

ORIGINAL

# In the Supreme Court of Ohio

MICHAEL E. CULLEN,

*Plaintiff-Appellee,*

v.

STATE FARM MUTUAL  
AUTOMOBILE INSURANCE  
COMPANY,

*Defendant-Appellant.*

Case No. 2012-0535

On Appeal from the  
Court of Appeals of Cuyahoga County,  
Eighth Appellate District

Court of Appeals  
Case No. 10-095925

## BRIEF OF *AMICI CURIAE* GRANGE INDEMNITY INSURANCE COMPANY AND GRANGE MUTUAL CASUALTY COMPANY IN SUPPORT OF DEFENDANT- APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Philip F. Downey\* (0040308)

*\*Counsel of Record*

VORYS, SATER, SEYMOUR AND PEASE LLP  
First National Tower  
106 South Main Street  
Akron, Ohio 44308  
Telephone: (330) 208-1152  
Facsimile: (330) 208-1089  
pfdowney@vorys.com

Robert N. Webner (0029984)

Robert J. Krummen (0076996)

VORYS, SATER, SEYMOUR AND PEASE LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008  
Telephone: (614) 464-6400  
Facsimile: (614) 464-6350  
rnwebner@vorys.com  
rjkrummen@vorys.com

*Counsel for Amici Curiae  
Grange Indemnity Insurance Company  
and Grange Mutual Casualty Company*

Mark A. Johnson\* (0030768)

*\*Counsel of Record*

Joseph E. Ezzie (0075446)  
Robert J. Tucker (0082205)  
BAKER & HOSTETLER LLP  
65 East State Street, Suite 2100  
Columbus, Ohio 43215-4260  
Telephone: (614) 228-1541  
Facsimile: (614) 462-2616  
mjohnson@bakerlaw.com  
jezzie@bakerlaw.com  
rtucker@bakerlaw.com

Michael K. Farrell (0040941)

BAKER & HOSTETLER LLP  
3200 PNC Center  
1900 East Ninth Street  
Cleveland, Ohio 44114-3485  
Telephone: (216) 621-0200  
Facsimile: (216) 696-0740  
mf Farrell@bakerlaw.com

*Counsel for Defendant-Appellant  
State Farm Mutual Automobile Insurance  
Company*

FILED  
AUG 17 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

W. Craig Bashein (0034591)  
John P. Hurst (0010569)  
BASHEIN & BASHEIN CO., L.P.A.  
Terminal Tower, 35th Floor  
50 Public Square  
Cleveland, Ohio 44113  
Telephone: (216) 771-3239  
Facsimile: (216) 771-5876  
wcb@basheinlaw.com

Paul W. Flowers\* (0046625)  
*\*Counsel of Record*  
PAUL W. FLOWERS CO., L.P.A.  
Terminal Tower, 35th Floor  
50 Public Square  
Cleveland, Ohio 44113  
Telephone: (216) 344-9393  
Facsimile: (216) 344-9395  
pwf@pwfco.com

*Counsel for Plaintiff-Appellee*  
*Michael E. Cullen*

**TABLE OF CONTENTS**

	<b>PAGE</b>
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
STATEMENT OF THE FACTS .....	1
ARGUMENT.....	2
<b><u>Proposition of Law No. I:</u></b> In ruling on class certification, courts may and should examine merits issues that are relevant to the Civ. R. 23 requirements .....	2
A.    A class action lawsuit is an exceptional procedural device, and the burden should be placed on the plaintiff to demonstrate, through submission of admissible evidence, that the lawsuit fully complies with Rule 23’s class certification requirements .....	2
B.    Common questions do not predominate, for purposes of 23(B)(3), simply because a defendant utilized a centralized policy or procedure .....	8
C.    The exceptional nature of a class action raises important policy concerns for defendants who are often forced to settle even meritless claims in order to avoid the cost of litigating claims and the risk of a massive – potentially crippling – judgment .....	11
CONCLUSION.....	16
CERTIFICATE OF SERVICE .....	17

## TABLE OF AUTHORITIES

	PAGE
<b>CASES</b>	
<i>Cope v. Metro. Life Ins. Co.</i> , 82 Ohio St.3d 426, 696 N.E.2d 1001 (1998) .....	4
<i>Cullen v. State Farm Mut. Auto. Ins. Co.</i> , 8th Dist. No. 95925, 2011-Ohio-6621, 2011 Ohio App. LEXIS 5453 .....	6, 8, 12
<i>Eisen v. Carlisle &amp; Jacquelin</i> , 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974).....	4, 5, 6, 12
<i>Hansberry v. Lee</i> , 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940) .....	2
<i>In re Rhone-Poulenc Rorer, Inc.</i> 51 F.3d 1293 (7th Cir. 1995).....	13
<i>Marks v. C.P. Chem. Co.</i> , 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987) .....	7
<i>Martin v. Wilks</i> , 490 U.S. 755, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989).....	2
<i>Ojalvo v. Bd. of Trustees of Ohio State Univ.</i> , 12 Ohio St.3d 230, 466 N.E.2d 875 (1984).....	4, 5, 6
<i>Richards v. Jefferson Cty., Alabama</i> , 517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).....	2
<i>Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.</i> , 559 U.S. ___, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010) .....	14
<i>State ex rel. Davis v. Pub. Emps. Ret. Bd.</i> , 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444 .....	8
<i>Szabo v. Bridgeport Machs., Inc.</i> , 249 F.3d 672 (7th Cir. 2001).....	7, 14
<i>Thorogood v. Sears Roebuck &amp; Co.</i> , 624 F.3d 842 (7th Cir. 2010) .....	15
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. ___, 131 S. Ct. 2541, 180 L. Ed. 374 (2011).....	passim
<i>Wolfe v. Grange Indem. Ins. Co.</i> , 5th Dist. No. 2010CA00339, 2012-Ohio-598 2012 WL 504569 .....	1
<b>RULES</b>	
Advisory Committee Notes to the 1998 Amendments to Federal Rule 23(f).....	14
Ohio Civ. R. 12(b)(6).....	7

Ohio Civ. R. 23 .....	passim
Ohio Civ. R. 23(B)(1) .....	1
Ohio Civ. R. 23(B)(3) .....	1, 5, 8, 11
Ohio Civ. R. 56 .....	7

**SECONDARY SOURCES**

1 <i>McLaughlin on Class Actions</i> , Section 5:23 (3d ed. 2006).....	8
18 Wright, Miller, & Cooper, <i>Federal Practice and Procedure</i> , Section 4449, p. 417 (1981).....	2
Daft, <i>Organization Theory and Design</i> 23 (10th ed. 2010).....	10
Kramer, <i>No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases</i> , 15 Lab. Law 415 (2000).....	14
Nagareda, <i>Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, And CAFA</i> , 106 Colum.L.Rev. 1872, 1875 (2006) .....	13
Ostroff, <i>The Horizontal Organization</i> , (1999).....	10
Solimine & Hines, <i>Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)</i> , 41 Wm and Mary L.Rev. 1531 (2000).....	14
Tuluello & Welen, <i>Commentary: In light of “Wal-mart,” D.C. Circuit should correct its approach to class actions</i> , The National Law Journal (August 31, 2011) .....	3

## **INTEREST OF *AMICI CURIAE***

The issues presented by this appeal are extremely important to *Amici Curiae* Grange Indemnity Insurance Company and Grange Mutual Casualty Company (collectively, “Grange”). Grange has thousands of insurance policies in effect with customers throughout Ohio. Like other Ohio businesses, it has a strong interest in seeing the standards applicable to class certification in Ohio returned to first principles – principles that recognize that the exceptional class action procedural device should be limited to appropriate circumstances and not expanded to encompass any claim that might arguably involve some form of centralized policy, procedure, or business practice. The criteria of Civ. R. 23 should not be diluted by improperly defining “common issues,” as the court of appeals did in this case, in contravention of the United States Supreme Court’s recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. \_\_\_, 131 S. Ct. 2541, 180 L. Ed. 374 (2011).

Moreover, this Court recently accepted Grange’s appeal in *Wolfe v. Grange Indemnity Ins. Co., et al.*, Case No. 2012-0497, and is holding that case in abeyance pending the decision in this action. In *Wolfe*, the court of appeals approved class certification under Civ. R. 23(B)(1) and 23(B)(3) without adhering to the *Dukes* analysis. See *Wolfe v. Grange Indem. Ins. Co.*, 5th Dist. No. 2010CA00339, 2012-Ohio-598, 2012 WL 504569. Grange knows, all too well, the disruptive effect of class actions on business and the intense pressures presented by improvident class certifications, and it urges this Court to provide lower courts with important and necessary guidance that will bring Ohio class action jurisprudence in line with federal law and practice.

## **STATEMENT OF THE FACTS**

*Amici Curiae* hereby adopt the statement of facts set forth by Defendant-Appellant State Farm Mutual Automobile Insurance Company.

## ARGUMENT

**Proposition of Law No. I:** In ruling on class certification, courts may and should examine merits issues that are relevant to the Civ. R. 23 requirements.

**A. A class action lawsuit is an exceptional procedural device, and the burden should be placed on the plaintiff to demonstrate, through submission of admissible evidence, that the lawsuit fully complies with Rule 23's class certification requirements.**

It is part of our “deep-rooted historic tradition that everyone should have his own day in court.” 18 Wright, Miller, & Cooper, *Federal Practice and Procedure*, Section 4449, p. 417 (1981). “A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.” *Martin v. Wilks*, 490 U.S. 755, 762, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989). The class action lawsuit is an exception to the rule that litigation be conducted by and on behalf of individually named parties only – and the standards that govern whether a case may be certified as a class action should appropriately reflect its exceptional nature.

Historically, the class action was an invention of equity that allowed courts “to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable.” *Hansberry v. Lee*, 311 U.S. 32, 41, 61 S. Ct. 115, 85 L. Ed. 22 (1940). In the beginning, courts were overwhelmingly concerned with the risk of depriving absent class members of due process. *See, e.g., Richards v. Jefferson Cty., Alabama*, 517 U.S. 793, 798, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996) (describing the tradition that each person was entitled to his own day in court). Thus, much of the early case law focused on issues relating to whether the class representative adequately represented the interests of the absent class members. *See Hansberry*, 311 U.S. at 41.

Today, courts also are considering with greater care the enormous impact that putative

class actions have on defendants. Although class action suits can, in certain instances, provide an appropriate vehicle for the adjudication of claims suitable for complete resolution in a common, class-wide manner, ill-defined and misunderstood standards set forth in the case law in Ohio and in federal courts have expanded the scope of class actions far beyond the proper and reasonable use of this exceptional procedural device. As a result, cases are now brought as class actions as a matter of course, and courts are willing to certify classes without grappling with the questions of fairness to the defendants and to the absent class members that historically made courts hesitant to allow class actions to proceed.

The increasing number of inadequately tested and poorly considered class certification decisions provide disproportionate leverage in favor of the plaintiffs – which may be why so few class actions ever get tried. The certification decision is a pivotal moment. If the court denies class certification, the named plaintiffs will still have the opportunity to present their individual claims. If the court certifies the class, however, the defendant’s prospect of liability to hundreds, thousands, or even hundreds of thousands of class members can turn the case into a “bet-the-company” proposition. In view of the risk of crippling liability that arises when certification occurs, few defendants are willing to risk actually trying cases certified as class actions – and, as a result of their understandable reluctance, the clear practical problems involved in attempting to try thousands of claims to overwhelmed juries never are adequately demonstrated.

Traditionally, whether a class was certified often turned on the plaintiff’s burden in demonstrating their compliance with the Rule 23 factors. *See Tuluello & Welen, Commentary: In light of “Wal-mart,” D.C. Circuit should correct its approach to class actions*, *The National Law Journal* (August 31, 2011). Courts pondered two analytical questions: First, what was plaintiff’s evidentiary burden with regard to showing compliance with the Rule 23 factors; and

second, should the reviewing court delve into the merits of the case when reviewing that evidence for class certification. *See id.*

In addressing these issues, many state and federal courts unfortunately misinterpreted *dicta* from the United States Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). In that case, the Court reviewed a district court's decision to shift the costs of class notification from plaintiffs to the defendants based on the court's conclusion that the plaintiffs were likely to win the on merits. Although the usual rule is that plaintiffs must bear the costs of notice to the unrepresented class, the district court in *Eisen* determined that 90% of the cost of notice should be shifted to the defendants because the court had looked to the merits of the case and determined that the plaintiffs had a strong case. *Id.* at 168. The Supreme Court rejected that approach, holding that plaintiffs must bear the cost of notice regardless of their likelihood of success, and stated: "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." *Id.* at 177.

In the wake of *Eisen*, many state and federal courts seized upon the quoted passage, divorcing it from its cost-of-notice context and applying it instead to Rule 23's fundamental requirements. *See Ojalvo v. Bd. of Trustees of Ohio State Univ.*, 12 Ohio St.3d 230, 233, 466 N.E.2d 875 (1984). The mistaken reading of *Eisen* led many courts, including Ohio courts, to hold that plaintiffs need only *allege* – and need not introduce any admissible supporting evidence of – compliance with Rule 23's threshold requirements, such as typicality, commonality, predominance, and superiority. *See, e.g., Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 436-437, 696 N.E.2d 1001 (1998) (reviewing courts may rely on the allegations in Appellee's

complaint rather than conduct a rigorous predominance analysis). Such courts, misreading the *Eisen dicta*, believed that they were restricted from resolving *any* factual disputes that overlapped with the merits of the case, and had to assume that any facts plaintiff alleged in the complaint and class certification motion were true. *See Ojalvo*, 12 Ohio St.3d at 233 (citing *Eisen* for the proposition that review of merits issues during class certification is contrary to applicable law because “[c]lass action certification does *not* go to the merits of the action.” (emphasis in original)).

The misinterpretation of *Eisen*, in Ohio and elsewhere, inevitably led to a sweeping and unwarranted expansion in the scope and frequency of use of the class action device. With courts believing they were barred from considering the “merits” of a plaintiff’s claims and theories – even though those claims and theories were directly relevant to determining whether, for example, common issues predominated over individual issues within the meaning of Civ. R. 23(B)(3) – class certifications went from exceptional to commonplace and the number of cases filed as putative class actions skyrocketed.

In 2011, the United States Supreme Court finally responded to the growing problem. The Court explicitly rejected the misreading of *Eisen* that was employed to bar consideration of the “merits” of claims at the class certification stage and emphasized, instead, that it is necessary to touch upon aspects of the merits of a case in order to resolve preliminary matters, such as class certification. *See Wal-Mart Stores v. Dukes*, 564 U.S. \_\_\_, 131 S. Ct. 2541, 2552, 180 L. Ed. 374 (2011). The Court explained:

A statement in one of our prior cases, *Eisen v. Carlisle & Jacqueline*, is sometimes mistakenly cited to the contrary: ‘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.’ But in that case, the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine the

propriety of certification under Rules 23(a) and (b) (he had already done that), but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants. *To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.*

*Id.* at 2552, fn. 6 (emphasis added) (citations omitted).

In *Dukes*, the Court recognized that the exceptional nature of a class action demands rigorous application of Rule 23, because “Rule 23 does not set forth a mere pleading standard.” *Id.* at 2551. Therefore, “[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Id.* (emphasis in original). In addition, the Court explained that the mere recitation of abstract or threshold “common questions” is not sufficient because the Rule’s focus is on crucial common contentions that can be resolved on a class-wide basis through reference to common proof. *Id.* at 2550-51. Simply put, common questions alone are insufficient: there also must be a proven, legally legitimate means to answer those questions in a common, class-wide manner.

This case gives this Court its first opportunity to consider Rule 23’s requirements, and the standards to be applied by courts construing them, in light of *Dukes*. The court of appeals in this case, like many courts in Ohio, improperly relied on the now-discredited misreading of the *dicta* in *Eisen* and concluded that “[c]lass certification does not address the merits of the claim” and that it would be “inappropriate” to review the “heart of the merits of the case \* \* \* at this point.” *See Cullen v. State Farm Mut. Auto. Ins. Co.*, 8th Dist. No. 95925, 2011-Ohio-6621, 2011 Ohio App. LEXIS 5453, at ¶ 55. That approach is erroneous, and this Court should seize this opportunity to reject the mistaken reliance on the *Eisen dicta* in *Ojalvo* and other cases, adopt the robust, evidence-based *Dukes* approach to class certification, and bring Ohio in line with the

federal class action jurisprudence.

Requiring the plaintiff to present, and the court to consider, actual proof of compliance with the various requirements of Rule 23, is both consistent with the language of the Rule – which variously requires the trial court to “find” and “determine,” rather than assume, that the Rule’s requirements are in fact “satisfied” – and also has significant practical implications. As the Court explained in *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675-676 (7th Cir. 2001):

The proposition that a district judge must accept all of the complaint’s allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it. The reason why judges accept a complaint’s factual allegations when ruling on motions to dismiss under Rule 12(b)(6) is that a motion to dismiss tests the legal sufficiency of a pleading. Its *factual* sufficiency will be tested later – by a motion for summary judgment under Rule 56, and if necessary by trial. By contrast, an order certifying a class usually is the district judge’s last word on the subject; there is no later test of the decision’s factual premises (and, if the case is settled, there could not be such an examination even if the district judge viewed the certification as provisional). Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23.

Equally important, this Court has consistently maintained that Ohio’s Civil Rule 23 is “identical” to the federal rule and thus “federal authority is an appropriate aid to interpretation of the Ohio rule.” *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987). The *Dukes* decision properly rebalances the duties of purported class action representatives and reviewing courts in considering whether individual actions should be converted into extraordinary class action lawsuits. There is no reason why Ohio should adopt more lax class certification standards than now exist in federal courts – and thereby encourage plaintiffs who wish to take advantage of those lax standards to engage in forum-shopping in Ohio courtrooms. This Court should adopt the well-reasoned class action standards set forth in *Dukes* and, in light of the many conflicts between the principles announced in *Dukes* and the decision of the court of

appeals below – conflicts that are thoroughly described in Appellant’s brief -- this Court should reverse the decision of the Eighth District.

**B. Common questions do not predominate, for purposes of 23(B)(3), simply because a defendant utilized a centralized policy or procedure.**

To certify a class under Civil Rule 23(B)(3), common issues of fact and law must predominate over individual issues. “[I]t is not sufficient that such questions merely exist; rather, they must present a significant aspect of the case. Furthermore, they must be capable of resolution for all members [of the class] in a single adjudication.” *State ex rel. Davis v. Pub. Emps. Ret. Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444, at ¶ 28 (citations omitted). 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,” which in turn “requires an understanding of the elements of the claims and defenses to be litigated.” 1 McLaughlin, *McLaughlin on Class Actions*, Section 5:23 (3d ed. 2006) (quotations omitted).

In *Dukes*, *supra*, the Court explained that an issue is not a “common issue” for class certification purposes unless it is “of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Dukes*, 131 S. Ct. at 2551. Below, the Eighth District Court of Appeals certified a proposed class of plaintiffs whose windshield repair claims had been administered by the third party Lynx Services, L.L.C. because Lynx utilized a purported common scripted conversation. *Cullen*, 2011-Ohio-6621, at ¶ 26 (“Here, the use of a common script creates such a common, class-wide contention making this case suitable for class litigation.”). Discussing State Farm’s objections to the class based on predominance, the court of

appeals reasoned that “[t]he existence of the Lynx script or ‘word track’ offers evidence of class-wide treatment.” *Id.* at ¶ 31.

The use of a threshold centralized business practice, such as a common script or word track used by a third party, typically will not constitute a common issue that predominates for purposes of Rule 23 analysis because, in the words of the *Dukes* Court, it does not “resolve an issue that is central to the validity of each one of the claims in one stroke.” *Dukes*, 131 S. Ct. at 2551. Instead, the claims of each putative class member in this case will require analysis into, among other things, whether policyholders were told different things in response to the Lynx word track, since the questions asked of policyholders varied based on their responses, whether the insured asked questions or had other communications with the Lynx customer service representative, whether the insured individual relied on his or her conversation with Lynx – or, instead, relied on the advice of a State Farm agent or a glass shop – in choosing the windshield repair option, whether the insured made an effective consumer choice in consenting to repair of the damaged windshield, and whether each policyholder in fact incurred actual injury by choosing windshield repair rather than replacement, given the policyholder’s deductible and the cost of the replacement windshield. Whether Lynx used a “common script” is not, by itself, determinative of the disputed elements of the putative class members’ actual claims for breach of contract and bad faith – and therefore it does not satisfy the *Dukes* analysis.

Equally important, it would be a dangerous precedent to allow class certification simply on the basis of a corporate defendant’s use of a standardized business practice. The use of common policies and practices are essential to the successful operation of large, modern businesses that must identify and realize efficiencies in order to compete effectively in a capitalistic economy. Indeed, much of the Nation’s industrial growth has been made possible by

the adoption of centralized policies. As “manufacturing and industrial production grew more complex and involved the management of more and more workers,” the use of centralized policies expanded. Ostroff, *The Horizontal Organization*, at 4 (1999); see also Daft, *Organization Theory and Design* 23 (10th ed. 2010). Companies in a variety of industries use centralized policies to ensure uniform quality and safety. See Ostroff, *The Horizontal Organization*, at 4-5.

In the insurance industry, companies often resort to common threshold practices – common application forms, common policy language, and review of medical claims by a single third party, for example – to realize efficiencies and economies of scale and to allow insurance to be sold to the public at a competitive price. Such standardized threshold practices therefore not only allow insurers to be competitive in an intensely competitive marketplace, they also provide tangible benefits for policyholders. See Expert Witness Report of J. Lee Covington II, at 4,11, 27, 29 (discussing benefits to policyholders from windshield repair option in policy). If ill-considered class certification decisions make the use of such policies and practices prohibitively expensive, policyholders ultimately will bear the cost, through increased insurance rates and premiums.

As the *Dukes* decision makes plain, the issue for purposes of class certification is not whether a common policy or practice is used, but whether the members of the putative class suffered the same injury caused in the same way by the same actionable conduct. *Dukes*, 131 S. Ct. at 2550-51. The existence of standardized practices or policies therefore cannot support class certification if the *effect* of those practices or policies varies from individual to individual. Crucial factual and legal issues that will affect the litigation of core elements of claims, such as

the existence of injury-in-fact and the causation of any such injury, cannot be overlooked or blithely excused simply because a plaintiff has identified a common threshold practice or policy.

To reiterate, class claims “must depend upon a common contention” such that “the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Dukes*, 131 S. Ct. at 2551. That standard cannot be met merely by showing that a defendant utilized a threshold common practice that applied to all alleged class members – particularly where, as here, the fact that a common practice was used will not prove or disprove any of the contested elements of plaintiff’s alleged claims, let alone satisfy the predominance requirement of Rule 23(B)(3). To hold otherwise would greatly jeopardize modern business practices and expose all large companies to potentially crippling class action liability simply for implementing common company-wide practices or policies. The court of appeals’ overbroad approach in this case, if adopted by this Court, would mean that many unobjectionable, common business practices could give rise to spurious class action claims. This Court should not permit that to occur.

**C. The exceptional nature of a class action raises important policy concerns for defendants who are often forced to settle even meritless claims in order to avoid the cost of litigating claims and the risk of a massive – potentially crippling – judgment.**

Class certifications have become so commonplace in modern America that, for many, they have lost their shock value. This case, however, should shock this Court. The court of appeals decision approves certification of a class estimated to number more than 100,000 people who purchased insurance and made individual decisions about having their damaged windshields repaired over a period of more than 20 years and includes claims based on a theory that the court of appeals aptly described as “dubious,” in which damages purportedly will be calculated

through resort to unsupported and hypothetical “computerized algorithms.” *Cullen*, 2011-Ohio-6621, at ¶¶ 36, 56.

In *Dukes*, the Supreme Court’s rigorous analysis reflected a healthy skepticism of a similarly vast and sweeping class action that asserted comparably novel and legally suspect claims. *See, e.g., Dukes*, 131 S. Ct. at 2554 (concluding that Court could “safely disregard” opinions of “expert” who could not address what the Court determined was “the essential question on which respondents’ theory of commonality depends.”); *id.* at 2555 (“In a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.”); *id.* at 2556 (concluding that plaintiffs’ “anecdotal evidence \* \* \* is too weak to raise any inference that all individual, discretionary personnel decisions are discriminatory.”). That skepticism stands in sharp contrast to the Eighth District’s willingness to allow certification based on “dubious” legal theories and to accept that “computerized algorithms” could magically resolve individualized issues. *See Cullen*, 2011-Ohio-6621, at ¶¶ 36, 56.

All too often, class certification rulings are cookie-cutter exercises, where the arguments against certification are approached and rejected piecemeal – often through erroneous citation of the *Eisen* dicta – without any consideration of the ultimate question of whether the certified case could actually be tried as a class action. As *Dukes* teaches, courts instead should thoughtfully consider whether, given the sprawling nature of the purported class members and their claims, a jury hearing the evidence to be presented at a trial could possibly reach a decision based on a rational interpretation of the evidence, consistent with the requirements of fundamental fairness and due process.

This case not only illustrates the overwhelming burdens that would be imposed upon the judicial systems if ill-considered class actions were actually tried, it also demonstrates why such trials rarely occur. Parties to litigation typically decide whether to settle or try the action based on a careful weighing of the risks, and potential benefits, of a trial. In this case, the scope and duration of the class, the “dubious” theories that might, or might not, survive to trial, and unknown quantities like the “computerized algorithms” that somehow will cure the otherwise overwhelming issues of injury, causation, and damages make such a rational assessment of risk impossible. The defendant faces an unenviable choice – settle an inappropriately certified class action in order to ensure that liability is limited to a certain amount, or gamble on the outcome of trial and the decision of a confused jury that has been inundated with evidence of 20 years of claims by tens of thousands of class members pursuing theories of admittedly questionable legal merit.

Even a properly certified class action imposes significant costs on defendants because resolving thousands of claims in a single liability proceeding can transform an ordinary lawsuit into “bet-the-company” litigation. For that reason alone, class certification almost always forces a defendant to settle. *See In re Rhone-Poulenc Rorer, Inc.* 51 F.3d 1293, 1298 (7th Cir. 1995) (acknowledging that class actions place pressure on defendants to settle even if there is no legal liability); *see also* Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, And CAFA*, 106 Colum.L.Rev. 1872, 1875 (2006) (“Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements.”); Solimine & Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 Wm and Mary

L.Rev. 1531, 1546 fn. 74 (2000) (“[T]hat defendants would rather settle large class actions than face the risk, even if it be small, of crushing liability from an adverse judgment on the merits is widely recognized.”); Advisory Committee Notes to the 1998 Amendments to Federal Rule 23(f) (“An order granting certification \* \* \* may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”).

These intense settlement pressures, flowing from the inherent uncertainties of trials and the potentially disastrous consequences of an adverse outcome, exist even if the putative class claims are weak. In *Szabo*, 249 F.3d at 676, the Seventh Circuit recognized that class certification turned a \$200,000 individual dispute into a \$200 million dispute and observed that “[s]uch a claim puts a bet-your-company decision to Bridgeport’s managers and may induce a substantial settlement even if the customers’ position is weak.” See also *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. \_\_\_, 130 S. Ct. 1431, 1465, 176 L. Ed. 2d 311, fn. 3 (2010) (Ginsburg, J., dissenting) (“A court’s decision to certify a class places pressure on the defendant to settle even unmeritorious claims.”).

Furthermore, the enormous costs, and attendant business disruption, of litigating thousands of claims at the same time – conducting the discovery, preserving, identifying, reviewing, and producing the documents, locating the experts, deposing the witnesses, and ultimately working with the court to develop the unprecedented trial plans, “phased” proceedings, “bellwether” litigants, and other special structures and techniques that often are employed to allow the pretense that such gigantic cases can be decided through the judicial process -- also produce their own settlement pressures. See, e.g., Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 Lab. Law 415, 416-17 (2000) (discussing steep costs associated with litigating class action); see

*also Thorogood v. Sears Roebuck & Co.*, 624 F.3d 842, 850 (7th Cir. 2010) (“[T]he pressure on [the defendant] to settle on terms advantageous to its opponent will mount up if class counsel’s ambitious program of discovery is allowed to continue.”).

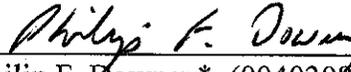
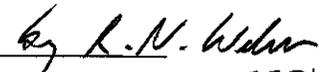
Notably, the Supreme Court, in *Dukes*, specifically disapproved a novel “Trial by Formula” approach that featured a “sample set” of class members as to whom liability would be determined “in depositions supervised by a master,” and in which the “percentage of claims determined to be valid would then be applied to the entire remaining class,” without any individualized proceedings. *Dukes*, 131 S. Ct. at 2561. The *Dukes* Court stated, unequivocally, that “a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.” *Id.* More broadly, the fact that courts are entertaining such contrived processes, which bear scant resemblance to traditional forms of judicial resolution of claims, simply demonstrates how far afield the use of the class action device has strayed – and how important it is for courts to return the device to its proper, limited role.

If class certification motions are not subjected to the careful, rigorous analysis that the *Dukes* opinion requires, the Rule 23 criteria that are carefully designed to guard against abuses and ensure fundamental fairness are essentially nullified -- and cases like the one at bar will be the result. Rather than allow enterprising counsel to use Ohio courts to convert simple, straightforward disputes into massive and complex class actions “on behalf of” tens of thousands of individuals who have never complained about their treatment, and thereby apply extraordinary pressure on defendants, this Court should articulate standards that return the class action device to its rightful place as an exceptional tool that is reserved for exceptional cases – and not cases involving “dubious” legal theories, unspecified “computer algorithms,” and decades of personal choices by tens of thousands of individual policyholders.

## CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be reversed to ensure that Rule 23 requirements that guard against abuses and ensure fundamental fairness are not nullified in Ohio.

Respectfully submitted,

 by   
Philip F. Downey\* (0040308) 027787  
*\*Counsel of Record*

VORYS, SATER, SEYMOUR AND PEASE LLP  
First National Tower  
106 South Main Street  
Akron, Ohio 44308  
Telephone: (330) 208-1152  
Facsimile: (330) 208-1089  
pfdowney@vorys.com

Robert N. Webner (0029984)  
Robert J. Krummen (0076996)  
VORYS, SATER, SEYMOUR AND PEASE LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008  
Telephone: (614) 464-6400  
Facsimile: (614) 464-6350  
rnwebner@vorys.com  
rjkrummen@vorys.com

*Counsel for Amici Curiae  
Grange Indemnity Insurance Company  
and Grange Mutual Casualty Company*

**CERTIFICATE OF SERVICE**

I certify that the foregoing *Brief of Amici Curiae Grange Indemnity Insurance Company and Grange Mutual Casualty Company in Support of Defendant-Appellant State Farm Mutual Automobile Insurance Company* was served by U.S. mail this 17th day of August, 2012 on the following:

W. Craig Bashein, Esq.  
John P. Hurst, Esq.  
BASHEIN & BASHEIN CO., L.P.A.  
Terminal Tower, 35th Floor  
50 Public Square  
Cleveland, Ohio 44113

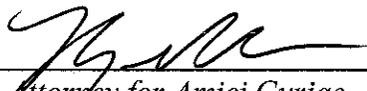
Paul W. Flowers, Esq.  
PAUL W. FLOWERS CO., L.P.A.  
Terminal Tower, 35th Floor  
50 Public Square  
Cleveland, Ohio 44113

*Counsel for Plaintiff-Appellee  
Michael E. Cullen*

Mark A. Johnson, Esq.  
Joseph E. Ezzie, Esq.  
Robert J. Tucker, Esq.  
BAKER & HOSTETLER LLP  
65 East State Street, Suite 2100  
Columbus, Ohio 43215-4260

Michael K. Farrell, Esq.  
BAKER & HOSTETLER LLP  
3200 National City Center  
1900 East Ninth Street  
Cleveland, Ohio 44114-3485

*Counsel for Defendant-Appellant  
State Farm Mutual Auto Ins. Co.*

  
\_\_\_\_\_  
*An Attorney for Amici Curiae  
Grange Indemnity Insurance Company  
and Grange Mutual Casualty Company*