IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 8, 2005 Session

GOVERNMENT EMPLOYEES INSURANCE CO., ET AL. v. LINDA BLOODWORTH, ET AL.

Appeal from the Circuit Court for Davidson County
No. 01C2325 Thomas Brothers, Judge

No. M2003-02986-COA-R10-CV - Filed on June 29, 2007

The trial court certified a class of residents of twenty-four states in this breach of contract action to recover from class members' uninsured motorist insurance provider claimed diminished value resulting to class members' vehicles after accidents with uninsured motorists. We conclude that the trial court was required to conduct a "rigorous analysis" of the class certification requirements in light of the issues raised; that such an analysis necessarily includes choice of law considerations where a multi-state class is involved; and that the question of whether common questions of law and fact predominate over individual ones requires identification of common and individual questions and a decision that the cause of action can be established by classwide proof. We also conclude that the classwide proof offered by the class proponents to show that decrease in value was actually suffered by the class members does not comport with Tennessee law. Because, based on the record before us, we cannot conclude that the trial court applied the correct legal standards and also cannot conclude that the class proponent met her burden of establishing that the requirements of Tenn. R. Civ. P. 23.03 have been met, we must vacate the trial court's certification decision.

Tenn. R. App. P. 10 Extraordinary Appeal; Judgment of the Circuit Court Vacated

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

John S. Hicks, Nashville, Tennessee; Stephen G. Anderson, Knoxville, Tennessee; David P. Gersch, Washington, D.C. for the appellants, Government Employees Insurance Company, et al.

Andrew S. Friedman, Elaine A. Ryan, Phoenix, Arizona; Van Bunch, Signal Mountain, Tennessee; Hal D. Hardin, Nashville, Tennessee; David Futscher, Covington, Kentucky; Debra Brewer Hayes, Houston, Texas; Morris A. Ratner, Scott P. Nealy, San Francisco, California; John J. Stoia, Jr., San Diego, California, for the appellees Linda Bloodworth, et al.

OPINION

Two individuals, Linda Bloodworth and Krista Lawrence, brought this action on behalf of themselves and others who were insured for certain losses by Government Employees Insurance Co. and/or GEICO General Insurance Company (hereinafter jointly "GEICO"). Although the plaintiffs sought injunctive and declaratory relief as well as monetary damages, the only cause of action alleged is breach of contract.

The essence of the plaintiff's breach of contract claims is (1) under the standard uninsured motorist policy language, GEICO agreed to pay an insured the amount he or she would be "legally entitled" to recover from the uninsured motorist or third party; (2) in addition to repair costs, that amount includes any loss in value (or diminished value) resulting from the damage caused by the uninsured motorist or third party; (3) a loss in value necessarily occurs with certain types of damage to a vehicle because the post-accident market value, even after repairs, is always less than before the accident; and (4) that GEICO systematically fails to compensate insureds for the loss in value or inform them of the right to such payment.

The named plaintiffs sought certification of a multistate class including "tens of thousands" of persons who had purchased an uninsured motorist policy from GEICO in twenty-four states. The named plaintiffs later sought to include insureds whose claims involved "hit and run" accidents and were handled by GEICO under the insured's collision coverage rather than under uninsured motorist coverage and who were not compensated for, nor informed of their right to, damages for loss in value. Ms. Bloodworth's claim is actually one of the "hit and run" claims. During this time, the trial court granted GEICO's motion for summary judgment as to Ms. Lawrence, the only other named plaintiff, because she had previously released her claims against GEICO.[1]

The parties briefed the class certification motion and made voluminous filings in support of and opposition to the motion. The trial court held a hearing on the certification motion on May 22, 2002. On October 7, 2003, the court entered an order certifying a plaintiff class. The definition of the class, whose certification is on appeal, is:

All GEICO insureds who after August 2, 1995:

> (1) Were paid under the uninsured motorists ("UM") coverage provisions of their GEICO policy or;
>
> (2) Had uninsured motorist property damage coverage and were involved in an accident with a hit-and-run motorist, but received payment under GEICO's collision coverage, and;

[1] Neither the parties nor the trial court addressed the potential impact of the dismissal of the only named plaintiff paid under the UM coverage provision. Since the only issue that is the subject of this appeal is predominance, we will not address it either.

(3) Were not compensated for diminished value where:

(A) The estimate, including supplements, to repair the vehicle was more than $1,000;

(B) The vehicle suffered structural (frame damage) and/or required body work; and

(C) The vehicle was less than six years old (model year plus five) and had less than 90,000 miles on it at the time of the accident.[2]

The class includes insureds who reside in Tennessee as well as the following other states: Alaska, Arkansas, California, Colorado, Delaware, Georgia, Illinois, Indiana, Louisiana, Maryland, Mississippi, New Mexico, North Carolina, Oregon, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, and West Virginia. The District of Columbia is also included.

In its order certifying the class, the trial court held that the plaintiff satisfied all the requirements of Tenn. R. Civ. P. 23.01. The trial court's order further stated that the plaintiff's claims met the requirements under both Tenn. R. Civ. P. 23.02(2) (allowing prospective injunctive relief) and Tenn. R. Civ. P. 23.02(3) (seeking primarily monetary damages) "in that the existence of diminished value is a common fact issue subject to class-wide proof." GEICO appeals the certification order.[3]

I. CLASS CERTIFICATION REQUIREMENTS

The requirements for bringing and maintaining a lawsuit on behalf of a class of persons and the standards to be applied in determining whether to certify a particular class are set out in Rule 23 of the Tennessee Rules of Civil Procedure. Although there are not a large number of reported opinions from Tennessee courts on class action certification, federal courts have frequently dealt with the issues surrounding class certification under the federal rule, which is substantially the same as the state rule, and which therefore may be consulted as persuasive authority. *Meighan v. U. S.*

[2]Plaintiff's class definition excludes: "(i) Those policyholders whose vehicles were declared total losses; (ii) Colorado policyholders with otherwise qualified claims paid before August 2, 1998; (iii) California policyholders with otherwise qualified claims but only to the extent that the claim, when fully paid, exceeds $3500; (iv) Ohio policy holders; (v) Policyholders with otherwise qualified claims who executed GEICO's form release and trust agreement; and (vi) Employees of GEICO, plaintiff's counsel, and the assigned judge and the judge's family."

[3]GEICO sought permission from the trial court for an interlocutory appeal pursuant to Tenn. R. App. P. 9, which was denied. Subsequently, GEICO applied to this court for extraordinary appeal, which we granted. The order granting the appeal identified issues to be addressed by the parties.

Sprint Communications Co., 924 S.W.2d 632, 637 n.2 (Tenn. 1996), *citing Bayberry Associates v. Jones*, 783 S.W.2d 553, 557 (Tenn. 1990).[4]

The first set of prerequisites is found in the first subsection of Rule 23, which allows an action to be brought by a representative party on behalf of all members of a class only if:

> (1) the class is so numerous that joinder of all members is impracticable,
> (2) there are questions of law or fact common to the class,
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
> (4) the representative parties will fairly and adequately protect the interest of the class.

Tenn. R. Civ. P. 23.01.

These prerequisites, frequently called numerosity, commonality, typicality, and adequate representation, are not at issue in this appeal. Instead, the dispute relates primarily to one of the additional requirements for maintaining a class action set out in Tenn. R. Civ. P. 23.02, which places additional limitations on the situations in which a class action can be maintained or in which class certification is appropriate. *Meighan v. U. S. Sprint Communications Co.*, 924 S.W.2d at 636. It is the third of those enumerated situations that is the basis for this appeal.[5] As stated in Tenn. R. Civ. P. 23.02(3), the additional requirements are:

> (3) the court finds that the question of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

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[4] The Class Action Fairness Act of 2005, Pub.L. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.), made some statutory changes that expanded federal court jurisdiction over class actions by creating an exception to the general requirement of complete diversity and allowing aggregation of claims to meet the amount in controversy requirement. Those changes do not affect the Rule 23 procedural requirements and do not modify the basic premise that federal court interpretation of federal rules may be consulted in interpreting similar or identical state rules.

[5] Tenn. R. Civ. P. 23.02(2) applies where the predominant relief sought is injunctive or declaratory, and GEICO has specifically stated it does not seek review of class certification as to the injunction claims of Tennessee residents.

Unlike the other sections that provide for class action litigation based on the type or effect of the relief sought, the common question class is based simply on the criteria listed in the rule on the justification that the actual interests of the parties will be best served by resolving the disputes in a single lawsuit. 7AA Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: Civil 3d §1777. Class actions certified under this subsection are subject to specific requirements for notice to and opt out provisions for class members. The rule at issue

> encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

Fed R. Civ. P. 23(b)(3) (adv. comm. n. to 1966 amend).

Class actions and relief to a class are "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class," because in those situations, the class action mechanism "saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982), *quoting Califano v. Yamasaki*, 442 U.S. 682, 701.

Both the United States Supreme Court and the Tennessee Supreme Court have recognized the benefits, to litigants and to the courts, of the class action procedure in the appropriate circumstances, especially where a common question class is involved. Those benefits include advancement of efficiency and economy of litigation, providing access to the courts to individual claimants whose small claims would not otherwise justify the costs to them of litigation, and protection to the defendant against inconsistent judgments. *Meighan v. U. S. Sprint Communications Co.*, 924 S.W.2d at 637, *citing Falcon*, 457 U.S. at 159; *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339; *United States Parole Comm. v. Geraghty*, 445 U.S. 388, 402-03.

Nonetheless, "[c]lass actions are specialized types of suits, and as a general rule must be brought and maintained in strict conformity with requirements of [the rule on class actions]." *DeFunis v. Odegaard*, 529 P.2d 438, 441 (Wash. 1974). Because "the granting of class certification considerably expands the dimensions of the lawsuit, and commits the court and the parties to much additional labor over and above that entailed in an ordinary private lawsuit," *Bishop v. Comm. on Prof'l Ethics and Conduct*, 686 F.2d 1278, 1288 (8th Cir. 1982), only those cases that meet the requirements of Rule 23 should be certified.

Thus, where the individual and class claims might as well be tried separately, allowing the litigation to proceed as a class action does not advance "the efficiency and economy of litigation," which is the principal justification for the class action mechanism. *Falcon*, 457 U.S. at 159, *citing American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). Although the common question class (under Tenn. R. Civ. P. 23.02(3)) provides a mechanism for resolving smaller claims, the

unavailability of individual litigation as a viable means of resolving the dispute does not, in and of itself, justify class certification. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 859 n.33 (1999).

Despite the perceived benefits of allowing a case to proceed as a class action, courts should not disregard the requirements for certification or other applicable legal principles. "[C]lass actions do not exist in some sort of alternative universe outside our normal jurisprudence." *Southwestern Refining Co. Inc. v. Bernal*, 22 S.W.3d 425, 432 (Tex. 2000).

II. REVIEW OF A TRIAL COURT'S DECISION ON CLASS CERTIFICATION

A. Standard of Review

In federal courts, the class certification determination rests within the sound discretion of the trial court and is reviewed under an abuse of discretion standard. *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 162 (2d Cir. 2001); *Sprague v. General Motors Corporation*, 133 F.3d 388, 397 (6th Cir. 1998). That discretion, however, must be exercised within the constraints of Rule 23. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996); *In re American Medical Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996); *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977).[6]

Under the relevant standard, where a trial court applies an incorrect legal principle, reversal is required, even though such a reversal does not indicate any "abuse" as that word is commonly understood. *In re Nassau County Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006). A trial court that premises its analysis on an erroneous understanding of the governing law acts outside its discretion. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (holding a certification that rests upon a misconception of the Rule 23 predominance requirement irreconcilable with the Rule's design cannot be upheld). If a trial court ignores, misunderstands, or misapplies the applicable legal principles, reversal is required under the abuse of discretion standard. *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) ("An abuse occurs when a court . . . relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them"); *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 434 (4th Cir. 2003); *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75,78 (4th Cir. 1989) (holding that the district court abused its discretion by misapprehending the law regarding the underlying issues).

In Tennessee, a class certification decision is also within the trial court's discretion and is reviewed under the abuse of discretion standard. *Meighan v. U. S. Sprint Communications Co.*, 924 S.W.2d at 637; *Albriton v. Hartsville Gas Co.*, 655 S.W.2d 153, 154 (Tenn. Ct. App. 1983). Where

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[6] Some reviewing courts have stated that they give greater deference to a trial court decision, or afford greater discretion to the trial court, when reviewing an order certifying a class than when reviewing an order denying certification. *See, e.g., Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997). However, we see no reason to apply different standards in our review of a certification decision depending on whether certification was granted or denied. *See Creveling v. Government Employees Ins. Co.*, 828 A.2d 229, 240 (Md. 2003).

a decision is said to lie within the trial court's discretion, appellate review includes determining whether the trial court correctly applied the appropriate legal standards and based its decision on the preponderance of the evidence. D v. K, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995).

> Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to the propriety of the decision made." A trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted). Thus, we review a class certification decision to determine, *inter alia*, whether the trial court correctly applied the requirements of Rule 23.

Other states use a similar standard to review class certification orders under which the discretionary decision is limited by applicable legal standards. *See, e.g., Avery v. State Farm Mut. Automobile Ins. Co.*, 835 N.E.2d 801, 819 (Ill. 2005) (holding that the trial court's discretion in a class certification decision is bounded by and must be exercised within the framework of the rule governing class actions), *citing* 4 A. Conte & H. Newberg, *Newberg on Class Actions* § 13.62 at 475 (4th ed. 2002); *Dragon v. Vanguard Indus., Inc*., 89 P.3d 908, 912 (Kan. 2004) (stating that while trial judges are afforded discretion in determining whether a class should be certified, the requirements established in statute and rule for such certification must be applied); *Hamilton v. Ohio Sav. Bank*, 694 N.E.2d 442, 447 (Ohio 1998) (stating that the trial court's discretion as to class certification must be exercised within the framework of the rule on class actions).

Further, while the abuse of discretion standard implies a recognition that a certification decision is largely factual and, consequently, is due deference, *see Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 408 (5th Cir. 1998), whether the trial court used a correct legal standard in making that decision is a question of law reviewed *de novo*. *Id.*; *Washington v. CSC Credit Services, Inc.*, 199 F.3d 263, 265 (5th Cir. 2000); *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 220 (Md. Ct. App. 2000). Any conclusions of law by a trial court that affect its decision on certification are reviewed *de novo*. *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 18 (2d Cir. 2003); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 737 (5th Cir. 2003).

Almost uniformly, then, even a decision that is described as discretionary is subject to review for adherence to applicable legal principles. "Abuse is found when the trial court has gone outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination." Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J.APP. PRAC. & PROCESS 47, 59 (2000). The rule on class actions establishes the basic applicable legal principles to be used in class certification decisions.

B. Rigorous Analysis

Conformance to and consideration of the correct principles is evidenced by the analysis undertaken by the trial court. The United States Supreme Court has recognized the important due process concerns of both plaintiff, including absent class members, and defendants inherent in the certification decision, and, because of those concerns, has required trial courts to conduct a "rigorous analysis" of Rule 23 requirements before certifying a class. *Falcon*, 457 U.S. at 161, 102 S.Ct. at 2372. A trial court is required to take a "close look" at the parties' claims and evidence in making its class certification decision. *Amchem Prods, Inc.*, 521 U.S. at 615. Because class actions are an exception to the usual rule that litigation is conducted by and on behalf of individual parties, courts have an independent duty to rigorously apply Rule 23's requirements and to ensure that those requirements are met. *See Falcon*, 457 U.S. at 161.

Accordingly, federal appellate courts review a trial court's certification decision to determine whether the trial court performed a rigorous analysis and took a close look at the issues, claims, and evidence in light of the requirements of Rule 23. *See, e.g.*, *Sprague v. General Motors Corp.*, 133 F.3d at 397 (the Sixth Circuit stating that "a district court may not certify any class without 'rigorous analysis' of the requirements of Rule 23"); *Robinson v. Texas Automobile Dealers Ass'n.*, 387 F.3d 416, 421 (5th Cir. 2004) (noting the requirement of a rigorous analysis of Rule 23 requirements before certifying a class); *Smilow v. Southwestern Bell Mobile Systems*, 323 F.3d, 32, 38 (1st Cir. 2003) (citing the *Falcon* rule); *Davis v. Hutchins*, 321 F.3d 641, 649 (7th Cir. 2003); *In re Milk Products Antitrust Litig*., 195 F.3d 430, 436 (8th Cir. 1999) (stating the requirement for a rigorous analysis); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004) (quoting *Falcon* for requirement of "rigorous analysis"); *In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (stating that courts must conduct a rigorous analysis of the rule on class certification); *Gilchrist v. Bolger*, 733 F.2d 1551, 1555 (11th Cir. 1984) (quoting *Falcon*); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983) (citing *Falcon*).

Because of the United States Supreme Court's holding in *Falcon*, many states have explicitly adopted the "rigorous analysis" requirement for trial court class certification decisions. *See, e.g., Ex Parte Citicorp Acceptance Co.,* 715 So.2d 199, 203 (Ala. 1997) (quoting *Falcon* and holding that the trial court must conduct a rigorous analysis of whether the requirements of the class action rule are met); *Marr v. WMX Technologies, Inc*., 711 A.2d 700, 702 (Conn. 1998) (holding that the trial court must undertake a rigorous analysis to determine whether plaintiff has met the burden of establishing the class action requirements); *Oda v. State*, 44 P.3d 8, 15 (Wash. Ct. App. 2002) (quoting *Falcon* and applying the rigorous analysis standard); *Hamilton v. Ohio Sav. Bank*, 694 N.E.2d at 447 (holding that the trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether those requirements have been met); *Dragon v. Vanguard Indus., Inc.*, 89 P.3d at 912 (holding that the requirements for class certification must be applied and rigorously analyzed, relying on *Falcon*); *Creveling v. Government Employees Ins. Co.*, 828 A.2d at 238-39, (citing *Falcon*); *Gardner v. South Carolina Dept. of Revenue*, 577 S.E.2d 190, 200 (S.C. 2003) (holding the trial court must apply a rigorous analysis to determine if each requirement is satisfied); *In re South Dakota Microsoft Antitrust Litig.*, 657 N.W.2d 668, 674 (S.D.

2003) (relying on *Falcon*); *Southwest Refining Co. v. Bernal*, 22 S.W.3d at 435 (citing *Falcon* and *In re American Medical Sys., Inc.*); *Philip Morris Inc. v. Angeletti*, 752 A.2d at 220 (relying on federal court interpretations of federal rule, including *Falcon*); *Romero v. Phillip Morris Inc.*, 109 P.3d 768, 778 (N.M. 2005) (citing *Falcon* and several federal circuit court opinions); *Baptist Hosp. of Miami, Inc. v. DeMario*, 661 So.2d 319, 321 (Fla. 3d DCA 1995) (citing *Falcon*); *Carroll v. Cellco Partnership*, 713 A.2d 509, 512 (N.J. App. Div. 1998) (citing *Falcon*).[7] The West Virginia Supreme Court has specifically adopted a "thorough analysis" rule. *Chemtall Inc. v. Madden*, 607 S.E.2d 772, 783 (W. Va. 2004).[8]

Although Tennessee appellate courts have not yet expressly or specifically adopted the rigorous analysis standard, we find no basis for exempting Tennessee trial courts from the requirement that they conduct a rigorous, thorough, and careful analysis of the issues related to the standards in Tenn. R. Civ. P. 23 before certifying a class action. The Tennessee Supreme Court has indicated as much by stating that whether a particular case should be certified as a class action is to be determined "by application of established legal principles to the facts and circumstances of the case." *Meighan v. U.S. Sprint Communications Co.*, 942 S.W.2d at 479. Indeed, the plaintiff does not suggest that something less than a rigorous or thorough analysis will suffice. The initial dispute in the appeal before us is not about whether such an analysis is required; instead, it is whether it was conducted and/or whether it is demonstrated in the record.

The specifics regarding the factors that must be included in a "rigorous analysis" may differ depending on the type of case, the claims asserted, the defenses raised, and the makeup of the proposed class. We will discuss those factors relevant to the case before us in more detail later in this opinion. At this point, however, we will address the issue raised by GEICO about the deficiency in the trial court's certification order.

C. Sufficiency of Order

GEICO argues that the trial court was required to perform a rigorous analysis of each requirement for a class action and that "there is no indication of a rigorous, much less any, analysis of predominance here." GEICO asserts that the court's finding that "the existence of diminished value is a common fact issue subject to class-wide proof" is relevant to the common question requirement of Tenn. R. Civ. P. 23.01(d) and not to the predominance requirement of Tenn. R. Civ. P. 23.02(3).

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[7] The Arkansas Supreme Court, departing from the majority of states, has specifically held that trial courts in that state are not required to conduct a rigorous analysis of the class certification requirements. *The Money Place, LLC v. Barnes*, 78 S.W.3d 730, 733-34 (Ark. 2002); *Mega Life and Health Ins. Co. v. Jacola*, 954 S.W.2d 898, 900-01 (Ark. 1997).

[8] A concurring opinion explains the conscious choice of "thorough" instead of 'rigorous" as based upon the former requiring that the court "proceed in a conscientious, careful, and methodical fashion" and with "great care and completeness," while "rigorous" implies "harshness, rigidity, inflexibility" or requires a court to be "severely exact or accurate." *Chemtall Inc. v. Madden*, 607 S.E.2d at 787 (Starcher, J. concurring).

In essence, GEICO argues that the trial court's order does not reflect that it conducted the thorough or rigorous analysis that is necessary to any class certification; that the order does not include any findings or legal analysis of Rule 23's requirements in the context of the issues raised; that the trial court has not enunciated the basis for certifying the class by reference to the rule's requirements; and that these omissions deny the parties certain procedural protections and prevent meaningful appellate review.

The plaintiff asserts that the filings and argument on the certification issue focused on the predominance question, and they point to comments by the court made at the certification hearing that show that the court recognized that it was necessary for the plaintiff to demonstrate that common questions of fact or law predominated over individual questions. The plaintiff argues that the court simply rejected GEICO's arguments. Having reviewed the comments, we cannot conclude that asking questions related to the predominance issue equates to an explanation of the answers to those questions reached by the court after analysis.

Because a rigorous analysis is a prerequisite to certification of a class, most courts have held that where such an analysis is not performed by the trial court, or where the record does not clearly reflect such an analysis, the certification decision must be overturned, just as it must if the order reflects the application of incorrect standards. *See Elizabeth M. v. Montenez,* 458 F.3d 779, 788 (8th Cir. 2006); *Stirman v. Exxon Corp*., 280 F.3d 554, 566 (5th Cir. 2002), *citing Castano v. Am. Tobacco Co.*, 84 F.3d at 740; *Wachtel v. Guardian Life Ins. Co. of America*, 453 F.3d 179, 185 (3d Cir. 2006) ("a sufficient certification order must, in some clear and cogent form, define the claims, issues, or defenses to be treated on a class basis"); *Chemtall Inc. v. Madden*, 607 S.E.2d at 783 (holding that where the order on class certification does not reflect that the court conducted a thorough analysis and fails to set forth detailed findings, the certification should be reversed); *Bill Heard Chevrolet Co. v. Thomas*, 819 So.2d 34, 40 (Ala. 2001) (holding that the certification order failed to meet the rigorous analysis standard because the order "fail[ed] to identify the elements of the four claims being certified for class treatment and fail[ed] to discuss in a cogent manner how those elements bear upon the criteria in Rule 23"); *Washington Educ. Ass'n. v. Shelton School Dist. 309*, 613 P.2d 769, 793 (Wash.1980) (holding that a trial court abused its discretion in refusing to certify a class "without appropriate consideration and articulate reference to the criteria of [the class action rule]").

The plaintiff also argues that the trial court was not required to make detailed findings of fact and conclusions of law in the absence of a request from a party, citing to Tenn. R. Civ. P. 52 and to Davidson County Local Rule of Court 33.01. Under those rules, she argues, it was incumbent upon GEICO to make a written request for detailed findings, which it did not do.[9] Accordingly, the plaintiff asserts, the trial court did not abuse its discretion by not making written findings of fact and conclusions of law.

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[9]The portions of Rule 52 requiring that a party request findings of fact or conclusions of law (before judgment), Tenn. R. Civ. P. 52.01, or additional findings (after judgment), Tenn. R. Civ. P. 52.02, apply only to judgments. Class certification orders are not judgments. *See* Tenn. R. Civ. P. 54.01.

We agree that Tenn. R. Civ. P. 52.01 does not itself require findings in a class certification order, since that rule provides, in pertinent part, "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rules 41.02 and 65.04(6)." However, the portion of the class action rule that applies to common question classes specifically provides that such an action may be maintained if "**the court finds** that the question of law or fact common to the members of the class predominate over any questions affecting only individual members **and** that a class action is superior to other available methods . . ." Tenn. R. Civ. P. 23.02(3). *See Gariety v. Grant Thornton LLP,* 368 F.3d at 365 (holding that the trial court failed to comply adequately with the procedural requirements of Rule 23 which "on its face" requires that the court make findings); *Unger v. Amedysis Inc*., 401 F.3d 316, 320-21 (5th Cir. 2005) (stating that the plain text of Fed. R. Civ. P. 23(b) requires that the court "find" that certification is appropriate, so findings are necessary).

Since subsection (3) of Tenn. R. Civ. P. 23 is the only provision that uses language specifically requiring a finding by the trial court, it must be afforded an interpretation giving effect to that specific language. We can only conclude that the rule specifically applicable to class actions must govern over the general rule applicable to rulings on motions. Thus, the trial court must make the findings set out in that subsection. In *Meighan*, the Tennessee Supreme Court stated "implicit in the trial court's ruling" certifying the action as a class action pursuant to Rule 23.02(3) was "a finding that plaintiff had established all of the prerequisites for maintaining a class action under Rule 23.01 as well as a finding that a class action was appropriate under Rule 23.02(3)." *Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d at 636. Consequently, we will treat the trial court's order as including a specific finding that common questions predominate over individual ones. We do not think that treatment changes the analysis of the sufficiency of the trial court's order. We also note that the trial court's order does not address the separate superiority requirement in Tenn. R. Civ. P. 23.02(3). As the Advisory Commission Comments to Rule 23 make clear, "[t]he court is required to make an affirmative determination as to whether or not a class action is proper in any given set of circumstances." The question is the extent to which the court must explain the basis for its findings or determination.

In response to the plaintiff's argument that more detailed findings of fact and conclusions of law were not required, GEICO responds:

> This misses the point entirely. The trial court was not required to make formal findings of fact and conclusions of law. Rather, the trial court was required in some manner, be it in writing or orally on the record, to make a determination whether the predominance prong of Rule 23 was satisfied, and, if so, to explain the basis for the finding. This it did not do.

The tension between a requirement that the trial court conduct a rigorous analysis of class certification and the absence in state procedural rules of a requirement that trial courts make detailed findings of fact and conclusions of law unless requested has been specifically addressed elsewhere. In *Dragon v. Vanguard Indus., Inc.*, *supra*, the court considered how courts of other states had

resolved the issue as well as Kansas's rule that detailed findings were not generally required unless requested by a party and determined:

> Ultimately, however, the decision to be rendered on appeal is an appellate decision. If the appellate court concludes that the trial court did not engage in a rigorous analysis of the certification factors, as required by both the United States Supreme Court and this court so as to permit meaningful appellate review, the appellate court is not required to assume that the trial court has made all the necessary findings and conclusions to support its decisions. In these cases, a court may remand for further findings and conclusions in order that the appellate court may conduct a meaningful appellate review.

Dragon v. Vanguard Indus., Inc., 144 P.3d at 1286.

We agree with this reasoning. If a trial court must conduct a rigorous and thorough analysis of the certification issues, one question on appeal is whether the reviewing court can determine from the order or record that such an analysis was undertaken. A trial court must "clearly articulate its reasons" for a class certification decision so that adequate appellate review is possible. *Wachtel v. Guardian Life Ins. Co. of America*, 453 F.3d 179, 185 (3d Cir. 2006). Additionally, since the appellate court must determine whether the trial court has correctly applied the applicable legal principles, meaningful appellate review can only be had when the record makes clear which issues the court considered and the factors used by the court to decide to certify the class. Mere repetition of the language of the rule in a certification order is not sufficient. *In re American Medical Systems, Inc*., 75 F.3d at 1079, *quoting Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974).

This conclusion is consistent with our Supreme Court's decision in *Jennings v. Sewell-Allen Piggly Wiggly*, 173 S.W.3d 710 (Tenn. 2005). In that case, the Court vacated the trial court's grant of summary judgment because it was unable, due to the inadequacy of the appellate record, to determine the basis for either the motion for summary judgment or the trial court's judgment granting the motion. While the Court addressed the insufficiency of the record and attributed the responsibility for that insufficiency to both parties, including the appellee whose summary judgment had been granted, it also discussed the trial court's order. Although the order complied with Tenn. R. Civ. P. 56.04 (requiring the court to include "legal grounds" for granting the motion for summary judgment only if requested by one of the parties), the order provided the reviewing court with "little assistance" in determining the basis for the trial court's decision. *Jennings*, 173 S.W.3d at 712.

The bottom line was that the Supreme Court was unable to determine the basis for the trial court's judgment and refused to "perform the equivalent of an archeological dig and endeavor to reconstruct the probable basis for the [trial] court's decision." *Jennings*, 173 S.W.3d at 713, *quoting Church v. Perales*, 39 S.W.3d 149, 157 (Tenn. Ct. App. 2000). It is important to note that the *Jennings* case involved review of a summary judgment. A trial court's order on summary judgment is reviewed *de novo*, and a reviewing court can make its own determination based on a sufficient record.

A trial court's decision on class certification, however, is reviewed under an entirely different standard that does not allow the appellate court to substitute its judgment for that of the trial court as to whether or not the class should have been certified. *See Eldridge v. Eldridge*, 42 S.W.3d at 85. Instead, we are to determine whether the trial court acted within the discretion afforded it, applied the correct legal standards, and conducted a rigorous analysis. That type of review necessarily requires that we examine the trial court's analysis of the issues raised in the case in the context of Rule 23's requirements. Accordingly, the order or record must contain enough insight into the court's reasoning to allow us to perform our review under the relevant standard in a meaningful way.

D. The Requirements of Rule 23 Must Be Met

While the sufficiency of the trial court's analysis of the certification question is one component of appellate review, examination of the substance of the certification decision is another. That is because no class that fails to satisfy all four prerequisites of the rule and at least one of the tests in the second subsection may be certified. *Sprague v. General Motors Corp.*, 133 F.3d at 397, citing *In re American Medical Sys., Inc.*, 75 F.3d at 1079. The class action rule establishes the requirements that the courts are bound to enforce, and certification is not appropriate unless the class satisfies those requirements. *Amchem Prods., Inc*. 521 U.S. at 620-22. Thus, even where the basis for the court's determination that Rule 23's requirements have been met is clear in the court's ruling, a reviewing court must still determine whether the applicable legal standards have been interpreted and applied correctly.

Class actions are a "special kind" of litigation with special rules, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978), and these rules must be enforced by the courts to justify the departure from general rules applicable to other kinds of litigation. *Mars Steel Corp. v. Continental Illinois Nat'l Bank and Trust*, 834 F.2d 677, 678 (7th Cir. 1987) (stating that the class action is a "fundamental departure from the traditional pattern in Anglo-American litigation").

The certification decision has significant consequences for both parties. Absent class members may be bound by the judgment. A defendant may be forced into settlement by the mere entry of a certification order. *Coopers & Lybrand v. Livesay*, 437 U.S. at 476 ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and abandon a meritorious defense"); *Castano v. Am. Tobacco Co.*, 84 F.3d at 746 ("Class certification creates insurmountable pressure on defendants to settle"); *Elizabeth M. v. Montenez*, 458 F.3d at 784 (quoting Advisory Committee Notes stating that a class certification order "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). Class certification actually can make it unlikely the merits of a case will be tried. *In the Matter of Bridgestone/Firestone, Inc.*, *Tires Products Liability Litig.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) (observing that the size of the class and the nature of the claims made the case so unwieldy and the stakes so large that "settlement becomes almost inevitable - and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claim." Consequently, courts must be careful to ensure that the requirements of Rule 23 are met before granting certification. *Meighan v. U.S. Sprint*

Communications Co., 942 S.W.2d at 479 (stating that a certification determination must be made by applying the established legal principles, particularly Tenn. R. Civ. P. 23).

Finally, in reviewing a trial court's certification decision, we must keep in mind that the party seeking certification has the burden of showing that each applicable requirement of Rule 23 has been met. *Amchem Prods. Inc.*, 521 U.S. at 614; *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d at 737-38; *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d at 146; *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992); *Senter v. General Motors Corp*., 532 F.2d 511, 522 (6th Cir. 1976); *Philip Morris v. Angeletti*, 752 A.2d at 219; *Chemtall, Inc. v. Madden*, 607 S.E.2d at 782; *Warren v. Scott*, 845 S.W.2d 780, 782 (Tenn. Ct. App. 1992). Reviewing courts may find an abuse of discretion in certifying a class where it is shown that the party seeking class certification failed to carry the burden of demonstrating that the case satisfies all the requirements for class action certification. *Ex parte Green Tree Fin. Corp*., 684 So.2d 1302, 1307-08 (Ala. 1996).

III. MODIFIABILITY OF CERTIFICATION ORDER DOES NOT RELIEVE COURT OF DUTY TO INSURE COMPLIANCE WITH CLASS ACTION REQUIREMENTS

The plaintiff asserts that any problems with the class as certified can be dealt with later in the litigation and that the trial court can modify its certification order accordingly. Because a trial court's decision to certify a class is modifiable, the plaintiff argues that the certification was appropriate even if all the issues raised were not specifically addressed in the certification order and even if some individualized questions of law or fact exist.

Rule 23 gives the trial court the flexibility to make appropriate orders during the course of a class action lawsuit, including orders on the course of proceedings, notice, imposing conditions, and dealing with similar "procedural" matters. Tenn. R. Civ. P. 23.04. Additionally, "[t]he orders . . . may be altered or amended as may be desirable from time to time." *Id.* Thus, a class may be modified, procedures for managing the action may be changed or created, and a previously certified class may later be decertified. Especially where manageability issues are concerned, the trial court "retains significant authority to redefine, modify, or clarify the class." *Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d at 637.

However, the fact that a class certification order may later be modified does not relieve the trial court of its duty to ensure from the outset that all the requirements for certification have been met and does not weaken those requirements. While modifications to a class certification order remain largely the trial court's prerogative, such prerogative is premised on the trial court's proper exercise of discretion in certifying the class initially. *Meighan*, 924 S.W.2d at 638. The class must meet the requirements of Rule 23 at the time it is certified.

While the trial court "remains free" to modify a certification order as the litigation develops, that flexibility does not reduce the need for the trial court to rigorously apply Rule 23's requirements at the initial certification stage. *Falcon*, 457 U.S. at 160, 102 S.Ct. at 2372. "[A]ctual, not presumed, conformance with Rule 23(a) remains, however, indispensable." *Id*. The same is true of

the predominance and superiority requirements, since they must be met in order to certify a common question class.[10]

Although some courts have not always rigorously applied the predominance requirement in the initial certification order on the basis that means could later be designed to deal with manageability problems caused by individual questions, *see Southwestern Refining Company v. Bernal*, 22 S.W.3d at 434-35 (listing a number of such decisions), that approach has generally given way in light of *Amchem Prods., Inc*., in which the United States Supreme Court stressed the importance of carefully scrutinizing the predominance requirement before certifying a common question class. *Id*. In *Amchem Prods., Inc*., the Court examined a decision to certify a class in conjunction with approving a settlement. The Court held that courts were bound to enforce the requirements of Rule 23 regarding certification and that the "sprawling" class certified by the trial court did not meet the predominance requirement. *Amchem Prods., Inc.*, 521 U.S. at 624. The Court stressed the importance of that requirement because it ensures "the class cohesion that legitimizes representative action in the first place." *Id*. at 623.

Consequently, most courts have rejected the approach of "certify now and worry later." *Southwestern Refining Co. v. Bernal*, 22 S.W.3d at 435. Because of the consequences of certification, "a cautious approach to class certification is essential" in the initial certification decision. *Id.*; *Unger v. Amedysis Inc*., 401 F.3d at 320-21. Although later modifications or reconsiderations are available, courts should be careful not to postpone rigorous analysis into satisfaction of the prerequisites until after certification. *See Berry v. Federal Kemper Life Assurance Co.*, 99 P.3d 1166, 1179 (N.M. 2004). It is necessary to conduct a sufficiently thorough analysis to make a correct certification decision initially. *Andrews v. American Tel. & Telegraph* Co., 95 F.3d 1014, 1023 (11th Cir. 1996)(holding that where serious problems with manageability appear at the time of certification the court should decline to certify on the assurance that some solution will be found).

A court may not avoid the rigorous analysis required in class certification or a determination of whether all the requirements of the class action rule have been met by labeling the certification order conditional or "subject to decertification at any time." *In re American Medical Systems, Inc*., 75 F.3d at 1085 (holding that where the "conditional" certification order did not reflect any consideration of the requirements and there was no evidence that common issues predominated, certification was improper); *see also Castano v. Am. Tobacco Co.*, 84 F.3d at 741 (holding that "conditional certification is not a means whereby the [trial] court can avoid deciding whether, at that time, the requirements of [Rule 23] have been substantially met"), *quoting In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974)); *American Bankers Life Assurance Co. of Florida v. Mercury Finance Corp*., 715 So.2d 186, 191 (Ala. 1997) (holding that trial courts must conduct the

[10] Although the quoted statement from *Falcon* only explicitly mentioned Rule 23(a), the statement applies equally to the requirements set out in subsection (b). "We see no reason to doubt that what the Supreme Court said about Rule 23(a) requirements applies with equal force to all Rule 23 requirements, including those set forth in Rule 23(b)(3)." *In re Initial Public Offerings Securities Litig.*, 471 F.3d 24, 33 n.3 (2d Cir. 2006).

same careful analysis, regardless of whether the class certification order is labeled conditional or final).

As the United States Supreme Court said in *Amchem Prods., Inc.*, the inquiry necessary to a common question class certification decision "trains on the legal or factual questions that qualify each class member's case as a genuine controversy." *Amchem Prods., Inc.*, 521 U.S. at 623. That inquiry must be conducted and those issues determined before the case is allowed to proceed as a class action. The modifiability and flexibility afforded class action decisions do not eliminate or lessen the trial court's responsibility to rigorously analyze the issues presented in a class certification request so as to insure that all the requirements of Rule 23 are met.

IV. Analysis of a Common Question Class Certification

The trial court has the responsibility to conduct its own inquiry into whether the requirements of Rule 23 have been met. *Valley Drug Co. v. Geneva Pharmaceuticals, Inc*., 350 F.3d 1181, 1188 (11th Cir. 2003). In this case, that means an evaluation of whether common questions of law or fact predominate over individual questions and whether class action provides the superior method of resolving the claims.

The extent and components of a thorough or rigorous analysis necessary for a class certification decision depend upon the claims and defenses presented, the type of class certification requested, the issues raised regarding the compliance with the rule's requirements, the members of the purported class, and other questions presented by the particular case and the requirements of Rule 23. The trial court must "understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Castano v. Am. Tobacco Co.*, 84 F.3d at 744; *see also Carroll v. Cellco Partnership*, 713 A.2d at 512.

A. The Predominance Requirement

The language of the predominance requirement itself requires more than the mere existence of common questions of fact or law, because such questions must exist to meet the prerequisite in Rule 23.01(2). *Assoc. Medical Networks, Ltd. v. Lewis*, 824 N.E.2d 679, 684 (Ind. 2005); 7AA Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d §1778. The predominance requirement of Rule 23.02(3) is "far more demanding" than the commonality requirement of 23.01(2) and "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 623-24; *Unger v. Amedisys, Inc.*, 401 F.3d at 320; *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d at 738. When individual rather than common issues predominate, "the economy and efficiency of class-action treatment are lost and the need for judicial supervision and the risk of confusion are magnified." 7AA Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d §1778.

The predominance requirement means simply that common issues should predominate over, and be unencumbered by, any individual claims or issues involved in the action. *In re Southeast*

Hotel Properties Ltd. P'ship Investor Litig., 151 F.R.D. 597, 603 (W.D.N.C. 1993). Common questions of fact and law predominate if they have "a direct impact on every class member's effort to establish liability and on every class member's entitlement to . . . relief." *Klay v. Humana*, 382 F.3d 1241, 1255 (11th Cir. 2004), *quoting Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 699 (N.D. Ga. 2001). An issue of law or fact should be considered common "only to the extent its resolution will advance the litigation of the case." *Philip Morris Inc. v. Angeletti*, 752 A.2d at 226, relying on *Insolia v. Philip Morris Inc.*, 186 F.R.D. 535, 542 (W.D.Wis. 1998). The predominance inquiry, therefore, must include consideration of each element of the cause of action asserted and the facts necessary to prove each.

A claim will satisfy the predominance requirement only "when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." *Parkhill v. Minnesota Mut. Life Ins. Co.*, 188 F.R.D. 332, 338 (D. Minn. 1999). Consequently, courts should not certify common question classes if most or all of the class members' claims depend on the resolution of individual questions of fact. *Cooper v. Southern Co.*, 390 F.3d 695, 722 (11th Cir. 2004), *citing Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228, 1235 (11th Cir. 2000). With regard to questions of fact, an issue is common to the class when it is susceptible to generalized, classwide proof. *In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d at 136 ("In order to meet the predominance requirement . . . a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof"). *See also Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 226 (2d Cir. 2006) (noting that "a plaintiff must show that those issues . . . subject to generalized proof outweigh those issues that are subject to individualized proof"); *see Philip Morris Inc. v. Angeletti*, 752 A.2d at 237-40 (discussing predominance decisions from various jurisdictions).

Where the elements of the subject claims can only be established after "considerable individual inquiry," predominance does not exist. *Gunnells v. Healthplan Services, Inc.*, 348 F.3d at 434. Predominance can be found only when "there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, because such proof obviates the need to examine each class member's individual position." *Lockwood Motors, Inc. v. Gen. Motors Corp.,* 162 F.R.D. 569, 580 (D. Minn. 1995). *See also Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997).

Where claims of the proposed class vary so greatly that evidence must be taken on each claim or at least on numerous types of claims, certification is not appropriate. *Warren v. Scott*, 845 S.W.2d at 782. The determination of whether common questions predominate depends on whether the class members will require individualized hearings to prove the elements of the cause(s) of action involved in the lawsuit. *Freeman v. Blue Ridge Paper Products*, No. E2006-00293-COA-R3-CV, 2007 WL 187934, at *4 (Tenn. Ct. App. Jan. 25, 2007), *citing Crouch v. Bridge Terminal Transp., Inc.*, No. M2001-00789-COA-R9-CV, 2002 WL 772998, at *4 (Tenn. Ct. App. Apr. 30, 2002).

Where an element of the cause of action requires individualized inquiry, certification of a class of plaintiffs is generally precluded because individual questions of law or fact will predominate. *Gariety v. Grant Thornton, LLP*, 368 F.3d at 362-63 (holding that where reliance is an element of the cause of action, such reliance is generally individual to each plaintiff and, in the absence of an applicable legal principle allowing presumption,[11] the need for individualized proof would preclude a finding that common issues predominate), citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 242 (1988)("[r]equiring proof of individualized reliance from each member of the proposed class effectively would have prevented [plaintiff] from proceeding with a class action, since individual issues then would have overwhelmed the common ones").[12]

When the resolution of a common legal issue is dependent on factual determinations that will differ among the proposed class members, courts have consistently refused to certify a class action. *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 76 (D.N.J. 1993); *In re Amerifirst Sec. Litig.*, 139 F.R.D. 423, 428 (S.D. Fla. 1991) (holding that class members must be in a "substantially identical factual situation" so that questions of law are common to the class members). As a general rule, "certification is improper if the merits of the claim [depend] on the defendant's individual dealings with each plaintiff." *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 975 (5th Cir. 2000).

Assertion of a common legal theory for recovery by a proposed class does not establish either typicality or predominance when proof of the cause of action asserted requires individualized inquiry. *Elizabeth M. v. Montenez*, 458 F.3d at 786-87, *citing Parke v. First Reliance Stand. Life Ins. Co.*, 368 F.3d 999, 1004-05 (8th Cir. 2004); *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. at 75 (holding that simply because the proposed class members allege the same theory of recovery does not establish that legal or factual commonality exists).

Neither, necessarily, does a common course of conduct by the defendant. There must be more than "a mere nucleus of facts in common," because the course of conduct or common facts must be relevant to proof of the elements of the cause of action alleged. *Assoc. Medical Networks, Ltd. v. Lewis*, 824 S.E.2d at 684 -86 (holding that the common course of conduct alleged was not relevant to any of the issues of proof in the cause of action asserted). For example, in *Klay v. Humana, Inc.*, 382 F.3d 1241, the court found that the fact that defendants conspired to underpay plaintiff did nothing to establish that any individual plaintiff was underpaid on any particular occasion. Accordingly, the court held that common questions did not predominate in the breach of

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[11] *Gariety* was a securities fraud action and involved the question of whether the "fraud on the market" theory was available to provide a presumption of the requisite reliance.

[12] Some causes of action include an element such as reliance that is particularly subject to individual proof. Many courts have held that "if the circumstances surrounding each plaintiff's alleged reliance on fraudulent misrepresentations differ, then reliance is an issue that will have to be proven by each plaintiff." *Unger v. Amedysis, Inc.*, 401 F.3d at 321, *citing Castano v. Am. Tobacco Co.*, 84 F.3d at 744; *Simon v. Merrill Lynch, Pierce, Fenner & Smith*, 482 F.2d 880 (5th Cir. 1973); *Philip Morris Inc. v. Angeletti*, 752 A.2d at 234 (holding that reliance was another issue unique to each class member, adding weight to the predominance of individual over common questions).

contract claim, although they did in the civil RICO claim. *Id*., 382 F.3d at 1276. *See also Hammett v. Am Bankers Ins. Co. of Florida*, 203 F.R.D. 690, 699 (S.D. Fla. 2001) (holding that whether the defendants delayed or improperly paid each class members' claims could not be determined by only considering the legality of the defendants' actions, but determining liability required consideration of each class member's cardholder agreement and claims history, because "these and other variables will affect whether a class member has a cognizable injury . . .").

Similarly, fraudulent misrepresentation claims can seldom be established with proof of a central scheme because, even if there were a common course of conduct by the defendant, each plaintiff would have to show that he or she received a material misrepresentation and that his or her reliance on it was the cause of a loss. *Moore v. PaineWebber, Inc*., 306 F.3d 1247, 1253 (2d Cir. 2002). In such cases, a common course of conduct by the defendant is not enough to show predominance, because it will not establish liability of the defendant to any particular plaintiff. *Id.*, 306 F.3d at 1255; *In re LifeUSA Holding, Inc.*, 242 F.3d 136, 147 (3d Cir. 2001); *Johnston v. HBO Film Mgmt.*, 265 F.3d 178, 190 (3d Cir. 2001) (holding that since two of the four elements of fraud, misstatements and reliance, were subject to individualized proof, the predominance requirement was not met).

In order to determine whether common questions predominate, a court must examine the cause of action asserted on behalf of the proposed class. *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d at 1234. After identifying the relevant legal and factual questions, the predominance inquiry requires a determination that common issues of law or fact exist and, then, a determination that such common issues predominate. That inquiry must focus on the relationship between common and individual issues. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). "Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action." *Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d at 1234.

The predominance inquiry is critical because class action status should not be conferred on cases that "would degenerate in practice into multiple lawsuits separately tried." Fed. R. Civ. P. 23 adv. comm. note. Thus, even where some common issues exist, if "after adjudication of the classwide issues, plaintiff must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification" under the predominance requirement for common question classes. *Klay v. Humana*, 382 F.3d at 1255. The presence of remaining multiple individual questions, even if some common questions can be determined on a class wide basis, affects the manageability of the class action, a key component of the superiority requirement.

B. The Superiority Requirement

In addition to finding that the common questions predominate over individual questions, the court making a certification decision under the common question subsection must also determine and find that class action is the superior method for determining the claims. "The rule requires the

court to find that the objectives of the class-action procedure really will be achieved in a particular case." 7AA Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: Civil 3d §1779. As set out above, the rule itself lists four factors that are relevant to the questions of predominance and superiority. Essentially,

> A consideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases certified under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis. In many ways the factors listed in the rule are interdependent and overlapping both among themselves and with the class-action prerequisites in Rule 23(a). In this way, they simply emphasize the policy objectives of the rule.

7AA Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: Civil 3d §1780.[13]

As its name suggests, the test under the superiority requirement is that the class action vehicle must be better than, not merely as good as, other methods of adjudication. *See Perez v. Metabolife Int'l., Inc.*, 218 F.R.D. 262, 273 (S.D. Fla. 2003) (declining to certify class even though there were some common issues that could be tried on a class wide basis because "any efficiency gained by deciding the common elements will be lost when separate trials are required for each class member in order to determine each member's entitlement to the requested relief"). The burden of showing that a class action is more efficient or more fair rests with the class certification proponents. *Henry Schien, Inc. v. Stromboe*, 102 S.W.3d 675, 689 (Tex. 2002).

Manageability is the most commonly-discussed factor of the superiority analysis. In and of itself, manageability of a class action raises an "whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974).

C. The Claims and Issues Mandate What Must be Considered

The inquiry in a common question class certification focuses on the legal and factual questions relevant to the class members' claim. *Amchem Prods., Inc.*, 521 U.S. at 623. "[I]t is essential for the [trial] court to understand the substantive law, proof of elements of, and defenses to the asserted cause of action to properly assess whether the certification criteria are met." *Romero v. Philip Morris Incorporated*, 109 P.3d at 778.

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[13] A court should also take into consideration whether the forum chosen for the class action is an appropriate place to resolve the controversy. For example, where potential plaintiff, witnesses, and evidence are located "across the country" plaintiff must establish why it would be especially efficient to hear the case in the court selected. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1191-92 (9th Cir. 2001). Where the class as defined includes residents from many states and the law of each state must be applied to the claims, "there is no particular basis" for deciding the desirability of the selected forum. *Jones v. Allercare, Inc.*, 203 F.R.D. 290, 306 (D.C. Ohio 2001). *See Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 653 (D.C. Cal. 1996).

In order to determine whether common questions predominate over individual ones, the court must examine the substantive law applicable to the claim and determine whether the party seeking class certification presented sufficient evidence that common questions of law or fact predominate. *Voyager Ins. Cos. v. Whitson*, 867 So.2d 1065, 1071 (Ala. 2003). The court determining the class certification issue is under a duty to evaluate the relationship between common and individual issues in all cases where certification of a common question class is sought. *Rockey v. Courtesy Motors, Inc*., 199 F.R.D. 578, 588 (D.C. Mich. 2001).

Such an evaluation necessarily requires identification of the questions presented in the lawsuit and a determination of whether those questions are common or must be determined individually. *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d at 1234. Because the predominance analysis tests whether the class is a "sufficiently cohesive" unit, all factual or legal issues that are common to the class and those that can only be decided individually must be identified and considered. *In re Visa Check/Master Money Antitrust Litig*., 280 F.3d at 136. The court must initially identify the substantive law applicable to the case and identify the proof that will be necessary to establish the claim. *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 316 (5th Cir. 1978). The most important components to the analysis are the substantive law applicable to the case and the proof necessary to establish the elements of the claim. *Hammett v. Am. Bankers Ins. Co. of Florida*, 203 F.R.D. at 698.

Certification is not appropriate if it is not determinable that individual issues can be managed in an efficient and fair manner, and any uncertainty as to that manageability at the outset defeats certification. *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 959 (Tex. 1996). Part of the analysis in a case where a number of issues regarding individual questions have been raised is to determine that the case will be manageable if tried as a class action. The trial court should consider manageability and efficiency in light of the claims and class members, including how the case will be tried. Consequently, a class should not be certified unless the court has considered and knows how the claims can and will likely be tried. *Southwestern Refining Co. v. Bernal*, 22 S.W.3d at 435; *Castano v. Am. Tobacco Co.*, 84 F.3d at 744. If it cannot be determined at the certification stage that individual issues can be examined or tried in an efficient but fair manner, certification is not appropriate. *Id*.

While the requirement that the trial court anticipate how a complex class action will be tried does not mandate a specific "trial plan," it does mean that a rigorous analysis must be conducted on the manageability and efficiency issues and "a specific explanation of how class claims are to proceed to trial." *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d at 689 (holding that the trial court's failure to explain how individual issues would be tried required reversal of a grant of certification). On appeal, a decision to certify a class cannot be meaningfully reviewed unless the trial court has indicated how the claims will be tried. *Southwestern Refining Co. v. Bernal*, 22 S.W.3d at 435.

The extent of the factual and legal inquiry necessary to a particular certification decision depends, of course, on many factors, including primarily the issues raised by the parties as to

compliance with the predominance and superiority requirements. However, some general rules exist, as set out in the following section.

V. DEPTH OF INQUIRY REQUIRED

The first steps in determining whether the party moving for class certification has met its burden of proving compliance with the predominance requirement must be identification and consideration of the substantive law applicable to the case and the proof that will be necessary to establish the claim. "[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand v. Livesay*, 437 U.S. at 469.

Because fundamental due process rights of both plaintiff and defendants are implicated, a full evidentiary demonstration and legal analysis is "indispensable" for each requirement of Rule 23. *In re Am. Med. Sys., Inc*., 75 F.3d at 1090. The certification decision should be made "carefully, on the basis of sufficient information." *Barton-Malow Co. v. Bauer*, 627 So.2d 1233, 1235 (Fla. Ct. App. 1993). "There must be a sound basis in fact, not supposition, that the requirements of the class action rule have been satisfied." *Baptist Hospital of Miami, Inc. v. DeMario*, 661 So.2d at 321.

Unlike in a motion to dismiss analysis, a court considering class certification need not assume that all well-plead facts are true, but instead must probe behind the pleadings to consider facts in evaluating whether the party moving for certification has met its burden.[14] *Geriarty v. Grant Thornton, LLP*, 368 F.3d at 365-66 *(*holding that when making a certification decision, a trial court is not bound to accept all of the complaint's allegations as true); *Unger v. Amedysis Inc*., 401 F.3d at 323 (holding that the court may not simply presume the facts as alleged); *Szabo v. Bridgeport Mach., Inc*., 249 F.3d 672, 675 (7th Cir. 2001) (stating that Rule 23 does not require such acceptance and nothing else recommends it). Thus, the argument that a trial court should make a certification decision solely on the basis of the allegations contained in the pleadings has been rejected by the courts. *See Dragon v. Vanguard Indus., Inc*., 89 P.3d at 912 (citing various federal appellate court decisions and treatises)**.**

Were the court to defer to the representative parties and accept their assertions as true, it would not fulfill its responsibility to ensure that representative parties should be allowed to prosecute the claims of absent class members, and "the court would be defaulting on the important responsibility conferred on the courts by Rule 23 of carefully determining the class action issues and supervising the conduct of any class action certified." *Geriarty v. Grant Thornton, LLP*, 368 F.3d at 367.

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[14] In the case before us the plaintiff, as to a few issues, has stated that the facts alleged in her complaint must be taken as true at this stage. We disagree. The plaintiff has the burden of proving that the proposed class meets the requirements for certification, including any factual issues.

> If it were appropriate for a court to simply accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order, frustrating the district court's responsibilities for taking a "close look" at relevant matters, *Amchem*, 521 U.S. at 615, 117 S.Ct. 2231, for conducting a rigorous analysis of such matters, *Falcon*, 457 U.S. at 147, 102 S.Ct. 2364, and for making "findings" that the requirements of Rule 23 have been satisfied, *see* Fed.R.Civ.P. 23(b)(3).

Gariety v. Grant Thornton, LLP, 368 F.3d at 365. The plain text of Rule 23 requires that the court "find," not merely assume, the facts favoring class certification. Fed. R. Civ. P. 23 (b)(3); *Unger v. Amedysis Inc*., 401 F.3d at 320-21.

Thus, "going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Castano v. Am. Tobacco Co.*, 84 F.3d at 744; *see also Falcon*, 457 U.S. at 160 (stating that "sometimes it may be necessary for the [trial] court to probe behind the pleadings before coming to rest on the certification question.")

A. Overlap With Merits Issues

The extent of that probe and its relationship to the eventual merits of the lawsuit have been the subject of much judicial discussion. For a time, the caution in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974), that trial courts should not use the class certification procedure to determine the merits or the probability of success[15] was interpreted by a number of courts to preclude examination of issues related to the merits even though they also related to class certification requirements. As it was later described, "Unfortunately, the statement in *Eisen* that a court considering certification must not consider the merits has sometimes been taken out of context and applied in cases where a merits inquiry either concerns a Rule 23 requirement or overlaps with such a requirement." *In re Initial Public Offerings Securities Litig.*, 471 F.3d at 34.

However, it is now generally understood that "evidence pertaining to the requirements embodied in Rule 23 is often intertwined with the merits, making it impossible to meaningfully address the Rule 23 criteria without at least touching on the 'merits' of the litigation." *Cooper v. Southern Co.*, 390 F.3d at 712, *citing Coopers & Lybrand v. Livesay*, 437 U.S. at 469 n.12. The federal circuits have in recent years clarified the trial court's duties with regard to the relationship between certification issues and the merits. *See In re Initial Public Offerings Securities Litig.*, 471

[15] The court said, "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen*, 417 U.S. at 177. That statement was made, however, in the context of a trial court's determination of who should bear the cost of notice to class members and was based on whether the plaintiff could show a probability of success on the merits. As the Second Circuit later explained, the "oft-quoted" statement from *Eisen* was made in a case in which the trial court's inquiry into the merits of the case was unrelated to any requirement for class certification. *See In re Initial Public Offerings Securities Litig.*, 471 F.3d at 33-34.

F.3d at 32-42 (detailing the various interpretations and direction given and agreeing with the majority of circuits supporting a requirement that a trial court make a determination that all the requirements for class certification have been met even where merits considerations are implicated).[16]

A majority of circuits now agree that a trial court is required to perform a rigorous analysis of the class certification requirements and to make such findings as are necessary to that analysis, regardless of whether a Rule 23 requirement overlaps with the merits. *Szabo v. Bridgeport Machines, Inc*., 249 F.3d at 676 (holding that the trial court should make whatever factual and legal inquiries are necessary to determine whether the requirements of Rule 23 are met and, if those inquiries require consideration of issues that overlap with the merits, the court must make a preliminary inquiry into the merits); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 166 (3d Cir. 2001) (holding that a trial court may consider the substantive elements of the case, because "the determination of a certification request invariably involves some examination of factual and legal issues underlying the plaintiff's cause of action"), *quoting* 5 Moore's Federal Practice § 23.46[4]; *Valley Drug Co. v. Geneva Pharmaceuticals, Inc*., 350 F.3d 1181, 1188 n. 15, (11th Cir. 2003), *citing Falcon*, 457 U.S. at 160 (holding that although the trial court should not determine the merits of the plaintiff's claim at the class certification stage, the trial court can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied).

Consequently, while *Eisen* restricts a trial court from expanding a class certification decision to a determination of the likelihood of success on the merits of the lawsuit, it does not prevent a court from probing into, considering, and ruling upon aspects of the merits that are essential to a rigorous analysis of whether a proposed class meets the requirements of the rule on class certification. *Geriarty v. Grant Thornton, LLP*, 368 F.3d at 365-66.

> Thus, while an evaluation of the merits to determine the strength of plaintiff's case is not part of a Rule 23 analysis, the factors spelled out in Rule 23 must be addressed through findings, **even if they overlap with issues on the merits**. *Eisen*'s prohibition against assessing plaintiff's likelihood of success on the merits as part of a Rule 23 certification does not mean that consideration of facts necessary to a Rule 23 determination is foreclosed merely because they are required to be proved as part of the merits. The analysis under Rule 23 must focus on the requirements of the rule, and if findings made in connection with those requirements overlap findings that will have to be made on the merits, such overlap is only coincidental. The findings made for resolving a class action certification motion serve the court only in its determination of whether the requirements of Rule 23 have been demonstrated.

[16] Although the court found that the 2003 amendments to Fed. R. Civ. P. 23 supported its conclusion, it relied in large part on decisions of other circuits that were made before those amendments.

Geriarty v. Grant Thornton, LLP, 368 F.3d at 366.[17]

State courts have agreed with this reasoning. *See, e.g. Carroll v. Cellco Partnership*, 713 A.2d at 512 (holding that although class certification should not be denied on the merits of the complaint, some preliminary analysis of the issues and the facts is required); *Creveling v. Government Employees Ins. Co.*, 828 A.2d at 238-39 (citing *Falcon and Castano* and holding that a trial court may look beyond the pleadings to determine whether class certification is appropriate).

Thus, while class certification hearings should not be mini-trials on the merits of the claims, a trial court should make whatever factual and legal inquiries are necessary, receive evidence on those issues, and resolve disputes before deciding whether to certify the class. *Szabo v. Bridgport Machines, Inc*., 249 F.3d at 676. Although class certification is not the time to address the merits of the parties' claims and defenses, the "rigorous analysis" must involve consideration of what the parties must prove. *See Amchem Prods. Inc.*, 521 U.S. at 622-23 & n. 18. At the certification stage, reliance on unverifiable evidence is hardly better than relying on bare allegations. *Unger v. Amedysis Inc.*, 401 F.3d at 324.

The requirements of Rule 23 must be met, not just supported by allegations or "some" evidence. Few courts have directly addressed the standard of evidence by which a class proponent must show compliance with the requirements for certification. However, the Second Circuit has examined this issue in detail in *In re Initial Public Offerings Securities Litig.*, 471 F.3d 24, and concluded that a trial judge should determine any disputes over compliance with certification requirements the same way as other disputes. *Id*., 471 F.3d at 42. The court concluded that "(1) a district judge may certify a class only after making determinations each of the Rule 23 requirements has been met; (2) such determinations can only be made if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met . . . ." *Id*.

Where the trial court fails to look beyond the pleadings and conduct a rigorous analysis of the issues, the case must be remanded to permit the trial court to make that analysis and to make the findings required by Rule 23. *Geriarty v. Grant Thornton, LLP*, 368 F.3d at 367 (the trial court indicated it was relying on plaintiff's assertions regarding the factual issue of the efficiency of the market which triggered the presumption of reliance).

[17] The court went on to say that the trial court's "concern that Rule 23 findings might prejudice later process on the merits need not lead to the conclusion that such findings cannot be made. The jury or factfinder can be given free hand to find all of the facts required to render a verdict on the merits, and if its finding on any fact differs from a finding made in conjunction with class certification, the ultimate factfinder's finding on the merits will govern the judgment." *Geriarty v. Grant Thornton, LLP*, 368 F.3d at 366.

B. Expert Proof Of An Essential Element

Where, as in the case before us, the proponents of the class intend to prove an essential element of the claim by use of expert testimony, the trial court should apply additional criteria in analysis of the factual issues. The plaintiff herein intends to prove that class members actually incurred damages or injury, one of the elements of the cause of action, through experts providing generalized evidence of diminished value. In that situation, courts should consider the criteria for expert evidence. *In re South Dakota Microsoft Antitrust Litig.*, 657 N.W. 2d 668, 675 (S.D. 2003).

Under *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263-64 (Tenn. 1997), trial courts perform a "gatekeeping" function to insure that proposed expert testimony meets the levels of relevance and reliability established in Tenn. R. Evid. 702 & 703. Similar requirements apply to federal courts. *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).

The primary inquiry is whether the expert opinion testimony will substantially assist the trier of fact to understand the evidence or to determine a fact in issue. Tennessee's substantial assistance standard is somewhat stricter than the comparable federal rule which permits expert testimony upon a finding that it merely assists the trier of fact. *State v. Shuck*, 953 S.W.2d 662, 668 (Tenn. 1997). Thus, in Tennessee, the probative force of the testimony must be stronger than that required under the federal rules. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d at 265.

Expert testimony regarding scientific theory or based on technical or specialized knowledge must be both relevant and reliable to be admissible. The trial court must make a determination as to the witness's qualification by knowledge, skill, experience, training or education to express an opinion within the limits of the demonstrated expertise. As to this question, the determinative factor is "whether the witness's qualifications authorize him or her to give an informed opinion *on the subject at issue*." *State v. Stevens*, 78 S.W.3d 817, 834 (Tenn. 2002).

In addition to determining the qualification of the expert, the court is also required to determine whether the expert evidence is reliable or valid. *Van Tran v. State*, 66 S.W.3d 790, 819 (Tenn. 2001); *State v. Farner*, 66 S.W.3d 188, 207 (Tenn. 2001). One purpose of this examination is for the court to assure itself that the opinions of the expert "are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation." *State v. Farner*, 66 S.W.2d at 207-208, *quoting McDaniel v. CSX Transp., Inc.*, 955 S.W.2d at 265.

The trial court must ensure that the basis for the expert witness's opinion (e.g. testing, research, studies, or experience-based observations) adequately supports that expert's conclusion or, in other words, that there is no analytical gap between the data relied upon and the opinion proffered. *State v. Stevens*, 78 S.W.3d at 834. A connection between the underlying data and the conclusion must exist. *Id*. Through the language of Tenn. R. Evid. 703, Tennessee courts are encouraged to take a more active role (as compared to federal courts) in evaluating the reasonableness of the expert's reliance on the particular facts or data that form the basis for the expert testimony or

opinion. *Seffernick v. Saint Thomas Hosp.*, 969 S.W.2d 391, 393 (Tenn. 1998); *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d at 265.

Where a proposed class bases its common question of fact argument on classwide proof of an element of the relevant cause of action, *e.g.*, the requirement that damages or injury were actually incurred by the class members, on expert testimony, some *Daubert/McDaniel* inquiry is necessary.

> This is not to suggest that the certification issue be combined with a full blown *Daubert* hearing, but rather has been described as a "lower *Daubert* standard." *Howe v. Microsoft Corp.*, 656 N.W.2d 285 (*citing Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc.*, 209 F.R.D. 159, 162-63 (C.D.Cal. 2002)) Under *Daubert*, the circuit court's rigorous certification analysis may be guided by whether "an expert's testimony rests on both a reliable foundation and is relevant to the task at hand." *Rogen v. Monson*, 609 N.W.2d 456, 459 (citing *State v. Hofer*, 512 N.W.2d 482, 484 (S.D. 1994).

In re South Dakota Microsoft Antitrust Litig., 657 N.W. 2d at 675.

Although a true battle of experts should generally wait until trial, *In re South Dakota Microsoft Antitrust Litigation*, 657 N.W. 2d at 677-78, evaluating proffered expert testimony in support of a motion for class certification is part of the rigorous analysis required. *See A&M Supply v. Microsoft Corp.*, 654 N.W.2d 572, 602 (Mich. App. 2002) (reversing a certification by the trial court after an analysis of the testimony and methodology of the battling experts and concluding that the purported class's expert's theories were "slogans, not methods of proof").

While the purpose of a *Daubert/ McDaniel* inquiry is distinct from that served by a class certification analysis, where an element of the cause of action is to be proved only by expert testimony, the trial court should make a preliminary assessment of whether the reasoning or methodology underlying the proffered expert testimony is scientifically valid and can be applied to the facts at issue. Otherwise, a certified class may, after considerable expense to the parties, be decertified after a *Daubert* hearing. *In re South Dakota Microsoft Antitrust Litig.*, 657 N.W.2d at 681 (Konenkamp, J. concurring).

VI. QUESTIONS OF LAW IN MULTISTATE ACTIONS

In the case before us, the proposed class includes Tennessee residents and those of twenty-three other states who purchased insurance contracts in the states where they lived. Such a situation can raise significant issues that must be considered or resolved before a proposed class is certified. Many of those issues have been raised herein by GEICO, but were not directly addressed by the trial court in its certification order. While not explicit in the trial court's order, the parties believe the trial court intends to apply Tennessee law to the claims of all the proposed class members.

Where a proposed class includes residents of many jurisdictions and the primary claims must be resolved according to state law, significant issues regarding both the predominance and the superiority requirements can arise. In more recent cases, the federal courts have increasingly denied multistate class actions involving state law claims because of choice of law problems. 7AA Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: Civil 3d §1780.1. So have state courts. *See Henry Schein, Inc. v. Stromboe*, 102 S.W.3d at 689-99 n. 91 (stating that state and federal courts have overwhelmingly rejected class certification when multiple states' law must be applied and citing more than twenty state cases and more than sixty federal court decisions).

That is because when liability is to be determined according to varying and inconsistent state laws, the predominance of common questions prerequisite will not be fulfilled. Variations in state law undermine not only the predominance requirement, but also the superiority requirements, because the case may be unmanageable as a class action if many different legal standards must be considered or applied. *See, e.g., Hammett v. Am. Bankers Ins. Co. of Florida*, 203 F.R.D. at 701-702 (holding that class proponents failed to establish predominance where adjudication of the asserted claims would require consideration of the laws of many states and failed to show the superiority of the class action procedure where resolution of liability and damages would require an individualized inquiry into each class member's situation as well as variations in state law, because there were no economies of time, effort or expense).

Unless all litigants are governed by the same legal rules, the class cannot satisfy the commonality, predominance, and superiority requirements. *In the Matter of Bridgestone/Firestone, Inc., Tires Products Liability Litig.*, 288 F.3d at 1015. Differences in state law may work to defeat predominance. *Amchem Prods, Inc.*, 521 U.S. at 624-25. Certification of multistate class actions where there are state law issues or claims that would require adjudication under the laws of many states is not appropriate, because the diverse state law issues would defeat the predominance of any common issues. *Castano v. Am. Tobacco Co.*, 84 F.3d at 741 (holding that "variations in state law may swamp any common issues and defeat predominance"); *In re American Medical Sys., Inc*., 75 F.3d at 1085 (holding that variations in state law will defeat predominance).

Additionally, there are constitutional limitations on some choice of law decisions that may be implicated when the forum state has little connection with most of the proposed class members. In *Chemtall*, *Inc. v. Madden*, *supra*, the West Virginia Supreme Court of Appeals' decision to grant review was based largely on the appellate court's "inability to grasp (1) how the out-of state plaintiff's cases were connected to West Virginia, and (2) whether it would, in a constitutional sense, be fair to adjudicate their cases here." *Chemtall, Inc. v. Madden*, 607 S.E.2d at 787 (Starcher, J. concurring). Based on the claims in this case, we have similar questions.

Choice of law is not merely a predominance or manageability issue. Application of the substantive law of Tennessee to proposed class members who reside in other states and whose insurance policy was issued in those states and where the payments were made to them in other states may raise due process concerns. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The parties have a due process right to have their claims governed by the applicable state law for their dispute.

Ford Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 347-48 (D.N.J. 1997); *Berry v. Kemper Life Assurance Co.*, 99 P.3d at 1188 (stating that conflicts of law in a multistate class action are "potentially of constitutional dimension").

In *Shutts*, the United States Supreme Court held that it was a violation of due process for a Kansas state court to apply only Kansas law to a nationwide plaintiff class when 97% of the plaintiffs "had no apparent connection to the State of Kansas except for this lawsuit." 472 U.S. at 815. A court "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement" of Rule 23. *Id.,* 472 U.S. at 821.[18] The forum state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Id.* at 822, *citing Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930).

As a matter of due process, where there are actual conflicts between the relevant law of Tennessee and that of the other states whose residents are class members, Tennessee law could only be applied to all claims if Tennessee has a significant contact or significant aggregation of contacts to the claims asserted by each class member so as to establish state interests. *Id*., 472 U.S. at 818. Absent a state interest in claims unrelated to Tennessee, if there is substantive conflict, application of Tennessee law to every claim would be "sufficiently arbitrary and unfair as to exceed constitutional limits." *Id*., 472 U.S. at 821-22.

In the case before us, GEICO asserts there are differences in the law among the states whose residents are members of the proposed case. Among the differences identified are contract interpretation, statutes of limitations, requirements for establishing tort liability, the allocation of responsibility for liability, and elements of available damages.

A. Choice of Law Rules

A trial court faced with the question of which state's law to apply to a particular dispute, be it an action by an individual or on behalf of a class, would generally undertake a choice of law analysis using the rules applicable in the forum court's state. Applying those rules to the case before us would lead to the conclusion that each insured's claim should be decided by reference to the law of the state where the insurance contract was issued, or where the automobile was primarily used; in most situations, the state in which the insured resides.

If a choice of law analysis were required or performed in the case before us, the following rules would apply. Tennessee follows the *lex loci contractus* rule for claims based on contract. *Vantage Technology, LLC v. Cross*, 17 S.W.3d 637, 650 (Tenn. Ct. App. 1999). Under this rule, a contract is presumed to be governed by the law of the jurisdiction in which it was executed, absent

[18] The Court also stated that a plaintiff's desire for forum law is "rarely, if ever controlling," and if a plaintiff could choose the substantive rules to be applied to an action, "the invitation to forum shopping would be irresistible". 472 U.S. at 821.

a contrary intent. *Id.; Ohio Cas. Ins. Co. v. Travelers Indem. Co.*, 493 S.W.2d 465, 467 (Tenn. 1973). In the case before us, the parties have not indicated that the insurance policies at issue contained a choice of law provision that indicates a contrary intent. Consequently, the law of the place of making of the contract will prevail. *Solomon v. FloWarr Mgmt*., 777 S.W.2d 701, 705 (Tenn. Ct. App. 1989).

The Tennessee rule is based on the presumed intent of the parties to the contract. *Boatland, Inc. v. Brunswick Corp.*, 558 F.2d 818 (6th Cir. 1977). In *Ohio Cas. Ins. Co.*, 493 S.W.2d at 466, the Tennessee Supreme Court quoted *First American Nat. Bank of Nashville v. Automobile Ins. Co.*, 252 F.2d 62 (6th Cir 1958), as stating well the Tennessee rule: "that rights and obligations under a contract are governed by the law of that state with the view to which it is made and that the intentions of the parties in this respect to be gathered from the terms of the instruments and all of the attending circumstances control." Consequently, depending on the nature of the agreement and the surrounding circumstances, the law of the state where performance is expected will sometimes be applied, especially where questions relating to performance are raised. *Solomon v. FloWarr Mgmt.*, 777 S.W.2d at 705 n.5. With regard to the each of the insurance policies herein, the state of performance and the state of contract formation will generally be the same, but that would be twenty-four different states.

With regard to insurance contracts particularly, Tennessee courts will generally apply the law of the state where an insurance policy was issued. *Dunn v. Hackett*, 833 S.W.2d 78 (Tenn. Ct. App. 1992) (holding that an insurer domiciled in another state was subject to Tennessee uninsured motorist law because it issued the policy to a Tennessee resident). In insurance coverage disputes, Tennessee courts apply the substantive law of the state in which the insurance policy was issued and delivered if there is no enforceable choice of law clause in the policy. *Kustoff v. Stuyvesant Ins. Co.*, 22 S.W. 2d 356, 358 (Tenn. 1929); *Standard Fire Ins. Co. v. Chester-O'Donley & Assocs., Inc.*, 972 S.W.2d 1, 5 (Tenn. Ct. App. 1998); *Hutchison v. Tennessee Farmers Mut. Ins. Co.*, 652 S.W.2d 904, 905 (Tenn. Ct. App. 1983). *See Burns v. Aetna Cas. & Sur. Co.*, 741 S.W.2d 318, 322 (Tenn. 1987) (holding that Tennessee law could not be applied to a policy issued and delivered in other states). Construction and operation of the policy is covered by this rule. *Standard Fire Ins. Co.*, 972 S.W.2d at 5.

The Restatement provision on casualty insurance is in accord:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship . . . to the transaction and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 193.

The object that is the subject of the insurance has its principal location in the state where it will be used a majority of time during the insurance period. RESTATEMENT (SECOND) OF CONFLICTS § 193, (cmt. b). In the case of an automobile, the parties to the insurance contract will generally know where it will be kept and operated the majority of the time. *Id*. There is good reason for using the law of the principal location of the insured risk. "This location has an intimate bearing upon the risk's nature and extent and is a factor upon which the terms and conditions of the policy will frequently depend." RESTATEMENT (SECOND) OF CONFLICTS § 193 (cmt. c). Accordingly, the location of the risk is of concern to the parties to the insurance contract. *Id. See, e.g., Dunn v. Meridian Mut. Ins. Co.*, 836 N.E. 2d at 251 (stating that an insurance policy is governed by the law of the principal location of the insured risk during the term of the policy).

Although the case before us is brought as a breach of contract claim, tort law principles will determine many of the primary issues in the case. Whether or not GEICO breached its insurance contract with a particular insured depends, in large part, upon the determination of what that insured would have been "legally entitled to recover" from the uninsured tortfeasor. This phrase necessarily incorporates tort law principles.

For tort claims, Tennessee has adopted the Restatement's approach for resolving choice of law issues. *Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992). That approach, also known as the "most significant relationship" test, provides that the state where the injury occurred will be applied unless some other state has a more significant relationship to the litigation. *Id.; see also McDonald v. General Motors Corp.*, 110 F.3d 337, 342 (6th Cir. 1997). The approach is set out in a number of sections, the most relevant here being the general principles in § 6 and the principles applicable to torts in § 145. Under the "General Principle" applicable to tort issues:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and parties under the principles stated in §6.[19]

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[19] The general principles for resolving choice of law issues are:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability, and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6.

> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties,
> (d) the place where the relationship, if any, between the parties is centered.
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145. Applying that rule, unless Tennessee has a more significant relationship to the accident that resulted in the insurance claim, the law of the state where each accident occurred would apply. Alternatively, the state where the policy was issued may be deemed to have a more significant interest.

Whether the proposed class members' claims herein are analyzed under the contract choice of law rule or that applicable to torts, or whether different issues are analyzed under the different rules,[20] it is unlikely that analysis under either rule would lead to the conclusion that all class members' claims should be decided using Tennessee law. Except for those members who are Tennessee residents, the insurance policies were issued in twenty-three other jurisdictions to cover vehicles and their owners who drove primarily in their states of residence, the claims were paid in those states, and we presume most of the accidents triggering the claims occurred in other states.

It is difficult to believe that a resident of Alaska, for example, who bought car insurance in that state and was involved in an accident in that state ever intended to have a dispute over that policy decided by Tennessee law. Similarly, had a resident of New Mexico sued another driver for damages he was "legally entitled to recover" from an accident in New Mexico, he would not have expected to have Tennessee law applied to decide his rights.

However, the plaintiff, on behalf of the proposed class members asserts that Tennessee law can be applied without reference to these choice of law rules because there is no real conflict among the relevant laws of the various states. She argues, as to various conflicts alleged by GEICO, that there are no real conflicts; that GEICO has waived the right to assert some of the defenses that would raise the conflicts; and that any real conflicts can be managed within the framework of the class action as certified.

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[20] *See Bonee v. L&M Constr. Chems.*, 518 F. Supp. 375, 379-80 (M.D. Tenn. 1981) (discussing how characterization of the issues affects the choice of law decision and that separate issues may be characterized separately for purposes of deciding which law to apply). *See also Lemons v. Cloer*, 206 S.W.3d 60, 65 (Tenn. Ct. App. 2006) (stating that courts are not bound to decide all issues under the local law of a single state).

B. Whether the State Laws Vary

While application of Tennessee's choice of law rules would require the court to apply the law of other states to most of the class members' claims herein, application of those rules, and indeed the choice of law analysis, are unnecessary if there is no real conflict between or among the relevant laws of the various states. In fact, a conflict between the laws of the states at issue is a necessary predicate to deciding which state's (or states') laws should govern the various issues presented in the case. *Hataway v. McKinley*, 830 S.W.2d at 55. A court need not make a choice of law if, in fact, there is no real difference or conflict between the relevant laws of the states involved. Similarly, if no real conflict exists, and one set of legal rules, or a few sets of legal rules for subclasses, can be applied, the preponderance and superiority requirements may be met. Additionally, there is no constitutional injury in applying the forum state's law if it is not in conflict with that of other jurisdictions involved. *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 816.

As a general rule, the analysis required to determine whether there is an actual conflict precedes the choice of law analysis. *See Lemons v. Cloer*, 206 S.W.3d at 65. *See also Portland Trailer & Equip., Inc. v. A-1 Freeman Moving & Storage, Inc*., 49 P.3d 803, 806 (Or. Ct. App. 2002) (stating that the first step in deciding which state's law to apply is to determine whether there is a material difference in the laws of the relevant states); *but see In re Estate of Davis,* 184 S.W.3d 231, 234-35 (Tenn. Ct. App. 2004) (deciding which state's law to apply without first deciding that a conflict existed). *See also Seals v. Delta Air Lines, Inc*., 924 F. Supp. 854, 859 (E.D. Tenn. 1996) (holding that preliminary to making a choice as to which state's law to apply, it must be determined whether an actual conflict of laws exists). The order in which the interrelated analyses take place is not as important as the fact that they be conducted.

The plaintiff maintains that many of the conflicts of law asserted by GEICO are false conflicts and, consequently, no choice of law analysis is required. Where there is only a false conflict, the court may ignore choice of law questions and apply forum law. *Portland Trailer & Equip., Inc. v. A-1 Freeman Moving & Storage, Inc*., 49 P.3d at 806 (holding that if there is no material difference in the laws, the forum law will govern). "A false conflict can occur where 'the laws of the involved states are identical, or different, but produce identical results.'" *Ferrell v. Allstate Ins. Co.*, 150 P.3d 1022, 1026 (N.M. Ct. App. 2007) (cert. granted Jan. 23, 2007), *quoting* Eugene F. Scoles et al., *Conflict of Laws* § 2.9, at 28 n. 16 (4th ed. 2004).

"According to conflicts of laws principles, where the law of the two jurisdictions would produce the same result on the particular issue presented, there is a 'false conflict,' and the [c]ourt should avoid the choice-of-law question." *Berg Chilling Sys., Inc. v. Hull Corp*., 435 F.3d 455, 462 (3d Cir. 2006). *See also Alaska Nat'l Ins. Co. v. Bryan*, 104 P.3d 1,5 (Wash. Ct. App. 2004) ("If applying the two states' laws would produce the same result, there is a 'false conflict' and [the forum state's] law will presumptively apply"). Although no Tennessee court has adopted the term "false conflict," the analysis is the same, *i.e.,* whether the law of the other state or states differs materially from applicable Tennessee law.

To create a variation sufficient to trigger a choice of law analysis, the differences among the laws of the various states need not be great, because even nuances can be significant to the resolution of issues raised in the case. *In re Am. Medical Sys., Inc.*, 75 F.3d at 1085; *Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995). Similarly, a determination that a false conflict exists is not appropriate where there is no clear precedent on the issue at hand in one or more of the states involved. *Fioretti v. Massachusetts Gen. Life Ins. Co.*, 53 F.3d 1228, 1234-35 (11th Cir. 1995) (holding that without precedent "it is, quite simply, impossible to say with certainty what the law of these states actually is, not to mention whether these states' laws are identical"); *Dugan v. Mobile Med. Testing Servs., Inc.*, 830 A.2d 752, 758 (Conn. 2003) (holding that in the absence of any appellate opinions on point in the other state, it could not be said that Connecticut's law was the same as the other state's). The same principle would apply in any inquiry into conflicts among states, whether or not phrased as a false conflict analysis.

C. The Required Analysis

While the absence of true differences among relevant state legal principles may obviate the need for a pure choice of law analysis, the court must first make the determination that the relevant law is, in fact, the same. That determination requires, at the least, an identification of the relevant legal principles as applied in the various states. Then, the principles in the forum state must be compared with the same principles in the other relevant jurisdictions to determine whether the laws are identical or will produce identical results. *Ferrell v. Allstate Ins. Co.*, 150 P.3d 1026-27. *See also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d at 1188 (stating that forum law must be compared to that of each state in the proposed class).

Consequently, a court deciding whether multistate class certification is appropriate would necessarily have to compare the law of the forum state with that of other states whose laws might apply on the legal questions presented in the case to determine whether material conflicts exist. *Chemtall Inc. v. Madden*, 607 S.E.2d at 780-81. A conclusory statement that "it would seem that there could not be a substantial difference in any event but whatever there is, it could be dealt with" does not meet the "rigorous analysis" standard. *Carroll v. Cellco Partnership*, 713 A.2d at 513. A mere conclusion that the laws of the applicable states are not materially different is inadequate if it is made without a thorough analysis and "detailed and specific findings" to support it. *Chemtall Inc. v. Madden*, 607 S.E.2d at 781. Courts must give careful consideration to any possible conflict of law problems. *Dragon v. Vanguard Indus., Inc.*, 89 P.3d at 915-17.

The burden is on the class certification proponent to prove "through extensive analysis that there are no material variations among the law of the states for which certification is sought." *Powers v. Gov't Employees Ins. Co.*, 192 F.R.D. 313, 318-19 (S.D. Fla. 1998) ("If a plaintiff fails to carry his or her burden of demonstrating similarity of state laws, then certification should be denied"). *See also Spence v. Glock* , 227 F.3d 308, 313 (5th Cir. 2000).

"A district court's duty to determine whether the plaintiff has borne its burden on class certification requires that a court consider variations in state law when a class involves multiple

jurisdictions." *Castano v. Am. Tobacco Co.*, 84 F.3d at 741; *see also Andrews v. AT&T*, 95 F.3d 1014, 1024 (11th Cir. 1996). Trial courts should not certify a multi-state class without analyzing the impact of the choice of law issue. *Dragon v. Vanguard Indus., Inc*., 89 P.3d at 918. Some courts have held that without the benefit of the trial court's analysis of the differences in the laws of the various states, the reviewing court cannot affirm certification because it is not clear that the class proponents met their burden to establish that common questions predominate. *See, e.g., Henry Schein, Inc. v. Stromboe*, 102 S.W.3d at 697.

Where real variations in law exist, the trial court must properly analyze the choice of law issue in determining whether common issues predominate and whether the class action is manageable. *Chemtall Inc. v. Madden*, 607 S.E.2d at 779. A number of courts have addressed how state law differences should be evaluated in making the predominance and superiority determinations in a common question class. *See, e.g., Szabo v. Bridgeport Machines, Inc.*, 249 F.3d at 674; *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d at 1189-1190; *Castano v. Am. Tobacco Co.*, 84 F.3d at 741.

In essence, a trial court faced with the question of whether to certify a class pursuant to the predominance and superiority criteria where the issues must be decided by reference to state law and the class includes a number of states should undertake an analysis that includes: (1) identification of the relevant determinative legal principles; (2) a determination of whether the law on those principles varies among the jurisdictions involved in the class; (3) if so, a determination of which state's or states' laws should be applied to which claims; (4) a determination of whether common questions of law predominate over individual questions as a result of the choice of law analysis; (5) a determination of whether the case is manageable if there are variations that require the application of the laws of many jurisdictions; and (6) if subclasses are to be used, how the case will be managed. *See Gariety v. Grant Thornton,LLP*, 368 F.3d at 370 *(*(holding that plaintiffs cannot meet their burden of showing that common questions of law predominate when various laws have not been identified and compared); *Spence v. Glock*, 227 F.3d at 313 (stating that the trial court is required to know which law will apply before it makes its predominance determination); *Andrews v. AT&T*, 95 F.3d at 1024 (discussing the need to examine the gaming laws of all fifty states, complicating the matter "exponentially"); *American Medical Sys.,* 75 F.3d at 1085 (holding that the court is required to determine whether variations in state law defeat predominance); *Berry v. Kemper Life Assurance Co.*, 99 P.3d 1166 at 1188 (stating, "courts dealing with multistate class actions must consider and evaluate how the laws of other states apply to the class claims"); *Dragon v. Vanguard Industries, Inc*., 89 P.3d at 915-919 explaining the various factors that must be considered in certification of a multi-state class).

In resolving choice of law questions, courts must apply an individualized choice of law analysis to each plaintiff's claims. *Spence v. Glock*, 227 F.3d at 313 (stating "[t]he choice of law determination is a function of the individual defendant, plaintiff, and the circumstances of the claim"); *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom*., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (holding that a federal court considering certification of a nationwide class "must apply an individualized choice of law to each plaintiff's claims"), *citing Phillips Petroleum Co. v. Shutts*, 472 U.S. at 823. *See also Philip Morris Inc. v. Angeletti*, 752 A.2d

at 232 (explaining that its choice of law rule applicable to torts would require consideration of the facts giving rise to each plaintiff's claim to determine which state's law would apply and the trial court's determination that "only the law of Maryland will apply to all class members," based on the fact they all lived in Maryland, was in error).

The individualized choice of law analysis, being a matter of due process, should not be altered in a multistate class certification "simply because it may otherwise result in procedural and management difficulties." *In re Jackson Nat'l Life Ins. Co. Premium Litig*., 183 F.R.D. 217, 221 -23 (W.D. Mich. 1998); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. at 821-22. In essence, the trial court must perform the same choice of law analysis it would perform if the case were not a class action.

Where variations exist and the law of several or many states must be applied, the court should consider the impact of that conclusion. Especially in a multistate class action, because variations in state law may overwhelm common issues, the trial court must discuss how the court would deal with such variations and the effect of those variations. *Castano v. Am. Tobacco Co.*, 84 F.3d at 741-43 (holding that a trial court must "consider how variations in state law affect predominance and superiority"). *See also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) (requiring a "considered predominance determination" in nationwide class actions where state law variations are involved); *In re Hotel Tel. Charges*, 500 F.2d at 90 (finding that the district court simply brushed aside a discussion of predominance by stating that individual questions "lie[s] far beyond the horizon in the realm of speculation").

In a multi-state class action, a predominance determination that does not include a discussion of how variations in state law would affect predominance and superiority is reversible. *Castano v. Am. Tobacco Co.*, 84 F.3d at 740-42 (stating that class action proponents must do more than merely assert that variations in state law are insignificant or academic, and the court cannot take class proponents' interpretations of law "on faith"). Consequently, a trial court that fails to conduct a meaningful analysis of variations in the law of the several states included in the proposed class action commits error. *Chemtall Inc. v. Madden*, 607 S.E.2d at 781.

> As a matter of general principle, the predominance requirement of Rule 23(b)(3) will not be satisfied if the trial court determines that the class claims must be decided on the basis of the laws of multiple states and **the appellate court will reverse an order granting certification if the lower court has failed to consider carefully whether or how multiple state laws will apply.**

7AA Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d §1780.1 (emphasis added).

The burden is on the proponent of class certification to demonstrate, through an analysis of the variances in the different states' laws, that certification does not present insuperable obstacles or that variations in state law do not present predominance or manageability problems. *Spence v.*

Glock, 227 F.3d at 313-16; *Castano v. Am. Tobacco Co.*, 84 F.3d at 742; *Walsh v. Ford Motor Co.*, 807 F.2d at 1017; *In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir.) (observing the need for multistate class plaintiff to undertake an extensive analysis of state law variances among jurisdictions to demonstrate that "class certification does not present insuperable obstacles"). Where the class proponents assert that any real conflicts can be managed through subclasses, it is their burden to establish that the differing laws of the states "are subject to grouping in a manageable number of subclasses." *Miner v. Gillette Co.*, 428 N.E.2d 478, 484 (Ill. 1981); *Klay v. Humana*, 382 F.3d 1241(the burden of showing 'groupability' into under a small number of standards rests with the plaintiffs); *Walsh v. Ford Motor Co.*, 807 F.2d at 1017. Use of subclasses may or may not resolve management issues where the law of different states must be applied to various class member's claims. *See Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 188-89 (4th Cir. 1993) (stating that use of subclasses will still pose management difficulties and reduce the efficiency sought to be achieved through certification).

Additionally, where applicable, the class proponents must show how application of the forum state's law satisfies due process. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d at 1187. With regard to the due process questions arising in *Chemtall Inc., supra,* the court concluded that, at the least, it needed the trial judge to "carefully analyze and explain why a plaintiff - who lived, worked, and was injured exclusively in a foreign jurisdiction - should be allowed or required to have their case heard by a West Virginia jury." *Chemtall Inc. v. Madden*, 607 S.E.2d at 787.

VII. IDENTIFICATION OF QUESTIONS OF LAW AND FACT

GEICO argues that common issues of law and fact do not predominate over individual issues. To the contrary, GEICO vigorously asserts, differences in the relevant law of the states whose residents are included in the class, as well as the individual questions of fact as to each insured, preclude maintenance of the claims made herein in a class action lawsuit.

The trial court did not directly address the specific questions of law and fact relevant to the causes of action alleged and, consequently, did not state its conclusions with regard to whether those questions were common or individual, with one exception. The trial court did find that "the existence of diminished value is a common fact issue subject to class-wide proof." The court did not explicitly state which state law it would apply, although the parties appear to believe Tennessee law would be applied to all class members' claims. The trial court did not put an analysis of the choice of law issues raised by GEICO in its certification order.

Nonetheless, we will attempt to at least identify the issues that have been raised in this dispute over class certification so as to determine whether the trial court rigorously analyzed the issues and applied the proper legal standards. Obviously, any attempt to identify the common questions of law and fact presented herein, as a prelude to determining predominance, must begin with the elements of the cause of action: breach of contract. The elements of any breach of contract claim include: (1) existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach. *ARC LifeMed, Inc. v. AMC-Tennessee*, Inc.,

183 S.W.3d 1, 26 (Tenn. Ct. App. 2005); *Life Care Cntrs. of Am., Inc. v. Charles Town Assoc's. Ltd. Partnership, LPIMC, Inc*., 79 F.3d 496, 514 (6th Cir. 1996). The parties do not claim that any other elements apply.[21]

Technically, an insured's action against his or her own uninsured motorist coverage carrier is a breach of contract action. Nonetheless, UM insurance recovery cases are typically a hybrid that also involve tort law principles. *Mallott v. State Farm Automobile Ins. Co.*, 798 N.E.2d 924, 926 (Ind. Ct. App. 2004). To recover, the insured must demonstrate that the uninsured driver was negligent, that the claimed injuries were caused by that negligence, and that those damages exceeded the amount paid by the insurer. *Id.*

With regard to the claims under the Uninsured Motorist provision of the policies,[22] a written contract exists. GEICO asserts that there are actually more than 24 contracts at issue, at least one different policy for each state, with amendments having been made in some circumstances during the period established in the class definition. While there may be some differences that affect this litigation in other ways, the language that establishes the contract (and, therefore, the first element by which to measure a claim of breach) does not differ among the policies at issue.

The parties appear to agree that the language of the uninsured motorist provision of the policies for all purported class members is essentially the same. The Tennessee policy, which is representative of all the policies with regard to this provision, states that under the "Uninsured Motorists Coverage" GEICO will pay

> compensatory damages for bodily injury and property damage (if carried) caused by accident **which the insured is legally entitled to recover** from the owner or operator of an uninsured motor vehicle or hit-and-run auto arising out of the ownership, maintenance or use of that auto. (emphasis added).

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[21] GEICO argues that the various states have different rules of contract interpretation, including, *inter alia*, whether extrinsic evidence may be used to determine whether a contract is ambiguous. Such differences, GEICO asserts, precludes certification of a multistate class, citing *Bowers v. Jefferson Pilot Fin. Ins. Co.*, 219 F.R.D. 578, 583-84 (E.D. Mich. 2004). While such differences might preclude a finding that common questions predominate in some cases, GEICO has not shown that rules regarding contract interpretation or use of extrinsic evidence in that interpretation will be applicable to the issues in this case. Consequently, we decline to address that issue.

[22] The trial court specifically found that the plaintiff was not seeking to certify "two distinct classes, " but, instead, was "seeking to certify a single class consisting of all GEICO insureds that have been denied payment of diminished value on their Uninsured Motorist ("UM") claims, regardless if it be by the so-called "collision" claim or the "Uninsured Motorist" claim. As to the difference, the plaintiff alleges that on hit-and-run claims, GEICO uniformly mischaracterizes the claims as falling under the collision coverage rather than UM claims, which practice denies the insured a recovery for diminished value because the collision coverage does not include the "legally entitled" language. GEICO argues that each plaintiff making this claim would have to show that he or she qualified for payment of the claim under UM coverage rather than the collision coverage. Such a burden could create additional questions of law and fact.

The complaint alleges that GEICO promised to make its UM insureds "whole" in the event of a covered loss. It further alleges that the "legally entitled to recover" language requires GEICO to compensate the class members just as would the uninsured or hit-and-run driver. The complaint further alleges:

> This tort measure of damage includes both repair costs and any resulting loss in value to the vehicle ("diminished value" or "DV"). Loss in value occurs because the post-accident market value of a vehicle is necessarily less after it has sustained certain types of damage incapable of full repair. As reflected in GEICO's own internal documents, this diminished value results from the common sense notion that a vehicle that has been wrecked and repaired is worth less than a similar vehicle that has never been repaired.[23]
>
> Despite its clear legal obligation, GEICO uniformly and systematically fails to estimate, compensate or even notify its insureds of their loss in value damages. . . . GEICO knowingly ignores the diminished value damages to which the Class Members are entitled and denies that it has an obligation to compensate them for the full tort measure of damages to which they are entitled. (emphasis added).

Of course, determining what an insured would be legally entitled to recover from an uninsured tortfeasor requires examination of tort law. Liability, and the extent of that liability, of the uninsured motorist, is one element. Additionally, as both the plaintiff and GEICO agree, the "legally entitled to recover" language imports into the breach of contract analysis a tort measure of damages for injury to property.

GEICO maintains that common factual and legal questions as to the application of the term "legally entitled to recover" are few, if any, among the insureds in the proposed class. First, GEICO argues that the question of whether and how much an insured is legally entitled to recover from an uninsured owner or operator can only be answered (1) by reference to the negligence law of the various states whose residents are members of the proposed class and (2) by individual factual determinations as to each accident. GEICO asserts that determining negligence and, where appropriate, allocation of fault, are necessarily individualized determinations.

GEICO also argues that whether diminished value resulting from damage to a vehicle, even if proved, is recoverable under the UM provision of its policies differs among the states involved. GEICO contends that the law of several states at issue would not include such recovery. Additionally, according to GEICO, some states' laws place limitations on when and to what extent diminished value is recoverable.

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[23] In her brief, the plaintiff clarifies that she does not seek to recover for "stigma DV" and states that, instead, she "seeks only to be compensated for the DV that necessarily results when a vehicle less than six years old and driven less than 90,000 miles sustains structural or body panel damages exceeding $1,000 such that it is humanly incapable of being restored to pre-loss condition."

While there are other key components to the analysis of the issues raised in this case, we begin with the questions of law and fact surrounding the issue of whether a decrease in the value of a vehicle due to damage sustained in an accident is a compensable component of damages and, if so, are there conditions on that recovery.

VIII. RECOVERY FOR DIMINISHED VALUE

There have been a number of cases filed around the country raising the issue of whether diminished value, or inherent diminished value as some courts have called it, is an element of loss payable under insurance policies. "'Diminished value damages' is the loss in market value of a vehicle allegedly caused by market perceptions that a vehicle involved in an accident, though fully repaired, is worth less than the same vehicle that has never been damaged." *American Mfrs. Mutual Ins. Co. v. Schaefer*, 124 S.W.3d 154, 156 (Tex. 2003).

Most of the recent cases involved collision coverage, and the language of the applicable policy provision was different from the UM provision in this case. A majority of courts considering diminished value claims under collision coverage have held that a provision limiting the insurer's obligation to repair or replace does not require the insurer to pay for diminished value after repair. *See Culhane v. Western National Mut. Ins. Co.*, 707 N.W.2d 287, 288-89 n. 10, 11, 12 (S.D. 2005) (holding that the vast majority of courts in recent years have held, or that the "unanimous view of the multitude of courts that have considered this issue in the past five years," is that "repair or replace" language does not include post-repair decrease in value and listing and discussing cases); *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243 (Ind. 2005) (holding that collision coverage language limiting insurer's payment to repair or replacement did not include post-repair diminished value); *American Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154 (holding that inherent diminished value was not a covered loss where language limited liability to "the amount necessary to repair or replace the property with other of like kind and quality" and the vehicle was fully and adequately

repaired); *Pritchett v. State Farm Mut. Auto Ins. Co.*, 834 So.2d 785, 792 (Ala. Civ. App. 2002).[24]

In these cases based on collision coverage language, courts have generally rejected the argument that repair includes the obligation to restore a vehicle to it pre-accident market value as opposed to its pre-accident condition. *See, e.g.*, *Sims v. Allstate Ins. Co.*, 851 N.E.2d 701, 705-707 (Ill. 2006); *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d at 247; *Given v. Commerce Ins. Co.*, 796 N.E.2d 1275, 1279-80 (Mass. 2003); *Seigle v. Progressive Consumers Ins. Co.*, 819 So.2d 732, 739 (Fla. 2002) (also holding that interpreting "repair" to include compensation for loss of value would negate the insurer's choice of remedy that is explicitly contained in the policy). Tennessee law appears to be in accord with the majority. *Black v. State Farm Mut. Automobile Ins. Co.*, 101 S.W.3d 427, 429 (Tenn. Ct. App. 2002) (holding that the policy language was unambiguous and did not include payment for diminished value and specifically rejecting the contention that prior authority had established diminution of value as a doctrine to be applied by Tennessee courts to all motor vehicle policies).[25]

Cases involving first-party claims under collision coverage are governed solely by the language of the insurance contract and breach of contract law. *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243 at 246; *Culhane v. Western National Mut. Ins. Co.*, 704 N.W.2d at 297. In such cases, an insurer's obligation is defined solely by the terms of the policy. *Id.* Contract principles and remedies are distinguishable from those sounding in tort.

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[24]The prominent exception to the "unanimous" view is *Mabry v. State Farm Mut. Automobile Ins. Co.*, 556 S.E.2d 114 (Ga. 2001). In that case, a first party contract action, the Georgia Supreme Court, based on longstanding judicial holdings in that state, held that under Georgia law, an insurer was required to assess and pay for diminished value resulting from an accident. *Id*., 556 S.E.2d at 122. The court held that Georgia case law established that "value, not condition, is the baseline for the measure of damages in a claim under an automobile insurance policy in which the insurer undertakes to pay for the insured's loss from a covered event, and that a limitation of liability provision affording the insurer the option to repair serves only to abate, not eliminate, the insurer's liability for the difference between pre-loss value and post-loss value." *Id.*, 556 S.E.2d at 121.

Additionally, in *Farmers Ins. Co., Inc. v. Snowden*, 366 Ark. 138, 2006 WL 1118938 (Ark. 2006), the Arkansas Supreme Court affirmed certification of a class of insureds whose insurer took the position that its collision coverage did not cover diminished value. The court relied in large part on its conclusion that even if a class must later be decertified because of individualized questions, certification is still appropriate if the case involves preliminary issues common to all class members. *Id*., 2006 WL 1118938, at *6. That approach is contrary to that taken by a majority of federal courts in recent years. The court found that the question of which insureds had a valid claim, and therefore whether class members were objectively identifiable, included the question of whether the policy obligated the insurer to compensate for diminished value in first-party claims. *Id*. The court found that question to be a common one, to be determined by state law and contract interpretation, that predominated over individualized issues. *Id*., 2006 WL 1118938, at *7. However, since the court did not rule on the legal question of whether diminished value is recoverable under the precise policy language, *Snowden* did not take a position contrary to the recent majority.

[25]For purposes of the later discussion on diminished value damages under the tort measure of damages, we point out that in *Black*, the insureds offered proof of the diminution in value of their vehicles, and the insurance company offered countervailing proof that no diminution in the value of each of the vehicles had occurred.

Under common law tort doctrines, an injured party may generally recover compensation from the tortfeasor for the loss sustained. *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d at 246. Where the rules for recovery in tort apply, a party is generally entitled to be made whole. Thus, while not applicable to situations where the policy language defines the types of compensable losses, the doctrine of making a party "whole" is the province of tort law and will apply where the tort measure of damages is the proper one. *Id.*[26]

Thus, a party is generally entitled to recover for the "entire loss" under the rules for recovery in tort. In the tort situation, "[a]llowing damages for diminution in value, when such damages are established, fulfills the tortfeasor's obligation to 'make whole' his victim." *Culhane v. Western National Mut. Ins. Co.*, 704 N.W.2d at 297, *quoting Carlton v Trinity Universal Ins. Co.*, 32 S.W.3d 454, 464 (Tex. App. 2000); *see also Pritchett v. State Farm Mut. Automobile Ins. Co.*, 834 So.2d at 788 (explaining that third party cases are governed by the tort principle that damages should compensate for the injury and make the injured party whole, but first party breach of contract claims are subject to the contractual definition of compensable loss).

Where a case is for recovery against the tortfeasor, or the driver whose negligence caused the injury, tort principles of recovery clearly apply. *Defraites v. State Farm Mut. Automobile Ins. Co.*, 864 So.2d 254 (La. Ct. App. 2004), involved third party claims by parties whose vehicles were damaged in accidents caused by State Farm insured motorists wherein the third parties asserted that State Farm failed to pay losses for diminution in value resulting from the accident. The court held that under Louisiana law diminution in value of a vehicle involved in an accident is an element of recoverable damages, but that there must be proof of such diminished value. *Id*., 864 So.2d at 260.

In fact, the vast majority of states allow, as a component of damages for injury short of destruction to personal property, recovery of a decrease in value if repair has not restored the property to its pre-injury value or condition. *See American Service Center Assocs. v. Helton*, 867 A.2d 235 (D.C. Ct. App. 2005) (surveying other jurisdictions and treatises). In *Helton*, the court discussed the basic rule for the appropriate measure of damages, *i.e*., the difference in value of the chattel immediately before and after the injury, and the alternate measure, *i.e*., the reasonable cost of repairs necessary to restore the chattel to its former condition. *Id*., 867 A.2d at 240-241. The court concluded that District of Columbia law recognized the availability of a remedy to compensate for "residual diminution in value, *i.e.*, the remaining reduction in value after repairs are made." *Id.*, 867 A.2d at 241. Noting that "measures may vary to fit the circumstances of each case," the court concluded that the goal of restoring the injured party to his or her pre-injury position was furthered by allowing such recovery, subject to certain limitations and circumstances. *Id*., 867 A.2d at 242-43. Those limitations are important to the issues in this case and are discussed below.

[26]The court stated that under Indiana law, the measure of damages recoverable against a tortfeasor for property damages includes diminution in value. *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d at 246.

Other courts have surveyed the law in various jurisdictions and have also recognized post-repair loss of value as recoverable in some situations. *See*, *e.g.*, *Papenheim v. Lovell*, 530 N.W.2d 668, 671-72 (Iowa 1995) (recounting Iowa's rule applying where a vehicle "cannot by repair be placed in as good condition as it was in before the injury," *stating* that rule is in accord with most states' rules and citing authority from other jurisdictions); *Brennen v. Aston*, 84 P.3d 99, 102 (Okla. 2003) (holding that where it is shown that repairs failed to bring a damaged vehicle up to its pre-injury condition, the proper measure of damages includes post-repair diminution in value and stating that almost all jurisdictions addressing the issue allow such damages); *Ellis v. King*, 400 S.E.2d 235, 239 (W. Va. 1990) (adopting a rule allowing recovery of loss of value where repair does not restore property to its pre-accident value or condition in certain circumstances); *Fred Frederick Motors, Inc. v. Krause*, 277 A.2d 464, 466 (Md. Ct. Spec. App. 1971) (holding that vehicle owner may recover loss of value resulting from accident in addition to cost of repair if the value of the repaired or restored property has a lesser value than before the accident because, in that situation, such recovery was the only way to ensure that a plaintiff whose vehicle was merely damaged was in no worse position than one whose vehicle was destroyed).

However, various limitations and requirements of proof necessary for recovery of such damages exist. For example, in *Papenheim v. Lovell*, 553 N.W.2d 328, 329 (Iowa 1996), after discussing the evidence in the record and various calculations, the court awarded the plaintiff the amount that was the difference in his car's pre-accident value and its post-accident value and specifically held that the cost of repairs and the value after repair were irrelevant. In *Ellis v. King*, *supra*, the court limited recovery for loss of value after repairs, stating, "if an owner can show a diminution in value based upon structural damage after repair, the recovery is permitted for that diminution in addition to the cost of repair, but the total shall not exceed the market value of the vehicle before it was damaged." *Ellis v. King*, 400 S.W.2d at 239. Additionally, the court warned trial courts to narrowly construe its holding and limited recovery to certain situations. Other states also limit recovery of both repair costs and any remaining decrease in value to the difference between the pre- and post-accident value. *See*, *e.g.*, *Fred Frederick Motors Inc. v. Krause*, 277 A.2d at 467 (holding a plaintiff may recover diminished market value in addition to the cost of repairs "provided the two together do not exceed the diminution in value prior to the repairs"); *American Service Center Assocs. v. Helton*, 867 A.2d at 243 (holding that while recovery of both cost of repair and residual post-repair diminution in value is available, the total award can not exceed the gross diminution in value). The result is a default to the general rule that the proper measure of damages is the difference between the pre-accident and post-accident values.

Some states have apparently declined to recognize diminution in value after repair as a recoverable element of damages where personal property is injured. *Sullivan v. Pulkrabek*, 611 N.W.2d 162, 164 (N.D. 2000), (holding that by statute, the proper measure of damages is either cost to repair or diminution in value, whichever is lower, and because the plaintiff had elected repair, he could not later recover any decrease in value after repair).

A few diminished value cases have been brought under the insured's uninsured motorist coverage. In general, uninsured motorist provisions incorporate a tort law measure of damages

because they are based on losses compensable from the uninsured motorist. To recover, an insured would need to establish the damages suffered in the accident according to tort law principles. *Malott v. State Farm Mut. Ins. Co.*, 798 N.E.2d at 926. Then, the breach of contract issue can be determined by comparing the damages shown with the amount paid by the insurance company. *Id*.

Two cases from Washington State, *Laughlin v. Allstate Ins. Co.*, 130 Wash. App. 1018, 2005 WL 2981685 (Wash. Ct. App. Nov. 8, 2005), and *Heaphy v. State Farm Mut. Automobile Ins. Co.*, 72 P.3d 220 (Ct. App. Wash. 2003), dealt with class certification, but neither dealt with the issue of whether diminished value is an element of recoverable damages. However, in later proceedings, an arbitrator determined that Ms. Heaphy was not entitled to recover from her UM insurer because she had not suffered any financial loss due to diminished value since she had leased the vehicle and did not own it, and the trial court confirmed the arbitrator's decision. *See Heaphy v. State Farm Mut. Automobile Ins. Co.*, 2005 WL 2573340, at *2 (W.D. Wash. Oct. 12, 2005) (explaining the history of the case prior to removal to federal court).

One recent case is of particular interest since the court of another state applied its understanding of Tennessee law to the question of diminished value under UM coverage. In *Dunn v. Meridian Mut. Ins. Co.*, 836 N.E.2d 249 (Ind. 2005), the Indiana Supreme Court considered whether diminished value was recoverable under a UM policy providing payment for damages the insured "is legally entitled to recover from the owner or operator of an uninsured vehicle." Because the plaintiff was a Tennessee resident and the policy was issued in Tennessee, the court applied Tennessee law.

Relying, *inter alia*, upon *Kirk v. Lowe*, 70 S.W.3d 77, 80 (Tenn. Ct. App. 2001) which held that the UM statute in Tennessee "gives the insured motorist the protection he would have had if the alleged tortfeasor had assumed his own financial responsibility by purchasing liability insurance coverage," the Indiana court concluded that both Tennessee and Indiana law allowed an insured to recover from his UM insurer any damages for which the uninsured motorist is liable. *Dunn v. Meridian Mut. Ins. Co.*, 836 N.E.2d at 252-53. After determining that Tennessee courts had not addressed whether diminished value is recoverable under "legally entitled to recover" language, the court held that Indiana law, having adopted the Restatement, allowed recovery for diminished value after repairs under that policy language. *Id*., 836 N.E.2d at 253-54. The court then stated, "[w]e see no basis to distinguish Tennessee law in this respect, and do not find any Tennessee authority to the contrary." *Id*., 836 N.E.2d at 254.

We agree, up to a point, with the Indiana court's interpretation of Tennessee law. The Tennessee Supreme Court has described the reasons our legislature chose to require insurers to offer uninsured motorist coverage to those buying general liability coverage and the benefit that such coverage provides:

> Our uninsured motorist statute was enacted in response to the growing public concern over the increasing problem arising from property and personal injury damage inflicted by uninsured and financially irresponsible motorists. Its purpose is to

> provide, within fixed limits, **some recompense** to those who receive bodily injury or property damage through the conduct of an uninsured motorist who cannot respond in damages. (emphasis added).

Tata v. Nichols, 848 S.W.2d 649, 654 (Tenn. 1993), *quoting Shoffner v. State Farm Mutual Automobile Ins. Co.*, 494 S.W.2d 756, 758 (Tenn. 1972), *rev'd on other grounds*, *State Farm Mutual Automobile Ins. Co. v. Cummings*, 519 S.W.2d 773 (Tenn. 1975).

The statutory requirements of uninsured motorist coverage form part of the contract and, as a matter of law, become provisions of the policy. *Sherer v. Linginfelter*, 29 S.W.3d 451, 454 (Tenn. 2000). "[A]ny statute applicable to an insurance policy becomes part of the policy and such statutory provisions override and supercede anything in the policy repugnant to the provisions of the statute." *Id.*, 29 S.W.3d at 453-54, *quoting Hermitage Health & Life Ins. Co. v. Cagle*, 420 S.W.2d 591, 594 (Tenn. Ct. App. 1967).

While the statute does not expressly require that the UM carrier pay its insured the amount the insured is entitled recover for property damage from the uninsured tortfeasor,[27] language in some opinions has implied such a requirement. *See, e.g.*, *Kirk v. Lowe*, 70 S.W.3d at 80. Our Supreme Court has stated that the uninsured motorist statutes reflect the "fundamental legislative design that the insured be placed in as good a position as, but no better position than he would occupy if he had been injured by an individual who complied with the financial responsibility law"). *Shoffner v. State Farm Mut. Automobile Ins. Co.*, 494 S.W.2d at 759.

Regardless of whether the language is statutorily required, the policy at issue herein, as well as all similar policies that have been the subject of appellate opinions in this state, obligates the insurer to pay the amount the insured is legally entitled to recover from the uninsured tortfeasor. Consequently, the question becomes whether, and in what circumstances, a party suffering property damage to his or her vehicle in an accident may recover from the party causing the damage a loss in value of the property. We do not disagree that loss in value, correctly proved, may be an element of recoverable damages. However, as explained below, longstanding law in Tennessee on the appropriate measure of damages limits the award of that element to specific situations where the required proof is made.

A. Tennessee Measure of Damages

As stated earlier, the complaint alleged that GEICO was required to pay its UM insured the amount the insured is "legally entitled" to recover from the third party and that this "tort measure of damage includes **both** repair costs and any resulting loss in value to the vehicle." The plaintiff asserts that all the states whose residents are class members, including Tennessee, have adopted the

[27] Tenn. Code Ann. § 56-7-1205 provides that the UM statutes do not require the insurer to afford limits in excess of those that "would be afforded had the insured thereunder been involved in an accident with the minimum limits described in § 55-12-107, or the uninsured motorist liability limits of the insured's policy if such limits are higher than the limits described in § 55-12-107."

same measure of personal property damages for torts, *i.e.*, the measure set out in RESTATEMENT (SECOND) OF TORTS § 928,[28] which provides:

> When one is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for
>
> a) the difference between the value of the chattel before the harm and the value after the harm or, at his election in the appropriate case, the reasonable cost of repair or restoration, with due allowance for any difference between the original value and the value after repairs.

No Tennessee court has expressly adopted this Restatement provision. In Tennessee, the measure of damages for injury to personal property is **either** the cost of repair **or** the difference in the property's market value immediately before and immediately after the injury. *Irving Pulp and Paper, Ltd. v. Dunbar Transfer and Storage Co.*, 732 F.2d 511, 516 (6th Cir. 1984); *Yazoo & M.V.R. Co. v. Williams*, 185 S.W.2d 527, 529 (Tenn. 1945); *Tire Shredders, Inc. v. ERM-North Central, Inc.*, 15 S.W.3d 849, 854-55 (Tenn. Ct. App. 1999). Which of those two measures is to be applied depends upon the proof presented, primarily as to whether repairs will restore the property to its pre-accident function, appearance and value.

If the property can be or has been repaired so as to substantially restore its function, appearance and value, then the reasonable cost of repair is the measure. If the property has not been so repaired or is not capable of such repair, then the proper measure is the pre-accident and post-accident difference in fair market value. *Tire Shredders, Inc. v. ERM-North Central, Inc.*, 15 S.W.3d at 855; *Tennessee Pattern Jury Instructions,* Civil 14.40.[29]

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[28] Plaintiff submitted a chart entitled "Diminished Value is Recoverable Under Tort Law" that lists each class member state and cites authority for that proposition. Our research indicates that Tennessee courts have never specifically adopted the Restatement provision at issue.

[29] The jury instruction provides:

> The measure of damage to personal property is as follows:
>
> If the damages have been repaired or the property is capable of repair so that the three factors of function, appearance, and value have been or will be restored to substantially the same value as before the incident, then the measure of damages is the reasonable cost of repairs necessary for the restoration plus any loss of use pending the repairs.
>
> If [the damages have not been repaired] [the property is not capable of repair] so as to restore function, appearance, and value as they were immediately before the incident, then the measure of damages is the difference in the fair market value of the property immediately before the incident and immediately after the incident.

Accordingly, a plaintiff who seeks the difference in pre- and post-accident value of damaged property must prove both the pre-injury value and the post-injury value. *See*, *e.g.*, *Rainbo Baking Co. of Louisville v. Release Coatings of Tennessee, Inc.*, No. 02A01-9510-CH-00223, 1996 WL 710928 (Tenn. Ct. App. Dec. 12, 1996) (No Tenn. R. App. P. 11 application filed) (holding that plaintiff failed to establish pre-incident fair market value of property, but totality of evidence established that the value actually increased and plaintiff consequently suffered no loss); *Gause v. Cole*, No. 03A01-9707-CH-00001, 1997 WL 304117 (Tenn. Ct. App. June 5, 1997) (No Tenn. R. App. P. 11 application filed) (holding that there was no proof of the value of the damaged property, only its cost, and the wrong measure of damages was therefore used).

Further, the plaintiff must prove that the property is not capable of repair that will substantially restore its condition, appearance, and value or that repairs made did not substantially restore them. *See*, *e.g.*, *Bickers v. Chrysler Motor Credit Corp.*, No. 6526, 1991 WL 18681 (Tenn. Ct. App. Feb. 20, 1991) (holding that if the property is capable of repair, repair costs are the proper measure of damages). *See also Pavcon, Inc. v. A.M.P. Const. Co., Inc.*, 1993 WL 369353 (Tenn. Ct. App. Sept. 22, 1993) (perm. app. denied Feb. 28, 1994) (holding that where repairs were made and plaintiff sought as damages the cost of repair, award of cost of repair will be upheld on appeal absent proof that the property was not repaired to pre-injury condition or value).

The question of whether the damaged property is capable of restoration, or has been restored, to substantially the same value and condition as it had before the accident is a question of fact to be determined by the jury or factfinder. *Yazoo & M.V.R. Co.*, 185 S.W.2d at 529-30; *Bledsoe v. Buttry*, No. E2003-01576-COA-R3-CV, 2004 WL 2378247 (Tenn. Ct. App. Oct. 25, 2004) (perm. app. denied March 28, 2005); *Tate v. United Inns, Inc.*, 1984 WL 568927, *2 (Tenn. Ct. App.)(Tenn. Ct. App. Feb. 13, 1984). Where there is no evidence that repairs did not restore the property to its pre-damage function, appearance, and value, the cost of repairs is the proper measure of damages. *Bledsoe v. Buttry*, 2004 WL 2378247, at *7.

Thus, while Tennessee law, in a general sense, allows recovery from a tortfeasor for a decrease in the value of personal property after an accident, there are distinguishing factors in Tennessee's rule. First, decrease in value is an alternative to cost of repair, and the appropriate measure is dependent upon the evidence presented. Second, the initial question to be asked is whether repair can or did **substantially** restore the property to its pre-accident value, function and appearance. These are fact-specific inquiries.

Important to the claims brought in this case by plaintiff on behalf of proposed class members is another distinction in Tennessee law: the measure of damages is either repair costs or the difference in market value immediately before the accident and that immediately after the accident. **It is not both**. Unlike the Restatement provision, decrease in value measured after the repair is not a recognized element of allowable damages in Tennessee. Unlike the Georgia courts, the Tennessee courts have not held that the basic measure, *i.e.*, the difference between pre-loss and post-loss value, is "modified by an election to repair so that the measure would be the difference between the pre-loss value and post-repair value." *State Farm Mut. Automobile Ins. Co. v. Mabry*, 556 S.E.2d at 121.

The plaintiff herein proposes to provide generalized proof that, because of the kind of damage sustained, each class member's vehicle suffered a decrease in value, regardless of repair, and proposes to prove that post-repair decrease in value by a statistical methodology. The class members do not, apparently, intend to prove either the pre-accident value or the post-accident value of any insured vehicle. Instead, they seek to use proof unrelated to either value. Additionally, each class member is effectively seeking, in addition to repair costs which they have already received, post-repair decrease in value. To the extent that total exceeds the difference between the vehicle's value immediately before the accident and its value immediately after the accident, such recovery is not allowed.[30]

An example may illustrate the issue. A vehicle is damaged in an accident, and that vehicle was valued at $20,000 immediately before the accident and at $10,000 after the accident. The cost of repair is $9,000. The plaintiff is able to prove that, by virtue of the accident and the type of damage sustained, the vehicle's market value after repair has been reduced by $3,000, even after the repairs. Under the plaintiff's theory herein, such a plaintiff would be entitled to recover both the cost of repair ($9,000) and the post-repair diminished value ($3,000), for a total of $12,000. Under Tennessee law, however, such a plaintiff would be limited to the $10,000 pre- and post-accident decrease in value, even if she were able to prove that repairs could not or did not restore the value of the vehicle substantially to its pre-accident value. Otherwise, she would be entitled only to the cost of repairs ($9,000).

Tennessee is not unique in limiting the total recovery to the amount derived from the application of the general rule for injury, short of destruction, to personal property. In fact, it is not the only jurisdiction whose residents are members of the proposed class that imposes such a limitation.

> . . . when a plaintiff can prove that the value of an injured chattel after repair is less than the chattel's worth before the injury, recovery may be had for both the reasonable cost of repair and the residual diminution in value, **provided that the award does not exceed the gross diminution in value.**

American Service Center Assocs. v. Helton, 867 A.2d at 243 (D.C. Ct. App. 2005) (emphasis added). To demonstrate application of its holding, the court gave the following example:

> . . . if a car worth $40,000 is worth only $25,000 after being damaged, it has suffered a $15,000 gross diminution in value. If after repairs of $10,000, the car is worth $30,000, the residual diminution in value is $10,000. Although the cost of repairs

[30] We do not intend to suggest that a plaintiff who, in the proper case, adequately proves a decrease in value, measured in accordance with the appropriate measure of damages, may not recover any difference in that amount over the repair cost damages the plaintiff has already received. In that situation, the defendant would likely be allowed a set off for the repair costs already paid.

> and residual diminution in value total $20,000, the award is capped at $15,000, the gross diminution in value.

Id., 867 A.21d at 243 n.10.

As the *Helton* court explained,

> The reason for the mutual exclusivity of damages to compensate for repair costs and gross diminution in value is that they overlap (the first being a component of the second), and to award both would overcompensate the plaintiff. Thus, the need for election of remedies. "The purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress for a single wrong." *Dean v. Garland*, 779 A.2d 911, 915 (D.C. 2001) (quoting *Twin City Federal Savings & Loan Ass'n v. Transamerica Ins. Co.*, 491 F.2d 1122, 1125 (8th Cir. 1974)). A damage award comprising both gross diminution in value and the reasonable cost of repair therefore presents a classic example of the form of double redress prohibited by the doctrine of election of remedies. *See* Dewitt C. Blashfield, 15 BLASHFIELD AUTOMOBILE LAW AND PRACTICE § 480.5, at 27 (4th ed. 2003) (explaining that a plaintiff may not recover the difference between the value of the injured vehicle immediately before and after the collision, in addition to the cost of repair necessary to restore the vehicle to its original condition, because a "motorist is not entitled to double compensation"). But whereas gross diminution in value subsumes the cost of repair, residual diminution in value does not duplicate the cost of repair because it is calculated based on a comparison of the value of the property before the injury and after repairs are made, *i.e.*, excluding injury compensated by damages for the cost of repair.

Id., 867 A.2d at 242.

As discussed earlier in this opinion, other states also cap or limit the amount of recovery when a plaintiff seeks both post-repair loss of value and cost of repairs, including states in the proposed class such as Maryland, *Fred Frederick Motors, Inc. v. Krause*, 277 A.2d at 467, and West Virginia, *Ellis v. King*, 400 S.E.2d at 239.[31]

Consequently, under Tennessee law (and at least some of the other jurisdictions) proof of both the pre-accident and post-accident values is necessary. The plaintiff proposes to introduce proof of the class members' injury that is not recognized under Tennessee's measure of damages: post-repair decrease in value, unrelated to the pre-accident value or post-accident value of the vehicle.

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[31] We have not performed a state-by-state analysis of the states in the proposed class, but have discovered enough distinctions to conclude that such an analysis is necessary in order to identify the elements of proof necessary to meet evidentiary requirements applicable in the various jurisdictions.

Class action is a procedural device that cannot alter the substantive prerequisites for recovery under tort law. *Southwestern Refining Co. v. Bernal*, 22 S.W.3d at 437.

The measure of damages a class member could recover from an uninsured tortfeasor is, in this case, one of the elements of the breach of contract claim. If a class member is unable to recover diminished value, because of inability to prove that value or for some other reason, GEICO would not have breached its insurance contract with that class member by failing to pay diminished value. This discussion, therefore, is relevant to **liability**, not to computation of any class member's damages against GEICO for breach of contract.[32]

B. Questions of Law and Fact Surrounding Recovery of Diminished Value

The difference between the Restatement provision, as plaintiff would have it applied, and Tennessee law regarding the measure of tort damages is significant, even though it appears small. Those class members whose claims are governed by Tennessee law must present proof that the class proponents have not indicated they can provide on a classwide basis. The difference also obviously raises choice of law questions.[33] Those questions were not addressed by the trial court.

As demonstrated earlier, a number of jurisdictions in the proposed class also place evidentiary requirements on the recovery of post-repair loss of value as well as limitations, or caps, that require determination of pre-accident value and post-accident or post-repair value of the vehicle involved. If, in these jurisdictions, GEICO has paid for repairs an amount that equals the gross diminution in value of an insured vehicle, then the owner of that vehicle cannot recover any more money, regardless of generalized proof that some diminution in value always occurs with certain kinds of damage. Some jurisdictions place other kinds of limitations on recovery, such as the type of injury sustained.

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[32] We are well aware that individual issues as to the amount of damages each class member may be entitled to do not necessarily defeat predominance. *Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d at 637. Common issues may predominate when liability can be determined on a classwide basis even when there are some individualized issues as to computation or extent of damages. *In re Visa Check/Mastercard Antitrust Litig.*, 280 F.3d at 139. The necessity to make individualized determinations in calculating the amount of various class member's damages does not preclude certification. *See Klay v. Humana*, 382 F.3d at 1259; *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 298 (5th Cir. 2001); *Gold Strike Stamp Co. v. Christiansen*, 436 F.2d 791, 796-98 (10th Cir. 1970). That is because the amount of damages is almost invariably an individual question and to allow that fact to preclude class certification would render the class action vehicle unavailable in many cases or types of cases. *In re Visa Check/Mastercard Antitrust Litig.*, 280 F.3d at 139-40. However, there is a difference in computing individual damages and proving that some injury has been suffered, which is an essential element of liability in the case before us. *Klay v. Humana, 382 F.3d at 1259; Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d at 1240; *In re South Dakota Microsoft Antitrust Litig.*, 657 N.W.2d at 674.

[33] Additionally, since the class proponent was in error in her characterization of Tennessee law, a thorough analysis of the law of the other states whose residents are included in the class is in order. Only after such an analysis can it be determined how many sets of legal rules must be applied to the class's claims.

Our brief exploration of the relevant legal principles in a few of the relevant jurisdictions indicates that a thorough analysis is required. Whether the class members can prove on a generalized basis all the elements necessary for recovery under the legal principles in each jurisdiction is a vital component of the predominance and superiority requirements.

Regardless of the choice of law issues presented, the Tennessee rule clearly raises questions of fact. As explained above, whether any particular class member can recover diminished value damages under Tennessee law would depend upon proof of: (1) the vehicle's pre-accident condition and value (taking into consideration, *e.g.*, other damage to the vehicle); (2) the vehicle's post-accident value; and (3) proof that the repair did not restore the vehicle to substantially the same value it had before the accident. Additionally, there are questions as to whether particular class members accepted payment for repairs in full satisfaction of their loss, thereby electing that measure of damages. That issue raises choice of law as well as factual questions.[34]

The plaintiff asserts that individualized proof that the insured vehicles actually suffered a decrease in value due to the damage they sustained is not necessary. She discounts GEICO's arguments that the diminished value, if any, of any vehicle necessarily depends on pre-loss condition, the quality of the repairs, and/or such post-accident events as the sale of the vehicle from which actual value is established.[35]

The plaintiff stated at argument that she intends to prove that all vehicles in the class, despite state-of-the-art repair, suffered diminished value. The class includes insureds whose vehicle suffered structural (frame damage) and/or required body work; the estimate to repair the vehicle was more than $1,000; and the vehicle was less than six years old (model year plus five) and had less than 90,000 miles on it at the time of the accident. As explained in the brief:

> Plaintiff intends to call expert witnesses in vehicle engineering and design, and in metallurgy, to show why the most skilled repair technician is incapable of restoring a frame or body panel damaged vehicle to its pre-loss condition. . . . In addition . . . auto damage appraisal experts will testify that all structural and/or body panel damaged and repaired cars suffer an actual loss in value in the marketplace when compared to similar vehicles that have not sustained such damage. This testimony

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[34] The class proponent asserts that GEICO, by paying claims, has waived its right to raise questions as to whether any insured's recovery from an uninsured motorist would have been reduced in comparative fault states or eliminated in contributory negligence states. Those assertions raise choice of law questions regarding waiver on the part of an insurer. Similarly, acceptance of repair and release may also raise election of remedies and other questions of law, which may be subject to differing legal rules, and questions of fact regarding waiver on the part of insureds.

[35] GEICO uses as an example the named plaintiff's circumstances. According to depositions and affidavits, the named plaintiff's 1998 Kia Sephia, for which she seeks diminished value, was in a deteriorated condition before the accident, had undergone repairs including body work and paint, had 55,000 miles on it at the time of the accident, was further damaged after the accident by the plaintiff's daughter's insistence on driving it home after the accident, but was later traded in for a value of $6,545, an amount in excess of the listed trade-in value for a Sephia in good condition. Consequently, GEICO asserts the plaintiff's vehicle suffered no decrease in value due to the accident.

> will be bolstered by internal GEICO documents which show that the company was aware that repaired vehicles suffer a loss in value and that loss can be ascertained and valued.

While the described evidence may provide a basis for the factfinder to decide that repair cannot restore vehicles with damage as defined in the class to their pre-accident condition and value (leaving aside the question of whether it can establish the impossibility of substantial restoration), it does not provide classwide proof of the elements critical to establishing the appropriate measure of damages. This intended proof does not include the evidence necessary to compare pre-accident and post-accident value of any particular vehicle. [36]

We agree with GEICO that pre-loss condition as well as other individualized factors affect the value of a vehicle. Two cars of the same make and model, with substantially the same mileage, may differ in value depending on the condition. Condition is an important component of valuation,[37] and pre-accident and post-accident value must be proved in Tennessee. A number of individual factors must be considered to determine whether any particular vehicle actually sustained a diminution in value attributable to the damage sustained in an accident. Among the factors relevant to determining pre-accident and post-accident values, in addition to the vehicle's make and model, are its pre-accident physical and mechanical condition; its age and history; its optional equipment or lack thereof; maintenance history by current and past owners; unrepaired damage from prior incidents; and various marketplace factors. Contrary to the plaintiff's argument herein, a subsequent sale close in time to completion of repairs is also relevant to its post-accident value.

The plaintiff, however, argues that pre-loss condition is irrelevant, stating:

> As Plaintiff explained to the trial court, she has retained Dr. Bernard Siskin to calculate the DV at issue on a classwide basis. To do so, Dr. Siskin will use a regression model because it enables him to isolate and exclude all pre-loss condition variables that may vary among the Class – such as the cigarette burns, stained upholstery, nicks and dents GEICO identifies on Plaintiff's vehicle.
>
> By isolating and excluding pre-loss condition variables from the damage analysis, Dr. Siskin can determine the DV resulting solely from the structural and body panel damage at issue. [Quoting Dr. Siskin's affidavit that damages "may be reliably

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[36] We see some problems with the proposed evidence, *e.g.*, it specifically ignores the possibility that the pre-accident value of a vehicle, based on its condition, which could include prior unrepaired panel or frame damage, may be increased after repair. Nonetheless, we leave it to the trial court to conduct a *Daubert/McDaniel* inquiry.

[37] Kelley's Blue Book, which contains a range of values for used vehicles, has been recognized as an objective guide to valuing vehicles. *See Martinez v. Enterprise Rent-A-Car Co.*, 119 Cal. App. 4th 46, 56 (2005); *Hill v. Mercedez-Benz USA, LLC*, 274 Ga. App. 826,829; *In re General Motors Corp. v. Pick-Up Truck Fuel Tank Prods. Liabil. Litig.*, 55 F.3d 768, 816 (3d Cir. 1995). The estimated values are tied in part to condition, as described in the book. Of course, testimony establishing the relevant condition is necessary when relying on Blue Book values.

> estimated without individual inspection of each car at the point of accident or sale"] Further, all of the information Dr. Siskin needs to calculate DV - - such as make, model, year and mileage of each Class member's car - - is available on a classwide basis from the electronic repair estimates GEICO maintains.

As this description indicates, the proposed classwide proof would exclude consideration of pre-accident condition. It is difficult to imagine how pre-accident value could be established without regard to condition. In addition, the proposed model does not address a number of other factors related to an individual car's value. It appears that the expert testimony described is offered as a model for calculating damages. Its purpose is to arrive at an amount attributable to post-repair decrease in value.

However, the plaintiff has not otherwise addressed how the class members would prove on a generalized or classwide basis the pre-accident and post-accident values of the class members' vehicles. In other words, the proposed expert testimony does not attempt to address the elements of proof necessary to establish an entitlement to diminished value. Post repair decrease in value, as described by plaintiff, is not an element of proof relevant to Tennessee's measure of damages. As the plaintiff's experts describe in their testimony, they use the term "diminished value" as something ascertainable without reference to a car's value before the accident or that after the accident or even after repair. Further, even if it were allowable, that amount added to the cost of repair which the class members have already received cannot exceed the decrease in value after the accident. Obviously, that amount, usually derived from proof of pre-accident and post accident values, must be established.

The critical question is whether plaintiff can present classwide proof that each class member's vehicle suffered diminished value without the trial court considering individualized factors affecting value. As we have discussed, that would appear difficult under Tennessee law. The proof the class has so far proposed to offer does not suffice. The proof described by plaintiff so far would not establish that the named plaintiff's vehicle suffered a decrease in value as recognized in Tennessee law. "[E]vidence insufficient to prove [an element of a cause of action] in a suit by an individual does not become sufficient in a class action simply because there are more plaintiffs." *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d at 693.

Defraites v. State Farm Mut. Automobile Ins. Co., *supra*, involved a proposed class of persons whose cars had been damaged in accidents with drivers insured by State Farm. They claimed that State Farm had not paid them for diminished value of their vehicles due to the accidents. The court found that certification of the class was not appropriate because, although diminution in value is an available element of damages in automobile accident cases, "Louisiana law does not presume there is inherent diminution in value involved in every automobile accident," and any plaintiff seeking to recover diminution in value must individually prove that loss. *Defraites v. State Farm Mut. Automobile Ins. Co.*, 864 So.2d at 261.

The court held that "as with other tort claims, no mechanical rule can be applied in the assessment of property damages claims and the claims must be assessed on a case by case basis." Consequently, the court determined that the requirements for class certification were not met since individual adjudication of each claim would be required. *Id*., 864 So.2d at 262-63. The court held that claims for diminution in value must be assessed on an individual basis. *Id*., 864 So.2d at 261.

The court also held that in order to grant the injunctive and declaratory relief plaintiff requested, the trial court would have to "examine each putative class member's claim and make separate, fact-based determinations on the following issues: 1) whether the State Farm insured was at fault in the accident; 2) whether a diminution in value of the vehicle occurred . . ." The court further held that as to the claims for money damages, the court would have to determine, among other things, "1) whether diminished value was sustained for each member of the putative class; 2) the amount of diminished value, which will be dependent on facts such as age, make, model, and condition of the vehicle . . ." . *Id*., 864 So.2d at 262.

In summary, the court concluded, in this case where the class included "as yet unidentified and unrelated insureds involved in various automobile accidents," that there were "**too many individualized variables which come into play in a claim for diminution in value in an automobile accident case to make the action appropriate for certification of a class.**" *Id*. (emphasis added).

In order to meet Rule 23.02(3)'s predominance requirement, a party seeking class certification must show that those issues subject to generalized proof outweigh those issues that are subject to individualized proof. We cannot say that, based on the record before us, the plaintiff has shown that she can prove that each class member actually suffered the injury of diminished value through the classwide proof she has described.

IX. Other Questions of Law and Fact

Although one question presented herein is whether diminished value is includable in the measure of damages a party may be entitled to recover from a tortfeasor under the laws of the various states, that is not the only question. Even if the plaintiff were able to show that classwide proof can establish the eligibility for an award of diminished value, the fact that all vehicles described in the class definition suffered a decrease in value does not necessarily prove that GEICO failed to pay any particular insured less than he or she was entitled to recover from the uninsured motorist.

To prove that GEICO did not meet its obligation under an insurance contract, an insured would have to prove more than that GEICO did not pay him or her an amount specifically designated as diminished value. The insured would be required to show that GEICO did not pay at least the amount the insured was legally entitled to recover from the third party tortfeasor. Put another way, the insured would have to demonstrate that he or she was entitled to recover from the uninsured motorist more than he or she was paid by GEICO. Even though GEICO may not have included an amount specifically for diminished value in its payment of a claim, it is conceivable that the amount

it paid a particular insured may, in fact, have exceeded the total amount (including diminished value) that insured could have recovered from the third party tortfeasor.

Key components of an examination of whether GEICO paid less than the insured could have recovered from the uninsured motorist are the applicable legal principles, a determination of whether those principles differ among the states where the policies were issued, and the facts of the individual accident.

GEICO asserts that questions of law exist that must be answered according to the laws of each state whose citizens are included in the proposed class and that state law differs in some instances on those questions. For example, GEICO points out that the states where the class members reside vary with regard to whether they have adopted some form of comparative negligence, whether they have retained contributory negligence principles, and which legal principles apply in the proper forum. These issues are relevant to determining what an insured was "entitled to recover" from an uninsured motorist.

Because neither GEICO nor the insureds in the twenty-three other states intended that disputes regarding their insurance agreements would be determined by Tennessee law, GEICO argues that the negligence law of each state must be applied or, in the least, the trial court was required to conduct a choice of law analysis. The Tennessee Supreme Court has recognized that differences in the concepts of comparative fault and contributory negligence create conflicts of law that require a determination of which state's law to apply using applicable choice of law rules. *Hataway v. McKinley*, 830 S.W.2d at 55. The same conclusion applies where there are differences in the systems for apportioning fault under applicable comparative fault or comparative negligence principles.

With regard to differences in such tort law principles, the plaintiff asserts that GEICO has made such issues irrelevant by paying to repair the damaged vehicles. She asserts that the law in each class state provides that once GEICO has completed its investigation and made a coverage determination, it cannot reopen the investigation and modify the amount of its payment.

GEICO disputes this contention and argues, first, that Tennessee law requires proof of misrepresentation by the insurer in order to establish waiver relying, *inter alia*, on *Bill Brown Constr. Co. v. Glen Falls Ins. Co.*, 818 S.W.2d 1, 13 (Tenn. 1991). GEICO also argues that other states reach the same result, even if based on different reasoning, and distinguish between coverage provisions and forfeiture provisions.

GEICO also argues that even if waiver is legally recognized in any of the class states, deciding whether a waiver has occurred as to any particular claim requires an individualized inquiry, stating:

> Each class member must still prove GEICO General intentionally relinquished its right to limit coverage to the terms of the policy. This cannot be done on a class-

wide basis. As to any given class member, GEICO General has a right to put on proof that GEICO General did not intend to expand coverage for that insured. For example, GEICO General is entitled to show that its initial payment of the cost of repair reflected a desire for a non-adversarial, prompt settlement of repair costs, not a relinquishment of its right to insist on proof of fault should the insured seek additional payments under UPD. . . . As the Michigan Court of Appeals has explained:

> The mere fact that the insurer paid some wage-loss benefits is insufficient by itself for us to hold that, in the event the insured filed suit objecting to the amount of benefits paid, the insurer is precluded from asserting that it owes the insured nothing at all. An insurer might rationally conclude it is better to pay something on a suspect claim than to litigate the matter in the hope of paying nothing at all yet to take the position that it has no liability to the insured, where the insured files suit.

Hammermeister v. Riverside Ins. Co., 323 N.W.2d 480, 482 (Mich. Ct. App. 1982).

In addition, GEICO cites other cases for the proposition that the fact that an insurance company paid part of a claim did not prevent the company from contesting liability when sued by the insured for more money, and that there is nothing inequitable in requiring suing insureds to prove entitlement to more, or any, payment. *See, e.g., Creveling v. Government Employees Ins. Co.*, 828 A.2d at 243.

Absent a conclusion that GEICO has, under the law of all the class states, waived its right to challenge an insured's right to additional money by paying the UM claims, the question of each insured's liability under applicable systems for allocating responsibility for tort injury comes into play. That, of course, raises choice of law issues, requiring a comparison of all the class states' tort law principles. Additionally, it raises individualized fact questions. How much any particular plaintiff is entitled to recover from an uninsured motorist due to an automobile accident can only be determined after application of fact-specific negligence and allocation of fault principles. Only if an insured was paid less by GEICO than he or she was entitled to recover from an uninsured motorist is a breach of contract claim established.

Consequently, the determination of whether GEICO has waived its right to challenge any particular insured's recovery of additional money, on the basis that the insured was not entitled to more than he or she received, even including damages for diminished value, because of negligence attributable to the insured is critical to the question of whether common questions predominate over individual ones. We think there are significant questions regarding the law of the various states on the waiver issue as described by the class proponent and opposed by GEICO. Only by analysis of Tennessee law and that of the other class states can the issue be resolved.

The trial court did not engage in that analysis or did not provide us with an explanation of the results of that analysis. Because of the problems set out above with generalized proof as to diminished value alone, we will not examine the issue of waiver further. Nonetheless, it is an issue that should be addressed in any future class certification decision.

Finally, GEICO also asserts that differences in the insurance contracts, individualized to meet each state, and differences in the law of the various states also either preclude a finding that common questions predominate or, at the least, demand a choice of law analysis. For example, GEICO asserts:

1. While Tennessee law prohibits the inclusion of a mandatory arbitration clause in uninsured motorist insurance policies, at least one other state whose residents are included in the proposed class allow such provisions. Delaware allows such provisions, and one is included in GEICO's policies issued in Delaware giving GEICO the right to demand arbitration of disputes. Thus, whether Delaware insureds can bring this action before arbitrating a dispute over payments of claims is a question of law that is not common to the class.[38] GEICO asserts that any party who has agreed to arbitrate should not be included in the plaintiff class. *See Heaphy v. State Farm Ins. Co.*, 72 P.3d at 226 (holding that the possibility of class certification cannot overcome the agreement to arbitrate).

2. The statutes of limitations applicable to suits over insurance payment of claims vary among the states. Thirteen of the states have statutes of limitations that are shorter than Tennessee's six year period; Utah and Illinois have three and two year statutes, respectively. GEICO and the insureds in those other states should have their contractual rights determined under the law of the state where the contract was entered into, not under Tennessee law. While Tennessee courts treat statutes of limitations as procedural, they have never addressed the issue in a multistate class action where most of the claims have no connection to Tennessee. The appropriate rule would hold that the claims of foreign class members should be governed by the statutes of limitations of their own states.

3. State law differs on whether an insurer is required to "speculate" about diminished value during the repair estimating process where the insured has not made a demand for or come forward with evidence of diminished value resulting from the accident. Louisiana courts have determined, with regard to diminished value, that there is nothing in Louisiana law "which requires the insurer to make an offer for an item of damage which is neither claimed nor factually supported based on the evidence." *Defraites v. State Farm Mut. Automobile Ins. Co.*, 864 So.2d at 261. Georgia courts have, however, found that such an obligation exists. *State Farm Mut. Automobile Ins. Co. v. Mabry*, 556 S.E.2d at 123. While most other states have not addressed the issue through court decisions, many of them cover it through state regulation of the insurance industry. Tennessee should not

[38] Delaware residents are included in the proposed class. At least one policy in the record provides that the amount of the insured's recovery for compensatory damages will be determined by agreement, but any dispute may be arbitrated if no agreement is reached.

impose its interpretation of the obligations on insurers regulated in their dealings with Tennessee customers on other states.

X. Summary and Conclusion

The trial court was required to make a rigorous or thorough analysis of the predominance and superiority requirements of Tenn. R. Civ. P. 23.02(3) and to provide a sufficient explanation of that analysis to provide an opportunity for meaningful appellate review. Based on the trial court's order and the record before us, we cannot determine whether the trial court applied the correct legal principles to the issues raised herein.

Because the proposed class includes residents of many states and the issues raised herein must be decided by reference to state law, an analysis of the variances among the class states as to the applicable legal principles was required or, at the least, a determination that no real conflicts existed. The plaintiff argues that the trial court was not required to "consider, let alone make," a choice of law determination prior to certifying the class. Based on the authority cited earlier in this opinion, we disagree. This case involves insureds from twenty-four states based on at least twenty-four different insurance policies and its resolution depends largely on negligence principles. Most of the proposed class members and the insurance contracts of those members have absolutely no connection or nexus to Tennessee. Those circumstances, in and of themselves, raise choice of law questions that should at least be addressed by the trial court as part of the necessary predominance determination.

The plaintiff argues that there is no "real conflict" between the state laws at issue and, therefore, no choice of law analysis is necessary. She further asserts that GEICO has the burden of demonstrating any conflicts. We disagree, because showing the absence of true conflicts is part of the class proponents' burden. In addition to their argument that there are no real conflicts, the plaintiff also state that "The few true conflicts are easily managed." The trial court, however, did not identify the "true conflicts" and did not explain how it would manage the class action in view of those conflicts.

Additionally, we have determined that the classwide proof offered by the class does not establish necessary elements of the cause of action claimed. Tennessee law on the tort measure of damages requires proof of pre-accident value and condition as well as post-accident value and condition. The classwide proof of post-repair decrease in value does not establish those requisite elements. Whether the law in the other class states varies from Tennessee's on this point was not determined by the trial court. While the plaintiff asserts that all the other states have adopted the Restatement's measure of damages for injury to property, Tennessee and other states in the class have rules regarding the measure of damages and the requisite proof thereof that differ. These differences require a choice of law analysis and a reconsideration of predominance in light of that analysis.

Based on the record before us, we cannot conclude that the class proponent has met her burden of establishing that the requirements of Tenn. R. Civ. P. 23.02(3) have been met. Neither can we conclude that the trial court has conducted the type of analysis necessary to insure compliance with those requirements. Consequently, we must vacate the trial court's order certifying this action as a class action. This conclusion, however, does not preclude re-examination of the propriety of certification by the trial court or submission of another motion to certify by the class proponents based on additional filings.

The trial court's order certifying the class is vacated. Costs of this appeal are taxed to the appellees.

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PATRICIA J. COTTRELL, JUDGE