

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO 1777 6 <sup>th</sup> Street Boulder, CO 80302	<b>FILED Document</b> <b>CO Boulder County District Court 20th JD</b> <b>Filing Date: Nov 2 2005 2:34PM MST</b> <b>Filing ID: 7342619</b> <b>Review Clerk:</b>
CHAD HICKS Plaintiff,  v.  AMERICAN FAMILY MUTUAL INSURANCE COMPANY  Defendant.	<b>COURT USE ONLY</b>  Case No.: 04 CV 879  Division 2
<b>ORDER GRANTING PLAINTIFF'S MOTION TO CERTIFY A CLASS          PURSUANT TO C.R.C.P. 23.</b>	

This matter comes before the Court on Plaintiff, Chad Hicks's Motion to Certify a Class Pursuant to C.R.C.P. 23. Having considered the parties' briefs, arguments made at the March 7, 2005 hearing, as well as the applicable law, this Court enters the following Ruling and Order:

### I. Background

This case arises from Defendant, American Family Insurance Company's ("American Family") failure to offer enhanced Personal Injury Protection ("PIP") coverage to its Colorado insureds as required by C.R.S. § 10-4-710(2)(a)(II) (2001). Pursuant to the now-repealed Colorado Auto Accident Reparations Act, C.R.S. § 10-4-701 (2001) *et. seq.* (the "No-Fault Act"), automobile insurance providers were required to offer their insureds enhanced or optional PIP benefits.<sup>1</sup> Between 1992 and 2001, American Family did not have available for purchase any automobile insurance policy that complied with the mandatory statutory requirements. Therefore, during the approximately nine-year span, American Family categorically failed to offer *any* of its Colorado insureds a policy that complied with the No-Fault Act.

<sup>1</sup> C.R.S. § 10-4-710(2)(a) provides:

Every insurer shall offer for inclusion in a complying policy in addition to the coverages described in section 10-4-706, at the option of the named insured:

- (I) Compensation of all expenses of the type described in section 10-4-706(1)(b) without dollar or time limitations; or
- (II) Compensation of all expenses of the type described in section 10-4-706(1)(b) without dollar or time limitations and payment of benefits equivalent to eighty-five percent of loss of gross income per week from work the injured person would have performed had such injured person not been injured during the period commencing on the day after the date of the accident without dollar or time limitations.

After curing the defect in policies after January, 2001, in 2003, American Family also initiated a "voluntary reformation" process to remedy the deficiency. As part of that process, American Family identified and contacted insureds who might be eligible for reformation of their non-complying policies and, as a result, additional benefits. The parties dispute the adequacy of the notice provided as well as American Family's method of identifying potential candidates for reformation.

Before receiving American Family's notice of voluntary reformation, Mr. Hicks, the putative class representative, filed a class action complaint against Defendant based on the insurer's failure offer enhanced PIP benefits. Plaintiff claims that he was injured in an automobile accident on January 11, 2001. Plaintiff contends that he was insured by American Family at the time of the accident and, while Defendant paid some of his bills, American Family refused to pay benefits in excess of Plaintiff's basic PIP policy limits.

In this lawsuit, Plaintiff alleges that American Family failed to offer him enhanced PIP coverage as required by the No-Fault Act. American Family does not, as a factual matter, dispute its failure to offer any of its insureds an insurance policy in compliance with the No-Fault Act. Nor does American Family dispute that, under well-established Colorado law, the remedy for an insurer's failure to comply with the mandatory requirements of C.R.S. § 10-4-710(2)(a)(II) is reformation of the policy to incorporate additional coverage as required by statute. Brennan v. Farmers Alliance Mut. Ins. Co., 961 P.2d 550 (Colo. 1998); Thompson v. Budget-Rent-A-Car Sys., Inc., 940 P.2d 987, 990 (Colo. App. 1996). Rather, the issue before the Court is whether Plaintiff's claims are appropriate for treatment as a class action.

## II. Class Certification

C.R.C.P. 23 governs class actions. The party seeking certification of a class bears the burden of demonstrating compliance with the requirements of C.R.C.P. 23. Levine v. Empire Sav. & Loan Ass'n, 197 Colo. 293, 297, 592 P.2d 410, 413 (1979). The trial court has broad discretion in determining the propriety of class certification. Ammons v. Am. Family Mut. Ins. Co., 897 P.2d 860, 862 (Colo. App. 1995). Accordingly, the trial court's decision to grant or deny a request for class certification will be reversed only upon a showing of clear error or abuse of discretion. Ammons, 897 P.2d at 862.

Certification of a class action under C.R.C.P. 23 is a two step inquiry. First, the plaintiff must satisfy the C.R.C.P. 23(a) requirements of numerosity, typicality, commonality, and adequate representation. Provided Plaintiff can clear the first hurdle, class certification is proper only if he can also demonstrate that his claims fall within the purview of one of the actions described in C.R.C.P. 23(b). In examining the propriety of class certification, federal cases decided under FED. R. CIV. PRO. 23 are persuasive because Colorado's counterpart, C.R.C.P. 23, is virtually identical to the federal rule. Goebel v. Colo. Dep't of Insts., 764 P.2d 785, 794 at n.12 (Colo. 1988).

(1) Preliminary Questions

Several underlying issues require resolution before this Court can evaluate the propriety of this proposed class action. In particular, this Court must first decide: (1) the scope of the class subject to certification and (2) the global effect of American Family's voluntary reformation process; and (3) an appropriate class definition.

(A) Scope of the Proposed Relief

Plaintiff purports to pursue this class action solely as a request for injunctive relief pursuant to C.R.C.P. 23(b)(2). Specifically, Plaintiff requests "An Order declaring all automobile insurance policies issued by American Family ...between July 1, 1992 and January 29, 2001 automatically include medical benefits without dollar or time limitations and loss of income benefits equivalent to eighty-five percent of loss of gross income per week without dollar or time limitations as of the date that each policy was issued." (Compl. p.10).

During the hearing on class certification, the parties engaged in significant discussion concerning the scope of the Plaintiff's request. However, in a proposed order granting class certification, Plaintiff seemingly retreated to his original position and seeks certification solely for the narrow purpose of ordering reformation of the subject policies and notifying class members of their rights. (Proposed Order p. 18).

This Court will take Mr. Hicks at his word and will address certification *only* as it applies to the limited relief sought of ordering the subject policies reformed and providing adequate notice to potential class members. Accordingly, the focus of the following C.R.C.P. 23 analysis is likewise limited to the propriety of certification under the circumscribed parameters of reformation and notice. To be explicit, should Plaintiff prevail on liability, the scope of relief available is limited to adequate notice and nothing more. Thus, to the extent this Order grants class certification, questions concerning the amount or type of benefits owed any individual class member under any reformed policies fall outside the scope of the class action.

(B) Effect of Voluntary Reformation

Given this limited focus, the crux of Defendant's objection to certification appears to center on the effect, if any, of a reformation process American Family voluntarily instituted both before and during the pendency of this litigation. Though addressed in greater detail where applicable, this Court finds that, as a preliminary matter, American Family's voluntary reformation process does not, by itself, interfere with Plaintiff's attempt to certify this class.

First, throughout this case, Plaintiff has argued that American Family has failed to provide adequate notice of the potential remedy of reformation to its affected insureds. Furthermore, testimony from Defendant's own representative indicates that the notice provided may not have been adequate. (Dep. S. Rucker, p. 86-87). Finally, it is

undisputed that to take part in the reformation, American Family required an affirmative response from the insured. According to Plaintiff, the remedy for noncompliance with the No-Fault Act is automatic reformation of the policy rather than reformation driven by the insured's responsive action.

Without deciding the substantive issue of the adequacy of American Family's procedure or notice, this Court finds that, as a general matter, the voluntary reformation undertaken by Defendants does not make Plaintiff's putative class action moot. Class claims are not rendered moot by a defendant's corrective action where the relief is not complete and adequate. Liberles v. County of Cook, 709 F.2d 1122, 1126 (7<sup>th</sup> Cir. 1983). Here, Plaintiff has challenged both the adequacy of the notice American Family provided its insureds as well as American Family's requirement that reformation be conditioned upon an affirmative response from the insured. (Pltf's Reply, p. 12). Without deciding the merits of Plaintiff's arguments, this Court finds that Plaintiff has demonstrated a sufficient basis to proceed with a class action. Accordingly, while American Family's reformation procedures may ultimately determine the constituents of the class by excluding those insureds whose claims have already been finally and adequately settled, the process does not obviate the need for certification of the class action. Thus, this Court rejects Defendant's overriding objection to certification based on the mere existence of voluntary reformation procedure.

(C) Class Definition

A plaintiff cannot successfully certify a class action without first demonstrating that an ascertainable class exists. Colo. Cross-Disability Coalition v. Taco Bell, Corp., 184 F.R.D. 354, 357 (D.Colo. 1999). A class is sufficiently defined if it is "administratively feasible for the court to determine whether a particular individual is a member." Davoll v. Webb, 160 F.R.D. 142, 143 (D.Colo.1995). In this case, Plaintiff's most recent proposed definition limited the putative class definition to:

Those persons or entities within the United States who purchased insurance policies from American Family in the State of Colorado subject to the Colorado Auto Accident Reparations Act between July 1, 1992 and January 29, 2001, and who submitted claims for benefits under those policies of insurance. Excluded from the class are (a) defendant, (b) any affiliate, officer, director, employee or controlling person thereof, (c) any entity owned or controlled by defendant, and (d) any legal representative, heir, successor or assign of any such excluded person.

(Proposed Order p. 18).<sup>2</sup> Pursuant to C.R.C.P. 23(c)(4), this Court will preliminarily accept the class definition detailed in Plaintiff's Proposed Order. See Colo. Cross-Disability Coalition, 184 F.R.D. at 357 (noting that class definition is a preliminary

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<sup>2</sup> American Family objects to this Court's consideration of Plaintiff's proposed order. However, pursuant to C.R.C.P. 23(c)(4), the Court may allow a class action to proceed on certain issues and not others. C.R.C.P. 23(c)(4); see also Toothman v. Freeborn & Peters, 80 P.3d 804, 817 (Colo. App. 2002), and may act *sua sponte* to define the class as needed.

decision that courts have discretion to modify, expand, or further alter as necessary). While further modification of the class may be required to accommodate, for example, statutes of limitations and policies already reformed and settled, this Court finds that there is a sufficient basis for finding an ascertainable class exists and that certification may be appropriate for the purposes of declaratory relief.

(2) C.R.C.P. 23(a) Requirements

Having circumscribed the scope of the putative class, this Court must now determine whether Plaintiff can satisfy the two-tiered test detailed in C.R.C.P. 23. Pursuant to C.R.C.P. 23(a), a class action is maintainable only if: (1) the members of the class are so numerous so as to make joinder impractical; (2) common questions of law or fact exist among the class members; (3) the representative party's claims or defenses are typical of those claims or defenses of the class; and (4) the representative party will fairly and adequately represent the interests of the class.

(A) Numerosity

Class certification is proper only where the number of potential class members is too numerous to accommodate practical joinder. C.R.C.P. 23(a)(1). Here, Plaintiff alleges that there are 19,000 potential class members. American Family admits that, as part of a voluntary reformation process, it has already provided notice to some 17,700. However, Plaintiff argues that notice provided under the voluntary reformation procedure may not have been adequate and may have failed to adequately locate at least 6,000 potential class members whose notices were returned as undeliverable. Based on the parties' representations at the March 7, 2005 hearing, this Court finds that the 6,000 potential class members who have not already been contacted is alone sufficient to satisfy the numerosity requirement. See Rodriguez v. Bar S Food Co., 567 F.Supp. 1241, 1247 (D. Colo. 1983) (certifying a class of 230 members).

(B) Commonality

The threshold inquiry of commonality under C.R.C.P. 23(a) is met where there are "questions of law or fact common to the class." C.R.C.P. 23(a)(2). The commonality prong does not require a demonstration that all of the class claims are identical, but merely a showing that the claims share a basis in the same legal or remedial theory. Colo. Cross-Disability Coalition, 184 F.R.D. at 359. Here, the Complaint alleges that American Family did not have complying policy available for purchase and, therefore, did not, as a matter of law, offer any of it insureds statutorily required insurance coverages for a period of years. Plaintiff seeks only an order declaring the subject policies reformed. Thus, the only issues presented here are: (1) whether the policies were in compliance with the No-Fault Act; and (2) if not, whether reformation of the policies is proper. This Court finds that the significant issues raised by this suit are common among potential class members.

(C) Typicality

Typicality concerns the degree of similarity between the class representative's claims and the claims of the remainder of the class. See Ammons v. Am. Family Mut. Ins. Co., 897 P.2d 860, 863 (Colo. App. 1995). This prerequisite to certification is usually met "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented...irrespective of varying fact patterns which underlie individual claims." Ammons, 897 P.2d at 863 (quoting 1 H. Newberg, *Newberg on Class Actions* § 3-13 at 3-77 (3d ed. 1992)). However, certification of the class may be denied if the named plaintiff's claims involve unique and dispositive considerations not shared by other class members. Id.

In this case, Plaintiff seeks to avert any individual and dispositive inquiries by limiting the scope of the action to a request for declaratory judgment and order that the subject policies are reformed. Plaintiff agrees that compliance with Rule 23 requires any individual dispute over an insured's recovery of damages be resolved in separate suits. Thus, this narrowly tailored class action requests reformation of certain American Family policies based on the insurer's failure to offer mandatory PIP benefits. Significantly, Plaintiff does not request bad faith or breach of contract damages, which would, out of necessity, require some evaluation of the facts in individual cases. See Ammons, 897 P.2d 860. Here, the wrong alleged is failure to offer a complying policy to *any* insured. Plaintiff's claims are typical of the class on the issue of whether or not the policy should be reformed. Even though American Family alleges that Plaintiff's policy has been adequately reformed, Plaintiff has also objected to the imposition of a \$200,000 aggregate cap and the amount of interest owed on benefits paid under reformed policies. Plaintiff's objections to these and other legal issues concerning the terms of any reformed policies apply with equal force to other class members. Thus, this Court finds that on the narrow issue of reforming the subject policies, Plaintiff has satisfied the typicality requirement of C.R.C.P. 23(a)(3).

(D) Adequacy of Representation

As a final hurdle to certification pursuant to C.R.C.P. 23(a), the rule also requires that the class representative adequately represent the claims of other class members. As such, there must be no disabling conflicts between the interests of the named class representatives and other class members. In addition, the Court must ensure that class counsel will effectively and adequately pursue claims on behalf of the class.

Defendant does not contest the adequacy of counsel. Rather, American Family contends that, pursuant to its voluntary reformation process, Mr. Hicks's policy has been reformed and, thus, he is no longer in a position to adequately represent the claims of class members whose policies have not been reformed.

However, a defendant's compliance with the plaintiff's demands cannot render moot a putative class representative's claims during the pendency of litigation. Griffith v.

Bowen, 678 F.Supp. 942, 947 (D. Mass. 1988). Furthermore, provided this Court ultimately orders the subject policies reformed, additional issues concerning the terms of the reformed policies may affect the adequacy of benefits Mr. Hicks has received. In this regard, Mr. Hicks's interests are in harmony with the interests of the remainder of the putative class. Accordingly, this Court finds that Mr. Hicks has sufficiently demonstrated his capability to adequately represent the claims of the class and has satisfied C.R.C.P. 23(a)(4).

(3) C.R.C.P. 23(b)(2)

In addition to the requirements of C.R.C.P. 23(a), the court may not certify a class unless the plaintiff can also satisfy one of the requirements of C.R.C.P. 23(b). Here, Plaintiff purports to request only declaratory relief and thus, seeks certification pursuant to C.R.C.P. 23(b)(2), which sanctions class actions where, "The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." C.R.C.P. 23(b)(2). C.R.C.P. 23(b)(2) does not apply to suits where the exclusive or primary relief sought is money damages. State v. Buckley Powder Co., 945 P.2d 841, 845 (Colo. 1997). Rather, subsection (b)(2) is applicable only in cases seeking predominately injunctive or declaratory relief. Buckley Powder Co., 945 P.2d at 845. While money damages incidental to the injunctive relief sought are recoverable in a class certified pursuant to C.R.C.P. 23(b)(2), certification under this subsection is not appropriate where money damages form the gravamen of the requested relief. Id. (finding money damages predominated where putative class sought tax refunds).

In this case, Plaintiff suggests that certification pursuant to C.R.C.P. 23(b)(2) is proper provided the scope of the class is limited to insure that monetary damages do not predominate. Specifically, Plaintiff suggests that the class exclude any individualized disputes involving, for example, the reasonableness or necessity of medical treatment. Instead, Plaintiff proposes that the class be certified *only* to declare the policies reformed and to facilitate discovery of and notice to the potential class members. Plaintiff argues that, under this limited scope, distribution of damages owed to insureds or disputes over amounts fall outside the purview of this class action.

Provided the scope of relief sought is limited to an order notifying class members that their non-complying policies are reformed, this Court finds that while reformation may ultimately result in payment to class members, money damages do not predominate. Thus, under these limited circumstances, this Court finds that Plaintiff has satisfied the requirements of C.R.C.P. 23(b)(2).


### III. Conclusion

In sum, for the foregoing reasons, this Court grants Plaintiff's motion to certify the class, as defined in Plaintiff's Proposed Order, pursuant to C.R.C.P. 23(b)(2). Within 90 days of this Ruling, the parties are ordered to identify all remaining issues which they cannot jointly resolve concerning the scope of reformation and the terms of any

potentially reformed policies. Also within 90 days, the parties should notify the Court by motion of any disputes concerning the content or distribution of the notices to be sent to class members.

Done this 7<sup>th</sup> day of Nov., 2005.

BY THE COURT:



Morris W. Sandstead, Jr.  
District Court Judge

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