) the representative parties will fairly and adequately represent the class. *Conn. Gen. Prac. Book, R. Super. Ct. § 9-8* adds two additional requirements: (1) that the common questions predominate over questions that affect individual members, and (2) that a class action be superior to other means for fairly and effectively adjudicating the controversy. These requirements are often referred to as "numerosity," "commonality" "typicality," "adequacy," "predominance" and "superiority."

Civil Procedure > Class Actions > Certification

[HN2] In determining a class certification motion, the trial court is bound to take the substantive allegations of the complaint as true. In reviewing such a motion it is

not the court's function to evaluate the merits of the case. Doubts about the propriety of certifying a class should be resolved in favor of certification. However, it is appropriate for a court in considering a class certification motion to probe behind the pleadings, not to determine the merits of the claims, but to ascertain whether the class action requirements are met.

Civil Procedure > Class Actions > General Overview
[HN3] The Connecticut Supreme Court has stated that class actions serve several and distinct purposes: (1) promoting judicial economy, (2) protecting defendants from inconsistent decisions or obligations, (3) protecting the interests of absentee parties, and (4) providing access to judicial relief for small claimants.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Judicial Discretion
[HN4] A trial court must undertake a rigorous analysis to determine whether a plaintiff has established that class certification is appropriate, and it has broad discretion in determining whether a lawsuit should proceed as a class action. The moving party has the heavy burden to establish the prerequisites for certification.

Civil Procedure > Class Actions > General Overview
Governments > Legislation > Interpretation
[HN5] In interpreting the class action provisions of the Practice Book, Connecticut courts regularly look to the somewhat similar provisions in *Fed. R. Civ. P. 23* and federal court interpretations thereof. As recently stated by the Connecticut Supreme Court, Connecticut courts look to federal case law for guidance in construing the provisions of *Conn. Gen. Prac. Book, R. Super. Ct. §§ 9-7* and *9-8*.

Civil Procedure > Class Actions > Prerequisites > Numerosity
[HN6] There is no "magic number" that satisfies the numerosity requirement for a class action, as the touchstone is not just numbers, but impracticability of joinder. Impracticable does not mean impossible. Ten or eleven class members are generally found to be insufficient to meet the numerosity requirement. On the other hand, a respected commentary on class action law suggests a presumption of sufficient impracticability and numerosity should arise when the putative class exceeds 40 members.

Civil Procedure > Class Actions > Prerequisites > Commonality
Civil Procedure > Class Actions > Prerequisites > Typicality
[HN7] *Conn. Gen. Prac. Book, R. Super. Ct. § 9-7(2)* and (3) requires there be questions of law and fact common to the class and the claims of the representative plaintiffs be typical of the putative class. The United States Supreme Court has noted that these two requirements tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the class members' claims are interrelated.

Civil Procedure > Class Actions > Prerequisites > Adequacy of Representation
[HN8] *Conn. Gen. Prac. Book, R. Super. Ct. § 9-7(4)* requires the representative parties to fairly and adequately protect the interests of the class. This requirement focuses on the named plaintiffs and their counsel. The tests are whether the named plaintiffs have any conflicts of interest with, or interests antagonistic to the class members, and whether counsel is competent to vigorously and effectively prosecute the action.

Civil Procedure > Class Actions > Prerequisites > Commonality
[HN9] *Conn. Gen. Prac. Book, R. Super. Ct. § 9-8* requires that for a case to be maintained as a class action, the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. The Connecticut Supreme Court has stated that the fundamental purpose of the predominance inquiry is whether the economics of a class action can be achieved without sacrificing fairness or creating other undesirable results. Thus, the Connecticut Supreme Court has established a three-part inquiry to determine whether common questions predominate. First, the court should review the elements of the plaintiffs' cause of action (i.e. what the plaintiff needs to prove). Second, the court should determine whether generalized evidence can be offered to prove those elements on a class-wide basis or whether individualized proof will be needed to establish each class member's entitlement to relief. Third, the court should weigh the common issues against the issues requiring individualized proof to determine which predominate.

Antitrust & Trade Law > Trade Practices & Unfair Competition > State Regulation > General Overview
[HN10] A claim under the Connecticut Unfair Trade Practices Act (CUTPA), *Conn. Gen. Stat. § 42-110a* et

seq., requires proof that the defendant committed unfair or deceptive acts or practices in the conduct of any trade or commerce. *Conn. Gen. Stat. § 42-110b*. In order to bring a claim under CUTPA the plaintiff must prove he has sustained an ascertainable loss. To be entitled to any relief under CUTPA, either individually or in a class action, the ascertainable loss requirement must be met. Ascertainable loss does not mean that a CUTPA plaintiff need prove the amount of damages suffered. Rather, it means that a loss susceptible of being measured or ascertained has occurred.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit
[HN11] To establish an unjust enrichment claim one must prove that the defendant was benefitted, that the defendant unjustly did not pay the plaintiff for the benefit and the failure of payment was to the detriment of the plaintiff. Damages in unjust enrichment cases are measured by the benefit to the defendant.

Civil Procedure > Class Actions > Prerequisites > Commonality
[HN12] When a party engages in a course of conduct that affects a group of persons and that conduct is alleged to give rise to a cause of action, proof of that conduct will be common to the class, the commonality requirement for a class action suit is satisfied as long as the members of the class have allegedly been affected by a general policy of the defendant.

Civil Procedure > Class Actions > Prerequisites > Commonality
[HN13] At the class certification stage, plaintiffs do not have to prove there is a predominance of common issues of fact or law relevant to the calculation of damages, but that such common issues related to establishment of an element of liability, i.e., a loss that is capable of being ascertained, do predominate.

Civil Procedure > Class Actions > Certification
[HN14] Proof of a class member's individual damages will require individualized proof, but this has not been held to be a bar to class certification.

Civil Procedure > Class Actions > Prerequisites > Commonality
[HN15] The Connecticut Supreme Court has recognized that the presence of individualized damages does not prevent a finding of predominance of common questions in a proposed class action suit. In assessing the predominance requirement in cases involving individualized damages, the court's inquiry is limited to whether the proposed methods for computing damages are so insubstantial as to amount to no method at all. The plaintiffs need only come forward with plausible statistical or economic methodologies to demonstrate impact on a class-wide basis.

Civil Procedure > Class Actions > Prerequisites > Commonality
[HN16] Predominance in the context of class action certification means when the common questions will be the object of most of the efforts of the litigants and the court.

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN17] *Conn. Gen. Prac. Book, R. Super. Ct. § 9-8* includes a requirement that a class action be superior to other available methods for the fair and efficient adjudication of the controversy. The Connecticut Supreme Court has identified the four factors set out in *Fed. R. Civ. P. 23(b)(3)* as pertinent to the superiority analysis. The Rule 23(b)(3) considerations are (1) the interests of the members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy commenced by or against members of the class; (3) the desirability or undesirability the litigation in a particular forum; (4) the difficulties likely to be encountered in the management of a class action.

Civil Procedure > Class Actions > General Overview
Civil Procedure > Class Actions > Certification
[HN18] A court has some flexibility to adjust class definitions as a litigation proceeds although such adjustments should be made with care because the rights of individual litigants can be significantly altered in the doing. Nevertheless, the Connecticut Supreme Court has noted that trial courts are required to reassess their class rulings as the case develops. Therefore, even after a certification order is entered, the trial judge remains free to modify it in the light of subsequent developments in the litigation.

JUDGES: TAGGART D. ADAMS, SUPERIOR COURT JUDGE.

OPINION BY: TAGGART D. ADAMS

OPINION:

COMPLEX LITIGATION DOCKET

MEMORANDUM OF DECISION

RE: MOTION FOR CLASS CERTIFICATION (154.00)

I. The Complaint

The plaintiffs, three auto body repair shops and a not-for-profit industry association, have filed a complaint, as a putative class action, against the Hartford Fire Insurance Company (Hartford) alleging that Hartford has violated the Connecticut Unfair Trade Practices Act, *General Statutes §§ 42-110a et seq.*, and been unjustly enriched. Plaintiffs seek money damages and injunctive relief. Specifically, they allege that Hartford has wrongfully steered its insureds and other insurance claimants to auto body repair shops favored by Hartford and part of Hartford's Customer Repair Service Program (CRSP). It is also alleged that Hartford through use of incentives and other pressures has prevailed upon its own and independent appraisers to establish an artificially low standard of hourly labor [*2] rates for auto body repair work in Connecticut, and this has damaged the non-CRSP repair shops such as the individual plaintiffs and the class members they seek to represent. According to the plaintiffs, Hartford's actions violate public policy as set forth in *General Statutes § 38a-354* prohibiting appraisers and insurance companies from requiring that appraisals or repairs be performed by a specific repair shop or facility. The complaint also alleges that Hartford's actions violate federal policy as set forth in a federal court consent decree to which Hartford was a party established in *United States v. Association of Casualty and Surety Companies, et al, 1963 U.S. Dist. LEXIS 9949, 63 Civ. 3106 (S.D.N.Y. 1963)* which enjoined each defendant (including Hartford) from

"placing into effect any plan program or practice which has the purpose or effect of

(1) sponsoring, endorsing or otherwise recommending any appraiser of damages to automobile vehicles;

(2) directing, advising or otherwise suggesting that any person or firm do business or refuse to do business with (a) any appraiser of damage to automotive vehicles with respect to the appraisal of such damage, or (b) [*3] any independent or dealer franchised repair shop with respect to the repair of damage to automotive vehicles;

(3) exercising any control over the activities of any appraiser of damage to automotive vehicles;

(4) allocating or dividing customers, territories, markets or business among any appraisers of damage to automotive vehicles;

(5) fixing, establishing, maintaining or otherwise controlling the prices to be paid for the appraisal of damage to automotive vehicles, or to be charged by independent or dealer franchised automotive repair shops for the repair of damage to automotive vehicles or for replacement parts or labor in connection therewith, whether by coercion, boycott, or intimidation or by the use of flat rate or parts manuals or otherwise."

The plaintiffs contend that Hartford provides incentives such as a reduced deductible and guarantees of the repairs for the life time of the vehicle to persuade its insureds and claimants to use CRSP auto body repair shops which have agreed to accept Hartford's appraisals of the cost of repairs. The complaint also alleges that Hartford employees are given substantial incentives to encourage and persuade the insureds and [*4] claimants to select a CRSP shop for the needed repairs. As a result the plaintiffs allege they have lost business to CRSP shops and been forced to charge below market labor rates set by Hartford appraisers and followed by CRSP shops.

Hartford denies any wrongdoing and denies the material allegations of the complaint.

The court's consideration of class certification has been delayed because the parties have been active in conducting discovery and certain issues arose in the meanwhile. Originally written discovery was to be completed by August 2004 and a motion for class certification to be made by the next month. Discovery took longer than projected by the parties and a need for depositions on some class issues became apparent. The parties were not prepared to brief the class certification issue until August 2005. After several delays requested by the parties, oral argument was held in March 2006. Because of issues arising during oral argument, the parties were given permission to file additional papers and conduct an additional deposition. The deposition occurred in June and the final brief on certification was filed on July 11, 2006. See note 1, infra.

The plaintiffs' motion for [*5] class certifications seeks to have the three individual plaintiff auto body shops, Artie's, A&R, and Skrips represent the interests of a class defined as businesses and individuals licensed to provide automobile physical damage repairs in Connecticut on all counts of the complaint and, along with the three named auto body repair shops, to have the Auto Body Association of Connecticut represent the class on the injunctive relief claim.

II. Class Action Standards

The Practice Book sets forth the elements required for a court to certify a class. [HN1] *Practice Book § 9-7* states that one or more members of a class may sue or be sued as representatives of the class only if (1) the class is

so numerous as to make joinder of all members impracticable; (2) there are questions or issues of fact or law common to the class; (3) the claims or defenses of the proposed class representative are typical of the claims or defenses of the class as a whole, and (4) the representative parties will fairly and adequately represent the class. *Practice Book § 9-8* adds two additional requirements: (1) that the common questions predominate over [*6] questions that affect individual members, and (2) that a class action be superior to other means for fairly and effectively adjudicating the controversy. These requirements are often referred to as "numerosity," "commonality" "typicality," "adequacy," "predominance" and "superiority."

[HN2] In determining a class certification motion, the trial court is bound to take the substantive allegations of the complaint as true. *Collins v. Anthem Health Plans, 266 Conn. 12, 24, 836 A.2d 1124 (2003)*. (Collins I) [quoting *Rivera v. Veterans Memorial Medical Center, 262 Conn. 730, 743, 818 A.2d 731 (2003)]*. In reviewing such a motion it is not the court's function to evaluate the merits of the case. *Heerwagen v. Clear Channel Communications, 435 F. 3d 219, 225 (2d Cir. 2006)*. Doubts about the propriety of certifying a class should be resolved "*in favor* of certification." *Rivera v. Veterans Memorial Medical Center, supra, 262 Conn. 743*. [quoting *Slaven v. BP America, Inc., 190 F.R.D. 649, 652 (C.D. Cal. 2000)* emphasis added by Rivera court.] However, it is appropriate for a court in considering a class certification motion to probe behind the [*7] pleadings, not to determine the merits of the claims, but to ascertain whether the class action requirements are met. Id. [Quoting *General Telephone Co. Of the Southwest v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)]*; see also Manual for Complex Litigation (4th ed. 2005) § 21.21.

[HN3] The Connecticut Supreme Court has stated that class actions serve several and distinct purposes: (1) promoting judicial economy, (2) protecting defendants from inconsistent decisions or obligations, (3) protecting the interests of absentee parties, and (4) providing access to judicial relief for small claimants. *Grimes v. Housing Authority, 242 Conn. 236, 244, 698 A.2d 302 (1997)*.

[HN4] A trial court must undertake a "rigorous analysis" to determine whether a plaintiff has established that class certification is appropriate, and it has broad discretion in determining whether a law suit should proceed as a class action. *Marr v. WMX Technologies, Inc., 244 Conn. 676, 680, 711 A.2d 700 (1998)* [quoting from *Arduini v. Automobile Insurance Co. Of Hartford, 23 Conn. App. 585, 583 A.2d 152 (1990)]*; see also *Collins I, supra 266 Conn. 23*; *Heerwagen v. Clear Channel Communications, supra, 435 F.3d 225.* [*8] The moving party has the "heavy burden" to establish the prerequisites for certification. *Arduini v. Automobile Insurance Co. Of Hartford, supra, 23 Conn. App. 589*.

[HN5] In interpreting the class action provisions of the Practice Book Connecticut courts regularly look to the somewhat similar provisions in *Rule 23 of the Federal Rules of Civil Procedure* and federal court interpretations thereof. See e.g. *Rivera v. Veterans Memorial Medical Center, supra, 262 Conn. 738*. As recently stated by the Connecticut Supreme Court, "we look to federal case law for guidance in construing the provisions of *Practice Book §§ 9-7* and *9-8*." *Collins v. Anthem Health Plans, Inc., 275 Conn. 309, 323, 880 A.2d 106 (2005)* (Collins II).

II. Discussion

The court now turns to an examination of whether the prerequisites for a class action set out in *Practice Book §§ 9-7* and *9-8* have been met. At the outset, the court notes that Hartford, in opposing certification, has not objected on the grounds of any [*9] of the requirements set forth in *Practice Book § 9-7*. Although, in effect, Hartford has conceded these issues, this court still must determine that the *Section 9-7* prerequisites have been met.

A. Numerosity. *Practice Book § 9-7(1)* sets forth the requirement that the putative class be "so numerous that joinder of all members is impracticable." The class size in this case has been described variously as 1000 persons or entities licensed to perform automobile physical damage repairs (Complaint P 9) and 750 class members (Transcript, March 6, 2006, [Tr.] 20). Even, as discussed at the end of the memorandum, if the class is defined as auto body repairers which have done business with Hartford, the class would number in the several hundreds. [HN6] There is no 'magic number' that satisfies the numerosity requirement, as the touchstone is not just numbers, but impracticability of joinder. *Arduini v. Automobile Insurance Co. of Hartford, supra, 23 Conn. App. 590*. Impracticable does not mean impossible. *Robidoux v. Celani, 987 F.2d 931, 935 (2d Cr. 1993)*. Arduini notes that ten or eleven class [*10] members are generally found to be insufficient to meet the numerosity requirement. *23 Conn. App. 590*. On the hand, a respected commentary on class action law suggests a presumption of sufficient impracticability and numerosity should arise when the putative class exceeds 40 members. 1 Conte & Newberg, Newberg on Class Actions, *§ 3.5* (4th ed. 2002). With a potential class in the hundreds, this court believes the plaintiffs have met the requirement of *Practice Book § 9-7(1).*

B. Commonality and Typicality. [HN7] *Practice Book § 9-7(2)* and *(3)* requires there be "questions of law and fact common to the class" and the claims of the representative plaintiffs be typical of the putative class. The

United States Supreme Court has noted that these two requirements "tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the class members' claim are . . . interrelated . . ." *General Telephone Company of the Southwest v. Falcon, supra, 457 U.S. 157, n.13*. That is true in this case. There are common questions [*11] of law and fact as to whether Hartford's actions violated CUTPA, and the representative plaintiffs' claims are the same as the unnamed class members' claims.

C. Adequacy of Representation. [HN8] *Practice Book § 9-7(4)* requires the representative parties to fairly and adequately protect the interests of the class. This requirement focuses on the named plaintiffs and their counsel. The tests are whether the named plaintiffs have any conflicts of interest with, or interests antagonistic to the class members, and whether counsel is competent to vigorously and effectively prosecute the action. See *Robichaud v. Hewlett-Packard Co., 82 Conn. App. 848 (2003)* aff'd *82 Conn. App. 848, 848 A.2d 495 (2004)*; *Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968)*; 1 Conte & Newberg, Newberg on Class Actions, § 3.22 (4th ed. 2002).

No conflict of interest between the named plaintiffs and the class has been brought to this court's attention, and it perceives none. The plaintiffs' attorneys are experienced in the prosecution of class actions. See, Slossberg Affidavit, August 15, 2005, Ex. 2. In addition, the court has [*12] had the opportunity to observe counsel in the courtroom and to consider their written submissions. The court finds that the adequacy of representation requirement has been met.

D. Predominance

The court now takes up the requirements set forth in *Practice Book § 9-8*, namely predominance and superiority.

Almost the entire thrust of Hartford's opposition to certification rests on the 2005 decision of the Connecticut Supreme Court in Collins II holding that plaintiffs had not met the predominance requirement. That case was a suit by orthopedic surgeons who had agreed to provide medical services to persons enrolled the defendant's health insurance plans. A class certification order was initially entered by the trial court and reversed and remanded in 2003 in Collins I because of a failure to analyze whether, or find that, the predominance criterion of *Practice Book § 9-8* had been met. On remand, the defendant urged that the trial court review the elements of each of plaintiffs' causes of action to determine whether those elements could be established by generalized proof applicable to the whole class, or [*13] whether the elements would require individualized factual inquiries. The defendant proposed the trial court weigh the issues involving generalized proof against those needing individualized inquiries to determine whether the former predominated. The trial court rejected this type of analysis finding no authority for it and adding that it involved impermissibly delving into the merits of the case. Thereafter, the trial court found the predominance and other requirements met. *275 Conn. 319-320*; see generally *49 Conn. Sup. 81, 865 A.2d 1247 (2004)*. On the second appeal the Connecticut Supreme Court again reversed and rather than remanding for further lower court consideration, made its own finding that common issues of fact or law did not predominate over the issues affecting only individual class members. As a result the case was remanded with a direction to deny class certification.

[HN9] *Practice Book § 9-8* requires that for a case to be maintained as a class action "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." In Collins II the Connecticut Supreme Court stated [*14] that "the fundamental purpose of the predominance inquiry" was whether the economics of a class action could be achieved without sacrificing fairness or creating other undesirable results. *275 Conn. 329*. Thus, the Connecticut Supreme Court established a three part inquiry to determine whether common questions predominate. This inquiry is similar to what the defendant earlier had proposed to the trial court. First, the court should review the elements of the plaintiffs' cause of action (i.e. what the plaintiff needs to prove.) Second, the court should determine whether generalized evidence can be offered to prove those elements on a class-wide basis or whether individualized proof will be needed to establish each class member's entitlement to relief. Third, the court should weigh the common issues against the issues requiring individualized proof to determine which predominate. *275 Conn. 331-332*.

The claims made by the plaintiffs are violations of CUTPA and unjust enrichment. [HN10] A CUTPA claim requires proof that the defendant committed unfair or deceptive acts or practices in the conduct of any trade or commerce. *General Statutes § 42-110b* [*15] . In order to bring a claim under CUTPA the plaintiff must prove he has sustained an "ascertainable loss" Id., *42-110g(a)*. To be entitled to any relief under CUTPA, either individually or in a class action, the ascertainable loss requirement must be met. *Collins II supra 334-335*. Ascertainable loss does not mean that a CUTPA plaintiff need prove the amount of damages suffered. *Hinchliffe v. American Motors Corp., 184 Conn. 607, 614, 440 A.2d 810 (1981)*. Rather, it means that a loss susceptible of being measured or ascertained has occurred. *Id., 613*. [HN11] To establish an unjust enrichment claim one

must prove that the defendant was benefitted, that the defendant unjustly did not pay the plaintiff for the benefit and the failure of payment was to the detriment of the plaintiff. *Ayotte Brothers Construction Co. v. Finney, 42 Conn. App. 578, 581, 680 A.2d 330 (1996)*. Damages in unjust enrichment cases are measured by the benefit to the defendant. *Rent-A-PC, Inc. v. Rental Management, Inc. 96 Conn. App. 600, 606, 901 A.2d 720 (2006)*

Hartford contends that the plaintiffs have not shown that class-wide, or generalized, proof will predominate in establishing that [*16] the plaintiffs have suffered ascertainable harm caused by the alleged unfair or deceptive trade practices of Hartford. Hartford points out that in connection with the steering claim the plaintiffs must prove that it was Hartford's actions or policies which resulted in an insured or claimant choosing a CRSP body shop rather than a myriad of potential other reasons, e.g. the CRSP shop's reputation, location, its past association with the insured or claimant, recommendations, etc. Hartford posits the actual reason for choice of a body shop requires individualized proof.

Similarly, Hartford argues that the available evidence shows that plaintiffs' claim that Hartford pressured the auto body shops to work at below market rates will require individualized, rather than class-wide evidence because deposition evidence indicates that appraisers did not violate their ethical obligation.

The plaintiffs disagree and contend that the requisite proof of liability under CUTPA can be offered predominantly through generalized, class-wide evidence. First, they point out that proof of unfair or deceptive acts or practices will be shown by evidence of Hartford's own conduct which was applicable to, or [*17] had an effect on, all members of the class. Plaintiffs contend that unfair or deceptive acts can be proven by evidence showing how Hartford breached the terms of the federal consent decree, violated Connecticut law, strongly encouraged its employees to persuade insureds or claimants to use CRSP shops and encouraged its appraisers to value repair work at certain hourly rates. The court agrees that such proof would be common to all plaintiffs efforts to establish liability. [HN12] When a party engages in a course of conduct that affects a group of persons and that conduct is alleged to give rise to a cause of action, proof of that conduct will be common to the class. "The commonality requirement is satisfied as long as the members of the class have allegedly been affected by a general policy of the defendant" *Collins II, supra, 275 Conn. 324* [quoting *Thompson v. Community Ins. Co., 213 F.R.D. 284, 292 (S.D. Ohio 2002)]*.

As for proof of ascertainable loss the plaintiffs offer evidence and analysis provided by their expert Frederic Jennings, Jr., Ph.D., an economic consultant. The affidavits submitted by Jennings n1 were not for the purpose of establishing [*18] damages but to set forth the existence of a method to attempt to prove that an ascertainable loss occurred to the plaintiff class by means of generalized evidence. This is an appropriate approach because [HN13] at this stage plaintiffs do not have to prove there is a predominance of common issues of fact or law relevant to the calculation of damages, but that such common issues related to establishment of an element of liability, i.e. a loss that is capable of being ascertained, do predominate.

n1 Jennings originally submitted an affidavit in reply to Hartford's objection to the plaintiffs' class certification memorandum. Presumably the affidavit was submitted because of the Collins II decision which was issued after the class certification motion was filed and in light of Hartford's heavy reliance on that decision in objecting to certification. At oral argument Hartford requested the opportunity to respond to the affidavit and the court also questioned some aspects of the affidavit. As a result the parties submitted additional papers at the end of March 2006, and these papers included an expanded Jennings' affidavit. Thereafter, Hartford sought to depose Jennings in June, a request that was granted along with permission for the parties to submit a final set of memoranda.

[*19]

With respect to the plaintiffs' claim of steering, Jennings opines that a method exists to establish ascertainable loss through existing generalized evidence. First, he states the number of Hartford insured repair jobs diverted by Hartford's alleged steering activities, can be estimated, very conservatively, by using as a benchmark for those who would have used a CRSP shop without any steering activity, the referrals to CRSP shops made by the least effective referrer of the Hartford's employees who receive calls from insureds or customers notifying them of accidents or losses. These employees, "customer care team specialists" (CCT's) are allegedly given many incentives or inducements to convince the insureds or claimants to use CRSP body shops. Therefore, Jennings opines that using the CCT least effective in referring insured repair jobs to CRSP shops as a benchmark is a conservative means of establishing how many such jobs would go to CRSP shops without any steering activities. Jennings Affidavit, March 30, 2001, PP 10-13.

There is presently evidence (and presumably more could be discovered) that in February 2003 the least ef-

fective CCT was able to refer 19% of insured repair [*20] jobs to CRSP shops. The average referral rate to CRSP shops for a CCT was 47% indicating that 19/47, or 40.4% of all referrals would have to go to CRSP shops without steering and 59.6% would have gone to a non-CRSP shop without any steering activity *Id., PP 14-16*.

Using other preliminary evidence available, Jennings contends that this 59.6% figure can be applied to the actual number of 19.1% of settled claims which were accomplished with CRSP shop repairs to arrive at a figure that non-CRSP shops' share of repairs was reduced by over 11% from what would have occurred without the effects of steering; *Id., P 18*; and of 3,693 repair jobs performed by CRSP shops in 2003, at least 2,200 were done in those shops as a result of Hartford's steering efforts. *Id., P 19*.

Jennings proceeds to estimate lost revenues incurred by non-CRSP shops by using average repair job costs arrived from Hartford figures and using a average net profit margin figure for Connecticut auto body repair ships. *Id., PP 20-21*.

Jennings also explains a method of arriving at losses incurred because of Hartford's alleged practice of paying for repairs at lower hourly rates than the purported market rate. [*21] First, he arrives at the labor component of all revenues from insurance repair jobs as estimated if there was no effect of steering. *Id., PP 27-29*. He points out that there are several ways to estimate losses due to labor rate suppression but these have not been done yet and in lieu of an economic determination of free-market auto body repair labor rates he relies, for the purpose of showing that a method exists to analyze this information, on testimony from Hartford's former appraisers. This testimony, Jennings opines, indicates a free market rate of twice the hourly rate that Hartford uses in making appraisals. *Id., PP 30-35*. Jennings then shows how the losses of non-CRSP shops from Hartford's activities in keeping down labor rates can be arrived at.

After deposing, Dr. Jennings, Hartford strongly contends that he has not proposed a method whereby ascertainable loss can be established by generalized proof. Hartford points out that with regard to the steering claim the method does not take into account what they described as the individualized issues of an auto body shop's location, its reputation etc., as being part of the decision to use that shop, rather than another. [*22] Hartford also rejects certain assumptions made by Dr. Jennings as unsubstantiated. Mainly, it criticizes his use of the least effective CCT representative as a benchmark, contending that this approach has "no rational basis", and insisting that individualized inquires are "the core of each class member's liability case." Defendant's Memorandum, June 30, 2006, 12. 14. Similarly, Hartford attacks Jennings' assumption that there should be a correlation between auto-body repair labor rates and auto mechanical repair rates.

The court disagrees with Hartford's arguments, to the extent they are directed to opposing certification. Much of Hartford's argument is directed at the ultimate persuasiveness of Jennings' testimony, an issue not before this court at this time. The issue at present is whether the case presented by the plaintiffs will be attempted to be proved predominantly by class-wide proof. It is well accepted that [HN14] proof of a class member's individuals damages will require individualized proof, but this has not been held to be a bar to class certification. *Marr v. WMX Technologies, 244 Conn. 676, 682 (1998)*. As pointed out in Collins II, however, the defendant's [*23] liability under CUTPA requires proof of ascertainable loss and thus must be proven by predominantly class-wide proof. We are not at this stage, however, determining liability, but only at the stage of determining, if the case on liability presented by the plaintiffs, whether successful or not, involves predominantly generalized proof. The court concludes that Jennings' approach is an appropriate method to attempt to prove the class suffered ascertainable loss.

First, Jennings approach is based entirely on generalized evidence, the vast bulk of which comes largely directly from documents generated by Hartford employees or actions concededly taken by Hartford. The methodology proposed to show the effects of alleged unfair or deceptive acts is based on Hartford produced evidence, as are the effects themselves.

Second, the opinions stated by Jennings are preliminary at best based on discovery and investigation to date; nevertheless, he stated flatly that Hartford's steering activities and suppression of the auto-body repair labor rate has done harm to non-CRSP shops and the harm can be established on the basis of issues common to the class and Hartford engendered information either received [*24] or requested. Jennings' Deposition Transcript June 20, 2006, 21-22.

Third, the opposition of Hartford is focused on the persuasiveness of Jennings, not the validity of his methodology. Hartford's criticism of using the least effective CCT will be weighed by the fact-finder against Jennings repeated point that the methodology is very conservative and tilted in favor of Hartford because even the least effective CCT was trying to persuade insured and claimants to use CRSP shops. And Hartford's assertion that Jennings' assumption of a correlation between auto body repair and mechanical repair labor rates is unsubstantiated must be balanced against the fact that the cor-

relation was testified to by present and former Hartford employees familiar with the subject.

In Collins II, [HN15] the Connecticut Supreme Court recognized that the presence of individualized damages did not prevent a finding of predominance and stated "[i]n assessing the predominance requirement in cases involving individualized damages the courts inquiry is limited to whether . . . the proposed methods [for computing damages] are so insubstantial as to amount to no method at all... [The plaintiffs] need only come [*25] forward with plausible statistical or economic methodologies to demonstrate impact on a class-wide basis" *275 Conn. 330-331*. This court concludes that the plaintiffs have offered a plausible methodology which amounts to far more than no method at all and it further finds, in connection with the Collins II, three-part analysis, that plaintiffs can offer generalized evidence to prove the elements of a CUTPA claim on a class-wide basis. The point here is that there is a methodology. The assumptions, even the benchmark, employed by Jennings may change with the discovery of additional facts. Surely they will be challenged by Hartford at trial and may be found unpersuasive, or otherwise lacking. Nevertheless, the court finds that plaintiffs are entitled to make their case of CUTPA violations leading to ascertainable loss.

For some of the same reasons, the court also determines that proof of the elements of unjust enrichment can be made predominantly through class-wide or generalized evidence. The elements of benefit to the defendant, and unjust holding of the benefit to the detriment of the plaintiffs can be established by class-wide evidence in much the same manner as [*26] in the CUTPA claim. Additionally, since damages are measured by the defendant's benefit, class-wide evidence should be even more predominant.

The third part of the Collins II analysis requires the trial court to "weigh the common issues... subject to generalized proof against the issues requiring individualized proof in order to determine which predominate." *Id., 332*. [HN16] Predominance means when the common questions will be the object of most of the efforts of the litigants and the court. Id., (quoting *Snyder Communications, L.P. v Magana, 142 S.W. 295, 300 [Tex. 2004])*. In this case, the court concludes that common questions predominate. Almost all of the evidence relating to allegations that Hartford committed unfair or deceptive trade practices will be evidence about Hartford's actions that are common to the entire class of plaintiffs. This will include evidence of the 1963 consent decree, evidence concerning Hartford's CRSP program and its efforts to persuade insureds and claimants to have repairs done at CRSP auto body shops as well as actions regarding any limitations or pressures on appraisers and their effect on hourly repair labor rates. [*27] These allegations are hotly contested by Hartford and in the court's estimation at least half the trial time, if not substantially more, will be spent on the evidence tending to prove, or disprove these allegations. When combined with the evidence presented by the plaintiffs though Jennings and possibly others to show causation and ascertainable harm by the generalized proof drawn from Hartford sources, as discussed above, the court concludes that common issues will predominate the trial. While it is possible, even likely, that Hartford will produce evidence that some insured or claimants chose a CRSP shop for reasons totally unrelated to, and uninfluenced by Hartford's admitted efforts to persuade them to use such a facility (including reductions in deductibles and lifetime guarantees) the court is unpersuaded that such evidence will consume half or more of the trial time.

E. Superiority.

[HN17] *Practice Book § 9-8* also includes a requirement that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." In Collins I, the Connecticut Supreme Court identified the four factors set out in [*28] *Rule 23 (b)(3) of the Federal Rules of Civil Procedure* as pertinent to the superiority analysis. *266 Conn. 56-57* [quoting In *Re VisaCheck/Mastermoney Antitrust Litigation, 280 F.3d 124, 133 (2d Cir. 2001)* cert denied, *536 U.S. 917, 122 S. Ct. 2382, 153 L. Ed. 2d 201 (2002)]*. The *Rule 23 (b)(3)* considerations are (1) the interests of the members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy commenced by or against members of the class; (3) the desirability or undesirability the litigation in a particular forum; (4) the difficulties likely to be encountered in the management of a class action. n2

n2 Collins I also noted that the four factors should apply to the predominance inquiry. *266 Conn. 48-49*.

No party has argued, and the court is not aware, of any expressed interest by any individual auto repair shop in controlling the prosecution [*29] of a separate action involving the subject matter of this case. The presence of the Auto Body Association helps to insure that the interest of all putative class members are considered during the course of the litigation. The sizes of individual damage claims would appear to militate against an individual body shop's interest in pursuing a separate claim and a class action is a superior means for such entities to seek redress through the judicial system.

The court is not aware of any existing cases raising similar issues by or against members of the class. The case clearly belongs in Connecticut because the alleged acts and practices occurred in Connecticut, a Connecticut statute is involved, and all parties are situated there. In addition, when the case was commenced in the judicial district of Stamford-Norwalk and then assigned to that District's Complex Litigation Docket there was no objection made.

The court is not aware of any specific or unique difficulties which would arise in managing this litigation as a class action. On the other hand, a number of advantages are apparent, such as eliminating the possibility of several lawsuits raising the same issues and causing the duplication [*30] of litigation expenses, attorneys fees and parties' time. A class action would also make inconsistent judicial decisions unlikely. In sum, the court finds a class action superior to other causes of action.

III. Definition of the Class

Having concluded that the requisites for class certification have been met, the court next considers the make-up of the class which might be certified. The plaintiffs have not been completely consistent in defining a potential class. In Paragraph 9 of the Complaint it is defined as "over one thousand (1,000) persons and/or entities licensed to perform automobile physical damage repairs in . . . Connecticut." At oral argument of the certification motion plaintiffs' counsel described the class as "approximately 750 licensed auto body [shops]." Tr., 2. After questioning by the court as to the propriety of including approximately 50 CRSP shops in the class, plaintiffs' counsel suggested including the CRSP shops only in connection with the labor rate claim. Id., 2-4. This concept was not developed further at oral argument, and only minimally more in subsequent papers.

However, plaintiffs proposed a different class definition [*31] in the subsequent papers. In his affidavit dated March 30, 2001 Dr. Jennings suggested defining the class as including all Connecticut auto body repair shops that have done any repair work for Hartford's insureds during the relevant time covered by this case. Jennings Affidavit, P 42. Plaintiffs' counsel has refined this definition to include Connecticut auto body shops "that have, at any time during the statute of limitations period, serviced a Hartford insured at its shop." Plaintiffs' Memorandum March 31, 2006, 9.

The parties, perhaps for their own reasons have not been particularly helpful in providing information to assist the court in defining a class. Hartford, taking the position that certification is not warranted in any case, has offered little or nothing on the subject. As noted, plaintiffs have changed course at lease once and now suggest a class somewhat narrower than at the outset, and leave the relevant time period up to the statute of limitations.

[HN18] The court recognizes that it has some flexibility to adjust class definitions as the litigation proceeds although such adjustments should be made with care because the rights of individual litigants can be significantly [*32] altered in the doing. Nevertheless, the Connecticut Supreme Court has noted that trial courts "are *required* to reassess their class rulings as the case develops . . . ." Therefore, even after a certification order is entered, the trial judge remains free to modify it in the light of subsequent developments in the litigation. *Rivera v. Veterans Memorial Medical Center, supra, 262 Conn. 738-739* (omitting citations and quotation marks; emphasis added by Rivera court).

With that in mind, and based on the considerations and conclusions noted above, the court will order certification of a class of plaintiffs along the following lines. The class will consist of Connecticut licensed auto body repair shops, or licensed individuals, that have performed physical auto body repairs paid for directly or indirectly, partially or in full, by Hartford as a result of automobile insurance policies issued by Hartford. n3 While the statutes of limitations set the outside parameters of the class period the allegations of the complaint focus almost entirely on Hartford's CRSP activities and the court's inclination is to limit the class period to the inception of that program, but at the moment [*33] there is not enough in the record to ascertain when CRSP began.

n3 Thus, the work may be performed on a vehicle owned or leased by a Hartford insured or a claimant against a Hartford insured

There may be some reason to create a subclass of plaintiffs to include the CRSP auto body shops. These businesses may have incurred ascertainable loss from doing business paid for by Hartford at allegedly improperly low labor rates. On the other hand, they may have benefitted by the additional business gained as the recipients of allegedly steered business. How this is calculated and whether this creates conflicts within the class can be the subject of further litigation, but it does seem that the CRSP shops present issues unique to them, and should be segregated in a separate subclass of plaintiffs.

The remaining question is whether there is an individual plaintiff which adequately represents CRSP shops. The plaintiff auto body shops allege they have been injured by "both" the alleged steering and the allegedly [*34] low labor rates. Complaint P 11. On its face this allegation indicates there is no individual plaintiff to

represent the CRSP shops included in the class. Unless there is an adequate plaintiff-representative of this potential subclass or if the conflicts between CRSP shops and other class members are too great the court may decide in the future to exclude the CRSP shops from the class.

IV. Conclusion

The motion for class certification is granted. The plaintiffs shall serve and file a proposed order of certification on or before September 15, 2006. The proposed order shall inter alia provide for appropriate notice to class members, shall contain a definition of the class and any subclass as outlined above and deal with the issue of representation of the subclass. The defendant shall have until September 29, 2006 to serve and file any counter proposed order, and/or comments on the plaintiffs' proposed order.

TAGGART D. ADAMS

SUPERIOR COURT JUDGE