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Attorney for Farmers Insurance of Columbus, Inc.

№ 2014-0451

In the Supreme Court of Ohio

FARMERS INSURANCE OF COLUMBUS, INC.,
Defendant-Appellant

v.

JERRY DILLON, et al.,
Plaintiffs-Appellees

On Discretionary Appeal from the
Court of Appeals, Fifth Appellate District
Coshocton County, Ohio
Case *No.* 2013-CA-0014

REPLY BRIEF OF APPELLANT, FARMERS INSURANCE OF COLUMBUS, INC.

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I. FACTUAL BACKGROUND

Several assertions in Appellees' Merit Brief must first be addressed and clarified. Non-OEM parts are commonly known as aftermarket vehicle parts built in accordance with OEM standards and procedures, but manufactured by third-parties. Non-OEM parts are heavily regulated by the National Highway Traffic Safety Administration, among other federal agencies and regulations. The quality associated with non-OEM parts can be equal to or greater than OEM parts. Indeed, aftermarket companies reverse-engineer the parts and resolve any weaknesses or other part deficiencies. There are hundreds of companies that make non-OEM parts, which offers substantial variety and superior availability. Non-OEM parts also often come with better warranties.

Regardless, the pros and cons associated with OEM versus non-OEM or aftermarket parts are not at issue in this appeal. What is at issue is whether Farmers violated the CSPA by notifying Mr. and Mrs. Dillon of various recommended vehicle repairs and providing an agreed upon oral and written estimate without also obtaining Mr. or Mrs. Dillon's signature on the written estimate. Furthermore, at no point in this litigation have the Dillons ever challenged the quality or functionality of the specific non-OEM parts listed in the Farmers written estimate. Appellees cannot now contend non-OEM parts are inferior without ever actually addressing the specific parts contained in the relevant repair estimate.

Contrary to Appellees' assertions, Mr. Dillon was well-aware of the content of the Farmers estimate and the differences between OEM and non-OEM vehicle parts. Mr. Dillon testified as follows:

> *Q: So it's fair to say or you would agree with me that you knew the difference between OEM and non-OEM parts when you talked to Paul.*

A: *Yes.*

Q: *Okay. And that was based on the prior claim that you had, or what's your knowledge of the difference between the two?*

A: *I mean, it's just -- I mean,* ***to me, it's just to me common knowledge.***

(Emphasis added). (R. 24, p. 24, lines 7-15).

Appellees also fail to admit Mr. Dillon was never actually deceived, confused, or misled by Farmers.

- He selected his own personal repair shop, Mission Auto Connection, Inc. (R. 24, p. 27). Mr. Dillon could have taken his vehicle to any repair shop to be fixed. (Id.).

- He admitted he was well-aware of the differences between OEM and non-OEM parts as noted above.

- He ***never*** once requested any form of estimate. (R. 24, pp. 18, 30-31; R. 22, p. 18). Instead, Farmers provided a voluntary oral and written estimate to provide Mr. Dillon knowledge and information regarding the scope and details of all recommended vehicle repairs.

- He was notified of the contents of the written vehicle repair estimate on multiple occasions, including the use of non-OEM parts. (R. 20; R. 22, p. 16).

- He knew and understood the insurance policy provisions in dispute, including the ability of Farmers to pay for vehicle repairs using both OEM and non-OEM parts. (R. 24, pp. 43-44).

- Mr. Dillon later spoke with Mr. Babb, and changed his mind, without explanation, demanding Farmers pay for the installation of purely OEM parts. (R. 20, ¶¶ 9-10; R. 24, p. 17). Mr. Babb again advised Mr. Dillon the insurance policy allowed Farmers to pay for the use of both OEM and non-OEM parts for the repairs. (Id.). Mr. Dillon ***unilaterally*** instructed Mission Auto to proceed with repairing his vehicle using solely OEM parts. (R. 20, ¶ 10; R. 24, pp. 3-9, 28, 30, 32, 34). Mr. Dillon was then informed he would be responsible for the difference in the cost of using strictly OEM parts in accordance with the insurance policy terms and conditions. (R. 24, pp. 34, 39-40).

- Farmers provided payment for all towing and rental car charges. Mission Auto requested and accepted payment of $8,462.25 from Farmers to pay for the agreed upon repairs using OEM and non-OEM parts, and also received more than $1,000.00

in additional payments from Farmers for subsequent repair work related to the accident. (R. 20, ¶¶ 11-12). The alleged difference between the Farmers payments and the use of solely OEM parts is $1,521.07. (Complaint; R. 24, p. 15).

The Dillons fail to acknowledge that at no point in time did Mr. Babb or Farmers ever control or attempt to control how or if the vehicle was going to be repaired, but rather simply set the price and scope of the estimate. The Dillons, like many other people do, could just as easily chosen not to repair the vehicle, and kept the insurance payment for their own personal benefit. Ultimately, the Dillons were free to make whatever deal they wanted with whatever auto repair shop these chose.

II. LAW AND ARGUMENT

Proposition of Law No. 1: An insurer does not engage in a "consumer transaction" for the purposes of any provision of the Ohio Consumer Sales Practices Act (R.C. §1345.01*et seq.*), when it adjusts its insured's claim for motor vehicle damage, and issues a repair estimate.

A. Almost every Ohio court addressing the issue has held, as a matter of law, an insured cannot bring a claim against his or her insurer under the CSPA.

The contract between the parties provides the ability of Farmers to use both OEM and non-OEM parts in preparing and issuing vehicle repair estimates. The policy of insurance also affords coverage to the Dillons and requires Farmers to issue payment for vehicle repairs in accordance with its terms and conditions. The Dillons also have sued their own insurer in this matter thereby implicating the insurance policy in question.

Appellees fail to admit nearly every Ohio court addressing the issue has held, as a matter of law, an insured cannot bring a claim against his or her insurer under the CSPA. While no published cases besides this Fifth District Court of Appeals decision and another recent Fifth District decision, *Bigelow v. American Family Ins.*, 5th Dist. No. 2013CA0024, 2014-Ohio-2945, address a precisely similar fact pattern involving a vehicle repair estimate and R.C.

§1345.81, following the Court of Appeals will drastically increases the scope of coverage under the CSPA throughout every Ohio court, and open the floodgates to countless CSPA verdicts and exorbitant and disproportionate attorney fee awards where no CSPA coverage has been historically afforded.

The Court of Appeals' decision permitted Plaintiffs' counsel to collect unreasonable attorney fees in excess of $20,000.00 at a rate of $400.00 per hour stemming from a case with limited and non-contentious discovery, and not extensive motion practice. The Dillons requested and received less than 100 pages of documents during discovery. Only two depositions were taken, which lasted a grand total of 76 minutes. In fact, the fee award was ***13 times*** the amount of actual damages. The fee award is egregious based on the underlying facts and minimal work to prosecute the claims at the trial court level. Upholding the Court of Appeals' decision will permit similar astronomical attorney fee and damage awards throughout Ohio and send shockwaves throughout the insurance industry.

The Court of Appeals' ruling contravenes the well-established Ohio precedent that the CSPA does not apply to any facet of insurance disputes. *See, e.g., Provident Life & Accident Ins. Co.*, 2006 WL 5909027 (S.D.Ohio Feb. 1, 2006) (summarizing Ohio law and concluding the CSPA does not apply to insurance disputes); *Drozeck v. Lawyers Title Ins. Corp.*, 140 Ohio App.3d 816, 749 N.E.2d 775 (2000) (granting insurer judgment on the pleadings because CSPA does not apply to claims against insurers). *Chesnut v. Progressive Cas. Ins. Co.*, 166 Ohio App.3d 299, 2006-Ohio-2080, 850 N.E.2d 751 (court dismissed CSPA claim alleging insurer should have obtained a salvage title for vehicle after declaring it a total loss), *Walker v. State Farm Mut. Auto. Ins. Co.*, 141 Ohio Misc.2d 36, 2006-Ohio-7255, 868 N.E.2d 1281 (dismissing CSPA claim stemming from insurer's act of declaring a car a total loss, but selling car with clean

title instead of salvage title); *Bernard v. Natl. Union Fire Ins. Co. of Pittsburgh*, 2009 WL 2413922, *1 (N.D.Ohio Aug. 5, 2009) ("Ohio courts interpreting these statutes have routinely ruled that insurance coverage disputes are not consumer transactions recognized under the OSCPA.").

Indeed, according to *Johnson v. Lincoln Natl. Life Ins. Co.*, 69 Ohio App.3d 249, 255, 590 N.E.2d 761 (1990), "[i]t is clear the Ohio Legislature meant to regulate the insurance industry in R.C. Title 39 and that the Ohio Consumer Sales Practices Act has no application to controversies over insurance policies." Title 39 of the Revised Code, along with Chapter 3901 of the Administrative Code, are intended to regulate the insurance industry, not the CSPA.

Regulation of insurers for transactions similar to this case fall solely under Title 39, and specifically Ohio Adm.Code 3901-1-07 and 3901-1-54. Indeed, the purpose of Ohio Adm.Code 3901-1-07 is to prohibit unfair or deceptive practices in the business of insurance and define certain acts or practices as unfair or deceptive. *See* Ohio Adm.Code 3901-1-07(B). Likewise, the purpose of Ohio Adm.Code 3901-1-54 is to set forth uniform minimum standards for the investigation and disposition of property and casualty claims arising under insurance contracts or certificates issued to residents of Ohio. *See* Ohio Adm.Code 3901-1-54(B). Title 39 expressly provides it does not provide any form of entitlement to a private cause of action for any statutory violations, as alleged in this case. *Id.*

R.C. §1345.81 has not been previously addressed by any courts in any published opinions and lacks any form of legislative history. While this particular statute was enacted on October 16, 1990, Ohio courts consistently and overwhelmingly thereafter still held Title 39 is intended to regulate the insurance industry, and the CSPA was not designed to address insurance disputes, in any respect as noted in each and every cited case above. Following the decision of the Court

of Appeals produces unreasonable results. Such a finding radically increases the scope of the CSPA, and contravenes the well-established Ohio precedent that the CSPA does not apply to any facet of insurance policy disputes, which insurers have relied upon for years.

The Municipal Court erred in denying Farmers' Motion for Partial Judgment on the Pleadings and Farmers' Motion for Summary Judgment. For the same reasons, the Municipal Court erred in granting the Dillons' Motion for Summary Judgment.

B. The necessary elements of a "supplier" and a "consumer transaction" pursuant to the CSPA are lacking.

A "supplier" is defined by the CSPA as "a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions." R.C. §1345.01(C). A "consumer transaction," is defined in R.C. §1345.01(A) as "a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things."

R.C. §1345.81 is also clear a "consumer transaction" is an absolutely necessary prerequisite for ***any*** form of liability under the CSPA. Indeed, R.C. §1345.81(E) states, in pertinent part, "[a]ny violation of this section ***in connection with a consumer transaction*** as defined in section 1345.01 of the Revised Code is an unfair and deceptive act or practice as defined by section 1345.02 of the Revised Code." (Emphasis added). Accordingly, to perfecting a CSPA claim, even under R.C. §1345.81, both a "supplier" and a "consumer transaction" must be involved. Nevertheless, the Court of Appeals' decision ***never addressed*** whether Farmers is a supplier and whether a consumer transaction existed.

The CSPA is intended to apply to the auto body shop that sold and performed the repairs, not to the issues associated with the insurance contract between the Dillons and Farmers or the

issuance of a vehicle repair estimate by Farmers. Farmers' dealings with the Dillons and Mission Auto were strictly limited to:

1. Contacting the Dillons about their insurance coverage and the claim adjustment process;
2. Inspecting the vehicle;
3. Creating and providing the oral and written vehicle repair estimate; and
4. Issuing payments to the Dillons and Mission Auto for the authorized repair work.

A "consumer transaction" is undeniably absent. Farmers did not "transfer" the car parts, but merely created the repair estimate to allow Mission Auto to repair the vehicle. Farmers did not personally purchase, sell, or distribute the car parts. Mr. Dillon also testified he unilaterally authorized Mission Auto to proceed with the vehicle repairs using strictly OEM parts. As such, Farmers did not make any solicitations to the Dillons or Mission Auto, and the Dillons cannot point to any affirmative evidence that Farmers affected or influenced the repair process. Indeed, the required consumer transaction is missing under these facts.

Further, Farmers is not a "supplier." There is no evidence Farmers affected or solicited anything from the Dillons or Mission Auto. The only business Farmers is involved in is that of providing insurance policies and benefits. Farmers was never going to perform the repairs or control whether or how the work was to be performed. Farmers' role is contractually defined and is limited to establishing the amount owed. Thus, Farmers is not a "supplier" pursuant to the CSPA.

At no point in time did Mr. Babb or Farmers ever control how or if the vehicle was going to be repaired, but rather simply set the price of the estimate. The Dillons, like other insureds do, could just as easily chosen not to repair the vehicle, and kept the insurance payment for their own

personal benefit. The Dillons were free to make whatever deal they wanted with whatever auto repair shop these chose.

C. The CSPA specifically excludes coverage to transactions involving insurance companies.

Consumer transactions do not encompass transactions between persons defined in R.C. §5725.01, which includes insurance companies. *See.* R.C. §1345.01(A). According to R.C. §5725.01(C), an "insurance company" is defined to broadly include:

> *every corporation, association, and society engaged in the business of insurance of any character, or engaged in the business of entering into contracts substantially amounting to insurance of any character, or of indemnifying or guaranteeing against loss or damage, or acting as surety on bonds or undertakings.*

The court must make a practical inquiry into whether the insurer "was actually operating as an insurance company in the transaction at issue." *Thornton v. State Farm Mut. Auto Ins. Co.*, 2006 U.S. Dist. LEXIS 83968, *25 (N.D.Ohio 2006). The exception does not provide a blanket exemption for all activities by an insurance company. *Id.* However, as noted in *Thornton*, "Ohio courts have held that the CSPA does not apply to insurance companies conducting insurance transactions." *Chesnut v. Progressive Cas. Ins. Co.*, 166 Ohio App.3d 299, 306, 2006-Ohio-2080, 850 N.E.2d 751.

Appellees also allege the U.S. Supreme Court has defined the "business of insurance" in a context of the McCarran-Ferguson Act, and Farmers' conduct is within the grasp of the CSPA because the facts of this case do not constitute the "business of insurance." Appellees' reliance on such U.S. Supreme Court cases as *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 995 S.Ct. 1067, 59 L.Ed.2d 261 (1979) and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982) is misplaced. First, Appellees' CSPA claims are based on Ohio statutory law, not federal law such as the McCarran-Ferguson Act. Thus, such

cases are inapposite. Second, the disputes in the cited cases were related to a separate contract between the insurer and third-party pharmacies, not the actual insurance policy between the insurer and its insureds. Lastly, no Ohio cases addressing the CSPA have relied upon this stream of U.S. Supreme Court case law. As such, these cases are legally and factually distinguishable from this case, and simply put, do not support the Dillons' position they can assert a CSPA claim against Farmers.

As part of adjusting the Dillons' insurance claim Farmers issued a repair estimate for repairs to their vehicle. If adjusting an insurance claim is not part of an insurer's "business of insurance," then what is? The *Chesnut* case relied upon by the Dillons even went so far as to hold the CSPA did not apply to an insurer's obtainment of a title to a vehicle it declared a total loss before selling it at an auto auction.

The limited case law provided by Appellees is inapplicable. The case of *Hofstetter v. Fletcher*, 905 F.2d 897 (6th Cir. 1988) involved CSPA claims stemming from alleged fraudulent sales tactics of agents to sell life insurance policies and promise of services in reducing tax liability. Likewise, *Thornton v. State Farm Mut. Auto Ins. Co.*, 2006 U.S. Dist. LEXIS 83968 (N.D.Ohio 2006), involved allegations the insurer laundered the titles of vehicles that had been declared a total loss by reselling them to third-parties without having obtained a salvage title. Here, the facts stem from the creation of a routine vehicle repair estimate and payment for vehicle repairs. No complex financial services or obscure sale of vehicles for profit are involved. Rather, this matter involves routine, everyday automobile claim adjustment practices designed to provide coverage for Farmers' insureds, which squarely fit into Farmers' "business of insurance."

Therefore, the Dillons' contentions are misplaced, and Ohio law bars their CSPA claims against Farmers as a matter of law since the CSPA specifically excludes coverage of claims involving insurance companies engaging in commonplace insurance transactions.

Proposition of Law No. 2: An insurer's issuance of a repair estimate for the use of OEM and non-OEM parts is not an "unfair or deceptive act or practice" pursuant to any provision of the Ohio Consumer Sales Practices Act (R.C. §1345.01 et seq.), where the estimate complies with the express terms of the applicable insurance policy; the insurer orally notifies its insured of the content of the estimate; and the insured chooses the repair facility.

A. R.C. §1345.81 is inapplicable if the insured does not choose the form of vehicle repair estimate to receive.

There is a key requirement of R.C. §1345.81 that the person requesting the repair *"chooses to receive"* either a written estimate, oral estimate, or even no estimate at all. Mr. Dillon ***never*** chose to receive either a written estimate or an oral estimate, and therefore, R.C. §1345.81 is inapplicable. Rather, as a matter of consistent internal policy and procedure, Farmers issued both an oral and a written vehicle repair estimate, to provide knowledge to the Dillons and inform them of the repairs being performed.

The record instead indicates the Dillons were actually provided both a written and an oral estimate by Farmers. Both Mr. Babb and Mr. Dillon testified the Dillons did not at any point request a specific form of estimate. Thus, the Dillons did not make any elections as to what type of estimate they wanted to receive, and as such, R.C. §1345.81 is not even implicated by the facts in this case.

Further, the Dillons were well-aware of the accurate content of the estimate provided by Farmers. Indeed, Mr. Babb explained the content of the estimate on multiple occasions. Mr. Dillon even later changed his mind and unilaterally instructed Mission Auto to only install OEM parts. The only conceivable protection afforded by R.C. §1345.81 is to provide the insured

knowledge of the content of the estimate, which was in no way implicated in this matter. Indeed, Mr. Dillon was fully aware of the scope and content of the vehicle repair estimate.

Nevertheless, the Court of Appeals failed to address the inner-workings of the specific statute, and failed to provide any guidance as to the application of R.C. §1345.81 for insurers to rely upon. Since R.C. §1345.81 is inapplicable to factual situations where the insured does not elect the form of vehicle repair estimate, there can be no CSPA violation or liability under the present case, and the Court of Appeals' decisions must be reversed.

B. The Dillons were never deceived, and Farmers did not commit an unfair or deceptive act or practice.

The sole purpose of the CSPA is to prevent unfair or deceptive practices involved in consumer transactions. Contrary to Appellees' contentions, the state of mind of Mr. Dillon is highly relevant to this determination. In Ohio, "deception is measured from the standpoint of the consumer asserting the OCSPA claim." *Ferron v. EchoStar Satellite, LLC*, 727 F.Supp.2d 647, 656 (S.D.Ohio 2009). Here, there is absolutely no evidence Mr. Dillon was deceived when Farmers issued the repair estimate, or subsequently paid Mission Auto the amount listed in the repair estimate.

He selected his own personal repair shop, Mission Auto Connection, Inc. Mr. Dillon could have taken his vehicle to any repair shop to be fixed. He admitted he was well-aware of the differences between OEM and non-OEM parts as noted above. He never once requested any form of estimate. Instead, Farmers provided a voluntary oral and written estimate to provide Mr. Dillon knowledge and information regarding the scope and details of all recommended vehicle repairs. He was notified of the contents of the written vehicle repair estimate on multiple occasions, including the use of non-OEM parts. He knew and understood the insurance policy

provisions in dispute, including the ability of Farmers to pay for vehicle repairs using both OEM and non-OEM parts.

Mr. Dillon later spoke with Mr. Babb, and changed his mind, without explanation, demanding Farmers pay for the installation of purely OEM parts. Mr. Babb again advised Mr. Dillon the insurance policy allowed Farmers to pay for the use of both OEM and non-OEM parts for the repairs. Mr. Dillon unilaterally instructed Mission Auto to proceed with repairing his vehicle using solely OEM parts. Mr. Dillon was then informed he would be responsible for the difference in the cost of using strictly OEM parts in accordance with the insurance policy terms and conditions.

Farmers provided payment for all towing and rental car charges. Mission Auto requested and accepted payment of $8,462.25 from Farmers to pay for the agreed upon repairs using OEM and non-OEM parts, and also received more than $1,000.00 in additional payments from Farmers for subsequent repair work related to the accident. The alleged difference between the Farmers payments and the use of solely OEM parts is $1,521.07.

Therefore, Farmers did not in any respect violate the provisions of the CSPA, and the decisions of the Fifth District Court of Appeals should be reversed.

III. CONCLUSION

Based on the foregoing, Appellant, Farmers Insurance of Columbus, Inc., respectfully requests the Court reverse the decisions of the Fifth District Court of Appeals. If the Court of Appeals' decision stands, it will be misused as a weapon by insureds to punish insurers for simply issuing vehicle repair estimates, and providing insureds with knowledge concerning the scope of such vehicle repairs. The Court of Appeals' ruling also regulates the insurance industry

beyond the scope of Title 39, and is in direct contravention of the clear majority of Ohio court decisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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