

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

GONZALO E. UBILLUS, individually and on
behalf of all others similarly situated,

Plaintiff,

CLASS ACTION

vs.

Case No.19- 741 - CK
Hon.

Timothy P Connors

PROGRESSIVE MARATHON INSURANCE
COMPANY,

Defendant.

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RECEIVED
JUL 18 2019
Washtenaw County
Clerk of the Court

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this Complaint pending in this Court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a Judge.

/s/ Beth M. Rivers
Beth M. Rivers P33614

CLASS ACTION COMPLAINT
AND DEMAND FOR JURY TRIAL

Plaintiff, **GONZALO E. UBILLUS** (“Ubillus”), individually, and on behalf of all others similarly situated, brings this action against Defendant, **PROGRESSIVE MARATHON INSURANCE COMPANY** (“Progressive”), and alleges as follows:

INTRODUCTORY STATEMENT

1. PROGRESSIVE insures all its Michigan individual automobile policyholders using the identical Form 9611DMI (11/15) policy form (the “Policy”). The Policy allows PROGRESSIVE to adjust and settle a first-party motor vehicle total loss claim via a cash payment based upon the “actual cash value” of the insured automobile. Neither the Policy nor Michigan law gives PROGRESSIVE the right to place any conditions on payment of any component of this cash payment.

2. The Policy does not define “actual cash value.” When a property and casualty insurance policy does not provide a definition, Michigan courts define “actual cash value” as “replacement cost less depreciation.” Also, per Michigan courts, replacement costs logically and necessarily include *any* costs that an insured reasonably would be expected to incur in repairing or replacing the damaged property; in this case, replacing the total loss vehicle.

3. In Michigan, an insured can reasonably expect to pay a 6% sales tax on the purchase of a replacement vehicle, because it is required by Michigan law. MCL § 205.52(1). Likewise, a Michigan insured can reasonably expect to pay title and registration fees required by law in

connection with the purchase of a replacement vehicle. At a minimum, an insured will pay \$8 to transfer the registration from their total loss vehicle to the replacement car (MCL § 257.809(1)) and \$15 for a certificate of title. MCL §§ 257.217(1); 257.806(1), (3); 257.810a. Thus, sales tax and \$23 in title and registration fees constitute costs that an insured reasonably would be expected to incur in replacing a total loss vehicle.

4. In addition, an insured in Michigan can reasonably be expected to pay a dealer documentary preparation fee as required to be disclosed in automobile installment sales contracts by MCL § 492.113(2)(a) (“dealer fees”) when purchasing a replacement vehicle. Every used car dealer in Washtenaw County, and indeed, in the State of Michigan charges such a fee. In 2005, the maximum documentation fee chargeable by any car seller in Michigan was the lesser of (a) 5% of the sale price or (b) \$160. MCL § 492.113(2)(a). This \$160 maximum is adjusted every two years to track changes in the consumer price index. *Id.* The bi-yearly adjustment is rounded to the nearest \$10 increment. *Id.* As of the date Progressive made a payment to Ubillus, the maximum documentation fee in Michigan was \$220. *See Documentary Fee Maximum Increases to \$220*, Office of Secretary of State Jocelyn Benson, https://www.michigan.gov/sos/0,4670,7-127-1631_50300_78624-209610--,00.html (last visited May 30, 2019). The overwhelming majority of used car dealers in Michigan charge the statutory maximum of \$220. Thus, dealer fees constitute costs that an insured reasonably would be expected to incur in replacing a total loss vehicle.

5. PROGRESSIVE breaches the Policy by failing to unconditionally pay as part of the cash payment the full sales tax, title fees, registration fees, and dealer fees that the insured reasonably would be expected to incur in replacing the total loss vehicle. First, PROGRESSIVE conditions the payment of sales tax on the insured purchasing a replacement vehicle and providing

documented proof of same to it within 30 days after the insured receives the cash payment from PROGRESSIVE of the “actual cash value” of the vehicle. The Policy does not require an insured to purchase a replacement car in order to receive a cash payment for the “actual cash value” of the total loss vehicle, as PROGRESSIVE concedes by uniformly making such cash payments without regard to whether its insureds have purchased replacement vehicles. The exact same thing is true of sales tax, as neither the Policy nor Michigan law provides for it to be treated any differently than the other components of the “actual cash value” of a total loss vehicle. And, by its conditional payment of sales tax, PROGRESSIVE concedes both that it constitutes part of the “actual cash value” of a total loss vehicle and that “actual cash value” means replacement cost less depreciation.

6. Second, PROGRESSIVE does not ever pay title and registration fees- not as part of the total loss cash payment and not when an insured buys a replacement car and submits documentation of same to PROGRESSIVE. Title and registration fees cannot be legally differentiated from sales tax, as both constitute costs that an insured reasonably would be expected to incur in replacing a total loss vehicle.

7. Third, PROGRESSIVE does not ever pay dealer fees- not as part of the total loss cash payment and not when an insured buys a replacement car and submits documentation of same to PROGRESSIVE. Dealer fees cannot be legally differentiated from sales tax, as both constitute costs that an insured reasonably would be expected to incur when replacing a total loss vehicle.

8. Even worse, PROGRESSIVE also breaches the Policy by either (a) requiring its total loss policyholders to permanently transfer ownership to it of their total loss vehicles without compensating them for the salvage values of those vehicles or (b) deducting the salvage values of the total loss vehicles from their total loss payments. On behalf of himself and a class of similarly situated Michigan PROGRESSIVE automobile insurance policyholders, Ubillus seeks a

declaratory judgment that the Policy requires PROGRESSIVE to unconditionally pay sales tax; vehicle title fees; registration fees; and dealer fees that an insured can reasonably be expected to incur when replacing a total loss vehicle. Ubillus further seeks a declaratory judgment that PROGRESSIVE cannot (1) require its insureds to transfer title of their total loss vehicles to PROGRESSIVE before it makes payments on their total loss claims; or (2) deduct the salvage values from insureds' total loss payments because they retain their total loss vehicles.

9. On behalf of himself and a class of similarly situated Michigan PROGRESSIVE automobile insurance policyholders, Ubillus also brings causes of action for breach of contract on behalf of himself and the proposed Class to recover damages they suffered as a result of (1) PROGRESSIVE's failure to unconditionally pay sales tax as part of its payments for total loss claims; (2) its failure to pay title and registration fees; and (3) its requirement that a Class member transfer title of a total loss vehicle or face a deduction from the Class member's total loss payment.

JURISDICTION, VENUE, AND PARTIES

10. This is an action asserting class claims for declaratory relief and damages pursuant to M.C.R. 3.501.

11. This Court has jurisdiction because Ubillus seeks declaratory relief and because the amount in controversy exceeds \$25,000, exclusive of interest, costs, and attorneys' fees.

12. Ubillus does not currently know if the total amount in controversy exceeds \$5 million.

13. Plaintiff Gonzalo E. Ubillus is, and at all material times has been, a citizen of Michigan and a resident of Washtenaw County, Michigan, and insured by PROGRESSIVE.

14. PROGRESSIVE is a national insurance company that regularly does business in Michigan. Additionally, PROGRESSIVE engaged in the conduct in Michigan which injured Ubillus and

similarly situated plaintiffs. Therefore, this Court has specific personal jurisdiction over PROGRESSIVE.

15. Venue is proper in Washtenaw County, Michigan, because PROGRESSIVE is a Michigan foreign corporation and it has a place of business in and conducts business in Washtenaw County.

16. All conditions precedent to the maintenance of this action have occurred, have been performed, have been waived, or PROGRESSIVE is estopped from asserting them, including, but not limited to the following Policy provisions (to the extent they constitute conditions precedent to maintaining this action): Part VI-Duties After an Accident or Loss and Part F-General Provisions, Payment of Premium and Fees and Legal Action Against Us.

Facts Regarding Progressive’s Treatment of Ubillus and the Class

17. PROGRESSIVE insures all its Michigan individual insurance policyholders using the identical Form 9611DMI (11/15) (the “Policy”). PROGRESSIVE possesses a copy of the Policy.

The Policy provides, in pertinent part, as follows:

PART IV—DAMAGE TO A VEHICLE

INSURING AGREEMENT—COLLISION COVERAGE AND BROAD FORM COLLISION COVERAGE

If **you** pay the premium for this coverage, **we** will pay for sudden, direct, and accidental loss to a:

1. **covered auto**, including an attached **trailer**; or
2. **non-owned auto**;

And its **custom parts or equipment**, resulting from **collision**.

INSURING AGREEMENT—COMPREHENSIVE COVERAGE

If **you** pay the premium for this coverage, **we** will pay for sudden, direct, and accidental loss to a:

1. **covered auto**, including an attached **trailer**; or
2. **non-owned auto**;

And its **custom parts or equipment**, that is not caused by **collision**.

A loss not caused by **collision** includes:

1. contact with an animal (including a bird);
2. explosion or earthquake;

3. fire;
4. malicious mischief or vandalism;
5. missiles or falling objects;
6. riot or civil commotion;
7. theft or larceny;
8. windstorm, hail, water or flood; or
9. breakage of glass not caused by **collision**.

ADDITIONAL DEFINITIONS

When used in this Part IV:

1. **Collision** means the upset of a vehicle or its impact with another vehicle or object.

LIMITS OF LIABILITY

1. The limit of liability for loss to a **covered auto, non-owned auto, or custom parts or equipment** is the lowest of:
 - a. the actual cash value of the stolen or damaged property at the time of the loss reduced by the applicable deductible;
 - b. the amount necessary to replace the stolen or damaged property reduced by the applicable deductible;
 - c. the amount necessary to repair the damaged property to its pre-loss condition reduced by the applicable deductible;
 - d. the Stated Amount shown on the **declarations page** for that **covered auto**.
2. Payments for loss to a **covered auto, non-owned auto, or custom parts or equipment** are subject to the following provisions:

...

g. The actual cash value is determined by the market value, age, and condition of the vehicle at the time the loss occurs.

PAYMENT OF LOSS

We may, at our option:

1. pay for the loss in money; or
2. repair or replace the damaged or stolen property.

At our expense, we may return any recovered stolen property to **you** or to the address shown on the **declarations page**, with payment for any damage resulting from the theft. We may keep all or part of the property at the agreed or appraised value.

18. Pursuant to the Limits of Liability for the Collision and Comprehensive coverages of the Policy, PROGRESSIVE has the right when presented with a claim for damages to a vehicle where the cost to repair would be greater than its actual cash value to declare the vehicle a total loss and pay in cash the lesser actual cash value. Of course, when a vehicle is stolen, it is a total loss, and PROGRESSIVE must pay the actual cash value in cash. This cash payment is almost always paid before a policyholder purchases a replacement vehicle and its amount is independent of what the policyholder ends up spending, if anything. In fact, the policyholder may simply keep the cash payment and never replace the total loss vehicle.

19. When PROGRESSIVE declares a vehicle a total loss, it must pay its insured the Michigan common law definition of “actual cash value,” because the Policy provides no other definition. Michigan courts define “actual cash value” as “replacement cost less depreciation.” *Salesin v. State Farm Fire & Cas. Co.*, 581 N.W.2d 781, 790 (Mich. App. 1998). Michigan courts have further held in the context of casualty and property insurance policies that “[r]epair or replacement costs logically and necessarily include *any* costs that an insured reasonably would be expected to incur in repairing or replacing the covered loss.” *Salesin*, 581 N.W.2d at 790 (holding replacement cost included contractor profit and overhead). Thus, if PROGRESSIVE elects to pay a cash payment, as it uniformly does, it must pay “any costs that an insured reasonably would be expected to incur” when purchasing a comparable vehicle. *See id.*

20. In Michigan, “any costs that an insured reasonably would be expected to incur” necessarily includes sales tax, registration fees, and title fees because the State of Michigan requires a dealer to collect those amounts in connection with the sale and registration of a used motor vehicle. It also includes dealer fees because all or virtually all auto dealers in Michigan charge dealer fees. PROGRESSIVE refuses to pay sales tax unless the insured replaces the covered vehicle and

provides it with documentation of same within thirty days after PROGRESSIVE pays the “actual cash value” of the total loss vehicle to the insured. PROGRESSIVE completely refuses to pay registration fees, title fees, and dealer fees.

21. PROGRESSIVE used the Mitchell WorkCenter Total Loss system (the “Mitchell System”), a proprietary electronic database product licensed from Mitchell International, Inc. (“Mitchell”), to calculate the actual cash values of the total loss vehicles for Ubillus and all the other members of the Class. The Mitchell valuation is set forth in a written report (the “Mitchell Report”) generated for each total loss claim and electronically maintained by PROGRESSIVE in its claim files where it is readily retrievable.

22. Furthermore, even though a vehicle has been declared a total loss, it still has some monetary (salvage) value, which value is not tied to the loss or actual cash value under the Policy. During the total loss adjustment process, purportedly relying on Policy terms and its contractual relationship with its insureds, PROGRESSIVE required its insureds, including Ubillus and Class members, to transfer ownership and possession of their totaled vehicles to it before it would make payment on their total loss claims. It did so without providing them any form of monetary consideration for the salvage values of their vehicles. Alternatively, if Class members retained their salvage vehicles and either sold the vehicles themselves or continued to use them (if still drivable), PROGRESSIVE deducted the salvage values from the total loss payments made to those Class members. Either way, PROGRESSIVE took the salvage values of the total loss vehicles.

23. PROGRESSIVE takes the total loss vehicles’ salvage values even though no provision in the Policy (a) requires insureds to permanently transfer titles of their total loss vehicles to PROGRESSIVE in order to receive payment for their total loss vehicles; or (b) provides for a deduction of salvage value from actual cash value payments of total loss claims. In the absence of

such provisions, PROGRESSIVE'S taking of Ubillus's and the Class' salvage values constitutes a breach of the Comprehensive and Collision coverages of the Policy, because it serves to reduce the total loss payments under those coverages to less than the amount required to be paid by those coverages.

Facts Regarding PROGRESSIVE's Treatment of Ubillus

24. On March 25, 2019, Ubillus's vehicle ("Covered Vehicle"), a 2013 Ford C-Max, was involved in a motor vehicle accident which rendered the vehicle a total loss. At that time, Ubillus was a contracting party and named insured under the Policy issued by PROGRESSIVE, which was in full force and effect. The Declarations Page for Ubillus's policy indicates that his Collision and Comprehensive coverage began on February 12, 2019. Ubillus's Standard Collision and Comprehensive Coverage limits were the "Actual Cash Value" of the 2013 C-Max, with \$1,000 deductibles for both coverages. His six-month premium was \$889. Ubillus owned the Covered Vehicle. This Declarations Page is attached as Exhibit A.

25. In a cover letter dated March 28, 2019, PROGRESSIVE informed Ubillus that PROGRESSIVE would not reimburse him for sales tax unless Ubillus replaced the Covered Vehicle "within thirty days." The letter also required Ubillus to submit proof of the replacement vehicle's sales price within that same 30 days. This "Sales Tax Reimbursement" letter is attached as Exhibit B.

26. On April 22, 2019, in a cover letter of that date, PROGRESSIVE affirmed Collision coverage for the Covered Vehicle as a total loss and told Ubillus it would pay him \$7,512.07 composed of the following: the C-Max's "Actual Cash Value" of \$8,212.07, minus a \$1,000 deductible, plus a "one time concession" of \$300. The "Actual Cash Value" came from the enclosed "Mitchell Work Center Total Loss Report" (the "Report"). The Report valued the 2013

C-Max at \$9,304.21 by comparing the list prices and sale prices of seven other 2013 Ford C-Max's. Then, the report subtracted \$1,162.14 based on Ubillus's car's "condition." Neither the cover letter nor the Mitchell Report contained an adjustment for or offered to pay sales tax, title fees, registration fees, or dealer fees. A redacted copy of the April 22, 2019 cover letter and enclosed Report are attached hereto as Exhibits C and D, respectively. Approximately one week later, Progressive stated it would pay an additional \$100 concession. The \$400 "one-time concession" resulted from Ubillus's attempts to dispute the "Actual Cash Value" calculated by the Report. It did not constitute payment for sales tax, title fees, registration fees or dealer fees.

27. Convinced that Progressive would pay him no more but still unsure as to his rights under the Policy, on April 30, 2019, Ubillus agreed to PROGRESSIVE to paying off the \$4,194.52 balance owed to his Covered Vehicle lender without agreeing that PROGRESSIVE had complied with the Policy in its payment of his claim. Consistent with its policy described above, PROGRESSIVE required Ubillus to sign over the title of his Covered Vehicle to PROGRESSIVE before PROGRESSIVE would pay the total loss payment. On May 7, 2019, PROGRESSIVE mailed Ubillus a check for \$3,415.03, representing the balance owed to him after payoff of his lender, which he received shortly thereafter.

28. On May 23, 2019, Ubillus specifically requested PROGRESSIVE to pay him sales tax regardless of whether he purchases a replacement vehicle. On May 24, 2019, PROGRESSIVE reiterated that it would not pay sales tax unless Ubillus purchased a replacement vehicle.

29. After PROGRESSIVE paid \$4,194.52 to his lender and \$3,415.03 to Ubillus, Ubillus (by and through his attorneys) finished his review of Michigan law and the Policy, and he duly informed PROGRESSIVE by a letter from his attorneys dated June 6, 2019, that PROGRESSIVE's adjustment of his total loss claim breached his Policy in several ways. The

letter makes clear that Ubillus does not dispute PROGRESSIVE's valuation of the Covered Vehicle. Instead, Ubillus contends that the plain meaning of "actual cash value" in the Policy provides coverage of sales tax, title fees, registration fees and dealer fees. Ubillus's coverage demand letter to PROGRESSIVE dated June 6, 2019, is attached hereto as Exhibit E.

30. More specifically, consistent with the proper definition of "actual cash value," Ubillus's letter informed PROGRESSIVE that the Policy required PROGRESSIVE to unconditionally pay sales tax on the Covered Vehicle, making PROGRESSIVE's conditioning of the payment of sales tax on Ubillus purchasing a replacement vehicle and providing it documentation of same within 30 days a breach of the Policy. The letter informed PROGRESSIVE that neither the Policy nor Michigan law allows PROGRESSIVE to so condition payment of sales tax. The coverage demand letter requested that PROGRESSIVE pay sales tax in the amount of 6% of the total loss vehicles' values (for Ubillus, \$492.72) to Ubillus and to all similarly situated Michigan policyholders.

31. In his coverage demand letter, Ubillus additionally informed PROGRESSIVE that it had failed to pay the minimum vehicle registration transfer fee of \$8, the vehicle title fee of \$15, and the near-universal dealer documentation fee of \$220. The letter informed PROGRESSIVE that buyers can reasonably expect to incur these costs when replacing an insured automobile in Michigan and, therefore, that "actual cash value" necessarily includes these fees. Ubillus's letter demanded \$243 for these fees on his own behalf and on behalf of each of PROGRESSIVE's similarly situated Michigan policyholders.

32. PROGRESSIVE has not responded to the coverage demand letter as of the date of the filing of this Complaint. PROGRESSIVE has never paid sales tax, title fees, registration fees or dealer fees to Ubillus.

Class Action Allegations

33. Pursuant to M.C.R. 3.501, Ubillus properly brings Counts I, II, and III on his own behalf and on behalf of the Class defined below.

34. The Class consists of and is defined as all Michigan citizens who: (a) on or after six years before the date this Complaint is filed; (b) are or were covered by a PROGRESSIVE Michigan personal automobile insurance policy; (c) made a claim under the Collision or Comprehensive coverage of that policy for damage or loss to a covered vehicle which PROGRESSIVE accepted and treated as a total loss claim; and (d) PROGRESSIVE paid or attempted to pay the claim on a cash basis without unconditionally including sales tax, title fees, registration fees and/or dealer fees as part of the cash payment (hereinafter the “Class”). The class period will be from six years before the date this Complaint is filed to the date of class certification (hereinafter the “Class Period”).

35. Ubillus reserves the right to amend the Class and/or add sub-class definitions as discovery proceeds and to conform to the evidence.

36. While the exact number of Class members is unknown at this time, Ubillus submits, based upon the number of insured drivers in Michigan, PROGRESSIVE’s large market share and the frequency of total loss accidents, that there are at least a hundred PROGRESSIVE policyholders spread through the State of Michigan who are potential Class members in this action. Accordingly, separate joinder of all Class members would be impracticable.

37. This action poses questions of law and fact that are common to the members of the Class and predominate over questions affecting only individual members. Such questions of law and fact common to the Class include, but are not limited to, the following:

- a. Whether PROGRESSIVE’s refusal to pay sales tax unless the insured buys a replacement vehicle breaches the Policy?

- b. Whether Ubillus and the other Class members were damaged by PROGRESSIVE's failure to unconditionally pay sales tax?
- c. Whether PROGRESSIVE's failure to pay Michigan's \$8 registration transfer fee and \$15 title fee breaches the Policy?
- d. Whether Ubillus and other Class members were damaged in the amount of the \$23 in registration/title fees that PROGRESSIVE refused to pay?
- e. Whether Ubillus and the other Class members are entitled to a declaration that the Policy requires payment upfront of sales tax, title fees, registration fees and dealer fees as part of a cash payment?
- f. Whether the Policy does not clearly and unambiguously permit PROGRESSIVE to take the salvage values of its insureds' total loss vehicles by either (a) requiring them to transfer title and possession of the total loss vehicles to PROGRESSIVE without compensating them for the salvage values of the vehicles or (b) deducting the salvage values from the insureds' total loss payments? and
- g. Whether PROGRESSIVE thereby breached the Policy as to Ubillus and the Class, entitling them to recover from PROGRESSIVE the amounts PROGRESSIVE received from the sales of their total loss vehicles or the amounts PROGRESSIVE deducted from their total loss payments for "salvage value"?

38. Common questions predominate over individual questions, because all questions necessary for resolution of PROGRESSIVE's liability to Ubillus and the Class are common. The only individual issues are the amounts of damages, and they may be calculated on a mechanical, ministerial basis without the need for the trier of fact to decide them. More specifically, the damages to each Class member from PROGRESSIVE's failure to pay title and registration fees is

\$23. The damages to each Class member from PROGRESSIVE's failure to pay sales tax can be calculated by multiplying 6% by the actual cash value of the total loss vehicle provided by the CCC Reports, which Reports are maintained in PROGRESSIVE's electronic records and are easily retrievable. The damages to each Class member from PROGRESSIVE's taking of the Covered Vehicles' salvage values is the amount for which PROGRESSIVE sold their total loss vehicle (if ownership was transferred to PROGRESSIVE) or the amount deducted by PROGRESSIVE for "salvage" from their total loss payment, which amounts are maintained in PROGRESSIVE's electronic records and are easily retrievable.

39. Ubillus's claims are typical of the claims of the other members of the Class because they all arise out of the exact same policies and practices of PROGRESSIVE and under the exact same theories of law.

40. Ubillus will fairly and adequately represent the Class, because he and the undersigned counsel he has retained have no known conflicts of interest with the other Class members, he is ready, willing and able to represent the Class, and the undersigned retained attorneys are very experienced class action practitioners with extensive experience in prosecuting class actions against automobile insurers. Ubillus's attorneys have identified and thoroughly investigated all claims in this action and have committed sufficient resources to represent the Class.

41. Pursuant to M.C.R. 3.501(2)(a)(i), this class action is superior to other available methods of adjudication in promoting the convenient administration of justice because the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would confront PROGRESSIVE with incompatible standards of conduct. For example, the court in one case might rule that PROGRESSIVE must pay title and registration fees while another might rule that it does not have

to do so. PROGRESSIVE would be left in an untenable legal limbo in such an event, because Michigan law requires it to treat all insureds the same under similar circumstances.

42. Pursuant to M.C.R. 3.501(2)(b), final declaratory is appropriate with respect to the class because PROGRESSIVE has acted and refused to act on grounds generally applicable to all members of the Class. Specifically, PROGRESSIVE has in the past and will in the future adjust total loss claims the exact same way in breach of the Policy, making declaratory relief for the Class as to its members' rights under the Policy appropriate.

43. Pursuant to M.C.R. 3.501(2)(c), this action will be manageable as a class action because Michigan law applies to all Class members' claims and the legal issues are simple matters of contractual interpretation. All Class members are readily ascertainable from PROGRESSIVE's records, including physical addresses and email addresses (in most cases), making the provision of notice routine. Finally, as previously explained, damages are easily and readily calculable for each Class member on a mechanical, ministerial basis. There are no unusual difficulties likely to be encountered in the management of this case as a class action.

44. Pursuant to M.C.R. 3.501(2)(d), in view of the expense of litigation, the separate claims of individual class members are insufficient in amount to support separate actions. A large corporation like PROGRESSIVE can be expected to vigorously defend every suit as a matter of precedent, which rapidly inflates the cost of litigation compared to the amount that an individual Class member can expect to collect in damages, anywhere from the low hundreds of dollars to the low thousands of dollars.

45. In contrast, pursuant to M.C.R. 3.501(2)(e), the amounts which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action. For example, Ubillus and the vast majority of the Class will be

entitled to recover the 6% sales tax, the \$15 title fee, and the \$8 vehicle registration transfer fee, which will amount to hundreds, and in some cases, thousands of dollars. Likewise, the salvage values of their vehicles will typically be in the hundreds of dollars. Such recoveries will be far higher than the cost per Class member that will be incurred in prosecuting this class action, and the total recovery will likely be in the millions of dollars, more than justifying the pursuit of this class action.

46. Pursuant to M.C.R. 3.501(f), the members of the Class do not have a significant interest in controlling the prosecution of separate actions because the expense and effort of individual litigation (as explained above) outweigh their potential awards. Further, the overwhelming majority of Class members do not even know they have such claims to pursue. This is demonstrated by the fact that there do not appear to be any pending individual suits in Michigan over this issue. Simply put, there are no alternatives to a class action to resolve this controversy.

CLAIMS FOR RELIEF

Count I – Cause of Action for Declaratory Relief

47. Ubillus and the Class re-allege and incorporate by reference Paragraphs 1-46 above.

48. Ubillus and the Class take the position that the Policy requires PROGRESSIVE to pay up front, as part of its cash payments of total loss claims, 6% sales tax, the \$15 Title Fee, the \$8 Vehicle Registration Transfer Fee, and the dealer fees which policyholders can reasonably be expected to pay. Further, Ubillus and the Class take the position that the Policy does not allow PROGRESSIVE to take the salvage values of their total loss vehicles. In contrast, PROGRESSIVE takes the position that the Policy does not require it to pay up front sales tax, title fees, vehicle registration transfer fees and dealer fees. PROGRESSIVE also takes the position that the Policy allows it to (a) force policyholders to sign over titles of total loss vehicles to

PROGRESSIVE before PROGRESSIVE makes total loss payments, or (b) deduct salvage values from policyholders' total loss payments.

49. Accordingly, an actual controversy exists between Ubillus and the other Class members and PROGRESSIVE concerning the proper interpretation of the Policy and their respective rights and legal relations thereunder. Furthermore, the Court would have jurisdiction over an action related to these issues which sought relief other than a declaratory judgment (such as damages). This entitles Ubillus and the other Class members to seek declaratory relief pursuant to M.C.R. § 2.605(A)(1).

50. M.C.R. § 2.605(C) states that “[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in an appropriate case.” Thus, regardless of whether damages are available to Ubillus and the Class, this Court has jurisdiction to determine the parties’ respective rights and other legal relations under the Policy.

51. Ubillus and the Class now petition this Court for a declaration that the Collision and Comprehensive coverages of the Policy require PROGRESSIVE to pay up front (as part of its cash payments related to total loss claims) sales tax, title fees, vehicle registration transfer fees, and dealer fees.

52. Ubillus and the Class additionally petition this Court for a declaration that the Policy does not grant PROGRESSIVE the right to take the salvage values of their total loss vehicles such that doing so breaches the Policy.

Count II – Cause of Action for Breach of Contract Based on Sales Tax

53. Ubillus and the Class re-allege and incorporate by reference Paragraphs 1-46 above.

54. The Policy constituted binding contracts between PROGRESSIVE and Ubillus and the other Class members.

55. As explained above, PROGRESSIVE breached the Policy by placing a condition on payment of the 6% sales tax owed to Ubillus and the other member of the Class under the Policy. Initially, PROGRESSIVE breached the Policy by never paying the 6% sales tax to Ubillus and many members of the Class who did not replace their Covered Vehicles and provide documentation of same to PROGRESSIVE within 30 days after the total loss payments. Further, PROGRESSIVE breached the Policy even when it did ultimately pay the 6% sales tax to some Class members because the Policy required PROGRESSIVE to pay the 6% sales tax unconditionally and upfront as part of the cash total loss payment.

56. PROGRESSIVE'S breach proximately injured Ubillus and each Class member in an amount mechanically calculable. For Ubillus and those Class members to whom PROGRESSIVE never paid the 6% sales tax, damages can be calculated by multiplying the "Actual Cash Value" set forth in the Mitchell Report by 6% and then calculating interest on that amount from the date that the Class member received the total loss payment to the date of judgment. For those Class members to whom PROGRESSIVE did eventually pay the 6% sales tax, the interest-based damages can be calculated from the date that the Class member received the total loss payment to the date that PROGRESSIVE finally paid the sales tax to the Class member.

**Count III – Cause of Action for Breach of Contract Based on Title and Vehicle
Registration Transfer Fees**

57. Ubillus and the Class re-allege and incorporate by reference Paragraphs 1-46 above.

58. The Policy constituted binding contracts between PROGRESSIVE and Ubillus and the other Class members.

59. As explained above, by refusing to pay Ubillus and the Class the minimum \$8 vehicle registration transfer fee and the \$15 title fee owed to them under the Policy, PROGRESSIVE

breached the Policy. Such breach proximately injured Ubillus and each Class member in the amount of \$23.

Count IV – Cause of Action for Breach of Contract Based for Taking Salvage Values

60. Ubillus and the Class re-allege and incorporate by reference Paragraphs 1-46 above.

61. The Policy constituted binding contracts between PROGRESSIVE and Ubillus and the other Class members.

62. As explained above, no provision in the Policy clearly and unambiguously gave PROGRESSIVE the right to take the salvage values of Ubillus's and the Class's total loss vehicles. By doing so, PROGRESSIVE breached the Policy, because this effectively reduced the total loss payments it made to Ubillus and the other members of the Class to less than it owed them under the Comprehensive and Collision coverages of the Policy. Such breach proximately injured Ubillus and all the other Class member in the amounts for which PROGRESSIVE sold their total loss vehicles (if ownership was transferred to PROGRESSIVE) or the amounts deducted by PROGRESSIVE for "salvage" from their total loss payments.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff Gonzalo E. Ubillus and the Class respectfully request the Court to award the following relief against PROGRESSIVE:

- a. Assert jurisdiction over this action;
- b. Issue an order certifying that this action is properly maintainable as a class action under Rule 3.501 of the Michigan Court Rules and appointing Ubillus to represent the Class herein;
- c. Issue an order appointing the undersigned law firms as class counsel;

- d. Grant a judgment pursuant to Count I against PROGRESSIVE to Ubillus and the other members of the Class declaring the parties' respective rights and other legal relations under the Policy as set forth above;
- e. Grant a judgment pursuant to Count II against PROGRESSIVE awarding Ubillus and the other members of the Class damages for breach of contract as set forth above;
- f. Grant a judgment pursuant to Count III against PROGRESSIVE awarding Ubillus and the other members of the Class damages for breach of contract as set forth above;
- g. Grant a judgment pursuant to Count IV against PROGRESSIVE awarding Ubillus and the other members of the Class damages for breach of contract as set forth above;
- h. Grant a judgment pursuant to Counts II, III, and IV against PROGRESSIVE awarding Ubillus and the Class pre-judgment and post-judgment interest at the maximum rates permissible at law or in equity; and
- i. Grant a judgment against PROGRESSIVE awarding Ubillus and the Class all such other and further relief, general or special, legal or equitable, to which they may be justly entitled.

Respectfully Submitted,

By: 

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***ATTORNEYS FOR PLAINTIFF GONZALO E.
UBILLUS AND THE CLASS***

Dated: July 18, 2019

Demand for Jury Trial

Ubillus and the Class hereby demand a trial by jury on all issues so triable.

Respectfully Submitted,

By: 

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***ATTORNEYS FOR PLAINTIFF GONZALO E.
UBILLUS AND THE CLASS***

Dated: July 18, 2019