

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW**

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

CLASS ACTION

Plaintiff,
vs.

Case No. 19-741-CK
Hon. Timothy P. Connors

PROGRESSIVE MARATHON INSURANCE
COMPANY,

Defendant.

Michael L. Pitt (P24429)
Beth M. Rivers (P33614)
**PITT MCGEHEE PALMER &
RIVERS, P.C.**

Attorneys for Plaintiffs
117 W. Fourth Street, Suite 200
Royal Oak, MI 48067
(248) 398-9800
mpitt@pittlawpc.com
brivers@pittlawpc.com

Scott J. Jeeves (*admitted pro hac vice*)
Roger L. Mandel (*admitted pro hac vice*)
JEEVES MANDEL LAW GROUP, P.C.
Attorneys for Plaintiffs
954 First Avenue North
St. Petersburg, FL 33705
sjeeves@jeeveslawgroup.com
rmandel@jeevesmandellawgroup.com

Craig E. Rothburd (*admitted pro hac vice*)
CRAIG E. ROTHBURD, P.A.
Attorneys for Plaintiffs
320 W. Kennedy Blvd. – Suite 700
Tampa, FL 33606
crothburd@e-rlaw.com

Elaine M. Pohl (P60359)
PLUNKETT COONEY
Attorneys for Defendant
38505 Woodward Avenue, Suite 100
Bloomfield Hills, MI 48304
(248) 901-4000
epohl@plunkettcooney.com

Karl A. Bekeny (*admitted pro hac vice*)
Benjamin C. Sassé (*admitted pro hac vice*)
Attorneys for Defendant
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
(216) 592-5000
(216) 592-5009 (Fax)
karl.bekeny@tuckerellis.com
benjamin.sasse@tuckerellis.com

DEFENDANT PROGRESSIVE MARATHON INSURANCE COMPANY'S
AMENDED SEPARATE OR AFFIRMATIVE DEFENSES

Consistent with the Court's September 26, 2022 ruling on the record regarding Plaintiff Gonzalo Ubillus' Motion to Strike Defendant Progressive Marathon Insurance Company's Affirmative Defenses, Progressive has undertaken in good faith to list all of the defenses that it may have with respect to insurance coverage under the applicable insurance policy(ies) and/or Plaintiff's allegations in this action. Progressive does, however, reserve the right to re-evaluate, re-state, and/or delete defenses and/or to assert additional defenses as the circumstances warrant. Further, by restating or characterizing the following as defenses, Progressive does not admit it bears the burden of proof on any of the issues raised by such defenses. Subject to and without waiving the foregoing limitations and reservations, Progressive identifies the following defenses upon which it may rely in this action:

1. Plaintiff's claims and those of the proposed Class members are barred, in whole or in part, by the terms, definitions, conditions, exclusions, and limitations contained in their respective Progressive policies. That is, while Progressive covers the damaged vehicle's sudden, direct, and accidental loss of value, this loss of value has nothing to do with whatever ancillary costs an insured might pay when he buys a new vehicle. Nor are those ancillary costs within the Policy's "actual cash value" Limit of Liability: this limit is "determined by the market value, age, and condition of the vehicle at the time of loss," and none of those factors encompass replacement costs. (Ubillus Dep. Ex. 16, PROGRESSIVE_UBILLUS_00000029-30). Thus, neither Plaintiff nor the putative Class can recover those costs, including without limitation the taxes and fees they seek.

2. Plaintiff lacks standing to assert some or all of the claims for relief alleged in the Complaint on his behalf or on behalf of the proposed Class members. First, Plaintiff never incurred

a documentary preparation fee to “replace” his total loss vehicle because he purchased the “replacement vehicle” through a private-party transaction facilitated by Craigslist. (Dep. of Gonzalo Ubillus at 97:12–20; 106:22–107:23). He thus lacks standing to pursue a claim in law or equity for dealer documentation fees on his behalf or on behalf of the proposed Class members. Second, Plaintiff lacks standing to assert a claim on behalf of proposed Class members against any Progressive entity other than Defendant Progressive Marathon Insurance Company, the corporation that issued his insurance policy.

3. Plaintiff’s causes of action and those of the proposed Class are barred, in whole or in part, to the extent that Plaintiff has not suffered any injury as a result of Progressive’s alleged actions or inactions. Progressive paid Plaintiff all that he was entitled under the applicable Policy; he was not harmed by Progressive’s payment of “actual cash value” in settling his total loss claim. The same is true for the proposed Class members as well. Yet even if Plaintiff or the proposed Class were entitled to certain taxes and fees incurred to replace their covered auto, Plaintiff and the proposed Class were not harmed to the extent that those taxes and fees did not increase the actual cost to buy the replacement vehicle. Nor were they harmed to the extent that Progressive’s total loss settlement payment exceeded the sum of the actual cash value of their covered auto plus the taxes and fees they seek.

4. Plaintiff’s Complaint fails to meet the criteria for class action certification under MCR 3.501. Individual questions of law or fact predominate over common questions. Plaintiff’s claims and the defenses to which he is subject are atypical of the putative Class. Plaintiff may have interests antagonistic to, materially different than, or not in the best interest of the putative Class. The claims and defenses implicated here will necessarily require individual inquiry into Plaintiff’s and each proposed Class member’s conduct, alleged damages, whether accord and satisfaction

applies, and whether each potential Class member complied with all relevant policy provisions, among other individualized inquiries. For example, Plaintiff negotiated his total loss settlement and received an additional \$400 to settle his total loss claim, an amount not reflected in his Settlement Summary and revealed only through a review of his individual claim file. (Ubillus Dep. Ex. 4, UBILLUS000065; Ubillus Dep. Ex. 5, UBILLUS000136; Ubillus Dep. Ex. 6, PROGRESSIVE_UBILLUS_00001124). Progressive claims adjusters can make these and other adjustments to total loss settlements with a supervisor's approval, including without limitation paying sales tax up front to settle claims, and not all of these adjustments appear in the summary data Plaintiff requested and received. Plaintiff thus cannot show that common questions would predominate over individual inquiries into the claims files of proposed Class members.

5. Recovery, if any, by Plaintiff and the proposed Class members is barred or reduced by a failure to mitigate alleged damages. Consistent with Progressive's practice in Michigan, insureds are able to seek reimbursement of sales tax following a total loss if the insured submits evidence to Progressive that the insured incurred sales tax to replace the total loss vehicle within a proscribed time. Plaintiff was provided this information and opportunity, yet never submitted that paperwork to Progressive. On March 28, 2019, Plaintiff was provided written instructions about how to submit documentation to Progressive for sales tax reimbursement if he replaced his total loss vehicle within thirty days of his total loss claim; on May 24, 2019, Ubillus was afforded additional time beyond those initial thirty days to provide documentation to Progressive. (*See* Ubillus Dep. Ex. 11, UBILLUS000077; Ubillus Dep. Ex. 14, UBILLUS000207). Yet he never did. (Ubillus Dep. at 113:4-7). This constitutes a failure to mitigate damages now claimed as part of this lawsuit. The same may be true for potential Class members and would require individual inquiries into claim files for each and every total loss.

6. Plaintiff's and the proposed Class members' causes of action are barred, in whole or in part, by the applicable statutes of limitations. In Michigan, the statute of limitations for breach of contract claims is six years. MCL § 600.5807(9). To the extent Plaintiff's claims or those of the proposed Class members fall outside that six-year limit, they are statutorily barred.

7. Plaintiff's and the proposed Class members' claims may be barred, in whole or in part, by the doctrines of waiver and estoppel. Waiver and estoppel may apply to Plaintiff's claim or the claims of the proposed Class because it is the insured's burden to demonstrate that his or her claim falls within the terms of his or her respective policy; if an insured's total loss was not covered, he or she may not be entitled to coverage and therefore not entitled to the damages sought in this action.

8. Plaintiff's and the proposed Class members' claims may be barred, in whole or in part, by the doctrine of set-off. That is, Plaintiff or the proposed Class members may have been overpaid certain amounts in sales taxes or fees sought as damages in this action. To the extent Progressive overpaid taxes or fees to Plaintiff or the proposed Class members, the overpayment should be set-off against any damage award to Plaintiff or the proposed Class member. Determining any applicable set-off would also require individualized inquiries into Plaintiff's and each potential Class members' claim.

9. Plaintiff's claims and the claims of the potential Class members may be barred, in whole or in part, by the doctrines of payment or release. Plaintiff and potential Class members may have or did agree to accept a sum certain to settle their individual total loss claims. For example, Plaintiff engaged in a negotiation with Progressive to settle his total loss claim. (*See* Affirmative Def. 4, *supra*). After this individual negotiation, Plaintiff accepted and cashed a check from Progressive for the balance of his agreed-to settlement amount, less the balance owed to his lender.

(Ubillus Dep. Ex. 9; UBILLUS000059, 76; Ubillus Dep. Ex. 10, PROGRESSIVE_UBILLUS_00001233). The terms of any payment or release may bar, in whole or in part, Plaintiff's claims and the claims of the potential Class members.

10. Plaintiff's and the proposed Class members' causes of action are barred, in whole or in part, by the doctrine of accord and satisfaction. Despite a good-faith dispute between Progressive and Plaintiff, or the potential Class member, over an unliquidated claim, Progressive may have tendered a check in full satisfaction of that claim, which the insured accepted. To the extent that the check and/or accompanying writing contained a conspicuous statement that the tender is in full satisfaction of the claim, or the claimant or his or her agent knew Progressive tendered the check in full satisfaction of the claim, the claim is discharged.

11. This Court lacks jurisdiction over any Progressive entity other than Defendant Progressive Marathon Insurance Company.

12. Progressive reserves all rights under the Policy and the policies issued to the proposed Class members. This includes the right to enforce all policy provisions, conditions, and exclusions, and to demand arbitration pursuant to the terms of the policies.

13. Progressive reserves its right to raise such further and additional defenses as may be available upon the facts up to and including at trial, under any applicable substantive law.

WHEREFORE, Progressive respectfully requests that this Court deny the relief requested in Plaintiff's Complaint and dismiss Plaintiff's Complaint in its entirety with prejudice. Progressive further requests any and all other relief to which it is entitled, including costs and attorneys' fees.

Respectfully submitted this 26th day of October, 2022.

/s/Elaine M. Pohl
Elaine M. Pohl (P60359)
PLUNKETT COONEY
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(248) 901-4000
epohl@plunkettcooney.com

and

Karl A. Bekeny (admitted *pro hac vice*)
Benjamin C. Sasse (admitted *pro hac vice*)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
(216) 592-5000
(216) 592-5009 (Fax)
karl.bekeny@tuckerellis.com
benjamin.sasse@tuckerellis.com
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2022, a copy of the foregoing was e-served on the following counsel of record at the email addresses set forth below:

Michael L. Pitt
Beth M. Rivers
PITT, MCGHEE, PALMER & RIVERS, P.C.
117 W. Fourth Street, Suite 200
Royal Oak, MI 48067
mpitt@pittlawpc.com
brivers@pittlawpc.com

Scott J. Jeeves
Roger L. Mandel
JEEVES MANDEL LAW GROUP, P.C.
954 First Avenue North
St. Petersburg, FL 33705
sjeeves@jeeveslawgroup.com
rmandel@jeevesmandellawgroup.com

Craig E. Rothburd
CRAIG E. ROTHBURD, P.A.
320 W. Kennedy Blvd., Suite 700
Tampa, FL 33606
crothburd@e-rlaw.com

Attorneys for Plaintiff

/s/Elaine M. Pohl

ELAINE M. POHL

*An Attorney for Defendant Progressive Marathon
Insurance Company*

Open.27851.93577.29874141-1