[Cite as *Cirino v. Ohio Bur. of Worker's Comp.*, 2016-Ohio-8323.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104102

MICHAEL CIRINO, ET AL.

PLAINTIFFS-APPELLEES

vs.

OHIO BUREAU OF WORKERS' COMPENSATION

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; DISMISSED IN PART;
REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-10-727380

BEFORE: E.A. Gallagher, P.J., Boyle, J. and S. Gallagher, J.

RELEASED AND JOURNALIZED: December 22, 2016

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EILEEN A. GALLAGHER, P.J.:

{¶1} This appeal involves a class action filed by plaintiff-appellee Michael Cirino on behalf of himself and other injured workers (collectively, "plaintiffs") who were paid workers' compensation benefits, most on a biweekly basis, through the Ohio Bureau of Workers' Compensation's (the "BWC's") mandatory electronic benefits transfer program (the "EBT program"). Under the EBT program, workers' compensation benefit payments were credited to debit cards issued by JPMorgan Chase Bank, N.A. ("Chase") that the benefit recipients then used to access their benefit payments. Cirino alleges that he and other benefit recipients who received workers' compensation benefits through the EBT program did not receive the full amount of the workers' compensation benefits to which they were entitled because they were assessed various fees by Chase to access their benefit payments using the debit cards. Cirino contends that the BWC's mandatory EBT program and, in particular, the fees that the BWC authorized Chase to charge benefit recipients to access their workers' compensation benefits under the EBT program, violates Article II, Section 35 of the Ohio Constitution and R.C. 4123.341 and 4123.67.

{¶2} The BWC appeals the trial court's denial of its motion to dismiss, its certification of a class under Civ.R. 23(B)(2) and 23(B)(3) and its rulings on summary judgment in favor of Cirino. The BWC contends that the trial court erred in denying its motion to dismiss for lack of subject matter jurisdiction because plaintiffs' claims constitute "legal claims" that can only be brought in the court of claims. The BWC contends that the trial court abused its discretion in certifying the class because (1) Cirino

is not an adequate class representative and his claims are not typical of the claims of the class, (2) certification of the class under Civ.R. 23(B)(2) was improper because plaintiffs seek "a recovery of money that is individualized as to each class member" and (3) certification of the class under Civ.R. 23(B)(3) was improper because "individual issues predominate over common issues." Finally, the BWC contends that the trial court erred in concluding that the BWC's benefit payment practices under the EBT program violates Article II, Section 35 of the Ohio Constitution and R.C. 4123.341 and 4123.67 and in granting Cirino's motion for summary judgment and denying its own motion for summary judgment on that basis.

{¶3} For the reasons that follow, we affirm the trial court's rulings on subject matter jurisdiction and class certification, dismiss the BWC's challenge to the trial court's rulings on summary judgment and remand the matter for further proceedings.

Factual and Procedural Background

The BWC's Obligation to Make Workers' Compensation Benefit Payments

{¶4} The BWC is responsible for the payment of workers' compensation benefits to injured workers who have been awarded benefits for workplace injuries. R.C. 4123.54 et seq. As Mary Manderson, the BWC's EBT coordinator, testified: "That is what our job is, to put the benefits [in the hands of] the injured worker." Pursuant to R.C. 4123.341, the "administrative costs" incurred by the BWC in discharging its duties, including the payment of benefits to claimants awarded workers' compensation benefits ("benefit recipients"), are to be borne by the state and employers. R.C. 4123.341

provides, in relevant part:

> The administrative costs of the industrial commission, the bureau of workers' compensation board of directors, and the bureau of workers' compensation shall be those costs and expenses that are incident to the discharge of the duties and performance of the activities of the industrial commission, the board, and the bureau under this chapter and Chapters 4121., 4125., 4127., 4131., and 4167. of the Revised Code, and all such costs shall be borne by the state and by other employers * * *

The Electronic Benefits Payment Program

{¶5} In or around 1995 or 1996, Ralph Morgan, the BWC's manager of benefits payable, had an idea for a cost-savings initiative. He observed that the BWC had been making benefit payments to benefit recipients who had bank accounts through electronic fund transfers ("EFTs"). These electronic transfers were a fraction of the cost of printing and mailing benefit checks. However, a number of benefit recipients did not have bank accounts into which funds could be electronically transferred. As a result, they still received their benefit payments through paper checks. Many of these recipients incurred substantial check-cashing fees to convert the paper checks into cash that could be used to pay for their living expenses. Morgan queried whether there was a way benefit payments to these benefit recipients could also be made electronically and began exploring whether debit cards could be used to pay benefits to benefit recipients who did not have bank accounts.

{¶6} In 1997, the BWC conducted a pilot program with Bank One for the electronic delivery of workers' compensation benefit payments. Participants were selected randomly and given the option of participating in the pilot program. Under the pilot program, a benefit recipient could have benefit payments deposited directly into his or her bank account or could receive benefits through a Visa debit card credited with the amount of the benefit payments due the benefit recipient. All costs of the pilot program were borne by the BWC, i.e., the BWC paid any bank fees or other fees that would have otherwise been charged to benefit recipients for accessing their benefits using the debit card.[1] The pilot program was a success and, sometime prior to 2000, the BWC decided to implement the program permanently, offering it to all workers' compensation benefit recipients statewide on a voluntary basis.

{¶7} In 2006, the General Assembly enacted R.C. 4123.311, which authorized the BWC to make payments of workers' compensation benefits to benefit recipients through direct deposit of funds by electronic transfer and debit cards. R.C. 4123.311 provides:

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[1]There is no evidence in the record as to whether the fees paid by the BWC under the pilot program were among the "administrative costs" allocated to the state, counties, taxing districts and private employers under R.C. 4123.341. In an affidavit submitted in support of the BWC's motion for summary judgment, discussed *infra*, Tracy Valentino, the BWC's chief fiscal/planning officer, asserted that the BWC does not include "expenses arising from banking or bank-related fees" in the "administrative costs" it allocates to the state, counties, taxing districts and private employers for recoupment under R.C. 4123.341 because "such services are not within the scope of [the BWC's] duties and functions" as set forth in R.C. 5121.121. However, he did not address the costs incurred or fees paid in connection with the pilot program. Once the program became mandatory, there were no such fees to allocate as costs because the BWC was charged nothing by Chase for its role in distributing benefits under the EBT program; all fees assessed in connection with the distribution of workers' compensation benefits under the EBT program were charged to the benefit recipients.

(A) The administrator of workers' compensation may do all of the following:

(1) Utilize direct deposit of funds by electronic transfer for all disbursements the administrator is authorized to pay under this chapter and Chapters 4121., 4127., and 4131. of the Revised Code;

(2) Require any payee to provide a written authorization designating a financial institution and an account number to which a payment made according to division (A)(1) of this section is to be credited, notwithstanding division (B) of section 9.37 of the Revised Code;

(3) Contract with an agent to do both of the following:

(a) Supply debit cards for claimants to access payments made to them pursuant to this chapter and Chapters 4121., 4127., and 4131. of the Revised Code;

(b) Credit the debit cards described in division (A)(3)(a) of this section with the amounts specified by the administrator pursuant to this chapter and Chapters 4121., 4127., and 4131. of the Revised Code by utilizing direct deposit of funds by electronic transfer.

(4) Enter into agreements with financial institutions to credit the debit cards described in division (A)(3)(a) of this section with the amounts specified by the administrator pursuant to this chapter and Chapters 4121., 4127., and 4131. of the Revised Code by utilizing direct deposit of funds by electronic transfer.

(B) The administrator shall inform claimants about the administrator's utilization of direct deposit of funds by electronic transfer under this section and section 9.37 of the Revised Code, furnish debit cards to claimants as appropriate, and provide claimants with instructions regarding use of those debit cards.

(C) The administrator, with the advice and consent of the bureau of workers' compensation board of directors, shall adopt rules in accordance with Chapter 119. of the Revised Code regarding utilization of the direct deposit of funds by electronic transfer under this section and section 9.37 of the Revised Code.

{¶8} Ohio Adm.Code 4123-3-10 was thereafter revised to provide that "[t]he standard method of delivering payment to a claimant or benefit recipient shall be by electronic fund transfer." Ohio Adm.Code 4123-3-10(A)(4). Ohio Adm.Code 4123-3-10(D)(2) provides that "[f]or any compensation paid directly to an injured worker or a dependent, the bureau shall require either an electronic fund transfer into a savings or checking account, or shall issue to the payee an electronic benefits card." The BWC is required to notify benefit recipients that benefits are paid through electronic transfer and to request bank account information from benefit recipients for directly depositing benefit payments. Ohio Adm.Code 4123-3-10(D)(3). If a benefit recipient does not have a bank account or fails to provide the BWC with his or her bank account information, the BWC issues payments electronically to the benefit recipient by debit card. *Id.*

The BWC's Agreement with Chase to Distribute Benefits to EBT Program Participants

{¶9} Pursuant to the authorization provided in R.C. 4123.311(A)(3) and (4), on December 22, 2006, the BWC entered into an agreement with Chase, the Chase Direct Payment Card Program—Agency Service Agreement (the "BWC-Chase agreement"), to distribute benefit payments to benefit recipients under the EBT program.[2] Under the BWC-Chase agreement, Chase established an individual account for each benefit recipient who was to receive workers' compensation benefit payments through the EBT program. As Tracy Dangott, a Chase vice president, explained: "There is an account underlying the card." The card is "simply an access device" that "draws off the balance."

{¶10} The BWC makes electronic transfers to Chase equal to the amount of the benefits payments that are due benefit recipients participating in the EBT program. Chase then credits those funds to the benefit recipients' individual accounts.

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[2]The BWC-Chase agreement was amended in January 2007 and April 2011. However, those amendments are not material to the issues presented here.

{¶11} Tracy Valentino, the BWC's chief fiscal/planning officer, testified that after the BWC transfers funds to Chase, it has "no access or control over the funds except under limited circumstances involving fraud or mistake." Manderson testified that where the BWC determines it has made a payment in error, e.g., where a power of attorney is not honored, a duplicate payment is made or an injured worker is paid by his or her employer for time off, it will submit an EBT reversal, removing the "erroneously deposited" funds from the benefit recipient's account.

{¶12} The BWC-Chase agreement includes an attached fee schedule, setting forth the fees "Chase will charge the Cardholders for its services * * * which Chase may change with reasonable notice to the Cardholder." The fee schedule authorized Chase to charge EBT program participants ten different fees for various banking activities,[3] but benefit recipients could access their benefits without being assessed a fee by (1) using their debit cards at Chase ATM machines, (2) withdrawing their benefits in one teller transaction at a Chase or other participating Visa member bank each month or (3) using their debit card to pay for goods and services at merchants directly.

{¶13} Dangott testified that to access benefits under the EBT program, benefit

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[3]These fees included: fees for debit card withdrawals from non-Chase ATMs ($1.50 per transaction), ATM balance inquiries at non-Chase ATMs ($.50 per transaction), withdrawals from ATMs outside the United States ($3.00 per transaction), two or more teller transactions in a month ($5.00 per transaction after the first monthly teller transaction), converting debit card funds into foreign currencies (3% of the transaction value), transactions denied for insufficient funds ($.50 per transaction), check issuance ($12.50 per request), card replacement (after the second card replacement) ($7.50 per card), overnight delivery service ($25.00 per delivery) and inactivity fees ($1.50 per month).

recipients had to activate the debit cards they received from Chase "which then binds them to the terms and conditions [Chase] put[s] forth to them," including the fee schedule. Dangott testified that, depending on how benefit recipients chose to use their debit cards, "[e]very fee may be avoided."

{¶14} Morgan testified that the BWC "negotiated" the fee schedule "on behalf of the injured worker." Dangott similarly acknowledged that "[t]he amount that [benefit recipients] would pay and for what service they were paying was specifically approved by [the BWC]." Dangott testified that Chase administers prepaid debit card programs for a number of different public sector entities, each with a different fee schedule. He indicated that some public sector entities, such as those involved in the disbursement of unemployment benefits, refuse to allow charges for point-of-sale cash advances through the use of teller transactions at a Chase bank and that cardholders in other public sector programs can withdraw funds from an ATM using the prepaid debit card without a fee. Dangott testified that the BWC is the only public workers' compensation agency for which it manages a prepaid card program.

{¶15} Although Dangott asserted that Chase "offered cardholders multiple no-cost options for accessing the entirety of their payments," Manderson acknowledged that, due to transaction limits and other restrictions on withdrawals, there could be instances in which a benefit recipient could not access all of his or her benefit payments under the EBT program at one time. She indicated that limits or restrictions on withdrawals are determined by the individual banks (in the case of a cash advance) or ATM owners (in the

case of an ATM withdrawal). Dangott acknowledged that, in 2011, Chase instituted an $800 per day limit on its customers' ATM withdrawals, "[r]egardless of [the] institution," as part of an "anti[-]money laundering program."

{¶16} Morgan testified that during the BWC's negotiations with Chase, he objected to the imposition of a $5.00 fee for a second teller transaction in a given month. Because most benefit recipients receive their benefits on a bi-weekly basis, Morgan believed that that fee was "unfair." He testified that he voiced his concerns during the BWC's negotiations with Chase and that, in response, Chase offered to allow benefit recipients to conduct two monthly teller transactions without a fee if the BWC would agree to eliminate the requirement that Chase provide monthly account statements. The BWC refused to eliminate the monthly statement requirement, and the $5.00 fee for a second monthly teller transaction remained until September 2012. In September 2012, the fee schedule was modified to permit benefit recipients to conduct two free teller transactions each month.

Participation in EFT or EBT Program Becomes Mandatory

{¶17} In February 2008, participation in the BWC's electronic payment program using either EFT or EBT became mandatory for all workers' compensation benefit recipients. Flyers were included with benefit recipients' workers' compensation benefit checks advising them that the BWC was converting to electronic payment, that the BWC would no longer offer paper checks as a payment method and that benefit recipients would have a choice of receiving their benefits either through EFT or EBT. If benefit

recipients provided their bank account information, their benefits would be paid by direct deposit without charge into their bank account. Those recipients who did not have a bank account or who did not identify a bank account for direct deposit were issued debit cards. The BWC provided information regarding the benefit recipients to Chase and Chase sent those recipients an enrollment packet. Benefit recipients were not permitted to opt out of the electronic payment program and continue receiving paper checks except in certain extraordinary circumstances where "hardship" was shown.[4] As Morgan acknowledged, there was nothing in the promotional materials benefit recipients received from the BWC that indicated that any fees would be charged when accessing benefits through the EBT program or that advised EBT program participants how fees could be avoided. However, EBT program participants were purportedly provided disclosure statements from Chase that identified the fees associated with each transaction, which benefit recipients could review to determine how to access their benefits to avoid paying any fees.

Cirino's Receipt of Benefits through the EBT Program

{¶18} In 2009, Cirino applied for and began receiving workers' compensation benefits for temporary total disability arising of out a workplace accident. He was

[4] Morgan testified that he receives less than ten requests for a hardship exception each year and makes the determination of whether a benefit recipient qualifies for a hardship exception on a case-by-case basis. He indicated that examples of hardship cases have included benefit recipients who are in a nursing home, are paraplegics or cannot read or write.

awarded $443 in weekly benefits, which were to be paid on an biweekly basis in the amount of $886. After he received two benefit checks from the BWC, which he deposited into his personal checking account at PNC Bank, he received a notice from the BWC advising him that would no longer receive paper checks and that he could either provide his bank account information to set up direct deposit or receive his benefits through a debit card issued by Chase.

{¶19} In August 2009, Cirino received several notices from the BWC and Chase regarding the EBT program. One such notice from the BWC, dated August 20, 2009, stated, in relevant part:

> This may be the last paper check you receive from BWC. For your security and convenience, BWC has established an electronic benefits transfer (EBT) debit card account for you. BWC will make future payments to you through the EBT debit card program. Your EBT debit card is issued through Chase and will arrive soon. The card will give you around-the-clock access to your money at any bank machine. You can also use it like a credit card to make purchases. If you would prefer BWC to deposit your benefits directly to your bank account, please call 1-800-OHIOBWC and listen to the options, or return the completed Direct deposit authorization form shown on page 2. * * *

{¶20} Another notice from the BWC dated August 18, 2009, stated:

> This notice confirms your enrollment in BWC's electronic benefits transfer (EBT) debit card program effective 08/18/2009, Chase bank manages the

program for BWC.

> Fraud Disclaimer/Terms of Usage
> Under the terms of this agreement, deposit of your compensation benefit(s) by BWC or use of your EBT debit card by you constitutes payment of benefits under the provisions of Ohio Revised Code section 4123.67. By receiving the electronic benefit card and attempting payments by this method, you agree that you are entitled to the benefits. You also agree to notify BWC should you become employed or otherwise ineligible to receive these benefits.

If you have any questions or would prefer to have BWC deposit your benefit payments directly to your bank account, please call 1-800-OHIOBWC, and listen to the options. BWC will no longer issue paper checks as a payment method.

{¶21} Cirino also received a flyer from the BWC for its electronic benefit card, which stated, in relevant part:

> **Now you can have quick, easy access to your workers' compensation benefits thanks to the Electronic Benefit Card, issued by the Ohio Bureau of Workers' Compensation (BWC) and Chase. The Electronic Benefit Card is available to all benefit recipients who receive payment(s) from BWC.**
>
> Why you should receive the Electronic Benefit Card?
> *Why shouldn't you?*
> 1. Pay no more check cashing fees! Receive 100 percent of your benefit.
> 2. Receive around-the-clock access to your money. You can use the Electronic Benefit Card at any bank machine, anywhere (with no ATM fees if used at Chase machines).
> 3. Make bill payments by phone.
> 4. Use it like a credit card for making purchases (only without the costly finance charges).
>
> You don't need to have a bank account.
> Chase issues your Electronic Benefit Card, which will directly access your

> BWC account. You will receive a personal identification number (PIN) when you call to activate your card, which ensures that only you can access your money. It is safer than carrying cash, and replacing a lost or stolen card is quick and easy.
>
> It's easy to receive. Just complete the attached, postage-paid form and mail it to BWC. * * *
>
> To receive.
> Carefully read and sign the Electronic Benefit Card agreement and provide your claim number. * * *

(Emphasis sic.) It further provided that there was "[n]o monthly or annual fee."

{¶22} The flyer included a detachable postage paid "enrollment card" with an "Electronic Benefit Card agreement" benefit recipients were asked to sign, which stated, in relevant part:

> This authorization shall remain in full force and effect until BWC has received notification from me of its termination or until there is no account or payment activity for six months; after which this authorization will be terminated and all future payments will be delivered by check to the last known address; or until an authorization is received by BWC.[5]
>
> I agree that under the terms of this agreement, deposit of my compensation payment(s) to this account constitutes payment to me under the provisions of the Ohio Revised Code (ORC) Section 4123.67. * * *

Cirino did not recall whether he ever signed the electronic benefit card agreement. Morgan testified that after the electronic payment program became mandatory, benefit

[5]Although the enrollment card suggests that checks would be issued if a benefit recipient terminated his or her authorization under the EBT program or there was "no account or payment activity for six months," Manderson testified that "[e]lectronic payment is mandatory" and that "[y]ou can't get a check."

recipients received an EBT card whether or not they returned the enrollment card or signed the electronic benefit card agreement if they did not provide bank account information for direct deposit.

{¶23} Cirino testified that, although he had a bank account, he did not wish to disclose his personal banking account information to the BWC or any third party and, therefore, did not authorize the direct deposit of his benefit payments into his bank account. Shortly after he received the August 20, 2009 letter from the BWC, Cirino testified that he was sent a Chase debit card to be used to access the workers' compensation benefits he was paid by the BWC. Cirino testified that prior to his receipt of the Chase debit card, he had never used an ATM card or debit card. Cirino claims that did not know he would be assessed fees for accessing benefits before he used the card and claimed that he never had never seen a Chase fee schedule until his deposition.

{¶24} Cirino testified that after he activated the card, he went to a local Chase branch, gave the teller the debit card and his driver's license and asked to withdraw his biweekly benefit of $886. He received $886 in cash. The second time he attempted to withdraw his biweekly $886 benefit through a teller transaction, his request was denied. Cirino called the number on the back of the debit card and was informed that the balance of his account was $881. When he went back to the teller and attempted to withdraw the $881 balance in his account, the teller informed him that she could not conduct the transaction and that he would have to go to another branch to withdraw the funds because only one attempted account withdrawal could be made at a branch in a single day.

Cirino went to another branch and withdrew the $881 in another teller transaction.

{¶25} Cirino testified that he later learned from his attorney that under the EBT program, he was limited to one free teller transaction a month and that for every subsequent teller transaction each month, Chase would assess him a $5 fee.[6] Despite this knowledge, Cirino continued withdraw his benefit payments on a bi-monthly basis through teller transactions, incurring a $5 fee with each second monthly teller transaction. Cirino accessed his benefits only through teller transactions; he did not use his debit card at any ATMs, to make purchases at merchants or in any other way. According to Chase's records, between September 23, 2009 and October 23, 2010, Cirino was assessed a $5 "POS Cash Advanc[e]" charge on 14 occasions, totaling $70 in fees. As of his deposition in May 2012, Cirino estimated that he had been charged approximately $150 or $160 in fees to access his benefit payments twice a month through teller transactions. Cirino does not dispute that he could have avoided all fees by (1) authorizing the direct deposit of his benefit payments into his bank account, (2) withdrawing all of his benefits from Chase ATMs or (3) waiting to withdraw his two bi-monthly payments in a single monthly teller transaction.

The Costs of Distributing Benefits under the Mandatory EBT Program

{¶26} Manderson testified that the goal of the EFT/EBT program was "[t]o cut

[6]Chase ultimately refunded Cirino the first $5 fee he was assessed for a second monthly teller transaction purportedly as a "one-time courtesy."

down the costs of producing checks." She explained that prior to implementation of the mandatory EFT/EBT program, the BWC had incurred various administrative costs in purchasing checks, printing checks and mailing checks that it no longer incurred once the mandatory EFT/EBT program was implemented. Chase charged the BWC nothing for administering the EBT program on its behalf. Dangott testified that Chase was compensated for its services through the fees it charged EBT cardholders, interest earned on account balances and interchange fees paid by merchants when the debit cards were used to purchase goods or services. Chase retained all of the fees it collected from debit card transactions under the EBT program; the BWC received no portion of the funds withheld to pay for the fees charged by Chase.

{¶27} The BWC projected over $4.6 million in annual costs savings under the electronic payment program. From June 2007 through February 2012, Chase collected $1.47 million in fees from benefit recipients through EBT transactions.

Legal Action

{¶28} On May 21, 2010, Cirino filed a class action complaint against the BWC, challenging the validity of the EBT program and asserting claims for (1) "statutory violation" of R.C. 4123.341 and 4123.67, (2) "restitution/unjust enrichment/equitable disgorgement and injunctive relief" and (3) "declaratory relief." Cirino requested that a class be certified and that he and the other class members be awarded "equitable restitution," "disgorgement" and "restoration" of the benefits that were allegedly wrongfully withheld from their benefit payments along with attorney fees, litigation expenses and court costs. Cirino also requested a declaration (1) that the BWC's

"continuing practices" of withholding fees from his and other class members' benefit payments under the EBT program violated the BWC's "authority provided under Ohio statutory laws," (2) that such practices are "unlawful and unenforceable" against the class and (3) "establishing the restitution and remedies that are due." Cirino also claimed that the class was entitled to "preliminary and permanent injunctive relief" enjoining the BWC and others acting in concert with it from engaging in such practices.

{¶29} The BWC filed an answer denying that it had engaged in any wrongdoing and asserting a laundry list of affirmative defenses. On December 23, 2010, the BWC filed a motion to dismiss Cirino's complaint for lack of subject matter jurisdiction, asserting that because "none of the disputed funds are collected or held by [the BWC]," Cirino was really seeking "legal damages" and his lawsuit, therefore, belonged in the court of claims. In support of its motion, the BWC attached: an affidavit from Morgan explaining the EBT program and the BWC and Chase's roles in the distribution of workers' compensation benefits under the EBT program; a copy of the BWC-Chase agreement and an affidavit from John Guzzi, vice-president and assistant general counsel at J.P. Morgan Electronic Financial Services, Inc., attaching documentation prepared by Chase explaining the use of the EBT debit card (including an illegible "direct payment card disclosure statement and user agreement")[7] and account statements and printouts of

[7]It is not clear from the record whether any of the Chase documents attached to Guzzi's affidavit, explaining the use of the EBT debit card were, in fact, provided to Cirino. Guzzi's affidavit does not state that these documents were provided to Cirino or when these documents were used by Chase and there is no other evidence in the record as to when these documents were used by Chase or during what period of time they were provided to EBT program participants.

computer screen entries pertaining to transactions involving Cirino's account. Cirino opposed the motion, asserting that because the complaint seeks only equitable, declaratory and injunctive relief and does not seek an award of "damages" against the BWC, his complaint was within the subject matter jurisdiction of the common pleas court.

On March 12, 2012, the trial court denied the motion, concluding that Cirino's claims were purely equitable in nature and that it, therefore, had subject matter jurisdiction over such claims. The court found that Chase was the BWC's agent for the payment of benefits and that because "money in an agent's possession is imputed to its principal's possession," Cirino's claim for "the return of specific funds wrongfully collected or held by the state" was brought in equity notwithstanding that he was seeking reimbursement of fees that were collected by Chase.

{¶30} Five months later, Cirino filed a motion for class certification, requesting that the following class be certified under Civ.R. 23(B)(2) and 23(B)(3):

> All current and former participants in the Ohio Workers' Compensation system who were assessed fees under authority of the Chase Direct Payment Card Program—Agency Service Agreement that was approved by Defendant, Ohio Bureau of Workers' Compensation, and dated December 22, 2006, as amended.

The following were excluded from the proposed class:

> all of Defendant's officers, employees, and attorneys, the attorneys representing the Named Plaintiff and members of the Class, and any judge assigned to this case as well as his/her staff and family members.[8]

[8]Also excluded were "any claims arising prior to May 21, 2000 that could be barred by the ten-year statute of limitations governing equitable actions."

{¶31} In support of his motion, Cirino attached copies of several Chase spreadsheets, the BWC-Chase agreement as amended, promotional materials from the BWC and Chase related to the EBT direct payment card and excerpts from the depositions of Cirino, Morgan, Manderson and Dangott. The BWC also filed a motion for summary judgment, arguing that Cirino's claims were "unsupported and unsupportable as a matter of law." The BWC asserted that, based on the undisputed facts, the EBT program complied fully with the relevant statutes and regulations and that Cirino's unjust enrichment claim failed because the BWC never charged, collected or benefitted from the $5 fees Chase charged Cirino. The BWC also contended that because Cirino admitted he could have avoided the $5 fees by having his benefit payments directly deposited into his bank account, his failure to mitigate his damages barred any recovery. The BWC argued that because Cirino could not prevail on his substantive statutory violation and unjust enrichment claims, his request for declaratory judgment must also be denied.

{¶32} In support of its motion, the BWC attached: the BWC-Chase agreement; affidavits from Morgan and Valentino explaining the history of the EBT program, the respective roles of the BWC and Chase in the distribution of workers' compensation benefits under the BWC-Chase agreement and the BWC's interpretation of "administrative costs"; an affidavit from Thomas Sico, assistant general counsel for the BWC, relating to the public hearing on Ohio Adm.Code 4123-3-10, and excerpts from the depositions of Cirino and Dangott.

{¶33} On September 17, 2012, Cirino filed a combined opposition to the BWC's motion for summary judgment and his own cross-motion for summary judgment. Cirino argued that, based on the undisputed material facts, the trial court should issue a declaration (1) that the EBT program is unlawful to the extent that it shifts the administrative costs of distributing workers' compensation benefits to benefit recipients in violation of Article II, Section 35 of the Ohio Constitution and R.C. 4123.341 and 4123.67 and (2) that plaintiffs are "entitled to a payment of benefits from the [BWC] equal to the fees that were withdrawn by Chase." Cirino also argued that plaintiffs were entitled to "[a]ppropriate equitable relief" restoring them to the "status quo ante they held before the charges were assessed" and injunctive relief precluding the continued withholding of fees from benefit recipients' workers' compensation benefit payments.

{¶34} The BWC opposed Cirino's motions for class certification and summary judgment. In its opposition to Cirino's motion for class certification, the BWC once again argued that the trial court lacked subject matter jurisdiction over Cirino's claims and, therefore, was "without power" to certify a class. The BWC also argued that (1) Cirino could not meet Civ.R. 23(A)'s typicality and adequacy requirements, (2) certification under Civ.R. 23(B)(2) was inappropriate because the predominant relief sought was monetary relief and that each class member, assuming liability, would be entitled to an individualized damage award and (3) certification under Civ.R. 23(B)(3) was improper because Cirino could not establish an injury in fact to all class members and had failed to show that common questions of law and fact predominated over the

individualized issues presented by the BWC's defenses. In support of its opposition, the BWC attached: excerpts from the depositions of Manderson, Cirino and Dangott; copies of the Morgan and Valentino affidavits it submitted with its summary judgment motion; an affidavit from Dangott identifying the sources of Chase's compensation under the EBT program and an affidavit from Cheryl Belgrave, an employee of Cavitch, Familo & Durkin Co., L.P.A., attaching documents she downloaded from various websites regarding "unbanked" and "underbanked" households. In its opposition to Cirino's motion for summary judgment, the BWC reiterated the arguments it made in its own motion for summary judgment and its opposition to Cirino's motion for class certification.

{¶35} On October 21, 2014, the trial court held a hearing on class certification. The parties waived the presentation of evidence at the hearing and stipulated that the trial court could consider all evidence submitted by the parties on summary judgment in deciding the issue of class certification.[9] On January 13, 2016, the trial court found that all requirements for class certification had been met and certified the following plaintiff class under Civ.R. 23(B)(2) and 23(B)(3):

> All current and former participants in the Ohio Workers' Compensation system who were assessed unreasonable fees under authority of the Chase Direct Payment Card Program—Agency Service Agreement that was approved by Defendant, Ohio Bureau of Workers' Compensation, and dated

[9]The trial court's January 27, 2015 order suggests that other stipulations were entered into by the parties relative to the class certification motion; however, the transcript from the class certification hearing is not in the record and there is nothing else in the record that appears to set forth these stipulations.

December 22, 2006, and as amended.[10]

{¶36} The trial court further held that "the claims of the class" would consist of (1) claims for "restitution, unjust enrichment, disgorgement, and injunctive relief" and (2) "a declaratory judgment establishing that BWC's practices are unlawful and unenforceable" but would not include "the complaint's prayor [sic] for injunctive relief."[11] The trial court ordered that the BWC produce a class list, including the types of fees and total amount of each fee charged to each and that the parties submit a proposed class notice to the court.

{¶37} In a separate judgment entry, the trial court denied the BWC's motion for summary judgment and granted Cirino's motion for summary judgment, holding that the BWC violated "state constitutional policy" and R.C. 4123.341 by shifting administrative costs of benefit payments to EBT benefit recipients and violated R.C. 4123.67 by "permit[ting] unlawful attachment of claimants' benefits by Chase to pay transaction

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[10]It is unclear from the trial court's judgment entry why it modified the class definition so as to limit the class to benefit recipients who were assessed "unreasonable" or what fees the trial court considered to be an "unreasonable" fee "With regard to class definition, the trial court has discretion to modify the class, even sua sponte." *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255, 20 N.E.3d 732, ¶ 3 (7th Dist.). Because neither party has claimed any error related to the trial court's definition of the class, we do not address that issue further here.

[11]It is unclear what the trial court meant by its statement that "[t]he class claims will not include the complaint's prayor [sic] for injunctive relief," particularly given that it expressly included the complaint's claim for "injunctive relief" among the "claims of the class." With respect to plaintiffs' claim for injunctive relief, the complaint's prayer requests only that the trial court award "such declaratory, injunctive, and other equitable relief as is just and appropriate[.]" Once again, because neither party has claimed any error related to this apparent discrepancy, we do not address the issue further here.

fees." The trial court also held that "[e]ach of the theories advanced by Cirino" — equitable restitution, unjust enrichment and disgorgement — "is a valid basis under Ohio law to require BWC to * * * restore the part of those benefits deducted by Chase" and stated that "[t]he amount of unpaid benefits, i.e., bank fees deducted from * * * benefits, shall be calculated after hearing" for all members of the class. The court set a date for the hearing and included Civ.R. 54(B) language in the judgment entry, indicating that there was "no just reason for delay should an interlocutory appeal of this order be pursued."

{¶38} The BWC appealed, raising the following three assignments of error for review:

> Assignment of Error I:
> The trial court erred in denying the motion of Defendant-Appellant Ohio Bureau of Workers' Compensation (the "Bureau") to dismiss for lack of subject-matter jurisdiction.
>
> Assignment of Error II:
> The trial court erred in granting the motion of Plaintiff-Appellee Michael Cirino ("Plaintiff" or "Cirino") for class certification.
>
> Assignment of Error III:
> The trial court erred in granting Cirino's motion for summary judgment and in denying the Bureau's motion for summary judgment.

Law and Analysis

Subject Matter Jurisdiction

{¶39} We first address the BWC's claim that the trial court lacks subject matter jurisdiction to hear this matter. In both its first and second assignments of error, the BWC challenges the trial court's subject matter jurisdiction. In its first assignment of

error, the BWC asserts that the trial court erred in denying its motion to dismiss for lack of subject matter jurisdiction. In its second assignment of error, the BWC raises lack of subject matter jurisdiction as one of the bases upon which the trial court allegedly erred in certifying the class.

{¶40} An appellate court can review only final, appealable orders. Without a final, appealable order, an appellate court has no jurisdiction. *See Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 9; Ohio Constitution, Article IV, Section 3(B)(2); R.C. 2501.02. An order denying a motion to dismiss is generally not a final, appealable order. *See, e.g., DiGiorgio v. Cleveland*, 196 Ohio App.3d 575, 2011-Ohio-5824, 964 N.E.2d 495, ¶ 4, citing *Polikoff v. Adam*, 67 Ohio St.3d 100, 103, 616 N.E.2d 213 (1993). This rule applies "with equal force" to motions that challenge a court's subject matter jurisdiction. *See, e.g., Cantie v. Hillside Plaza*, 8th Dist. Cuyahoga No. 99850, 2014-Ohio-822, ¶ 24; *Matteo v. Principe*, 8th Dist. Cuyahoga No. 92894, 2010-Ohio-1204, ¶ 21.

{¶41} Although we would otherwise lack jurisdiction to consider the trial court's denial of the BWC's motion to dismiss for lack of subject matter jurisdiction as raised in the BWC's first assignment of error, we can properly consider the issue in the context of the BWC's second assignment of error because it is intertwined with our review of the trial court's decision to certify this case as a class action — which is a final appealable order under R.C. 2505.02(B)(5).

{¶42} "The court's power to certify a class action is * * * limited to the extent of

its jurisdiction. If the court lacks subject matter jurisdiction to hear the case, it also lacks authority to certify the case as a class action." *Lingo v. State*, 8th Dist. Cuyahoga No. 97537, 2012-Ohio-2391, ¶ 15-16 (finding the trial court abused its discretion in certifying class action because it lacked jurisdiction to hear the case), *aff'd on other grounds*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, and, *overruled in part on other grounds, Lycan v. Cleveland*, 146 Ohio St.3d 29, 2016-Ohio-422, 51 N.E.3d 593; *see also Intl. Union of Operating Engineers, Local 18 v. Norris Bros. Co.*, 8th Dist. Cuyahoga No. 101353, 2015-Ohio-1140, ¶ 10, fn. 1 (subject matter jurisdiction could be considered on appeal notwithstanding that trial court's denial of motion to dismiss for lack of subject matter jurisdiction was not a final appealable order where it was "intertwined with" the trial court's granting of petition to enforce arbitration, which is a final appealable order).

{¶43} "'Subject-matter jurisdiction is the power conferred on a court to decide a particular matter on its merits and render an enforceable judgment over the action.'" *ABN AMRO Mtge. Group, Inc. v. Evans*, 8th Dist. Cuyahoga No. 96120, 2011-Ohio-5654, ¶ 5, quoting *Udelson v. Udelson*, 8th Dist. Cuyahoga No. 92717, 2009-Ohio-6462, ¶ 13. Where subject matter jurisdiction is challenged, the burden of establishing subject matter jurisdiction rests with the party asserting subject matter jurisdiction. *See, e.g., Marysville Exempted Village School Dist. Bd. of Edn. v. Union Cty. Bd. of Revision*, 136 Ohio St.3d 146, 2013-Ohio-3077, 991 N.E.2d 1134, ¶ 10 ("'when jurisdictional facts are challenged, the party claiming jurisdiction bears the burden of demonstrating that the court has jurisdiction over the subject matter'"), quoting *Ohio Natl. Life Ins. Co. v. United*

States, 922 F.2d 320, 324 (6th Cir.1990); *O'Shea v. Fayard*, 8th Dist. Cuyahoga No. 81791, 2003-Ohio-4340, ¶ 6 ("When subject matter jurisdiction is challenged, the plaintiff has the burden of proving that the chosen court has jurisdiction.").

{¶44} When determining whether subject matter jurisdiction exists, a court may consider any pertinent evidentiary materials. *See, e.g., Southgate Dev. Corp. v. Columbia Gas Transm. Corp.*, 48 Ohio St.2d 211, 214, 358 N.E.2d 526 (1976); *Muhammad v. Ohio Civ. Rights Comm.*, 8th Dist. Cuyahoga No. 99327, 2013-Ohio-3730, ¶ 17; *Zhelezny v. Olesh*, 10th Dist. Franklin No. 12AP-681, 2013-Ohio-4337, ¶ 10. We review a trial court's determination of subject matter jurisdiction de novo. *ABN AMRO Mtge. Group, Inc.* at ¶ 5.

{¶45} Cirino seeks declaratory and injunctive relief and what he characterizes as "equitable restitution." The BWC contends that the restitution sought by Cirino is actually a claim at law for money damages, i.e., a legal remedy over which the court of claims has exclusive jurisdiction, and that the trial court, therefore, erred as a matter of law in determining that it had subject matter jurisdiction over the case.

{¶46} R.C. 2743.03 established the court of claims, granting it "exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code." R.C. 2743.03(A)(1). Thus, claims seeking legal relief from the state as permitted by the statutory waiver of immunity fall within the exclusive jurisdiction of the court of claims. *Id.*; *see also Measles v. Indus. Comm. of Ohio*, 128 Ohio St.3d 458, 2011-Ohio-1523, 946 N.E.2d 204, ¶ 7 (The court of

claims "has exclusive jurisdiction over civil actions against the state for money damages that sound in law."), citing R.C. 2743.02 and 2743.03.

{¶47} R.C. Chapter 2743 does not, however, divest other courts of jurisdiction "to hear and determine a civil action in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief." *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, ¶ 9; R.C. 2743.03(A)(2). A suit seeking only declaratory, injunctive or other equitable relief may be brought against the state in the court of common pleas. R.C. 2743.03(A)(1). Where claims for damages are coupled with claims for injunctive, declaratory or other equitable relief, however, all of the claims are within the exclusive, original jurisdiction of the court of claims. R.C. 2743.03(A)(2). Thus, whether the trial court has subject matter jurisdiction in this case turns on whether Cirino's restitution claim is equitable or legal in nature. *Measles* at ¶ 8.

{¶48} Simply because Cirino characterizes the relief he seeks as being equitable in nature, does not mean it is so. *Morning View Care Ctr.-Fulton v. Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 04AP-57, 2004-Ohio-6073, ¶ 24 ("'At times, creative pleading may obscure the conceptual line between damages for loss sustained and claims for a specific form of relief.'"), quoting *Zelenak v. Indus. Comm.*, 148 Ohio App.3d 589, 2002-Ohio-3887, 774 N.E.2d 769, ¶ 15 (10th Dist.). "Regardless of how an action is labeled, the substance of the party's arguments and the type of relief requested determine the nature of the action." *Lingo v. State*, 138 Ohio St.3d 427,

2014-Ohio-1052, 7 N.E.3d 1188, ¶ 38; *see also Measles* at ¶ 8 (indicating that the "chief factors" in deciding whether a restitution claim sounds in equity or in law are "'the basis for the plaintiff's claim and the nature of the underlying remedies sought'"), quoting *Christino v. Ohio Bur. of Workers' Comp.*, 118 Ohio St.3d 151, 2008-Ohio-2013, 886 N.E.2d 857, ¶ 7.

{¶49} Not every claim for monetary relief constitutes a legal claim for money damages. *Interim HealthCare of Columbus, Inc. v. State Dept. of Adm. Servs.*, 10th Dist. Franklin No. 07AP-747, 2008-Ohio-2286, ¶ 15-16 ("A specific remedy, seeking reimbursement of the compensation allegedly denied, is not transformed into a claim for damages simply because it involves the payment of money."). "Even when the relief sought consists of the state's ultimately paying money, a cause of action will sound in equity if 'money damages' is not the essence of the claim." *Id.* at ¶ 15, citing *Ohio Academy of Nursing Homes v. Ohio Dept. of Job & Family Servs.*, 114 Ohio St.3d 14, 2007-Ohio-2620, 867 N.E.2d 400, ¶ 15.

{¶50} "Unlike a claim for money damages where a plaintiff recovers damages to compensate, or substitute, for a suffered loss, equitable remedies are not substitute remedies, but an attempt to give the plaintiff the very thing to which it was entitled." *Interim HealthCare* at ¶ 15, citing *Santos*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, at ¶ 14. "If the essence of a claim is * * * restitution for the state's unjust enrichment by withholding funds to which a worker had a statutory right, then the ultimate relief sought is equitable restitution." *Measles* at ¶ 9, citing *Ohio Academy of*

Nursing Homes at ¶ 15-19; *see also Morning View Care Ctr.-Fulton* at ¶ 25 ("When equitable relief is sought, 'the relief sought is the very thing to which the claimant is entitled under the statutory provision supporting the claim,' and the specific remedy 'is not transformed into a claim for damages simply because it involves the payment of money."), quoting *Zelenak*, 148 Ohio App.3d 589, 2002-Ohio-3887, 774 N.E.2d 769, at ¶ 18.

{¶51} "[A] claim that seeks to require a state agency to pay amounts it should have paid all along is a claim for equitable relief, not monetary damages." *Interim HealthCare* at ¶ 17, citing *Zelenak* at ¶ 19. If, on the other hand, a plaintiff "cannot assert title or right to possession of particular property," but he or she may, nevertheless, "be able to show just grounds for recovering money to compensate for some benefit the defendant has received from [the plaintiff]," the claim, however denominated by the plaintiff, is a treated as a claim for a legal remedy. *Interim HealthCare* at ¶ 17.

{¶52} Relying on the Ohio Supreme Court's decision in *Santos*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, the BWC maintains that Cirino's claim must be regarded as a claim for legal restitution within the exclusive jurisdiction of the court of claims because it was Chase — and not the BWC — that allegedly wrongfully withheld part of Cirino's workers' compensation benefits and because the BWC "is not holding, and thus cannot disgorge, funds from any fees Chase charged."

{¶53} In *Santos*, the Ohio Supreme Court considered whether the common pleas court had subject matter jurisdiction over a restitution claim brought by injured workers

who sought to recover funds the BWC had collected pursuant to a subrogation statute that was later declared unconstitutional. *Santos,* 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, at ¶ 3-8. The court looked to the United States Supreme Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), for "guidance" in differentiating between restitution claims sounding in law and those sounding in equity as follows:

> Restitution is available as a *legal* remedy when a plaintiff cannot "'assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him.'" [*Great-West* at 213], quoting Dobbs, *Law of Remedies* Section 4.2(1), 571 (2d Ed.1993). Restitution is available as an *equitable* remedy "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* "Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214, 122 S.Ct. 708, 151 L.Ed.2d 635.

(Emphasis sic.) *Santos* at ¶ 13. Because the plaintiffs sought repayment of specific funds wrongfully collected and held by the state, the court concluded that their claim sounded in equity and could be heard by the courts of common pleas. *Id.* at ¶ 17. As the court explained:

> This court held * * * that the workers' compensation subrogation statute was unconstitutional. Accordingly, any collection or retention of moneys collected under the statute by the BWC was wrongful. The action * * * is not a civil suit for money damages but rather an action to correct the unjust enrichment of the BWC. A suit that seeks the return of specific funds wrongfully collected or held by the state is brought in equity. Thus, a court of common pleas may properly exercise jurisdiction over the matter as provided in R.C. 2743.03(A)(2).

Santos at ¶ 17. The *Santos* court cited its prior decision in *Ohio Hosp. Assn. v. Ohio Dept. of Human Servs.*, 62 Ohio St.3d 97, 579 N.E.2d 695 (1991), as support for the proposition that "equitable restitution may include the recovery of funds wrongfully held by another." *Santos* at ¶ 14.

{¶54} In *Ohio Hosp. Assn.*, the Ohio Supreme Court held that reimbursement of Medicaid providers for amounts unlawfully withheld pursuant to invalid administrative rules improperly promulgated by the Ohio Department of Human Services was "not an award of money damages, but equitable relief." *Ohio Hosp. Assn.* at 104-105. The court relied on the United States Supreme Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.E.2d 749 (1988) (which, in turn, quoted extensively from *Maryland Dept. of Human Resources v. Dept. of Health & Human Servs.*, 763 F.2d 1441 (D.C.Cir.1985)), explaining its reasoning as follows:

> "'* * * Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." D. Dobbs, *Handbook on the Law of Remedies* 135 (1973). Thus, while in many instances an award of money is an award of damages, "[o]ccasionally a money award is also a specie remedy." *Id.* * * *
>
> In the present case, Maryland is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be, that Maryland will suffer or has suffered by virtue of the withholding of those funds. If the program in this case involved in-kind benefits this would be altogether evident. The fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the states (and then, in the form of services, to program beneficiaries) cannot transform the nature of the relief sought — specific relief, not relief in the form of damages. * * *'"
>
> * * *

> We find this distinction applicable to this suit. The reimbursement of monies withheld pursuant to an invalid administrative rule is equitable relief, not money damages, and is consequently not barred by sovereign immunity.

Ohio Hosp. Assn. at 105, quoting *Bowen* at 895, quoting *Maryland Dept. of Human Resources* at 1446.

{¶55} Other cases have similarly recognized that where a state agency collects money to which it is not entitled or fails to pay amounts it should have paid, an action to recover those funds is considered a claim for equitable restitution. *See, e.g., Interim HealthCare*, 2008-Ohio-2286, at ¶ 17 ("Cases in which a plaintiff claims a state agency has wrongfully collected certain funds are characterized generally as claims for equitable restitution."), citing *Morning View Care Ctr.-Fulton*, 2004-Ohio-6073, at ¶ 19; *Dunlop v. Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 11AP-929, 2012-Ohio-1378, ¶13-16 (claim for reimbursement of child support payments that child support agency allegedly wrongly collected in excess of child support payments ordered by the common pleas court was a claim for equitable restitution even though agency thereafter distributed most of the money collected to the child support obligee, the state and the federal government); *San Allen v. Buehner*, 8th Dist. Cuyahoga No. 99786, 2014-Ohio-2071 (employers' claim against the BWC for the return of portions of workers' compensation premiums that exceeded the premiums employers should have been charged was a claim for equitable restitution); *Keller v. Dailey*, 124 Ohio App.3d 298, 303-304, 706 N.E.2d 28 (10th Dist.1997) (plaintiff's claim for unpaid overtime compensation was an equitable

claim because plaintiff sought "the very thing to which she is allegedly entitled" under the Fair Labor Standards Act); *Henley Health Care v. Ohio Bur. of Workers' Comp.*, 10th Dist. Franklin No. 94 APE08-1216, 1995 Ohio App. LEXIS 715 (Feb. 23, 1995) (healthcare company's claims, which sought reimbursement of money withheld pursuant to allegedly invalid rules, were equitable in nature and not a request for money damages). *Compare Measles*, 128 Ohio St.3d 458, 2011-Ohio-1523, 946 N.E.2d 204 (injured workers' restitution claim to recover funds allegedly wrongfully withheld after the workers applied for, and the BWC approved, a lump sum advancement of permanent total disability benefits they had been awarded was a claim for money due under a contract, i.e., an action in law disputing the effect of the lump sum advancement agreement the workers had entered into with the state, that must be pursued in the court of claims); *Zelenak*, 148 Ohio App.3d 589, 2002-Ohio-3887, 774 N.E.2d 769, at ¶ 24-25 (claim for interest on total temporary disability compensation withheld or recovered as overpayments but later reimbursed was a claim for monetary damages over which the common pleas court lacked subject matter jurisdiction).

{¶56} Under the EBT program, rather than deliver benefits directly to Cirino, the BWC transferred his benefits to Chase for placement on an EBT debit card and then authorized Chase to charge Cirino certain fees to access those benefits. The BWC asserts that it "fulfills its statutory duty" by "transferring [claimants' benefits] to Chase pursuant to the Chase agreement" and claims that the fees Chase charges are simply "part of the normal banking relationship between Chase and its customers," "unrelated to the

distribution of workers' compensation benefits," because they are assessed only if a benefit recipient chooses to access his or her benefits in certain ways. However, the BWC's claims are belied by statute.

{¶57} R.C. 4123.67 expressly provides that, except in limited circumstances not applicable here, workers' compensation benefits "shall be paid only to the employees or their dependents." There is no evidence that Cirino authorized Chase to receive his workers' compensation benefits on his behalf and then distribute them to him only on such terms as were set forth in either the BWC-Chase agreement or the Chase debit card agreement. Although the BWC's enrollment cards for the EBT program included a statement that "[u]nder the terms of this agreement, deposit of your compensation benefit(s) by BWC or use of your EBT debit card by you constitutes payment of benefits under the provisions of Ohio Revised Code section 4123.67," there is no evidence Cirino ever completed an enrollment card or otherwise executed an electronic benefit card agreement, and the BWC readily admits that it issued EBT cards to all benefit recipients who did not provide bank account information regardless of whether they completed an enrollment card or executed an electronic benefit card agreement.

{¶58} Reasoning that "money in an agent's possession is imputed to its principal's possession" and because Cirino's claim was for "the return of specific funds wrongfully collected or held by the state," the trial court held that Cirino's restitution claim was brought in equity notwithstanding that he was seeking reimbursement of fees that were charged and collected by Chase. We agree that Cirino's claim is for equitable

restitution.

{¶59} The BWC disputes the trial court's finding that Chase is its "agent" for the distribution of benefits. However, if Chase were not its agent for that purpose, given that the BWC is expressly prohibited from paying benefits to anyone other than "employees or their dependents," the BWC would appear to run afoul of not only R.C. 4123.311, which authorized the BWC to "[c]ontract with an *agent*" to (1) "[s]upply debit cards for claimants to access payments made to them" and (2) "[c]redit the debit cards * * * with the amounts specified by the administrator," but also R.C. 4123.67. *See* R.C. 4123.67 ("compensation before payment shall be exempt from all claims of creditors and from any attachment or execution, and *shall be paid only to the employees or their dependents*"). (Emphasis added.)[12]

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[12]The BWC contends that Chase could not have been its agent for the distribution of workers' compensation benefits because their relationship did not satisfy the six "requisite factors" for determining whether an agency relationship exists enumerated by the Ohio Supreme Court in *Hanson v. Kynast*, 24 Ohio St.3d 171, 484 N.E.2d 1091 (1986). Specifically, the BWC argues that Chase could not be the BWC's "agent for the payment of benefits" because (1) Chase is not performing services that arise in the normal course of the BWC's business, (2) the BWC "does not compensate Chase for maintaining claimants' accounts," (3) the BWC "does not provide * * * any tools, offices, branches, or any other material assistance to further the administration of claimants' accounts," (4) Chase "officers its banking services to the public at-large and does not work exclusively for [the BWC]," (5) the relationship between Chase and the BWC is governed by contract and there is "no right for immediate termination" and (6) the BWC had "no right of control over Chase" under the BWC-Chase Agreement. However, many of the "*Hanson* factors" identified by the BWC are not relevant to the determination here. Indeed, even in *Hanson,* the court considered only three applicable factors in determining whether an agency relationship existed between Ashland University and one of its lacrosse players while playing in a lacrosse game. *Hanson* at 175-176 & fn.5.

Furthermore, the BWC's argument ignores not only the express language of the statute but also the fact that there are both general agency relationships and agency relationships for a limited purpose. *See, e.g., Ish v. Crane*, 13 Ohio St. 574, 582 (1862) ("[A]n agency * * * may be either special, general, or universal. It may be to make a particular contract, to buy or sell certain specified

{¶60} Cirino is seeking the balance of the full workers' compensation benefit payments he claims he should have received from the BWC pursuant to his workers' compensation award but did not receive due to the manner in which the BWC distributed workers' compensation benefits under the EBT program. Although the remedy Cirino seeks includes monetary relief, it is not monetary damages as a "substitute" for losses he suffered as a result of the BWC's implementation of the EBT program. He seeks to recover the specific funds he claims were wrongfully withheld from his benefit payments due to the BWC's alleged violation of Article II, Section 35 of the Ohio Constitution and R.C. 4123.341 and 4123.67 when distributing benefits under the EBT program, i.e., "payment of specific funds of a determined amount to which a statute [and his workers' compensation award] entitled [him]." *Morning View Care Ctr.-Fulton*, 2004-Ohio-6073, at ¶ 18. In other words, Cirino has asserted a claim for "the very thing" to which he was allegedly entitled in the first place — the difference between the full amount of workers' compensation benefits he should have received less the benefits he actually received when those benefits were distributed through the EBT program. *See, e.g., Santos*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, at ¶ 14; *Ohio Hosp. Assn.*, 62 Ohio St.3d at 105, 579 N.E.2d 695 (1991). As such, Cirino's claim is one for equitable relief.

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property upon specified terms; or to buy or sell certain property generally, and the same as to the performance of any business; or, the agency may be a universal agency — to do, generally, any, and all business."). Here, Chase was, in fact, "performing in the course of" one of the primary functions of the "business" of the BWC, i.e., getting workers' compensation benefits into the hands of benefit recipients. *Hanson* at 175.

{¶61} Accordingly, the trial court did not err in determining that it had subject matter jurisdiction in this case. We now turn to the BWC's remaining arguments against class certification.

Requirements for Class Certification under Civ.R. 23

{¶62} In its second assignment of error, the BWC also argues that the trial court erred in certifying the class because the trial court failed to undertake a "rigorous analysis" of the Civ.R. 23 requirements for class certification. The BWC challenges the adequacy of Cirino as a class representative under Civ.R. 23(A)(4) and the trial court's finding that Cirino's claims were typical of the class under Civ.R. 23(A)(3). The BWC further argues that the trial court abused its discretion in certifying a class under Civ.R. 23(B)(2) because plaintiffs seek "a recovery of money that is individualized as to each class member" and under Civ.R. 23(B)(3) because "individual issues predominate over common issues."

Standard of Review as to Class Certification

{¶63} A trial court has broad discretion in determining whether to certify a class action, and an appellate court should not disturb that determination absent an abuse of discretion. *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987), syllabus. That discretion is not, however, unlimited. It must be exercised within the framework of Civ.R. 23. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442 (1998). An abuse of discretion occurs where the trial court's decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217,

219, 450 N.E.2d 1140 (1983). "'A determination by a trial court regarding class certification that is clearly outside the boundaries established by Civ.R. 23, or that suggests that the trial court did not conduct a rigorous analysis into whether or not the prerequisites of Civ.R. 23 are satisfied, will constitute an abuse of discretion.'" *Mozingo v. 2007 Gaslight Ohio, L.L.C.*, 9th Dist. Summit Nos. 26164 and 26172, 2012-Ohio-5157, ¶ 8, quoting *Hill v. Moneytree of Ohio, Inc.*, 9th Dist. Lorain No. 08CA009410, 2009-Ohio-4614, ¶ 9.

{¶64} The application of the abuse of discretion standard to a trial court's decision to certify a class "is grounded not in credibility assessment, but in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket." *Hamilton* at 70. "[A]ny doubts about adequate representation, potential conflicts, or class affiliation should be resolved in favor of upholding the class, subject to the trial court's authority to amend or adjust its certification order as developing circumstances demand, including the augmentation or substitution of representative parties." *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 487, 727 N.E.2d 1265 (2000); *Gattozzi v. Sheehan*, 2016-Ohio-5230, 57 N.E.3d 1187, ¶ 17 (8th Dist.).

Requirements for Class Certification under Civ.R. 23

{¶65} Seven prerequisites must be met before a class may be properly certified as a class action under Civ.R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named plaintiff representatives must be members of

the class; (3) the class must be so numerous that joinder of all the members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representatives must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three requirements for certification under Civ.R. 23(B) must be met. *Hamilton* at 71, citing *Warner v. Waste Mgmt.*, 36 Ohio St.3d 91, 96, 521 N.E.2d 1091 (1988); Civ.R. 23.

{¶66} The party seeking to maintain a class action "has the burden of demonstrating that all factual and legal prerequisites to class certification have been met." *Repede v. Nunes*, 8th Dist. Cuyahoga Nos. 87277 and 97469, 2006-Ohio-4117, ¶ 14, citing *Gannon v. Cleveland*, 13 Ohio App.3d 334, 335, 469 N.E.2d 1045 (8th Dist.1984); *see also Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 15 ("a party seeking certification pursuant to Civ.R. 23 bears the burden of demonstrating by a preponderance of the evidence that the proposed class meets each of the requirements set forth in the rule"). If the party seeking to certify a class fails to meet any one of the Civ.R. 23 requirements, class certification must be denied. **"Rigorous Analysis"**

{¶67} The trial court is required to "carefully apply the class action requirements" and to conduct a "rigorous analysis" into whether the prerequisites for class certification under Civ.R. 23 have been satisfied. *Hamilton*, 82 Ohio St.3d at 70, 694 N.E.2d 442. This entails "resolv[ing] factual disputes relative to each [Civ.R. 23] requirement and to

find, based on those determinations, other relevant facts, and the applicable legal standard, that the requirement is met." *Cullen* at ¶ 16. This "rigorous analysis" often requires the trial court to "look[] into the enmeshed legal and factual issues that are part of the merits of the plaintiff's underlying claims," *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.2d 1224, ¶ 26, considering "what will have to be proved at trial and whether those matters can be presented by common proof," *Cullen* at ¶ 17. However, the court may consider the underlying merits of a plaintiff's claims only to the extent necessary to determine whether the plaintiff has satisfied the Civ.R. 23 requirements. *Felix* at ¶ 26; *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶ 44. The abuse of discretion standard applies both to the trial court's "ultimate decision" regarding class certification as well as its determination regarding each of the Civ.R. 23 requirements.

{¶68} The BWC contends that the trial court failed to conduct a sufficiently rigorous analysis of the Civ.R. 23 requirements because it conducted "no analysis" as to whether Cirino was an adequate class representative and "determined in a single conclusory sentence" that the requirements of Civ.R. 23(B)(2) were satisfied.

{¶69} Although the BWC asserts that the trial court conducted "no analysis" as to whether Cirino was an adequate class representative — mistakenly identifying "adequacy of representation" as one of the Civ.R. 23 requirements the BWC "did not dispute"[13] —

[13]There are two components to adequacy of representation — adequacy of the plaintiff as a representative of the class and the adequacy of class counsel. Although the BWC challenged the adequacy of plaintiff as a class representative, it did not challenge the adequacy of plaintiffs' counsel

its judgment entry as to class certification demonstrates otherwise. In its judgment entry, the trial court indicates that "Cirino is and was during the class period a claimant who received a statutory benefit award and who had transaction fees, charges, costs, or expenses collected or withheld from his workers' compensation claim payments under the EBT program" and specifically found that "Cirino's interests are not antagonistic to those of other class members."

{¶70} The trial court's judgment entry as to class certification reflects a careful consideration of the relevant facts, as set forth in the evidentiary materials submitted by the parties, and the applicable law. The trial court prepared detailed findings of fact and separately concluded that each of the seven class action requirements was satisfied. That the trial court did not simply "rubber stamp" plaintiffs' request for class certification, but rather, engaged in its own independent review and analysis, is evidenced by the fact that it did not certify a class of "[a]ll current and former participants in the Ohio Workers' Compensation system who were assessed fees under authority of the [BWC-Chase agreement]" as sought by Cirino but instead certified a class of "[a]ll current and former participants in the Ohio Workers' Compensation system who were assessed *unreasonable* fees under authority of the [BWC-Chase agreement]." (Emphasis added.)

{¶71} While the court's discussion of certain of the Civ.R. 23 requirements was

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to represent the class. Accordingly, the trial court's statement that the BWC "did not dispute * * * the adequacy of representation" was partially correct.

more extensive than others (and although it would have facilitated our review if the trial court had explained the reasoning underlying its conclusion that "Cirino's action does satisfy the requirements for class certification pursuant to Civ.R. 23(B)(2)"), we cannot say that its analysis was not sufficiently rigorous. *Hamilton*, 82 Ohio St.3d at 70-71, 694 N.E.2d 442 (indicating that although it is the preferred course, there is no requirement under Civ.R. 23 that a trial court make findings on each of the seven requirements for class certification or that it articulate its reasoning for such findings as part of its rigorous analysis). Accordingly, the trial court did not abuse its discretion by failing to conduct a sufficiently rigorous analysis of the Civ.R. 23 requirements.

{¶72} Apart from its general complaint that the trial court failed to conduct a "rigorous analysis" of the Civ.R. 23 requirements, the BWC challenges only the adequacy of Cirino as the class representative under Civ.R. 23(A)(4), typicality under Civ.R. 23(A)(3) and the trial court's determination that class treatment was appropriate under Civ.R. 23(B)(2) and 23(B)(3). Accordingly, we address only those requirements here.

Civ.R. 23(A) Requirements

Adequate Class Representative

{¶73} Under Civ.R. 23(A)(4), a class representative must "fairly and adequately protect the interests of the class." A representative is deemed adequate so long as his or her interests are not antagonistic to that of other class members. *Hamilton* at 77-78; *Marks*, 31 Ohio St.3d at 203, 509 N.E.2d 1249; *Warner*, 36 Ohio St.3d at 98, 521 N.E.2d 1091.

{¶74} The BWC contends that Cirino's interests are antagonistic to those of other class members because Cirino testified during his deposition that he understood the lawsuit as involving only the $5 teller transaction fee that he had been charged to access his benefits and that he was representing only other EBT program participants who had also been charged this fee.

{¶75} Based on Cirino's failure to fully comprehend the full extent of the claims of the class, the BWC argues that there is a "danger" Cirino would not adequately represent class members who were charged other fees to access their workers' compensation benefits and that the trial court, therefore, abused its discretion in concluding that Cirino was an adequate class representative. We disagree. There is nothing in the record to suggest that Cirino's interests are antagonistic to the interests of other class members or that there is any conflict between him and any other class members. Cirino — just like the other class members — was allegedly denied the full amount of workers' compensation benefits to which he was entitled following the BWC's implementation of its mandatory EBT program. Simply because Cirino was only assessed one type of fee does not render his interests antagonistic to those of other class members who may have been charged additional or different fees under the EBT program. Cirino and the other class members could all recover the benefits they claim are due without impairing each others' interests. Thus, Cirino's interests are aligned with — rather than antagonistic to — those of the other class members. Cirino's lack of knowledge or understanding regarding the details of the claims asserted by the class does not render him an inadequate

class representative. *See, e.g., LaBorde v. Gahanna*, 10th Dist. Franklin Nos. 14AP-764 and 14AP-806, 2015-Ohio-2047, ¶ 43-44 (plaintiffs' "unfamiliarity with the details of the lawsuit and minimal involvement" did not preclude a finding that their interests were aligned with those of the class). Accordingly, the trial court did not abuse its discretion in finding that Cirino is an adequate class representative.

Typicality

{¶76} Under Civ. R. 23(A)(3), the claims or defenses of the representative must be "typical" of the "claims or defenses" of the class sought to be certified. The BWC argues that Cirino is atypical because he was charged only one particular type of fee and continued to incur fees by accessing his benefits through bi-monthly teller transactions even after he knew he was allowed only one free teller transaction each month. The BWC also asserts that Cirino's claims are not typical because he, presumably unlike many class members, has an existing bank account into which his workers' compensation benefits could have been directly deposited via EFT. Thus, he could have chosen to participate in the EFT program, avoiding any fees under the EBT program. As such, the BWC argues he is "uniquely susceptible" to mitigation and voluntary payment defenses.

{¶77} "[T]he requirement of typicality serves the purpose of protecting absent class members and promoting the economy of class action by ensuring that the interests of the named plaintiffs are substantially aligned with those of the class." *Baughman*, 88 Ohio St.3d at 484, 727 N.E.2d 1265, citing 5 *Moore's Federal Practice,* Section 23.24[1], at 23-92 to 23-93. "Typical" does not mean "identical." *Baughman* at 484. A

plaintiff's claim is typical "'if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.'" *Id.* at 485, quoting 1 *Newberg on Class Actions*, Section 3.13, 3-74 to 3-77 (3d Ed.1992). "'When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.'" *Baughman* at 485, quoting 1 *Newberg on Class Actions*, Section 3.13, at 3-74 to 3-77. This test is "not demanding," *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 86596, 2007-Ohio-4013, ¶ 55, and is based on the rationale that "a plaintiff with typical claims will pursue his or her own self-interest in the litigation and in so doing will advance the interests of the class members, which are aligned with those of the representative." *Baughman* at 485, quoting 1 *Newberg on Class Actions*, Section 3.13, 3-74 to 3-77. The typicality requirement is met where "there is no express conflict between the class representatives and the class." *Gattozzi*, 2016-Ohio-5230, at ¶ 39, citing *Hamilton*, 82 Ohio St.3d at 77, 694 N.E.2d 442.

{¶78} In this case, we find no abuse of discretion by the trial court in concluding that the typicality requirement was met. Cirino claims that he did not receive the full amount of the workers' compensation benefits to which he was entitled because he was assessed service fees by Chase to access his benefits under the EBT program. This same conduct gives rise to the claims of the other class members, and their claims are based on

the same legal theory, i.e., that the BWC's distribution of benefits through the EBT program violates Article II, Section 35 of the Ohio Constitution and R.C. 4123.341 and 4123.67. Although Cirino was assessed only one of the categories of fees charged to benefit recipients participating in the EBT program, the class claims are not limited to a particular type of fee paid by class members; rather, the complaint challenges the practice of charging benefit recipients any fees to access their benefits under the EBT program and the class, as defined by the trial court, includes "[a]ll current and former participants in the Ohio Workers' Compensation system who were assessed unreasonable fees under authority of the [BWC-Chase agreement]." Likewise, to the extent the BWC contends Cirino continued to "knowingly" pay to access his benefits after he learned of the fees, this does not make his claims atypical. Presumably other class members "knowingly" paid fees to access their benefits as well. BWC and Chase representatives testified that all benefit recipients were given disclosure statements from Chase that identified the fees benefit recipients would be charged to access their benefits in various ways and were provided monthly statements (as required under the BWC-Chase agreement) that detailed the balances of, and distributions from, their accounts, including any fees assessed.

{¶79} Furthermore, even "a unique defense will not destroy typicality or adequacy of representation unless it is 'so central to the litigation that it threatens to preoccupy the class representative to the detriment of the other class members.'" *Hamilton* at 78, quoting 5 *Moore's Federal Practice,* Section 23.25[4][b][iv], at 23-126, Section 23.24[6], at 23-98; *see also Baughman* at 486, 727 N.E.2d 1265 ("'[D]efenses

asserted against a class representative should not make his or her claims atypical. Defenses may affect the individual's ultimate right to recover, but they do not affect the presentation of the case on the liability issues for the plaintiff class.'"), quoting 1 *Newberg on Class Actions*, Section 3.16, at 3-90 to 3-93. This is not that case. As discussed in greater detail *infra*, the BWC contends that there were ways in which benefit recipients could have "avoided all fees" and still gained timely access to their benefits. Thus, even assuming the BWC's voluntary payment or mitigation defenses applied, they would not render Cirino's claims "atypical" of the class.

{¶80} Accordingly, the trial court did not abuse its discretion when it found that Cirino's claims were typical of the claims of the class.

Certification under Civ.R. 23(B)(2)

{¶81} Under Civil Rule 23(B)(2), an action may be maintained as a class action if "the party opposing the class has acted or refused to act on grounds that

apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Thus, "Civ.R. 23(B)(2) has, as its primary application, a suit seeking injunctive relief." *Warner*, 36 Ohio St.3d at 95, 521 N.E.2d 1091. To be properly certified under Civ.R. 23(B)(2), the class (1) must seek "primarily injunctive relief" and (2) must be "cohesive." *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶ 13.

{¶82} "'The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined

or declared unlawful only as to all of the class members or as to none of them."'" (Emphasis omitted.) *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 25, quoting *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 360, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 132 (2009). Thus, Civ.R. 23(B)(2)

> "applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."

(Emphasis sic.) *Cullen* at ¶ 21, quoting *Wal-Mart* at 360-361. "Claims for individualized relief are not compatible with Civ.R. 23(B)(2), because the relief sought must affect the entire class at once." *Cullen* at ¶ 21, citing *Wal-Mart* at 360-361.

{¶83} In this case, the BWC does not dispute that the conduct at issue is such that it could "'"be enjoined or declared unlawful as to all of the class members or to none of them."'" *Cullen* at ¶ 25, quoting *Wal-Mart* at 360, quoting Nagareda, 84 N.Y.U.L.Rev. at 132. The BWC likewise does not dispute that "a single injunction or declaratory judgment would provide relief to each member of the class." *Cullen* at ¶ 21, quoting *Wal-Mart* at 360-361. Accordingly, we do not address those issues here.

{¶84} Nevertheless, based on the United States Supreme Court's decision in *Wal-Mart*, the BWC contends that the trial court's certification of the class under Civ.R. 23(B)(2) was improper because each class member would require an "individualized damages assessment and award." The BWC maintains that the total fees charged to each

class member would need to be "individually calculated" based on each member's "individual conduct in using certain Chase services" and that the court would then need to determine whether "such damages were reduced" by one or more of the BWC's defenses. The BWC further argues, based on the Ohio Supreme Court's decision in *Cullen*, that even Cirino's "separate claims for declaratory and injunctive relief" fail the requirements for class certification under Civ.R. 23(B)(2) because a judgment on those claims "would merely lay a foundation for subsequent determinations regarding liability or * * * facilitate an award of damages" rather than awarding "final" relief. *Cullen* at paragraph four of the syllabus.

{¶85} In *Wal-Mart*, employees of Wal-Mart Stores, Inc. ("Wal-Mart") filed a class action lawsuit against their employer alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1 et seq. based upon the discretion Wal-Mart gave local managers over pay and promotions, which the employees claimed was exercised disproportionately in favor of men. *Wal-Mart*, 564 U.S. at 338, 131 S.Ct. 2541, 180 L.Ed.2d 374. The United States Supreme Court held that the employees' class could not be certified because the action did not satisfy the commonality requirement under Fed.R.Civ.P. 23(a)(2). The Court also rejected the employees' argument that their claims for backpay were properly certified under Fed.R.Civ.P. 23(b)(2) because those claims did not "predominate" over their requests for injunctive and declaratory relief, holding that claims for monetary relief could not be certified under that provision "at least where * * * the monetary relief is not incidental to the injunctive

or declaratory relief." *Id.* at 361. The Court noted that "Title VII includes a detailed remedial scheme" pursuant to which Wal-Mart was entitled to "individualized determinations of each employee's eligibility for backpay" and that the "necessity" of litigating Wal-Mart's defenses prevented backpay from being "incidental" to a classwide injunction. *Id.* at 366-367.

{¶86} The Court's decision was based on due process concerns in adjudicating claims for monetary relief, given that members of a Fed.R.Civ.P. 23(b)(2) are not entitled to the notice and opt-out protections afforded a class certified under Fed.R.Civ.P. 23(b)(3). *Id.* at 362-363. As the Court explained:

> The procedural protections attending the (b)(3) class — predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary to a (b)(2) class. When a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member's individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class. Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here. * * *
>
> Respondents' predominance test, moreover, creates perverse incentives for

> class representatives to place at risk potentially valid claims for monetary relief. In this case, for example, the named plaintiffs declined to include employees' claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would not "predominate." But it also created the possibility (if the predominance test were correct) that individual class members' compensatory-damages claims would be precluded by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was not the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide for themselves whether to tie their fates to the class representatives' or go it alone — a choice Rule 23(b)(2) does not ensure that they have.

Id. at 362-364. The Court also noted that under the employees' proposed "predominance test," the trial court would have to continuously update the roster of class members to exclude those who leave employment and become ineligible for classwide injunctive or declaratory relief because those no longer employed by Wal-Mart would lack standing to seek injunctive or declaratory relief against its employment practices. *Id.* at 364-365.

{¶87} The Court declined to decide in *Wal-Mart* "whether there are any forms of * * * monetary relief" that are "incidental" to requested injunctive or declaratory relief, i.e., "'damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief,'" that could be properly certified under Fed.R.Civ.P. 23(b)(2). *Id.* at 365-366, quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir.1998).

{¶88} In *Cullen*, the Ohio Supreme Court reversed a trial court's certification of

a class of State Farm automobile policyholders under Civ.R. 23(B)(2). The plaintiff asserted claims of breach of contract, bad faith and breach of fiduciary duty against State Farm and requested class certification, alleging that State Farm's practice of encouraging policyholders to repair damaged windshields rather than replace them breached the terms of State Farm's insurance contracts with the policyholders and its obligations as a fiduciary under Ohio law. *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 5. The plaintiff sought compensatory and punitive damages as well as a declaration that "State Farm's practices * * * are illegal and/or violative of the terms of the standard policies and the obligations owed by fiduciaries under Ohio law" and "establishing the damages and remedies that are due them." *Id.* at ¶ 5, 24.

{¶89} The court stated that "'where injunctive relief is merely incidental to the primary claim for money damages, Civ.R. 23(B)(2) certification is inappropriate,'" *id.* at ¶ 22, quoting *Wilson*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, at ¶ 17, and held that certification of the class under Civ.R. 23(B)(2) was improper because the plaintiff had failed to demonstrate that all class members would benefit from the declaratory relief sought given that a number of the class members were no longer State Farm policyholders. *Cullen* at ¶ 24-25. Similar to the Court in *Wal-Mart*, it did not decide whether Civ.R. 23(B)(2) "allow[s] certification when the monetary damages are only incidental to the declaratory relief" because it concluded that "[e]ven if Civ.R. 23(B)(2) did allow certification when the monetary damages are only incidental to the declaratory relief sought," damages were "the primary relief sought." *Cullen* at ¶ 27.

The court further held that the plaintiff's request for a declaration that "State Farm's practices are illegal and violated fiduciary obligations" "merely lays a foundation for a subsequent individual determination of liability" and, therefore, did not satisfy the requirements for class certification under Civ.R. 23(B)(2). *Id.* at ¶ 28.

{¶90} In so holding, the *Cullen* court distinguished its prior decision in *Hamilton* as follows:

> [In *Hamilton*], the class sought to enjoin the practice of overcharging interest and misamortizing loans. We concluded that without injunctive or declaratory relief, the class would not be able to recover for ongoing injuries caused to each class member by continuing practices. In contrast, the proposed *Cullen* class seeks a declaration "establishing that State Farm's practices as herein described are illegal and/or violative of the terms of the standard policies and the obligations owed by fiduciaries under Ohio law," as well as one "establishing the damages and remedies that are due to them." This does not allege that any ongoing practice continues to injure all class members, some of whom, like Cullen himself, are no longer State Farm policyholders and could not be injured by future actions taken by State Farm. And for any current policyholders to be harmed by this practice, they necessarily would have to suffer another damaged windshield that State Farm repaired rather than replaced.

Cullen at ¶ 24. Thus, *Cullen* recognized that where an "ongoing practice continues to injure all class members," certification under Civ.R. 23(B)(2) may be appropriate. *Id.*

{¶91} In *Hamilton*, the plaintiffs sought class certification in an action against a bank challenging the bank's method of calculating interest on residential mortgage loans. *Hamilton*, 82 Ohio St.3d at 67-68, 694 N.E.2d 442. The court addressed the certification of four subclasses of borrowers — two of which encompassed borrowers whose loans had been retired and two of which had loans that were still outstanding. *Id.* at 72, 86-87. The court held that the trial court's denial of class certification to the two

subclasses of borrowers with outstanding loans under Civ.R. 23(B)(2) was an abuse of discretion, rejecting the bank's argument that the primary relief sought by those subclasses was money damages. The court explained:

> Their primary object is to terminate [the bank's] alleged practice of overcharging interest and/or misamortizing its loans. Without such relief, they would achieve only the recoupment of overpaid interest to date. The fact that money damages are also sought in addition to injunctive relief does not defeat certification under Civ.R. 23(B)(2).

Id. at 86-87.

{¶92} The injunctive and declaratory relief sought in this case falls squarely within Civ.R. 23(B)(2). The relief sought relates to actions by the BWC "on grounds generally applicable to the class," seeks to resolve the legality of that conduct as to all class members and would "affect the entire class at once." Civ.R. 23(B)(2); *Cullen* at ¶ 21.

{¶93} Unlike in *Cullen*, the conduct at issue involves "ongoing" benefits payment practices that continue to affect all class members, i.e., the continued withholding of portions of class members' workers' compensation benefits that were assessed as fees. As such, this case is more in line with *Hamilton.* The relief sought would not merely "lay a foundation for subsequent individual determinations of liability," it would in and of itself determine liability. Accordingly, we cannot say that the trial court abused its discretion in certifying the plaintiffs' claims for injunctive and declaratory relief under Civ.R. 23(B)(2).

{¶94} With respect to plaintiffs' claims for monetary relief, Ohio courts, both prior to and since *Cullen*, have recognized that the fact that monetary relief is sought in

addition to declaratory or injunctive relief does not, in and of itself, defeat certification under Civ.R. 23(B)(2). *See, e.g., Hamilton* at 86-87; *Gattozzi*, 2016-Ohio-5230, at ¶ 50-61 (where plaintiffs sought a declaration that the county's practice of retaining interest earned on funds when it releases the funds to the owner is unconstitutional and injunctive relief to prevent the county from retaining interest on funds when it releases the funds to the owner, the fact that money damages were sought in addition to declaratory and injunctive relief did not defeat class certification under Civ.R. 23(B)(2)); *Barrow v. New Miami*, 12th Dist. Butler No. CA2-15-03-043, 2016-Ohio-340, ¶ 39-41 (trial court did not abuse its discretion in certifying two subclasses under Civ.R. 23(B)(2) challenging the constitutionality of ordinance establishing automated speed enforcement program notwithstanding that one of the subclasses sought restitution of penalties and fines paid under the program where the "primary objective" was to halt operation of the allegedly unconstitutional ordinance and a "single declaration" that ordinance is unconstitutional and a "single injunction" prohibiting its enforcement "would provide relief to all members of both subclasses"); *see also Gordon v. Erie Islands Resort & Marina*, 6th Dist. Ottawa No. OT-15-035, 2016-Ohio-7107, ¶ 55 ("A demand for monetary damages does not necessarily defeat certification under Civ.R. 23(B)(2)."). As the Ohio Supreme Court explained in *Hamilton*:

> "Disputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award neither promote the disposition of the case on the merits nor represent a useful expenditure of energy. Therefore, they should be avoided. If the Rule 23(A) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (B)(2). Those aspects of the case

> not falling within Rule 23(B)(2) should be treated as incidental. Indeed, quite commonly they will fall within Rule 23(B)(1) or Rule 23(B)(3) and may be heard on a class basis under one of those subdivisions. Even when this is not the case, the action should not be dismissed. The court has the power under subdivision (C)(4)(a), which permits an action to be brought under 'with respect to particular issues,' to confine the class action aspects of a case to those issues pertaining to the injunction and to allow damage issues to be tried separately."

Hamilton at 87, quoting Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, Section 1775, 470 (2d Ed.1986).

{¶95} The BWC contends that the trial court improperly "lumped all of the Chase fees together and failed to analyze how the ten fees could be distinguished based on the type of transaction or service a claimant used," asserting that seven of the categories of fees charged under the original BWC-Chase agreement related to benefit recipients' "volitional use of account services entirely unrelated to accessing their benefits." The BWC, however, ignores the fact that, in certifying the class, the trial court defined the class to include only those benefit recipients who were charged "unreasonable" fees under the BWC-Chase agreement. Neither party objected to or raised any error related to the trial court's definition of the class. What matters for purposes of plaintiffs' claims is the fact that "unreasonable" fees were withheld from their benefit payments not which "unreasonable" fees were withheld. Once it is determined who is properly within the class, i.e., which benefit recipients were assessed "unreasonable" fees under the BWC-Chase agreement, determining what fees were withheld from class members' benefit payments and the amount of those fees would be easily ascertainable from Chase's records. Further, as discussed in detail *infra*, we do not agree that

individualized assessments of the BWC's defenses will be necessary to determine the amount of restitution properly awarded class members, if any.

{¶96} In this case, the monetary relief requested, i.e., restitution of the amounts allegedly improperly withheld from the benefit payments due benefit recipients, flows directly and naturally from the injunctive and declaratory relief requested. As such, it could reasonably be said that the monetary relief requested is "incidental" to the requested injunctive and declaratory relief. *See Wal-Mart*, 564 U.S. at 365-366, 131 S.Ct. 2541, 180 L.Ed.2d 374.

{¶97} However, different class claims may be certified under different provisions of Civ.R. 23(B). *See, e.g., Hamilton* at 87; *see also* Civ.R. 23(C)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."). Following the suggestion of the court in *Hamilton* that "[d]isputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award * * * should be avoided" where possible, *Hamilton* at 87, we need not decide whether plaintiffs' restitution claim was properly certified under Civ.R. 23(B)(2) as "incidental" to plaintiffs' claims for injunctive and declaratory relief because, for the reasons set forth below, we find that the trial court did not abuse its discretion in certifying the restitution claim under Civ.R. 23(B)(3). *Hamilton* at 87; *see also Barrow*, 2016-Ohio-340, ¶ 42 (noting that even if "prayer for damages" could not be properly certified under Civ.R. 23(B)(2), there was no abuse of discretion in the trial court's "alternate path supporting certification under Civ.R. 23(B)(3)"); *Gordon*,

2016-Ohio-7107, at ¶ 62 (finding no abuse of discretion by the trial court in finding that case was certifiable under Civ.R. 23(B)(2) or 23(B)(3)).[14]

Certification under Civ.R. 23(B)(3)

{¶98} For a class action to be certified under Civ.R. 23(B)(3), the trial court must making two findings: (1) that "the questions of law or fact common to class members predominate over any questions affecting only individual members" and (2) that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

{¶99} A "key purpose" of the predominance requirement "is to test whether the proposed class is sufficiently cohesive to warrant adjudication by representation." *Felix*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, at ¶ 35, citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). "'For common questions of law or fact to predominate it is not sufficient that such questions merely exist; rather, they must represent a significant aspect of the case.'" *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 30, quoting *Marks*, 31 Ohio St.3d at 204, 509 N.E.2d 1249. They must also be _''capable of resolution for all members in

[14]In this case, the trial court ordered, as part of its judgment entry as to class certification, that class members be given notice and an opportunity to opt out of the class. Where, as here, class claims for monetary relief could potentially be certified under either Civ.R. 23(B)(2) or 23(B)(3), we believe that is the preferred course. By certifying plaintiffs' claims for monetary relief under Civ.R. 23(B)(3) and providing class notice and an opportunity to opt out, as the trial court has done here, the trial court avoids the due process concerns raised by the Court in *Wal-Mart* that could arise when certifying a class under Civ.R. 23(B)(2) that seeks monetary relief. *See Wal-Mart*, 564 U.S. at 362-363, 131 S.Ct. 2541, 180 L.Ed.2d 374.

a single adjudication.'" *Cullen* at ¶ 30, quoting *Marks* at 204.

{¶100} It is not sufficient for class certification under Civ.R. 23(B)(3) that the allegations of the complaint merely raise "a colorable claim." *Cullen* at ¶ 34. The plaintiff must demonstrate and the trial court must find that "questions common to the class *in fact* predominate over individual ones." (Emphasis sic.) *Id.* "'To meet the predominance requirement, a plaintiff must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof.'" *Id.* at ¶ 30, quoting *Randleman v. Fidelity Natl. Title Ins. Co.*, 646 F.3d 347, 352-353 (6th Cir.2011).

{¶101} With respect to the superiority requirement, the determination of whether a class action is the superior method of adjudication "requires a comparative evaluation of other available procedures to determine if the judicial time and energy involved would be justified." *Marks* at 204.

{¶102} Civ.R. 23(B)(3) sets forth a list of factors "pertinent" to the predominance and superiority findings required under Civ.R. 23(B)(3): (1) "the class members' interests in individually controlling the prosecution or defense of separate actions"; (2) "the extent and nature of any litigation concerning the controversy already begun by or against class members"; (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum" and (4) "the likely difficulties in managing a class action." This list, however, is not exhaustive; other relevant factors may also be considered. *State ex rel. Davis v. Pub. Emps. Ret. Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855

N.E.2d 444, ¶ 28. The purpose of class certification under Civ.R. 23(B)(3) is to enable "'numerous persons who have small claims that might not be worth litigating in individual actions to combine their resources and bring an action to vindicate their collective rights.'" *Hamilton*, 82 Ohio St.3d at 80, quoting Wright et al., *Federal Practice and Procedure*, Section 1777, at 518.

{¶103} Considering the four factors under Civ.R. 23(B)(3)(a)-(d) and the purpose of class certification under Civ.R. 23(B)(3), the trial court found that the predominance and superiority requirements had been met because benefit recipients received "form letter communications" from the BWC regarding "the new payment system that was being universally applied to all workers' compensation claimants," individual class members were unlikely to litigate their claims separately due to the small potential recovery for each claimant and a single adjudication of the lawfulness of the BWC's actions would resolve the issue for the entire class "preserving adjudicative efficiency." With respect to the BWC's claimed defenses, the trial court concluded that they did not apply because Cirino and the plaintiff class seek "the unpaid balance of owed benefits * * * rather than damages." The trial court further held that "there is nothing to suggest that Cirino alone would face a mitigation defense."

{¶104} The BWC contends that the trial court's conclusion that its defenses do not apply is "unsupportable" because (1) it paid "full benefit amounts" into each class member's debit card account with Chase and (2) "did not have control over the fees collected." We considered and rejected similar arguments when considering the BWC's

claim that the trial court lacked subject matter jurisdiction. As stated above, the BWC's obligation under R.C. 4123.54 et seq. and R.C. 4123.67 was to make benefit payments to the benefit recipients; it was not to transfer benefit payments to Chase that Chase then deposited into accounts Chase held for the individual benefit recipients. Although R.C. 4123.311 authorized the BWC to "[c]ontract with an agent" to "[s]upply debit cards for claimants to access payments made to them" and "[c]redit the debit cards * * * with the amounts specified by the administrator," it did not negate the BWC's obligation to put benefit payments into the hands of the benefit recipients. Further, although the BWC may not have had control over the fees Chase chose to *collect* from benefit recipients, e.g., the BWC did not have control over Chase's decision whether, in certain circumstances, to waive certain fees (as Chase did the first time Cirino accessed his benefit payments through a second monthly teller transaction), it is undisputed that Chase negotiated and authorized, as part of the BWC-Chase agreement, the fees Chase was permitted to *charge* benefit recipients to access their workers' compensation benefits under the EBT program and that every fee Chase charged a benefit recipient was in accordance with the fee schedule approved by the BWC. Thus, the BWC arguably had "control over" the fees charged benefit recipients to access their benefits under the EBT program.

{¶105} The BWC also argues that certification was improper because the BWC's "voluntary payment" and "benefits" defenses require an "individualized inquiry" that the trial court ignored and because "class-wide proof cannot establish an injury in fact to all

class members."

{¶106} Under the "voluntary payment doctrine," "'[m]oney voluntarily paid on a claim of right with full knowledge of all the facts, in the absence of fraud, duress, or compulsion, cannot be recovered back merely because the party, at the time of payment, was ignorant of, or mistook, the law as to his liability.'" *Consol. Mgmt. v. Handee Marts*, 109 Ohio App.3d 185, 189, 671 N.E.2d 1304 (8th Dist.1996), quoting 73 Ohio Jurisprudence 3d 74 (1986); *see also Meeker R&D, Inc. v. Evenflo Co.*, 2016-Ohio-2688, 52 N.E.3d 1207, ¶ 75 (11th Dist.) ("'In the absence of fraud, duress, compulsion or mistake of fact, money voluntarily paid by one person to another on a claim of right to such payment, cannot be recovered merely because the person who made the payment mistook the law as to his liability to pay.'"), quoting *State ex rel. Dickman v. Defenbacher,* 151 Ohio St. 391, 392, 86 N.E.2d 5 (1949). A mistake of law occurs when a person, having full knowledge of the facts, reaches an erroneous conclusion regarding their legal effect. *Consol. Mgmt.* at 189. The BWC contends that if a class member "voluntarily accepted" a fee charged to access his or her benefits under the EBT program, he or she would be precluded under the voluntary payment doctrine from recovering that fee, requiring an "individualized analysis" of its voluntary payment defense as to each class member.

{¶107} The BWC also asserts that class members derived certain "benefits" in exchange for the fees assessed under the EBT program — such as the convenience of accessing benefits from nonChase/nonAllpoint ATMs, alleged loss and fraud protection,

benefits derived from inactivity fees, the alleged facilitation of foreign purchases through from foreign transactions fees and the avoidance of costly check-cashing fees — that must be offset against the fees class members were charged in determining the amount of any recovery. The BWC contends that the "benefits rule" must be applied to each fee Chase charged each class member and that minitrials would be required to determine the benefits each class member received for each fee paid at the time it was paid.

{¶108} The "benefits rule" upon which the BWC relies is set forth at 4 Restatement of the Law 2d, Torts, Section 920 (1979). It provides: "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable." As the court explained in *Cline v. Am. Aggregates Corp.*, 64 Ohio App.3d 503, 507, 582 N.E.2d 1 (10th Dist.1989):

> The benefits rule is intended to place an injured party as nearly as possible in the position he would have occupied had it not been for the tortious conduct of another. Thus, this principle is intended to restrict an injured person's recovery to the harm he actually incurred, and not to permit the tortfeasor to force a benefit on him against his will. [Restatement of the Law 2d, Torts, Section 920, 509 at Comment f.] Under the benefits rule, to justify a reduction or setoff in damages, the benefit to the injured party must result from the tortious conduct. *Id.* at Comment d.

{¶109} As to its injury-in-fact argument, the BWC asserts that "to the extent that the value of the benefits conferred by [the EBT program] to an individual claimant, exceeds any costs incurred by that claimant, there can be no injury in fact" and that determining whether a particular class member suffered an injury in fact, will require an

individualized inquiry.

{¶110} Based on the authority cited by the BWC, we have serious doubts as to whether its tort and damages-related defenses would even apply to plaintiffs' claims. However, we need not decide, at this juncture, whether the BWC's defenses apply because even assuming one or more of the BWC's defenses applies, any individualized inquiries associated with the application of its defenses would not predominate over the common questions of law and fact.

{¶111} To the extent that the BWC's defenses apply to the claims at issue, they would appear to apply equally to each of the class members — susceptible to common, generalized proof and amenable to class-wide resolution. For example, it is undisputed that benefit recipients could have avoided all fees under the EBT program if they accessed their benefits in certain ways (e.g., through ATM withdrawals at particular ATMs or through point-of-sale transactions), at particular times or locations (e.g., through withdrawals from *Chase* ATMs or through a once-a-month withdrawal in a teller transaction) and in particular amounts (e.g., subject to daily or per transaction withdrawal limits set by the bank or ATM owner). Thus, to the extent the BWC's mitigation and voluntary payment defenses are based on benefit recipients' failure to access their benefits so as to avoid all fees, they would present common issues.

{¶112} Likewise, although the BWC contends that, in applying the voluntary payment doctrine, "claimant-specific" inquiries would need to be made to determine whether each class member had prior knowledge of the fees charged and whether he or

she "voluntarily accepted the fee for some or all of his transactions," both BWC and Chase representatives testified that all benefit recipients received disclosure statements and card member agreements that set forth the applicable fees prior to activating their debit cards. Those representatives further testified that, with respect to fees associated with ATM transactions, benefit recipients were informed of applicable fees during the course of the ATM transaction and were required to accept those fees before the transaction could be completed. If this is true, all class members arguably knew or should have known, prior to accessing their benefits, that they would be charged fees if they accessed their benefits in certain ways. Furthermore, each benefit recipient participating the EBT program received a monthly account statement in which any fees assessed were disclosed. Accordingly, even if class members were not initially aware that they would be charged fees for accessing benefits in certain ways, once they used their debit cards, they certainly would have been on notice that they were being charged fees to access their benefits.

{¶113} Moreover, as the BWC points out, the voluntary payment doctrine does not apply where an individual acts under fraud, duress or compulsion. It is undisputed that if benefit recipients accessed their benefits in certain ways, they had no choice but to pay the fees assessed by Chase. Cirino testified that the second time he used his debit card and attempted to access the balance of his benefits through a second monthly teller transaction, Chase took out fees from his account, reducing his benefit payments, before allowing him to withdraw any funds. Indeed, even after taking out the fees, Chase did

not allow Cirino to immediately withdraw the balance of his benefit payments. Due to the bank's one-teller-transaction-per-branch-per-day rule, Cirino had to go to a second Chase branch to access the balance of his benefit payments. Likewise, to access benefit payments through transactions at nonChase ATMs for which fees were assessed, the benefit recipient had to "accept" the fees before the transaction would be processed. Accordingly, there was no way benefit recipients could access their benefits in those ways without paying the fees assessed by Chase.

{¶114} In addition, the BWC's "injury-in-fact" and "benefits rule" arguments ignore the fact that, as defined by the trial court, the class is limited to those EBT program participants "who were assessed *unreasonable* fees under authority of the [BWC-Chase agreement]." (Emphasis added.) As noted above, what constitutes an "unreasonable" fee is not specified in the class definition.[15] Even assuming the BWC could demonstrate that some or all of the class members received benefits in exchange for the fees assessed under the EBT program, given that the class is limited to those who were charged "unreasonable" fees, it would not appear that any "benefits" class members allegedly received from participating in the EBT program could be said to have exceeded the fees they were assessed under the EBT program.

{¶115} Indeed, even if one or more of the BWC's defenses applied to only

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[15] It is unclear from the trial court's opinion what constitutes "unreasonable fees" for purposes of the class definition. Although neither party has raised the issue, we believe it will be necessary for the trial court to define the term in order to properly identify the members of the class moving forward. *See* Civ.R. 23(C)(1)(c) ("An order that grants or denies class certification may be altered or amended before final judgment.").

certain class members or some other individualized inquiry needed to be made to determine a class member's eligibility for recovery or the amount of a class member's recovery, it would not preclude class certification under Civ.R. 23(B)(3). "'[A]s long as there is a sufficient nucleus of common issues, differences in the application of [an alleged defense] to individual class members will not preclude certification under Rule 23(B)(3).'" *Hamilton*, 82 Ohio St.3d 67 at 84, 694 N.E.2d 442, quoting 5 *Moore's Federal Practice*, Section 23.46[3], at 23-210 to 23-211.

{¶116} On the record before us, we cannot say that the trial court abused its discretion in certifying the class under Civ.R. 23(B)(3). Here, the common questions of law and fact at issue are both a "significant aspect of the case" and "capable of resolution for all members in a single adjudication." *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 30, quoting *Marks*, 31 Ohio St.3d at 204, 509 N.E.2d 1249. The class claims are based on a single practice, i.e., charging benefit recipients fees to access benefits under the EBT program, that applied across-the-board, without exception, to all class members. The central, pivotal issues in the case are whether the BWC's distribution of workers' compensation benefits through the EBT program violates Article II, Section 35 of the Ohio Constitution, R.C. 4123.341 and/or 4123.67 and whether the BWC owes benefit recipients the difference between the benefits they were awarded and the benefits they received under the EBT program after Chase deducted various fees from their benefit payments. The record reflects that benefit recipients received standardized communications and marketing materials from the BWC regarding the distribution of

benefits under the EBT program and that class members were all subjected to the same fees and fee schedules. If the BWC's practice of distributing benefits to benefit recipients through the EBT program violates Article II, Section 35 of the Ohio Constitution, R.C. 4123.341 and/or R.C. 4123.67, a single adjudication will resolve the issue as to all class members. Even assuming the BWC has specific defenses against one or more members of the class, the overriding "common" questions concerning the lawfulness of the BWC's EBT program predominates over these individualized inquiries. Accordingly, the trial court did not abuse its discretion in finding that the predominance requirement was satisfied.

{¶117} Likewise, we find no abuse of discretion by the trial court in concluding that the superiority requirement was satisfied. The anticipated recoveries of each of the class members in this case are relatively modest. The record reflects that from June 2007 through February 2012, Chase collected $1.47 million in fees from benefit recipients in EBT transactions. Although the number of class members is unclear, it appears from the record that 65,723 new accounts were opened at Chase for benefit recipients under the EBT program from 2007 through February 2012. Of the ten fees authorized under the fee schedule, seven of the fees were under $5.00, ranging from $.50 to $5.00 per transaction. Litigating the disputes one claim at a time would not be an efficient use of judicial resources. There is no evidence in the record that any other class members have filed individual actions against the BWC. Thus, it does not appear that there is a current or anticipated interest in individual plaintiffs pursuing their own

separate actions against the BWC. Accordingly, the trial court's finding that a class action is superior to other methods of adjudication was not an abuse of discretion.

{¶118} We overrule the BWC's second assignment of error.

Rulings on Motions for Summary Judgment

{¶119} In its third assignment of error, the BWC challenges the trial court's denial of its motion for summary judgment and granting of plaintiffs' motion for summary judgment. Once again, we must first consider whether we have jurisdiction to consider this assignment of error. Cirino asserts that the trial court's judgment entry on summary judgment is not a final, appealable order because the trial court "has not yet undertaken the final proceedings to determine the recovery that is due," impose declaratory and injunctive relief and "otherwise conclude the administration of the class." The BWC argues that this court has jurisdiction to review the trial court's rulings on summary judgment because (1) the trial court determined that each class member is entitled to restoration of his or her unpaid benefits, (2) we have jurisdiction to consider the trial court's order on class certification and the same arguments and evidence were considered by the trial court on class certification and summary judgment and (3) the trial court included Civ.R. 54(B) language in its judgment entry on summary judgment, stating that "there is no just reason for delay should an interlocutory appeal of this order be pursued."

Following a thorough review of the issue, we conclude that we lack jurisdiction to consider the BWC's third assignment of error.

{¶120} As noted above, we can review only final, appealable orders. *See*

Hubbell, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, at ¶ 9; Ohio Constitution, Article IV, Section 3(B)(2); R.C. 2501.02. An order granting summary judgment alone, without providing any remedy, is, as a general rule, interlocutory and not appealable. *See, e.g., Coon v. Barnes*, 95 Ohio App.3d 349, 351-352, 642 N.E.2d 449 (3d Dist.1994) (order granting summary judgment for the plaintiff in an action for an injunction, "without providing any remedy establishing the respective rights and obligations of the parties to permit compliance or enforcement," was not a final, appealable order); *State ex rel. Fisher v. Cleveland*, 8th Dist. Cuyahoga No. 82389, 2003-Ohio-2754, ¶ 8 (order granting summary judgment to plaintiffs was not a final, appealable order where it did not "expressly grant plaintiffs the only forms of relief they requested, injunctive relief and attorney's fees"); *Haberley v. Nationwide Mut. Fire Ins. Co.*, 142 Ohio App.3d 312, 314, 755 N.E.2d 455 (8th Dist.2001) (trial court's order granting insurer's motion for summary judgment was not a final appealable order where it did not "expressly declare the rights and duties of the parties"); *see also Lycan v. Cleveland*, 146 Ohio St.3d 29, 2016-Ohio-422, 51 N.E.3d 593, ¶ 22-24 (trial court's order granting partial summary judgment did not provide a basis for reviewing res judicata issue because order was not final and appealable).

{¶121} Although this case involves issues of restitution rather than damages, we note that "[g]enerally, orders determining liability in the plaintiffs' * * * favor and deferring the issue of damages are not final appealable orders under R.C. 2505.02 because they do not determine the action or prevent a judgment." *State ex rel. White v.*

Cuyahoga Metro. Hous. Auth., 79 Ohio St.3d 543, 546, 684 N.E.2d 72 (1997). Although an exception is recognized "where the computation of damages is mechanical and unlikely to produce a second appeal because only a ministerial task similar to assessing costs remains," *id.*, this is not a case in which only "mechanical" or "ministerial tasks" remain.

{¶122} In this case, although the trial determined (1) that Cirino was entitled to judgment as a matter of law against BWC on his claims for statutory and constitutional violations, (2) that he and "similarly-situated workers['] compensation claimants" were entitled to receive "the balance of their benefit payments equal to the amount of bank fees deducted by Chase from their benefits" and (3) that "[d]eclaratory judgment and injunctive relief should issue," it has not yet ordered any relief. The trial court has ordered that hearings be scheduled to determine the monetary relief to be awarded. Further, it has not yet been established who is to be included in the final judgment. The class is limited to "current and former participants in the Ohio Workers' Compensation system who were assessed unreasonable fees under authority of the [BWC-Chase agreement]." The trial court has ordered that class members be given notice and an opportunity to opt out as required under Civ.R. 23(B)(3); however, class notice has not yet been issued. Further, given that the class is limited to those benefit recipients who were charged "unreasonable" fees, we anticipate that there will be future disputes over who is properly included within the class. *See, e.g., Lucio v. Safe Auto Ins. Co.*, 188 Ohio App.3d 190, 2010-Ohio-2528, 935 N.E.2d 53, ¶ 1-2, 20-34 (7th Dist.) (order

granting summary judgment to plaintiffs but postponing issue of damages until after hearing was not a final, appealable order under R.C. 2505.02 and was not subject to the ministerial acts exception as evidence had to be presented as to each class member's status and entitlement and there could be disputes as to amount of damages); *see also White* at 546.

{¶123} The fact that the trial court issued a ruling on class certification does not mean that subsequent interlocutory decisions become appealable orders simply because the case is a class action. *See, e.g., Lucio* at ¶ 35-36. "The plain language of R.C. 2505.02(B)(5) is that only the order that determines the action can be maintained as a class action can be appealed, not subsequent orders that apply to the class after certification." *Id.*

{¶124} Likewise, the fact that the trial court included Civ.R. 54(B) language in its journal entry does not mean that it is a final, appealable order. A trial court's "mere incantation" of Civ.R. 54(B) language does not convert an otherwise nonfinal order into a final, appealable order. *Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989). Regardless of the Civ.R. 54(B) language, if an order is not final under R.C. 2505.02(B), then the appeal must be dismissed because the appellate court lacks jurisdiction. *See, e.g., Lycan*, 146 Ohio St.3d 29, 2016-Ohio-422, 51 N.E.3d 593, ¶ 21 ("An order is a final, appealable order only if it meets the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B)."); *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, 861 N.E.2d 519, ¶ 15 ("The threshold requirement * * * is that

the order satisfies the criteria of R.C. 2505.02."); *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 354, 617 N.E.2d 1136 (1993) ("the phrase 'no just reason for delay' is not a mystical incantation which transforms a nonfinal order into a final appealable order" but it can "through Civ.R. 54(B),transform a final order into a final appealable order"), citing *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989).

{¶125} Accordingly, we lack jurisdiction to consider the BWC's third assignment of error. The BWC's third assignment of error is disregarded.

{¶126} Appeal dismissed in part; judgment affirmed in part; matter remanded for further proceedings.

It is ordered that appellees recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and
SEAN C. GALLAGHER, J., CONCUR