COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2012-00205

ANTHONY G. MORGAN, & others[1]

vs.

MASSACHUSETTS HOMELAND INSURANCE COMPANY

MEMORANDUM OF DECISION AND ORDER
ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

INTRODUCTION

On March 8, 2011, the plaintiff, Anthony G. Morgan ("Morgan"), filed this automobile insurance coverage action against his auto insurance provider, the defendant, Massachusetts Homeland Insurance Co. ("Massachusetts Homeland"), alleging breach of contract (Count I);[2] violation of G. L. c. 93A and c. 176D (Count II); and violation of G. L. c. 93A and c. 176D on behalf of a putative class (Count III). The heart of Morgan's claim is that Massachusetts Homeland committed an unfair insurance settlement practice by improperly valuing his total loss claim by failing to consider the "retail book value" of his vehicle.

Pursuant to G. L. c. 93A, § 9 (2), Morgan now moves for class certification on behalf of all of Massachusetts Homeland's Massachusetts insureds that were compensated for a total loss by Massachusetts Homeland within a certain limitations period.[3] He argues that this alleged 93A violation harmed him, and that Massachusetts Homeland's alleged bad practice has harmed all similarly situated insureds, to varying degrees. Massachusetts Homeland denies any 93A violation, but counters that Morgan, assuming he was injured by Massachusetts Homeland, has

[1] All others similarly situated for purposes of Count III.
[2] On January 23, 2013, the parties filed a stipulation of dismissal with prejudice as to the breach of contract claim.
[3] In his proposed class certification order, Morgan qualifies his class as follows: "[T]he class shall consist of all individuals who (1) received a payment for a claim under a Massachusetts automobile insurance policy of any kind issued by Massachusetts Homeland Insurance Company on or after March 8, 2008 and prior to the date of this order; and (2) the claim was determined to be a so-called 'total loss' claim arising from damage or other covered loss to an insured vehicle requiring Homeland to determine the actual cash value of the vehicle."

not shown that any other party was similarly injured by Massachusetts Homeland's practices. For the following reasons, Morgan's motion will be denied.

BACKGROUND

On January 9, 2011, Morgan's 2005 Chevrolet Colorado was damaged when Morgan lost control of the vehicle on an icy road in Westfield, Massachusetts. The vehicle damage was significant and Massachusetts Homeland determined the accident to be a "total loss." The parties agree that in such cases, an insurance company is obligated to pay the owner of the vehicle the actual cash value of the vehicle, plus sales tax, minus any deductible under the insurance policy. The Massachusetts Commissioner of Insurance has enacted specific regulations requiring insurance companies to consider the "retail book value" when calculating the actual cash value of total loss vehicles. 211 Code Mass. Regs. 133.05 (1) (a).

On January 12, 2011, Massachusetts Homeland determined the actual cash value of Morgan's vehicle to be $11,891.00. The source of this valuation was a software program maintained by a third-party, Certified Collateral Corporation ("CCC").[4] On January 20, 2011, Massachusetts Homeland called Morgan to inform him that it valued the vehicle at $11,891.00; Morgan responded that he believed the vehicle to be worth more than $14,000.00, based on the National Automobile Dealers Association ("NADA") retail book value. Morgan alleges Massachusetts Homeland's representative stated: "We do not consider retail book evaluations in collision claims." Massachusetts Homeland claims that its representative requested that Morgan provide supporting documentation, including the NADA report upon which Morgan was relying.[5] On February 11, 2011, Morgan's attorney sent Massachusetts Homeland a demand

[4] Massachusetts Homeland's CCC report is based, in part, on the following factors: (1) vehicle description; (2) vehicle options; (3) vehicle history; (4) the local market; (5) vehicle's pre-accident condition; (6) value of comparable vehicles; (7) the National Highway Traffic Safety Administration recall notices; and (8) vehicle mileage.

[5] Massachusetts Homeland further alleges that on January 21, 2011, it obtained a NADA report for Morgan's vehicle that provided values for the vehicle ranging from a low of $9,125.00 to a high of $14,250.00, depending upon the vehicle's condition. The NADA report also provided detailed descriptions of its values and stated, "because individual vehicle condition varies greatly, users of NADAguidelines.com may need to make independent

letter pursuant to chapters 176D and 93A demanding $14,750.00 for Morgan's total loss claim and damages for interest, loss of use, and emotional distress. On March 9, 2011, Massachusetts Homeland paid Morgan $14,003.12 by check and Morgan accepted that tender. Morgan now seeks to certify a class on behalf of those he alleges were similarly injured by Massachusetts Homeland's failure to calculate the "actual cash value" of total loss vehicles by considering the "retail book value."

DISCUSSION

Morgan moves for class action certification under G. L. c. 93A, § 9 (2), contending that: he is an adequate class representative; he brings this motion on behalf of himself and the putative class; and that the proposed class members share the similar injury of having their total loss claim handled "in a manner constituting an unfair or deceptive act or practice warranting either actual or statutory damages in accordance with c. 93A, § 9."[6] Massachusetts Homeland principally counters that Morgan has failed to show that the purported 93A violation has harmed any putative class member.

To certify a class under chapter 93A, the court must decide three questions in the plaintiff's favor: (1) whether "the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated," (2) whether the named plaintiff "adequately and fairly represents such other persons," and (3) whether the plaintiff brings the action on behalf of himself and "such other similarly injured and situated persons." G. L. c. 93A, § 9 (2); *Aspinall* v. *Phillip Morris Cos.*, 442 Mass. 381, 391, 392 (2004). See *Fletcher* v. *Cape Cod Gas Co.*, 394 Mass. 595, 605-606 (specifying that courts may exercise discretion in certifying classes under 93A, but should avoid reading technicalities into the

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adjustments for actual vehicle condition."

[6] G. L. c. 93A, § 9 (2), provides that "[a]ny persons entitled to bring [a c. 93A] action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly situated persons."

statute). A plaintiff bears the burden of making a sufficient showing to enable the judge to "form a reasonable judgment that the class meets the requirements of . . . [c. 93A, § 9(2)]." *Kwaak* v. *Pfizer, Inc.*, 71 Mass. App. Ct. 293, 297 (2008), quoting *Weld* v. *Glaxo Wellcome, Inc.*, 434 Mass. 81, 87 (2001) (recognizing that judges may certify a class when reasonably convinced that a plaintiff meets the requirements, even where the plaintiff has not adduced evidence sufficient to prove the requirements have been met).

Crucially, the first inquiry imparts a causation element to the analysis: the alleged 93A violation must have *caused* similar injury to class members similarly situated. G. L. c. 93A, § 9 (2). A plaintiff, then, must produce sufficient information for the court to form a reasonable judgment that the 93A violation caused harm. See *Kwaak*, 71 Mass. App. Ct. at 297. Morgan has not met this burden.

Generally, a violation of the Massachusetts Consumer Protection statute will not necessarily cause a common injury to a class of consumers; injuries may take many unexpected forms if they even occur at all. A class should not be certified where "there is insufficient information in the record to identify any such similarity of exposure, deception, and *causation*." *Kwaak*, 71 Mass. App. Ct. at 301 (emphasis added). The presence or absence of injury caused by the defendant is a preliminary determination that must be answered in the affirmative before a plaintiff's class can be certified, notwithstanding Morgan's correct assertion that the amount of damages is an individual question. See *id.*

Here, Morgan has not demonstrated a similarity of injury suffered between his alleged harm and that of the putative classmembers. Massachusetts Homeland claims that it bases its vehicle valuations on mostly the same information on which "retail book values" such as the NADA values themselves are based. Since the CCC report will in many instances adequately compensate a total loss insured, there is no indication that any other party similarly situated to Morgan has suffered similar harm. Because Morgan has not demonstrated that any other party

was adversely affected by Massachusetts Homeland's use of the CCC program, there cannot be a common 93A action, and the class cannot be certified under G. L. c. 93A. See *Van Dyke* v. *St. Paul Fire and Marine Ins. Co.*, 388 Mass. 671, 678 (1983) (no 93A claim where defendant's failure to investigate did not adversely affect plaintiff).

Moreover, this is not a case where a judge can reasonably determine that a defendant's 93A violation must have caused a common injury per se.[7] Instead, "[w]hether a causal connection exists between [this] deceptive act and a loss is not just difficult to identify but appears to vary widely depending on the consumer." *Kwaak* v. *Pfizer, Inc.*, 71 Mass. App. Ct. at 301-302. See also *Bellerman* v. *Fitchburg Gas and Electric Light Co.*, 2013 WL 485670, 1-5 (Mass. Super. Ct. 2013) (refusing to certify a class under 93A of all customers of an allegedly negligent electric company, where it was not demonstrated that the classmembers were individually injured by the defendant).

Notably, Morgan has provided no evidence tending to show that Massachusetts Homeland's vehicle estimations necessarily deprived other consumers of the insurance payments to which they were entitled.[8] There is no evidence that Morgan conducted depositions, informed the press, or posted any public requests for information. Cf. *Owens* v. *Diperna*, 1995 Mass. Super. LEXIS 717, 3-5 (Mass. Super. Ct. 1995) (McEvoy, J.) (class action plaintiff posted flyers and informed the press resulting in a newspaper article to encourage other class members to come forward). In sum, there is no indication that Massachusetts Homeland's method of evaluating vehicle value for purposes of total loss payments has injured other consumers.

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[7] Cf. *Aspinall* 442 Mass. at 392 (holding that the purported 93A violation, marketing "light" cigarettes as being less hazardous, necessarily resulted in economic injury because the cigarettes were not any less dangerous, and therefore consumers who paid more for "light" cigarettes invariably suffered an economic loss of some degree); *Bennett* v. *Milford Water Company*, Worcester Superior Court No. 2009-2166, Memorandum of Decision and Order of the Court (December 31, 2012) (holding that proposed class members necessarily suffered injury where the defendant breached its duty to provide potable water, requiring the state to issue a boil water order).

[8] Morgan has failed to adduce any evidence of injury to any other party. Assuming that Massachusetts Homeland has violated chapter 93A, there may be a subset of Morgan's proposed class entitled to relief; however, even if one exists, this Court will not carve out such a class. See *Kwaak*, 71 Mass. App. Ct. at 302 n.8; *Bellerman*, 2013 WL 485670, 5 ("The pleadings, as they stand, do not permit certification of a class consisting of only some plaintiffs").

Accordingly, Morgan's motion for class certification fails the first 93A class certification factor: he has not shown that any other similarly situated person was similarly injured.[9] As a result, class certification is not appropriate in this case.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Plaintiff's Motion for Class Certification is **DENIED**.

Edward J. McDonough Jr.
Justice of the Superior Court

Dated: September 24, 2013

[9] Because Morgan's claim fails for lack of causation, this Court does not address Massachusetts Homeland's remaining arguments that Morgan's motion for certification suffers from other substantive and procedural defects.