IN THE SUPREME COURT OF THE STATE OF FLORIDA
SC09-1849

CASE NO. 3D06-2579
L.T. CASE NO.: 03-28811 CA 21

LAZARO E. SOSA,

Plaintiff/Appellee/Petitioner

v.

SAFEWAY PREMIUM FINANCE COMPANY

Defendant/Appellant/Respondent

ON APPEAL FROM AN OPINION OF THE THIRD DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER LAZARO E. SOSA

Date: August 18, 2010

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INTRODUCTION

This matter arises out of the Third District Court of Appeal's Opinion in *Safeway Premium Finance Co. v. Sosa*, 15 So. 3d 8 (Fla. 3d DCA 2009), rehearing and rehearing en banc *denied*, wherein the Court of Appeal held that Plaintiff Lazaro E. Sosa ("Plaintiff") allegedly failed to meet the requirements of Fla. R. Civ. P. 1.220, specifically, Fla. R. Civ. P. 1.220(a)(2), requiring commonality, and Fla. R. Civ. P. 1.220(b)(3), requiring that common questions of law or fact predominate over the individual questions of the separate members. The Court of Appeal stated that due to the manual review process put in place by Safeway Premium Finance Co., ("Defendant"), the issue of whether Defendant knowingly overcharged Plaintiff and other members of the certified class an extra $20 in violation of §§ 627.835 and 627.840(3)(b), Fla. Stat., would allegedly require the facts regarding the processing of each application be reviewed individually. *Id.* The Court of Appeal stated: "As such, Sosa must allege facts to show that Safeway billed and accepted the additional twenty dollars from him and from each class member with knowledge that its actions violated Florida Statutes." *Id.* at 10-11. As set forth herein, Plaintiff more than amply set forth facts that revealed Defendant knowingly billed and accepted the additional twenty dollars from Plaintiff and the other class members through the same general intent to establish a practice or course of conduct allowing the overcharges to occur and knew that the

overcharges were in violation of Florida Statutes. The trial court did not abuse its discretion in certifying the class and the Opinion of the Court of Appeal is properly reversed and this matter remanded for further proceedings.

STATEMENT OF THE CASE AND THE FACTS

Defendant is a Premium Finance Company. App.-Tab F at 59-61.[1] It is a "non-standard" insurance company within the insurance industry. *Id.* It is in the business of financing insurance policies for lower income automobile drivers like the Plaintiff. *Id.* at 30. The Defendant charges a statutorily permitted $20.00 dollar fee pursuant to § 627.840(3)(b), Fla. Stat. *Id.* at 31. In addition, it charges the premium for the insurance and interest thereon for each of its customers. *Id.* The interest rates vary and can be high depending on the amount and time the premium is financed. For example, Plaintiff's November 2002 contract had an annual percentage rate ("APR") of 62.84%. *Id.* at 34. His November 2003 contract had an APR of 47.49%. App. at Tab H. The Defendant finances insurance policies sold by agencies on behalf of United Auto Insurance ("UAI"). UAI has the exact same shareholders and officers and is located in the same

[1] "App.-__" refers to the Appendix filed by Defendant Safeway Premium Finance Company in the Third District Court of Appeal, followed by a description of the relevant document or testimony. "Supp. App.-__", refers to the Supplemental Appendix filed by the Plaintiff Lazaro E. Sosa, followed by a description of the relevant document or testimony.

facility as Defendant. App.-Tab F at 26-30. United Auto Insurance Group is the parent company of Defendant. *Id.*

UAI sells insurance through approximately 300 agencies. App.-Tab F at 61. All an agency needs to sell UAI insurance is a computer program called Quick Quote. *Id.* The agencies charge the initial $20 upfront by placing it in the premium finance contracts, which are then sent to and received by the Defendant in its mailroom. *Id.* at pp. 54-55. That $20.00 charge is placed in the premium finance contract automatically by the agent in a predetermined amount pursuant to a code programmed into the Quick Quote program at the Defendant's request. *Id.*

Premium Finance Companies are regulated by Florida Statute Chapter 627 Insurance Rates and Contracts Part XV Premium Finance Companies and Agreements. In 2001 the Florida Department of Insurance (the "DOI") audited the Defendant's business practices and books for the period from January 1, 1998 through December 31, 1999. As a result of the audit, the DOI made the following finding:

> Section 627.840(3)(b), Florida Statutes, and section 4-196.038, Florida Administrative Code, provides that the service charge shall be a maximum of $12 per $100 per year plus an additional charge not exceeding $20. Such additional charge may be charged only once in a 12 month period for any one customer unless that customer's policy has been cancelled due to nonpayment within the immediately preceding 12 month period. *Our examination disclosed numerous accounts where insureds were inappropriately charged the additional service charge twice during a 12-month period*. Accordingly,

> management should ensure controls are established to prevent this from reoccurring.

Supp. App.-Tab 2, February 8, 2001 letter from DOI (emphasis supplied). Thus, on that date, the DOI put the Defendant on notice of its overcharging and therefore Defendant had knowledge it was overcharging its customers. The Defendant's Comptroller and Chief Financial Officer was Mr. Juan Ferrer. Mr. Ferrer informed the Defendant's President of the violation, so he too knew that customers were being overcharged. App.-Tab F at 52; Supp. App.-Tab 3, memorandum to Defendant's President Richard Parillo. However, neither Mr. Ferrer nor any other employee of the Defendant informed the 300 or so agencies taking applications for premium finance contracts that no additional $20.00 fee could be charged in a 12 month period. App.-Tab F at 54.

Mr. Ferrer testified that the Defendant decided not to refund the money to the customers that were identified in the DOI audit as being overcharged. App.-Tab F at 20-22. Defendant simply kept those monies with the knowledge that those customers had been improperly overcharged an additional $20.00. *Id.* No self audit was performed. *Id.* To date, Defendant still retains and uses some of that money to finance contracts. *Id.*

Mr. Ferrer met with Jim Machul of UAI to develop corrective measures ordered by the DOI. App.-Tab G at 14. Mr. Machul is an employee of UAI, but

handles Defendant's accounting as part of his job requirements. *Id.* at 5. As a result of their meeting, Mr. Ferrer sent a letter to the DOI as to what corrective action Defendant was going to take. Supp. App.-Tab 1. In his letter to the DOI he wrote:

> A. Effective February 1, 2001, six-month renewals will be reviewed for violation of the $20 service fee.
>
> B. If the contract is in violation, we will credit the insured's account accordingly.

Id.

Mr. Ferrer submitted an affidavit below wherein he outlined the procedure that was supposed to correct the problem of overcharging customers in violation of Florida law. As set forth in his Affidavit, Defendant implemented a manual procedure to check each application individually as it arrived in the mailroom. App.-E at ¶ 5. A "Safeway" clerk initially checked each application to make a determination whether the applicant had prior insurance and/or whether that prior insurance was for a six month period. *Id.* at ¶¶ 6-8. If she noted that the application indicated that there was prior insurance with UAI, and/or that the prior insurance was for a six month period, the application was set aside. *Id.* Then another "Safeway" clerk would make another check of the isolated applications by customer name in order to determine whether the prior policy was cancelled for non-payment. *Id.* at ¶ 9-11. If the prior insurance policy was cancelled for

nonpayment, then the second clerk would put the application and agreement back in the stack indicating that it was ready for continued processing because the $20.00 fee was permitted by statute. *Id.* If there was no cancellation of the prior insurance for non-payment, the application would be processed through Defendant's computer software, known as UNICORP, with directions to credit the upfront $20.00 additional charge. *Id.* at ¶ 11. This was done manually by Mr. Machul using UNICORP. App.-Tab G at 10. The policy as implemented was verbal and both Mr. Ferrer and Mr. Machul testified that there was no written policy as to how to deal with the issue of overcharges. App.-Tab F at 40-41; App.-Tab G at 26.

After submitting his Affidavit in June of 2004, alleging that "Safeway" clerks reviewed each application, Mr. Ferrer testified in April of 2005 that none of the Defendant's employees actually worked in the Safeway mailroom. App.-Tab F at 29 lines 14-17. Mr. Machul confirmed this fact when he testified that there were no employees of the Defendant in the mailroom where the applications were received and reviewed, because only UAI employees worked in the mailroom. App.-Tab G at 40 lines 9-18. This testimony contradicted the representation in Mr. Ferrer's affidavit that two "Safeway" mailroom clerks, Brenda Joseph and Skarling Ruiz, made the initial review of the applications. App. E at ¶¶ 6-9. When asked which company's employees worked in the mailroom, Mr. Machul confirmed that

it was indeed UAI employees that checked all incoming mail. App.-Tab G at 40. However, UAI was not charged by the DOI to make a change in the process whereby customers were overcharged – Defendant was. So, Defendant knowingly failed to have its own employees implementing the unwritten policy of how to check the applications when they came in. As explained in greater detail below, before the policy was implemented between January 1998 and December 1999, there were approximately 4,000 overcharges. App.-Tab F at 19. Amazingly, after the implementation of the unwritten "policy" there were another approximately 4,000 overcharges. *Id.*

Mr. Ferrer testified that in addition to using a customer's name to check for overcharges, a customer's address was also checked. App.-Tab F at 17. Interestingly, Mr. Ferrer testified that the manual system of checking by name and/or address was the best available system at the time. *Id.* In its Opinion, the Court of Appeal made much of the fact that the manual system had flaws and that mistakes could occur because a name or address could change causing the error. *Sosa*, 15 So. 3d at 11. The Court of Appeal even took at face value that: "According to Safeway, no computerized process existed in the industry that could perform this task [checking for overcharges] at this time." *Id.* at 13. However, because Plaintiff is precluded from engaging in merits discovery during the class

certification stage of the litigation, Defendant's self serving allegation has stood unchallenged.

However, each application taken by the agencies and each Truth in Lending Act Statement generated by the Defendant contained the applicant's social security number. App.-Tab D at Exhibits 1-2; App.-Tab E at Exhibits A-C. The social security number could have easily been used with no possible errors for overcharging. That is because it, unlike a name or address, would not change, be duplicative or subject to human error. Or, more to the point, why not charge the $20.00 *after* the application process is complete instead of taking the money up front and "asking questions later?" This could easily be done by Defendant telling its agents to simply not program the $20 charge in their Quick Quote program. Or, Defendant could charge $10.00 on each six month application thus never violating the statute.

As set forth below, Defendant had used the UNICORP computer system since at least 1997, well before the DOI audit. App.-Tab G at 18. After suit was filed, the Defendant sought to forego the manual process and UNICORP now checks all of the applications. *Id.* at 18-20. However, from the time of the original citation by Florida's DOI in February 2001 and up through the present, Defendant still uses *names and addresses* to check applications instead of using, for example, the applicant's social security number. *Id.* Since Defendant knows that the use of

names and addresses invariably leads to overcharges, the fact that it continues to use those exact parameters in the UNICORP system reveals that it knows that it is overcharging its customers to this day, through its routine practice and course of conduct, in what has now become a reckless violation of Florida law and admonishments by the DOI.

Plaintiff purchased his first insurance contract with UAI on November 26, 2002. App.-Tab E at Exhibit A at p. 2. On or about the same date, Plaintiff and Defendant entered into a six month premium finance agreement whereby the Defendant would pay the premiums for Plaintiff's insurance contract with UAI and paid $20.00. App.-Tab D at Exhibit A. On May 24, 2003, six months later, Plaintiff entered into another six month premium finance agreement with the Defendant and at that time was charged and paid another $20.00 in violation of § 627.840(3)(b), Fla. Stat. *Id.* at Exhibit B. On November 10, 2003, Plaintiff applied for his third contract of insurance dated October 31, 2003. App.-Tab E ¶ 21 Exhibit C at p. 2. On November 24, 2003, the Plaintiff entered into his third finance agreement with Defendant. *Id.* at p. 1. As set forth in his Affidavit, Mr. Ferrer admitted that the violation occurred when Plaintiff entered into his second contract on May 24, 2003 and paid the additional $20.00 within the 12 month period. App.-Tab E at ¶¶ 17-24. When they attempted to credit Plaintiff $20.00 on November 17, 2003, it was done on his third contract, not his second. *Id.* at

Exhibit C at p. 6, printout showing credit was made on the third contract *six months after the violation of § 627.840(b)(3).*

On December 16, 2003, Plaintiff filed his Class Action Complaint. App.-Tab D. On March 13, 2004, Defendant filed an Amended Motion to Dismiss, raising the same arguments raised in its appellate brief, which was denied by the Honorable Norman S. Gerstein by Order dated May 4, 2004. Supp. App.-Tabs 7-8, respectively. Defendant filed its Answer and Affirmative Defenses on May 24, 2004. Supp. App.-Tab 6. Defendant filed a Motion for Summary Judgment on June 3, 2004. Supp.App.-Tab 9. Defendant advanced the same arguments in the motion for summary judgment that it made in its Brief before the Court of Appeal. Judge Gerstein again rejected the Defendant's argument and denied the motion for summary judgment by Order dated October 19, 2001. Supp. App.-Tab 10. [2]

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[2] Defendant attempted to argue below that Plaintiff did not have standing because, in spite of the overcharge and violation of the statute, Plaintiff had been credited $20.00 on November 17, 2003, prior to the filing of the suit. However, as set forth above, the Plaintiff was overcharged the $20.00 on May 24, 2003 on his second contract in violation of § 627.835, Fla. Stat. The credit was on the third contract six months later and not the second contract. The Defendant could have charged the additional $20.00 on the third contract as that would have been 12 months after the first contract was signed. Pursuant to the statute, the Defendant forfeits the entire premium finance charge, plus twice the amount of the premium finance charge so paid once it violates the statute. That amount was not paid to Plaintiff. The Court of Appeal properly rejected the Defendant's standing argument.

Defendant relied upon the defective Affidavit of Mr. Ferrer in support of each of its motions.

After suit was filed, Mr. Ferrer and Mr. Machul had yet another meeting. App.-Tab at 16. Immediately, the Defendant did something it did not do prior to the DOI audit or after it – it conducted its own audit. The audit was conducted using the UNICORP computer system that Defendant had in place since at least the time of the original DOI investigation seven years earlier. *Id.* at 18. This was strange because since February 2001, the Defendant was indisputably aware of the fact that it was overcharging customers, yet knowingly continued to allow it to happen and conducted no routine audits to stop such illegal practice.

Mr. Ferrer testified that the audit started from the date of the original DOI investigation in 1998 and was conducted through the date of the lawsuit. App.-Tab F at 19. It was determined that there were approximately 8,000 overcharges that occurred from the start date of the DOI audit in 1998 through the date of the filing of the lawsuit. *Id.* Defendant had knowledge all that time that it had overcharged customers because the DOI told them they had and Mr. Ferrer admitted that he knew that the system he put in place was not going to catch all of the overcharges in continuing violation of Florida law. App.-Tab E Affidavit of Ferrer at ¶ 28. The

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Further, the Defendant attempted to "pick off" the Plaintiff after suit was filed by sending him a $20.00 check for violating the statute. That check was never cashed.

Defendant never conducted any audits whatsoever prior to the suit, even though it used its longstanding UNICORP computer system to conduct an audit immediately after suit was filed by the Plaintiff. App.-Tab F at 23.

With regard to the approximately 8,000 overcharges, the Defendant purportedly credited "some four thousand accounts." App.-Tab F at 22-23. None of those customers credited were told why or were provided an explanation for the purported credit. *Id.* Thus, it is indisputable that all of those customers are entitled to receive additional statutory damages and Defendant knows it. Defendant sent out approximately 4,000 other checks to customers in the amount of $20.00 of which approximately 1,300 to this day have not been cashed and said funds are still retained by the Defendant. *Id.* at 23. The Defendant did not send a letter with the checks explaining to their customers the reason for the refund, i.e. that there was a violation of Florida law. *Id.* at 34. Indeed, Mr. Ferrer as Comptroller and CFO of the Defendant admitted that for the time period from 1998 through the filing of the suit in late 2003, the Defendant used the overcharged monies to finance other premium finance contracts, some of which had APRs exceeding 60% such as Plaintiff's contract. *Id.* at pp. 31-36. Likewise, Mr. Machul admitted that the money obtained from the 8,000 customers that had been previously overcharged was used to finance premium finance contracts. App.-Tab G at 22. No interest was repaid to the customers that were overcharged, nor did Defendant pay them an

additional $20.00. App.-Tab F at 31-36. Mr. Ferrer admitted that he knows that Defendant's customers should have been repaid more than the $20.00 sent to them, but, to this day, they knowingly have failed to do so:

> Q: Were you aware that the contract holder by you overcharging them $20 in a twelve month period was entitled to more than the $20?
>
> A: No, sir.
>
> Q: You never knew that?
>
> A: No, sir.
>
> Q: Do you know now?
>
> A: Excuse me?
>
> Q: Do you know now?
>
> A: At this stage, yes, sir.

App.-Tab F at 36. Mr. Machul who handles Defendant's accounting admitted that he too *knew* the manual system that they had in place did not work. App.-Tab G at 25 lines 18-25 through 26 line 1.

Mr. Machul testified that, to this day, the UNICORP computer system is the only safeguard used by Defendant to prevent people from being overcharged in violation of Florida Statute. App.-Tab G at 19. However, instead of using something like a social security number, which never changes, the UNICORP system still checks *names and addresses*. *Id.* (emphasis supplied). In its Opinion,

the Third District Court of Appeal stated that the use of names and addresses would lead to mistakes from human error due to the inevitable change of names and addresses. *Sosa*, 15 So. 3d at 11. Now, instead of human error, the Defendant has knowingly designed the exact error into its new supposedly improved processes via its new computer system and yet it is still overcharging customers, just like it did prior to the filing of Plaintiff's Complaint. And, Defendant still does not conduct audits to ensure that it is not in violation of Florida law. App.-Tab G at 19-20. This is what is known from the very limited non-merits discovery taken in the case thus far.

On February 6, 2006, the Plaintiff filed his Motion for Class Certification and Incorporated Memorandum of Law. App.-Tab A. On June 15, 2006, Defendant filed its Memorandum in Opposition to Plaintiff's Motion for Class Certification. Thereafter, on July 11, 2006, the trial court conducted a lengthy evidentiary hearing on the motion for class certification. App.-Tab M. After having heard extensive argument from counsel and reviewing all papers, the trial court entered its Order Granting Motion for Class Certification. App.-Tab C. In considering its Order, the trial court conducted a rigorous analysis and as set forth in the Order specifically considered: 1) the arguments presented at the class certification hearing; 2) Plaintiff's Class Action Complaint; 3) Defendant's Answer and Affirmative Defenses; 4) Plaintiff's Motion for Class Certification and

Incorporated Memorandum of law; 5) Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification; 6) Defendant's responses to Plaintiff's Interrogatories; 7) Defendant's Power Point Presentation and 8) the remainder of the Court's file. App. Tab-C. The trial court found that: the Plaintiff indeed had standing and had satisfied the requirements of numerosity, commonality, typicality, adequacy, predominance and superiority. *Id.*

With regard to commonality, the trial court found there were many questions of law and fact common to the class, as illustrated by the following non-exclusive question:

> Whether the Defendant knowingly violated § 627.840, Florida Statutes, by assessing and accepting for payment from Plaintiff and the Class members an additional charge in excess of twenty dollars ($20) in a 12-month period.

Id. The class was certified as:

> All persons in the State of Florida who since December 10, 1999 entered into a premium financing agreement with SAFEWAY PREMIUM FINANCE COMPANY and were assessed an additional charge in excess of twenty dollars ($20) during one or more 12-month periods. Excluded from this Class are insureds that were not charged by SAFEWAY PREMIUM FINANCE COMPANY an additional charge in excess of twenty dollars ($20), but who had their policy cancelled due to nonpayment within the immediately preceding 12-month period.

Id.

On October 11, 2006 Defendant filed its Notice of Appeal of the trial court's non-final order pursuant to Fla. R. App. P. 9.130(a)(6).

In *Sosa*, 15 So. 3d 8, the Third District Court of Appeal, in a 2-1 Opinion, held that Plaintiff, using strictly non-merits discovery, had failed to establish the commonality requirement of Fla. R. Civ. P. 1.220(a)(2), because the reason for each of the separate applications being rejected would allegedly be different for each putative class member. *Id.* at 11. This was allegedly because of "human errors" in the application process which could occur if an applicant changed his or her name or address from one six-month premium application period to the next or committed other mistakes, allegedly unintentionally, in the processing of an application. *Id*. Thus, the Court of Appeal ignored the "process" and "course of conduct" that Defendant knowingly put in place and knowingly engaged in. A process and a course of conduct that was going to, did and still does, lead to overcharges.

The Court of Appeal further found that individual questions of law and fact predominated over common allegations of overcharges due to individual questions pertinent to all potential class members being subject to different explanations and defenses relating to knowing violations of the statutes at issue. *Id.* Thus, allegedly failing the test set forth in Fla. R. Civ. P. 1.220(b)(3). In the concurring opinion the judge took the non-merit based discovery presented below in the light most

favorable to the Defendant and the Defendant's explanation at "face value" even going so far as to state: "According to Safeway, no computerized process existed in the industry that could perform this task at the time." *Id.* at 13. Since Plaintiff was precluded from engaging in merit based discovery, to accept at face value that in 2003 there was no computerized process to catch the mistakes was, to say the least, outside the type of inquiry an abuse of discretion standard required.

As previously noted, because each application and finance agreement contained the social security number of the applicant, looking at just the name and address is a knowingly flawed – and profitable - decision made by the Defendant as the best way to process the applications.

Thereafter, on April 4, 2009, the Plaintiff filed his motion for rehearing and rehearing en banc. On May 1, 2009, the Defendant filed its memorandum in opposition to the motion for rehearing and rehearing en banc. On August 28, 2009, the motion for rehearing and rehearing en banc was denied. On November 5, 2009, the Plaintiff/Petitioner filed his Jurisdictional Brief and on December 5, 2009, Defendant/Respondent filed its Response. This Court granted the Plaintiff's Petition by Order dated June 23, 2010.

SUMMARY OF THE ARGUMENT

Commonality

The trial court properly exercised its discretion when it found that the Plaintiff and all of the putative class members were subjected to the same course of conduct by the Defendant, i.e. being overcharged $20.00 more than once in a twelve month period. The Plaintiff and each of the putative class members are all relying on the same legal theory. Therefore, the low threshold of commonality was easily met. With regard to the course of conduct, after the Florida DOI's audit, the Defendant put in place a system to review applications using a customer's name and/or address. The Defendant's CFO and Comptroller and its accounting manager both testified that they knew this would result in overcharges in violation of Florida law, but consented through their course of conduct, to allow it anyway. The Defendant did not use the readily available social security numbers of their customers, which would never change. Manually, or through the use of the computer system that was in place since prior to the DOI audit, Defendant could have checked the social security numbers. There was no merit based discovery so it is unclear whether the Defendant's assertion that checking the names and addresses manually was the best it could do at the time. In any event, the low threshold for commonality was easily met. The primary concern in determining commonality is whether the representative member's claims arose out of the *same*

course of conduct that gave rise to the other claims, or whether the claims are based on the same legal theory. Here, both questions are answered in the affirmative.

Predominance

That common questions of law or fact "predominate" over individualized questions means that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof during the course of the trial. Each of the class members was subjected to the same practice or course of conduct causing them to be overcharged. The common issues of liability are clear and common to each of the members of the class subjected to the Defendant's practice or course of conduct and is easily established. All of the members of the class were uniformly assessed the $20.00 additional charge twice in a one year period, thus exceeding the amount allowed by Florida Statute. Therefore, the common question of fact with regard to the Defendant's practice and course of conduct predominates over any individual inquiry. The issues in this class action are subject to generalized proof and thus applicable to the class as a whole. Simply put, it is whether the Defendant, through a pattern or course of conduct, knowingly overcharged the members of the class the additional $20.00 during a twelve month period in violation of Florida Statute.

Damages

Florida and federal courts have uniformly held that the potential for disparate damage recoveries by class members is not a reason to deny class certification. The primary focus of the court's inquiry at the class certification stage is liability, not damages. The issue of individual damages will not defeat an otherwise valid class certification. Any individual liability or damage issues that might conceivably arise cannot possibly predominate over the overwhelming number of common legal and factual issues. As a result, Plaintiff satisfied the predominance requirement and the trial court did not abuse its discretion in certifying the class.

Typicality

With regard to typicality, the Court of Appeal did not have an issue with typicality outside of that portion of the class that existed between December 10, 1999 and February 16, 2001, prior to the implementation of the manual system by the Defendant. The class claims are typical if they stem from the same event, practice, or course of conduct. The mere presence of factual differences between the claim of the class representative and claims of proposed class members will not defeat typicality for purposes of class certification. Claims which arise out of the same course of conduct by a defendant, but in differing factual contexts, may be pled as class action if they present questions of common interest. The critical

inquiry is whether the class representative's claims have the same essential characteristics as those of the putative class. Even if there are factual distinctions between the claims of the named plaintiff and those of other class members, the similarity of legal theory may control even in the face of differences of fact. Here, the Defendant's conduct of systematically overcharging a statutorily prohibited fee impacts all class members, including that portion of the class singled out in the concurrence. That, in turn, results in some measure of money damage, according to a statutory formula, to each member of the class. The class claims stem from the same practice and course of conduct of the Defendant - overcharges of more than $20.00 within a twelve month period, which is applicable to all class members. The claims are based on the same legal theory, which is applicable to all class members. Therefore, factual distinctions in the singled out portion of the class have little or no relevancy to the relief requested and the low threshold for typicality was easily met.

Proper Application of Abuse of Discretion Standard on Appellate Review

The Court of Appeal did not give the proper deference to the trial court pursuant to the abuse of discretion standard. It performed more of a quasi *de novo* review of the trial court's Order. A proper application of the abuse of discretion standard in this matter leads to the inescapable conclusion that the trial court did not abuse its discretion in certifying the class below.

STANDARD OF REVIEW

The Court of Appeal reviews an order of a trial court granting class certification based upon an abuse of discretion standard. *Renaissance Cruises, Inc. v. Glassman,* 738 So. 2d 436, 438 (Fla. 4th DCA 1999); *Freedom Life Ins. Co. of America v. Wallant,* 891 So. 2d 1109, 1114 (Fla. 4th DCA 2004).

The trial court is not required to, nor should it, determine the merits of the case before certifying the class. *Rollins, Inc. v. Butland*, 951 So. 2d 860, 868 (Fla. 2d DCA 2006).

ARGUMENT

To grant class action certification, the trial court must conduct a rigorous analysis to determine that the elements of Fla. R. Civ. P. 1.220, the class action rule, have been met. *Ortiz v. Ford Motor Co.,* 909 So. 2d 479, 480-81 (Fla. 3d DCA 2005) (*citing Baptist Hosp. of Miami, Inc. v. Demario,* 661 So. 2d 319, 321 (Fla. 3d DCA 1995)). The party seeking class certification bears the burden of pleading and proving the elements required for certification. *Execu-Tech Bus. Sys., Inc. v. Appleton Papers, Inc.,* 743 So. 2d 19, 21 (Fla. 4th DCA 1999). The requirements under Rule 1.220(a) for class action certification are that: (1) the members of the class are so numerous that a separate joinder of each member is impracticable (numerosity); (2) the claim of the representative party raises questions of law or fact common to questions of law or fact raised by the claim of

each member of the class (commonality); (3) the claim of the representative party is typical of the claim of each member of the class (typicality); and (4) the representative party can fairly and adequately represent the interests of each member of the class (adequacy). *See* Fla. R. Civ. P. 1.220(a); *Ortiz*, 909 So. 2d at 481. In addition to satisfying Rule 1.220(a)(2), a plaintiff must also satisfy one of the subdivisions of Rule 1.220(b). The subdivision applicable to the instant case is contained in section (b)(3). Section (b)(3) requires that common questions of law or fact predominate over the individual questions of the separate members. Fla. R. Civ. P. 1.220(b)(3); *see also Volkswagen of America, Inc. v. Sugarman,* 909 So.2d 923, 924 (Fla. 3d DCA 2005). The 1.220(b)(3) requirement parallels the commonality requirement under 1.220(a), in that both require that common questions exist, but the 1.220(b) predominance requirement is more stringent since common questions must pervade over individual inquiries.

The issues raised by the Defendant on appeal in relation to the elements of Fla. R. Civ. P. 1.220 were commonality, typicality, adequacy and predominance. The Defendant did not raise numerosity or superiority in the trial court, so those issues were waived. Since the Court of Appeal based its ruling on Fla. R. Civ. P.

1.220(a)(2) (commonality) and Fla. R. Civ. P. 1.220(b)(3) (predominance), those two requirements of the Rule will be discussed first.[3]

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT FOUND THAT THE COMMONALITY AND PREDOMINANCE REQUIREMENTS WERE MET

A. Commonality - Fla. R. Civ. P. 1.220(a)(2)

Fla. R. Civ. P. 1.220(a)(2) provides: "[T]he claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member." "The primary concern in determining commonality is whether the representative member's claims arose out of the *same course of conduct* that gave rise to the other claims, and whether the claims are based on the same legal theory." *Olen Properties Corp. v. Moss*, 981 So. 2d 515, 519-520 (Fla. 4th DCA 2008); *Equity Residential Properties Trust v. Yates*, 910 So. 2d 401, 403 (Fla. 4th DCA 2005); *Smith v. Glen Cove Apartments Condominiums Master Ass'n, Inc.*, 847 So. 2d 1107, 1110 (Fla. 4th DCA 2003);

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[3] The Defendant raised standing and adequacy of representation below and in the Court of Appeal. However, the Defendant did not file a cross-appeal on those issues and therefore they are waived for purposes of this appeal. *See* Fla. R. App. P. 9.110(g); *see e.g. Sampson v. Sampson*, 566 So. 2d 831 (Fla. 5th DCA 1990) (timing of filing of cross appeal was not jurisdictional but would not be considered where there was no motion for leave of court to permit late filing and thus nothing in the record to explain why rule governing timing should not be enforced).

Terry L. Braun, P.A. v. Campbell, 827 So. 2d 261, 267 (Fla. 5th DCA 2002); *Mc Fadden v. Staley*, 687 So. 2d 357 (Fla. 4th DCA 1997).

The test for commonality is simple, as evidenced by the recent case of *Morgan v. Coats*, 33 So. 3d. 59 (Fla. 2d DCA 2010). In that matter the plaintiff was a detention deputy for the Pinellas' County sheriff's office. *Id.* at 62-63. Detention deputies were supposed to work 8 hour shifts, with an unpaid 30 minute meal break. *Id.* In the event the meal break was interrupted, the deputy was to be compensated for his or her time. *Id.* While dentition deputies could leave the premises for their meal break, it was rare and they usually remained in the facility. *Id.* While in the facility, they were considered to be on-call and were required to assist with disturbances and any other matters which arose. *Id.* The plaintiff brought claims for breach of oral contract, unjust enrichment and quantum meruit on behalf of a similarly situated class. *Id.* The basis for plaintiff's claims was that although he worked for 8 ½ hours, he was only compensated for eight hours. *Id.* He sought compensation for the full 8 ½ hour period. *Id.* Plaintiff alleged that the commonality test was met because the sheriff engaged in a similar course of conduct with each detention deputy. *Id.* The trial court denied the motion for class certification finding that the commonality requirement was not met because each claim would be based on individualized proof. *Id.*

In reversing the trial court, the Court of Appeal discussed commonality and found that the defendant had engaged in a common course of conduct by failing to pay the detention deputies for their meal periods. *Id.* at 64. There would be some variation regarding when each deputy was hired and the extent to which they spent their meal breaks performing services for the benefit of the sheriff's office, but those issues go to damages. *Id.* citing to *Campbell* and *Mc Fadden, supra,* and *Powell v. River Ranch Property Owners Ass'n, Inc.*, 522 So. 2d 69, 70 (Fla. 2d DCA), review denied, 531 So. 2d 1354 (Fla. 1988). The Court of Appeal further found that individualized damage issues do not preclude class certification. *Id.* citing *Quellette v. Wal-Mart Stores, Inc.*, 888 So. 2d 90, 91 (Fla. 1st DCA 2004). Thus, commonality is an easily satisfied element.

In *Equity Residential Properties Trust v. Yates*, 910 So. 2d 401, 403 (Fla. 4th DCA 2005), former tenants brought a class action lawsuit against their landlord alleging the landlord was collecting double rent in violation of Florida's Consumer Collection Practices Act ("FCCPA") § 559.55 *et seq.* and Florida's Deceptive and Unfair Trade Practices Act ("FDUPTA") § 501.201 *et seq.* 910 So. 2d at 403. In rejecting the landlord's claim that the issue of individualized proof would defeat commonality, the Court of Appeal found:

> The biggest hurdle facing the former tenants was the landlord's contention that the need for individualized proof to establish damages necessarily undermined commonality, typicality, predominance, and

> superiority. **For purposes of class certification, though, liability – not damages – is the focus of the inquiry.**

Id. In *Sosa*, the issue of liability is simple – was the customer improperly charged more than $20.00 in a twelve month period in violation of § 627.840, Fla. Stat. through the Defendant's "course of conduct?" The Court of Appeal in *Yates* did not look at each individual charge to determine proof, but rather, the course of conduct of the landlord. The civil penalty section of Chapter 501, §501.2075, Fla. Stat. provides:

> Any person…or entity…who is **willfully using**, or has **willfully used**, a method, act or practice declared unlawful…or who is **willfully violating** any of the rules of the department…is liable for a civil penalty….**Willful violations occur when the person knew or should have known that his or her conduct was unfair or deceptive or prohibited by rule**.

The terms "willfully" and "knowingly" can be used interchangeably for purposes of establishing scienter. The Fourth District Court of Appeal was correct to leave the issue of whether there was a willful violation of FDUPTA to the trier of fact. It is a question of fact for a jury to decide if the Defendant acted knowingly in overcharging its customers. *See e.g. Kimbrell v. Great American Ins. Co.*, 420 So. 2d 1087, 1088 (Fla. 1982) (question of whether insured knowingly rejected uninsured motorist coverage or knowingly selected coverage in a lesser amount than which insurer is required to make available is an issue to be decided by the trier of fact). The Third District Court of Appeal should have looked to the

course of conduct of the Defendant in this matter to establish that issues of fact or law were common to Plaintiff and each of the putative class members in accordance with Fla. R. Civ. P. 1.220(a)(2). As set forth in the Statement of the Case and Facts, it is clear the Defendant knew and admitted it knew that it was overcharging customers. The evidence adduced certainly provided for a question of fact whether or not the Defendant's course of conduct, common to the Plaintiff and each of the class members, was a knowing violation of § 627.840(b)(3), Fla. Stat.

Smith v. Foremost Ins. Co., 884 So. 2d 341 (Fla. 2d DCA 2004), involved alleged violations of §§ 627.826-.849, Fla. Stat. and §§ 627.901-.904, Fla. Stat. These violations would result in penalties pursuant to § 627.835, Fla. Stat., the penalty statute at issue in this matter. *Id.* at 342. The Court of Appeal overruled the trial court's finding that the service fees charged to the plaintiff and other putative class members were not subject to the premium financing statutes because they did not constitute an "advancement of funds or credit." *Id.* at 343. Thus, the Court of Appeal rejected the defendant's claimed ignorance. The statutes at issue limited service fees to $1 per installment not to exceed $12 per year. *Id.* at 345. Alternatively, defendant could charge interest not to exceed 18 percent simple interest per annum. *Id.* The defendant claimed that it was not in violation of the statutes because its "service charge" was, in reality, interest. *Id.* at 346. The Court

of Appeal found that defendant had charged more than both the maximum service charge and the interest as allowed by the statute, thus rejecting any claim that defendant did not violate the statute. *Id.* at 346. The broad view regarding the *Foremost* Opinion is that the defendant claimed: 1) it was not subject to the statute; and 2) if it was subject to the statute it did not charge either a service charge or interest rate in violation of the statute. The issue of whether its actions were done "knowingly" in violation of the § 627.835, Fla. Stat., when clearly defendant was making the case it was not, was left for the trier of fact to determine. The Court of Appeal did not step in and decide that issue as it clearly is one for a trier of fact.

1. **Common Questions of Fact or Law Exist and Commonality is Easily Satisfied**

In this matter, it is clear that the Defendant knowingly established a system that caused the Plaintiff and all of the putative class members to be subject to the Defendant's practice or course of conduct causing them to be overcharged. *Morgan*, 33 So. 3d. at 64; *Glen Cove Apartments Condominiums Master Ass'n, Inc.*, 847 So. 2d at 1110; *Campbell*, 827 So. 2d at 267; *Mc Fadden*, 687 So. 2d 357. The commonality test is easily satisfied under the facts of this case.

The Defendant established a practice or course of conduct that it admitted would cause overcharges to its customers, retained those overcharges, earned interest on the overcharges, financed other contracts on the overcharges, and

conducted no audits regarding overcharges until it was sued. App.-Tab F at 20-23; 31-36 and App.-Tab G at 22; 25. If all that was not bad enough, when Defendant's "manual" system using names and addresses was changed allegedly to a "computerized" system, it continued to use the same flawed parameters of names and addresses. App.-Tab G at 19.[4] Therefore, the Defendant continues to use the same practice or course of conduct in dealing with its customers to this day. This matter is ripe for class action treatment.

In focusing narrowly on what happened in the mail room when applications arrived, the Court of Appeal missed the "forest from the trees." It missed the fact that Defendant's employees were not checking the applications when they came in, but rather, UAI employees were. App.-Tab F at 29; App.-Tab G at 40. The issue is not whether the clerks in the mailroom knowingly charged the additional $20.00. That is a preposterous proposition. Rather, it is the Defendant's course of conduct and business practices that were established by its CFO and Comptroller, Mr.

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[4] As stated, there was obviously no merits discovery so there is no evidence regarding whether or not in the year 2003 a *manual system* rather than a computer system was the best system available or even the industry norm. Why not use the social security numbers of customers to check the applications? They would never change. Why not charge the $20.00 *after* the application process is complete instead of taking the money up front and "asking questions later?" Or, why not charge $10.00 for each six month application. Certainly the Quick Quote program used by the agents can do that if it can be programmed to charge $20.00. But, that would deprive the Defendant of the use of a great deal of money.

Ferrer, in conjunction with Mr. Machul, with the knowledge of the Defendant's president that is the focus of the inquiry. They knew that checking only "names and addresses" would lead to overcharges and yet they still use the same parameters to this day through their UNICORP computer system. That is the focus of the inquiry. As correctly noted by Chief Judge Gersten in his dissent:

> When multiplied by several thousand applicants, Safeway's method allows Safeway to use considerable sums of money for considerable periods of time. This practice clearly violates the statute. Thus, Safeway's *general intent and common practice are at issue*, and there is no need for a case-by-case factual determination of each plaintiff's individual circumstances. The trier of fact here would be faced with a single question on liability: Did Safeway knowingly and systematically charge an improper fee?

Sosa, 15 So. 3d at 16.

The trial court concluded that the whole class shared this liability question: Whether the Defendant knowingly violated 627.840, Florida Statutes, by assessing and accepting for payment from Plaintiff and the Class members an additional charge in excess of twenty dollars ($20) in a 12-month period. App. Tab-C. That issue is, at a minimum, a question of fact for a jury as a trial court is not required to and should not determine the merits of the case before certifying a class. *See Samples v. Hernando Taxpayers Ass'n,* 682 So. 2d 184, 185 (Fla. 5th DCA 1996) citing *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 94 S. Ct. 2140 (1974). It is for the trier of fact to determine if the Defendant knowingly violated the law.

Samples, 682 So. 2d at 185. Here, the Plaintiff and the putative class members clearly were subject to a common course of conduct on the part of the Defendant and the trial court did not abuse its discretion when it found that commonality existed between the Plaintiff and the putative class members. *See*, *Moss*, 981 So. 2d at 519-520 ("the issue is not whether the three types of fees are the same, but whether or not [defendant landlord's] practice of charging liquidated damages rather than actual damages violated Florida law…"- claims arising out of same course of conduct); *Glen Cove Apartments Condominiums Master Ass'n, Inc.*, 847 So. 2d at 1110 (allegations that condominium association and lessors violated statutory duty in failing to maintain roof causing damage to tenants raised issue of law and fact common to all tenants meeting commonality requirement); *Campbell*, 827 So. 2d at 267 (representative class member's claims arose from the same course of conduct and same legal theories and therefore commonality was satisfied); *Mc Fadden*, 687 So. 2d at 359 (claims that arise out of same course of conduct by a defendant but in differing factual contexts may be pled as a class action if they present a question of common interest). The trial court did not abuse its discretion in finding commonality in this case and the Opinion of the Third District Court of Appeal is properly reversed and the matter remanded back to the trial court for further proceedings.

B. Predominance Requirements Under Fla. R. Civ. P. 1.220(b)(3)

Florida courts have long recognized that where the plaintiff alleges that the defendant engaged in a common course of conduct, individualized inquiries are not required and thus are not legally relevant to the predominance inquiry. *See e.g. Davis v. Powertel, Inc.*, 776 So. 2d 971, 974-975 (Fla. 1st DCA 2000) (certifying class action seeking damages and injunctive relief based on defendant's uniform non-disclosures regarding pre-programmed cellular phones); *Colonial Penn Ins. Co. v. Magnetic Imaging Sys. I, Ltd.*, 694 So. 2d 852, 854 (Fla. 3d DCA 1997) (certifying class of consumers/insureds and medical care providers alleging common scheme by defendant insurer to fail to pay statutorily mandated interest); *AutoNation USA Corp. v. Miranda*, 789 So. 2d 1188 (Fla. 4th DCA 2001) (certifying class alleging common course of conduct by defendant in unilaterally altering terms of retail sales contract following consummation of deals); *Latman v. Costa Cruise Lines*, 758 So. 2d 699 (Fla. 3d DCA 2000) (certifying class action under allegations of uniform scheme of non-disclosure regarding cruise "port charges").

That "common questions of law or fact predominate over individualized questions" means that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof. Stated another way, the

standard to be applied in determining whether common questions predominate is whether common or individual questions will be the object of most of the efforts of the litigants and the court. *See Sargent v. Genesco, Inc.*, 75 F.R.D. 79, 84 (M.D. Fla. 1977). Furthermore, the rule does not require that all questions of law or fact be common; it only requires that the common questions *predominate* over individual questions. *See e.g., Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 93 (S.D. N.Y. 1981). Thus, the predominance inquiry tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation. Here, the standard of predominance is easily met.

1. Common Questions of Fact or Law Predominate Over Individual Inquiries

As set forth in Section I A, *supra*, each of the class members were subject to the same practice or course of conduct which resulted in their being overcharged. The common issues of liability are clear and common to each of the members of the class who were subjected to the Defendant's practice or course of conduct and same is easily established. For example, all of the members of the class were uniformly assessed the $20.00 additional charge twice in a one year period, thus exceeding the amount allowed by § 627.840(3)(b), Fla. Stat. Therefore, the common question of fact with regard to the Defendant's practice and course of conduct predominates over any individual inquiry. The issues in this class action

are subject to generalized proof and thus are applicable to the class as a whole. Simply put, it is whether the Defendant, through a pattern or course of conduct, knowingly overcharged the members of the class the additional $20.00 during a twelve month period in violation of § 627.840(3)(b), Fla. Stat. That straightforward, uncomplicated issue clearly predominates over any issues that are subject only to individualized proof. *Sargent*, 75 F.R.D. at 84.

In *Morgan*, 33 So. 3d. 59, discussed *supra*, the Court of Appeal found that the common issues predominated over individual questions. *Id.* The trial court found that the predominance test was not met. *Id.* at 62. In reversing the trial court the Court of Appeal found that:

> [A]lthough there will be some factual variations among the claims of each class member, those variations go to the determination of each class member's *damages* rather than to the elements of the claims. The actual claims are based on the same legal theories and are based on the same course of conduct by the sheriff. Thus, if [plaintiff] is able to prove the elements of his claims, he would necessarily be able to prove elements of the claims of each of the other class members. Consequently, [plaintiff] adequately proved that common issues predominate over individual questions.

Id. at 66. Likewise, in this matter the claims are all based on the same single legal theory and course of conduct. Did Defendant knowingly establish a system of reviewing renewal applications that violated § 627.840(3)(b), Fla. Stat.? Thus, the common issues of fact and/or law predominate over individual questions and the trial court's Order certifying the class was proper.

By failing to recognize that the Defendant's officers put into place a process or engaged in a course of conduct that would, by design, result in overcharges to its customers, the Court of Appeal wrongly focused on the clerks in the mailroom, who were later discovered to not even be Defendant's employees, rather than the course of conduct of the Defendant. By Defendant not having a written policy as to how to process applications and not even having its own employees checking them, it was certainly engaged in a course of conduct that it admitted would result in errors. Therefore, the trial court properly found that common issues of fact predominate over any individual questions and did not abuse its discretion in certifying the class. The Court of Appeal is properly reversed and this matter is properly remanded for further proceedings.

2. **Damages**

Because the Court of Appeal found that the issue of proof of damages for each of the class members would require individual inquires, thus allegedly defeating the predominance requirement, it will be addressed separately. As with the factual and legal issues surrounding liability, damages issues will be essentially identical for Plaintiff and all class members. All class members were injured in the exact same way, and all would be similarly entitled to a monetary recovery if successful in demonstrating Defendant's violation of § 627.840(3)(b), Fla. Stat.

The total amount of financial benefit attained by Defendant as a result of its violations will be readily provable and largely demonstrated through Defendant's own corporate documents. § 627.835, Fla. Stat. specifically identifies the remedies available to each class member. Thus, the inquiry regarding damages will be treated in an identical fashion for each member of the class.

Notwithstanding, Florida and federal courts have uniformly held that the potential for disparate damage recoveries by class members is not a reason to deny class certification. *See OCE Printing Systems USA, Inc. v. Mailers Data Services, Inc.*, 760 So. 2d 1037, 1043 (Fla. 2d DCA 2000) ("[T]he primary focus of the court's inquiry at the class certification stage is liability, not damages. The issue of individual damages will not defeat an otherwise valid class certification."); *Cohen v. Camino Sheridan, Inc.*, 466 So. 2d 1212 (Fla. 4th DCA 1985) ("Entitlement to different amounts of damages is not fatal to class action."); *Smilow v. Southwestern Bell Mobile System, Inc.*, 323 F.3d 32, 40 (1st Cir. 2003) ("Where, as here, common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain."); *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 139 (2d Cir. 2001)(same); *Gunnels v. Healthplan Servs., Inc.*, 348 F.3d 417, 428-430 (4th Cir. 2003)(same); *Sterling v. Veliscol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988)(same); *CV Reit, Inc. v. Levy*, 144 F.R.D. 690, 699 (S.D. Fla.

1992)(same); *Riordan v. Smith Barney*, 113 F.R.D. 60, 65 (N.D. Ill. 1986)(same); *Ardey v. Fed. Kemper Ins. Co.*, 142 F.R.D. 105, 114 (E.D. Pa. 1992). (same).

In sum, any individual liability or damage issues that might conceivably arise cannot possibly predominate over the overwhelming number of common legal and factual issues. As a result, Plaintiff satisfied the predominance requirement pursuant to Fla. R. Civ. P. 1.220(b)(3). The Opinion of the Court of Appeal is properly reversed and the matter remanded to the trial court for further proceedings.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT FOUND THAT THE TYPICALITY REQUIREMENT WAS SASTISFIED AND THE COURT OF APPEAL AGREED EXCEPT FOR A SMALL SUB-CLASS OF THE PUTATIVE CLASS

While the commonality and typicality requirements of Fla. R. Civ. P. 1.220(a)(2-3) tend to merge, they serve distinct and separate purposes. The commonality requirement tests the definition of the class itself, while the typicality requirement focuses on how the named plaintiff's claims compare to the claims of the other class members. *Hassine v. Jeffes*, 846 F.2d 169, 177 n.4 (3d Cir. 1988) (two requirements remain distinct because commonality focuses on class claims and typicality focuses on claims of the named plaintiff). The majority opinion in *Sosa* did not focus on the issue of typicality; however, it was mentioned in the concurring opinion with regard to the portion of the class that exists for the time

period from December 10, 1999 through February 16, 2001. *Sosa*, 15 So. 3d at 14. Thus, the Court of Appeal found that for the rest of the certified class, typicality was certainly satisfied or the appellate court would have reversed on that basis also. The Court of Appeal stated that the above mentioned portion of the class was not subject to the same course of conduct that the members of the class were after the institution of the two tier review process put in place subsequent to the DOI audit. *Id.* The Court of Appeal is incorrect.[5]

Pursuant to Fla. R. Civ. P. 1.220(a)(3), the claims or defenses of the representative parties must be "typical of the claims or defenses of the class." The class claims are typical if they stem from the same event, practice, or course of conduct. *See Colonial Penn*, 694 So. 2d at 854. Mere presence of factual differences between the claim of the class representative and claims of proposed class members will not defeat typicality for purposes of class certification. Claims which arise out of the same course of conduct by a defendant, but in differing

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[5] There was no testimony or record evidence below as to what, if any, process was in place prior to the DOI audit. Therefore, it is speculation on the part of the Court of Appeal to argue that the class members were not typical because they were not subject to the same course of conduct. As will be shown, they were overcharged the $20.00 and therefore the Plaintiff can adequately represent their interest. And, it may be that the Defendant was using the same manual process that it told the DOI it was going to implement for the first time in early February 2001. Without merits based discovery, that question remains unanswered.

factual contexts, may be pled as a class action if they present questions of common interest. *Id.* The critical inquiry is whether the class representative's claims have the same essential characteristics as those of the putative class. *De L Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). Even if there are factual distinctions between the claims of the named plaintiff and those of other class members, the similarity of legal theory may control even in the face of differences of fact. *Id.* citing *Donaldson v. Pillsbury Co.*, 554 F.2d 825 (8th Cir.), cert. denied, 434 U.S. 856, 98 S. Ct. 177 (1977) (other citations omitted).

In *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985), the Court of Appeals found that the similarity of legal theories shared by the plaintiffs in the class at large was so strong as to override whatever factual differences might have existed and held that the named plaintiffs' claims were typical of the class. *Id.* In that matter, the factual differences surrounding the medical condition of each of the named plaintiffs, individuals who had been denied medicaid nursing home benefits under Alabama's Medicaid level of care admission criteria, did not compel denial of class action certification under the class action typicality requirement. *Id.* The factual distinctions had little or no relevancy to the relief requested. *Id.* Because the claims need only share the same essential characteristics and need not be identical, courts have concluded that the typicality requirement is *not highly demanding*. *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996)

(typicality is "fairly easily met" because named plaintiff and class members need only have similar claims) (emphasis supplied); *Forbush v. J.C. Penny Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (test for typicality, like commonality, is not demanding); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) (threshold requirements for typicality are not high).

In this matter, the Defendant's course of conduct of systematically overcharging a statutorily prohibited fee impacts all class members, including that portion of the class singled out in the concurrence. That, in turn, results in some measure of money damages, according to a statutory formula, to each member of the class. The class claims stem from the same practice and course of conduct of the Defendant - overcharges of more than $20.00 within a twelve month period, which is applicable to all class members. The claims are based on the same legal theory, which is applicable to all class members. Therefore, factual distinctions in the singled out portion of the class in this matter have little or no relevancy to the relief requested. *Appleyard,* 754 F.2d at 958.

It is clear that the Defendant engaged in the same course of conduct as to all of the class members. It is that course of conduct that gives rise to the class claims and the legal theory asserted. Plaintiff's claim of being overcharged is typical to even those members of the putative sub-class from December 10, 1999 through February 16, 2001, such that his claim has the same essential characteristics as

those members of the putative sub-class for the time period the Court of Appeal discussed in its concurrence. The trial court did not abuse its discretion in finding that the low threshold required to show typicality was met. Indeed, the Court of Appeal agreed on that point except for a distinction it made for the class members for the period December 1999 through February 16, 2001. But, as shown above, that parsing of the class in the concurrence is contrary to the law and is properly rejected by this Court.

III. THE COURT OF APPEAL MISAPPLIED THE ABUSE OF DISCRETION STANDARD BELOW

Justice Overton, writing on behalf of this Court 30 years ago, defined the abuse of discretion standard in *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). The standard is defined as follows:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only when no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. (emphasis added).

Id. The Court of Appeal did not adhere to this standard of review as evidenced by the concurrence when it stated:

> I agree the proposed class action in this case fails to satisfy the requirements of Florida Rule of Civil Procedure 1.220. I write only to further clarify why I believe that to be true on the facts of this case.

Sosa, 15 So. 3d at 11.

The concurrence then went to take at face value the facts in the light most favorable to the Defendant, while not giving any regard to the other facts set forth in the Statement of the Case and Facts, *supra*. It took at face value the statement that the "Safeway" employees performed the checks on the incoming financing agreements. *Sosa*, 15 So. 3d at 12. But, Mr. Ferrer and Mr. Machul both testified that no "Safeway" employees worked in the mailroom and therefore their testimony contradicted the Affidavit Mr. Ferrer submitted with regard to the process of checking the applications. Compare App.-Tab E ¶¶ 5-11 and App.-Tab F at 29 and App.-Tab G at 40. Further, the Court of Appeal took at face value the Defendant's claim that in 2003 the "manual process" was the best available at the time and no computerized process existed, when there was no merits discovery on industry standards for one example. *Id.* at 13. It also ignored the fact that Defendant now uses the UNICORP system to implement the flawed process of checking names and addresses up through today and that that computer system was in place prior to the DOI audit. App.-Tab G at 18-20. The concurrence stated that there was "no evidence of uniform or systematic conduct by Safeway …." *Id.* at 13 n.3. That simply ignores all of the evidence presented to the trial court and set forth above. Plaintiff does not seek to disparage the Court of Appeal's Opinion, but rather, seeks to point out that the review in this matter appears to be more akin to a quasi *de novo* review rather than a true review based upon an abuse of

discretion standard. The abuse of discretion standard, if properly applied in this matter, leads to the inescapable conclusion that the trial court did not abuse its discretion in certifying the class at issue. Its certification of the class was certainly was not "arbitrary, fanciful, or unreasonable." The Court of Appeal is properly reversed and this matter remanded to the trial court for further proceedings as it did not abuse its discretion in certifying the class in this matter.

IV. CONCLUSION

For the aforementioned reasons, this Court properly reverses the Court of Appeal's Opinion in this matter and remands this matter to the trial court as it did not abuse its discretion by certifying the class in this matter.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail to: Maria Elena Abate, Esq., Krista S. Kovalcin, Esq., One Financial Plaza 23rd Floor, 100 S.E. Third Avenue, Ft. Lauderdale, FL 33394 (954) 492-1144 on this 18th day of August, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Petition has been submitted in Times New Roman 14-point font, in compliance with Fla. R. App. P. 9.210(a)(2).

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