

IN THE SUPREME COURT OF OHIO

MICHAEL E. CULLEN,	:	Case No. 12-0535
Plaintiff-Appellee	:	On Appeal from the Cuyahoga
	:	County Court of Appeals,
	:	Eighth Appellate District
v.	:	
	:	
STATE FARM MUTUAL	:	Court of Appeals
AUTOMOBILE INSURANCE CO.,	:	Case No. 10-095925
Defendant-Appellant.	:	

**BRIEF ON THE MERITS OF WASHINGTON LEGAL FOUNDATION
AND OHIO CHEMISTRY TECHNOLOGY COUNCIL
AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS**

Elizabeth B. Wright (0018456)
 Brian A. Troyer, Counsel of Record
 (0059671)
 Thompson Hine LLP
 3900 Key Center
 127 Public Square
 Cleveland, OH 44114-1291
 Phone: 216-566-5716
 Facsimile: 216-566-8500
 Brian.Troyer@thompsonhine.com

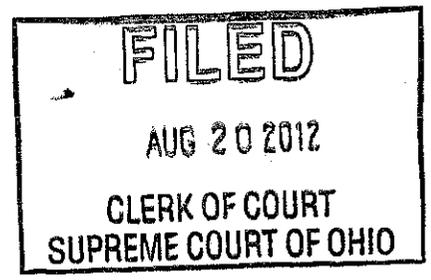
Stephanie M. Chmiel (0087555)
 Thompson Hine LLP
 41 South High Street
 Columbus, OH 43215-6101
 Phone: 614-469-3247
 Facsimile: 614-469-3361
 Stephanie.Chmiel@thompsonhine.com

Counsel for *Amici Curiae*

Mark A. Johnson, Counsel of Record (0030768)
 Joseph E. Ezzie (0075446)
 Robert J. Tucker (0082205)
 Baker & Hostetler LLP
 65 East State Street, Suite 2100
 Columbus, OH 43215-4260
 Phone: 614-228-1541
 Facsimile: 614-462-2616
 mjohnson@bakerlaw.com

Michael K. Farrell (0040941)
 Baker & Hostetler LLP
 3200 National City Center
 1900 East Ninth Street
 Cleveland, OH 44114-3485
 Phone: 216-621-0200
 Facsimile: 216-696-0740
 mfarrell@bakerlaw.com

Counsel for Defendant-Appellant



W. Craig Bashein (0034591)
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113-2216
Telephone: 216-771-3239
Facsimile: 216-781-5876

Paul W. Flowers (0046625)
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113-2216
Telephone: 216-344-9393
Facsimile: 216-344-9395

John P. Hurst (0010569)
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113-2216
Telephone: 216-771-3239
Facsimile: 216-781-5876

Counsel for Plaintiff-Appellee

Dated: August 20, 2012

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND STATEMENT OF INTERESTS OF <i>AMICI CURIAE</i>	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	7
<u>Proposition of Law No. 1: Civ.R. 23(B)(3)'s predominance requirement is not satisfied when there are numerous individual questions regarding whether the 100,000 class members were misled regarding their settlement options and/or were dealt with in bad faith</u>	7
<u>Proposition of Law No. 2: A non-opt-out Civ.R. 23(B)(2) class is not appropriately certified in a case in which the plaintiff seeks significant monetary damages and in which no “cohesiveness” finding has been made</u>	12
A. <i>Wal-Mart</i> Is Not Distinguishable Simply Because the Trial Court Certified a Class Under Both Civ.R. 23(B)(2) and 23(B)(3)	13
B. The Civ.R. 23(B)(2) Class Should Not Have Been Certified in the Absence of Any Evidence of Class Cohesiveness and the Potential for “Final” Relief	14
<u>Proposition of Law No. 3: Certification of a class action under the circumstances of this case will improperly encourage further attempts to certify essentially untriable classes in order to coerce settlements from defendants</u>	17
CONCLUSION	19

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)	2
<i>Augustus v. Progressive Corp.</i> , 8th Dist. No. 81308, 2003-Ohio-296 (2003)	11
<i>Barnes v. Am. Tobacco Co.</i> , 161 F.3d 127 (3d Cir. 1998)	14
<i>Ellis v. Costco Wholesale Corp.</i> , 657 F.3d 970 (9th Cir. 2011)	12
<i>Hamilton v. Ohio Savings Bank</i> , 82 Ohio St. 3d 67, 694 N.E.2d 442 (1998)	3
<i>Hansberry v. Lee</i> , 311 U.S. 32, 61 S. Ct. 115, 85 L.Ed. 22 (1940)	16
<i>Howland v. Purdue Pharma L.P.</i> , 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d 141 (2004)	1, 7, 8
<i>In re Rhone-Poulenc Rorer, Inc.</i> , 51 F.3d 1293 (7th Cir. 1995)	17
<i>Jamie S. v. Milwaukee Public Schools</i> , 668 F.3d 481 (7th Cir. 2012)	14, 15, 16
<i>Marks v. C.P. Chemical Co.</i> , 31 Ohio St. 3d 200, 509 N.E.2d 1249 (1987)	3
<i>M.D. ex rel. Stukenberg v. Perry</i> , 675 F.3d 832 (5th Cir. 2012)	2
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999)	16
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797, 105 S. Ct. 2965, 86 L.Ed.2d 628 (1985)	17

	Pages
<i>Schmidt v. Avco Corp.</i> , 15 Ohio St.3d 310, 473 N.E.2d 822 (1984)	8
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541, 180 L.Ed.2d 374 (2011)	1, 2, 3, 6, 11, 13, 15, 16
<i>Wilson v. Brush Wellman Inc.</i> , 103 Ohio St.3d 538, 2004-Ohio-6552, 817 N.E.2d 59 (2004)	1, 14, 13

Rules:

Ohio Rules of Civil Procedure

Rule 23	2, 3
Rule 23(A)	2, 8, 12
Rule 23(B)(1)	8
Rule 23(B)(2)	<i>passim</i>
Rule 23(B)(3)	<i>passim</i>

Federal Rules of Civil Procedure

Rule 23	2
Rule 23(a)	2
Rule 23(b)(2)	6, 12, 13, 14, 15
Rule 23(b)(3)	13, 14

Miscellaneous:

Henry Friendly, <i>Federal Jurisdiction: A General View</i> (1973)	17
Richard A. Nagareda, <i>Class Certification in the Age of Aggregate Proof</i> , 84 N.Y.U. L. REV. 97 (2009)	15

INTRODUCTION AND STATEMENT OF INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 States, including many in Ohio. WLF devotes a substantial portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive, unreasonable litigation. In particular, WLF regularly participates as *amicus curiae* in litigation in support of its view that lax certification of class actions can undermine the fairness of the court system. Among the many federal and state class-action cases in which WLF has appeared as an *amicus curiae* are *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011); *Wilson v. Brush Wellman Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59 (2004); and *Howland v. Purdue Pharma L.P.*, 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d 141 (2004). WLF also filed a jurisdictional memorandum in this case, in support of Defendant-Appellant's discretionary appeal.

The Ohio Chemistry Technology Council, with offices in Columbus, is a state-wide trade association that represents over 80 companies involved in the chemical industry in the State of Ohio. Its members include large, medium, and small companies that work together to advance the common interests of the industry in a very competitive global market.

Although the rules permitting class actions are intended to serve legitimate purposes (such as promoting judicial economy by reducing the number of occasions on which courts will be required to consider the legal consequences of a recurring fact pattern), the certification of class actions that fail to satisfy the rigorous requirements for certification can create more work for courts and compromise the rights of parties and nonparties alike. *Amici* are concerned by the proliferation of class action lawsuits being filed in state and federal courts and the inhibiting

effects that such suits can have on the development and expansion of businesses. The appeals court's decision, if allowed to stand, will exacerbate that trend by encouraging efforts to certify inappropriate, unwieldy classes that render the underlying lawsuits untriable. Its reasoning and legal premises are inconsistent with the requirements of Civ.R. 23 and parties' and nonparties' due process rights as established by the U.S. Supreme Court in its recent *Wal-Mart* decision.

Wal-Mart comprehensively re-examined the circumstances under which certification of a class action serves the ends of justice, and explained the potential unfairness to defendants when a class is inappropriately certified. As many subsequent court decisions have recognized, the *Wal-Mart* decision "heightened the standards" for a plaintiff seeking class certification under federal Rule 23. See, e.g., *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 839 (5th Cir. 2012). In particular, *Wal-Mart* explained that, to meet Rule 23(a)'s "commonality" requirement, a plaintiff must do much more than simply show that class members "all suffered a violation of the same provision of law." *Wal-Mart*, 131 S. Ct. at 2551, 180 L.Ed.2d 374. Rather, class members' claims must "depend upon a common contention," and the common contention "must be of 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."

*Id.*¹

This Court has instructed that Ohio courts should look to Fed.R.Civ.P. 23 for guidance in

¹Moreover, establishing Civ.R. 23(A) "commonality" is just a first step in the long road a plaintiff must travel in order to establish the prerequisites for certification. For example, Civ.R. 23(B)(3) requires that the plaintiff, in addition to establishing "commonality," must also show that the common issues he has identified "predominate" over individual issues. As the U.S. Supreme Court has explained, "the predominance criterion is far more demanding" than the "commonality" requirement. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

interpreting Civ.R. 23. *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987). Yet the court of appeals paid scant heed to the U.S. Supreme Court's warnings against inappropriate class certification, despite issuing its decision more than six months after *Wal-Mart* was handed down. In particular, the appeals court rested its "predominance" analysis on a statement that "use of a common script creates * * * a common, class-wide contention making this case suitable for class litigation" – without considering the individual issues of fact raised by State Farm that will make it virtually impossible for the claims of the 100,000 class members to be resolved "in one stroke." Moreover, the decision to certify a non-opt-out Rule 23(B)(2) class raises serious due process concerns because a judgment adverse to the class likely would preclude class members from seeking damages on their own.

Amici recognize that a trial court's class certification decisions are entitled to deference. But this Court has cautioned that there must be limits to that deference. *See Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442 (1998) ("[T]he trial court's discretion in deciding whether to certify a class action is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23. The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied."). Both in light of *Wal-Mart* and in light of the failure of the trial court and appeals court to undertake any meaningful analysis of whether the common issues they identified could be resolved on a class-wide basis, this Court should reverse the decision below and declare that certification of a plaintiff class is inappropriate under the facts of this case.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee Michael Cullen is a former insurance policyholder of Defendant State

Farm Mutual Automobile Insurance Co. In 2003, Cullen reported to State Farm that his car windshield had been damaged by a stone. Cullen agreed to have his windshield repaired instead of being replaced, and State Farm paid for the repairs in full (*i.e.*, it waived the \$250 deductible on Cullen's policy). Cullen never complained to the glass repair shop regarding the quality of the repair, and, as of September 2009, he was still driving his car with the same repaired windshield.

Cullen later sued State Farm, claiming breach of contract, bad faith, and breach of fiduciary duty. He contended that his insurance contract gave him the option to demand a cash payment equal to the cost of replacing his windshield (less his deductible) and then decide for himself whether to repair or replace his windshield or simply to retain the payment. He further contended that State Farm failed to inform him of this "cash out" option, and that he would have chosen that option if it had been offered to him. Because replacement of a windshield costs more than repair, he contends that he would have derived a financial benefit (even taking into account his \$250 policy deductible) if he had exercised the alleged "cash out" option and paid for the repairs himself.

In September 2010, the trial court granted Cullen's motion to certify a plaintiff class under both Civ.R. 23(B)(2) and Civ.R. 23(B)(3). The certified class comprises all Ohio policyholders insured by State Farm who, at any time after January 1, 1991, submitted a "glass-only" damage claim (*i.e.*, no damage to the car other than to the windshield) that was resolved by payment of the cost of repairing the windshield. The court created two subclasses: insureds whose claims were administered by Lynx Services (post-1997) and insureds whose claims were not administered by Lynx (1991-1997 and 5% of policyholders after 1997).

In connection with its class certification order, the trial court made numerous findings in

Cullen's favor. It found that: (1) State Farm's standard automobile insurance policy in effect throughout the class period provided a "cash out" option; (2) Ohio insurance regulations and the "duty of good faith" imposed an affirmative duty on State Farm to call to the attention of insureds "pertinent" policy information that they might otherwise fail to read; and (3) State Farm agents and representatives should have disclosed the "cash out" option to insureds who filed glass-only claims. In finding that Civ.R. 23(B)(3) certification was appropriate, the court did not identify specific "common questions" of fact or law, or state whether such questions "predominated" but simply stated, "The Court is sufficiently convinced that Plaintiffs' claims for relief are founded squarely upon standardized policies and practices which had been adopted and employed by State Farm throughout Ohio on a systematic basis throughout the class period." In apparent reference to the practices of Lynx Services, the court added, "The use of standardized scripting by Defendant is an additional factor that this Court must consider in weighing the predominance issue."

In certifying a Civ.R. 23(B)(2) class, the trial court's entire explanation was: "[I]t appears that the same practices which [Cullen] experienced are still ongoing. Declaratory and injunctive relief are thus potentially available remedies which can be issued on a class wide basis in the event that he prevails upon the merits of his claim."

In December 2011, a divided court of appeals affirmed class certification but ordered that the class definition be modified to exclude those policyholders who initially agreed to windshield repair but later requested (and received) new windshields. Op. ¶ 35. It affirmed certification, despite concluding that the trial court's order granting certification was based in part on findings regarding merits-based issues that (it contended) the trial court should not have reached:

However, the trial court's findings of fact and conclusions of law do go too far into the merits of the case. One statement in particular is possibly outcome determinative. The trial court states that a cash pay-out option was available and that State Farm failed to disclose that option. This goes to the heart of the merits of the case and is inappropriate at this point. Class certification does not address the merits of the claim.

Op. ¶ 55. The court of appeals court did not explain why it was appropriate to defer to the trial court's class certification decision even though the decision was based on what it deemed a major error of law.

In upholding the trial court's finding that Cullen met Civ.R. 23(B)(3)'s predominance requirement, the appeals court concluded, "[T]he use of a common plan to steer claimants to opt for repair rather than replacement or disclosure of a cash payment for the value of the glass, less deductible, is a significant class-wide issue." Op. ¶ 21. In particular, the court held that "the use of a common script" by Lynx employees made the case "suitable for class litigation." Op. ¶ 27. With respect to pre-1997 claims (with which Lynx had no involvement), the court stated that the common question of fact was whether (as alleged by Cullen) a windshield repair can *never* "restore vehicles to their preloss condition." Op. ¶ 56. The court held (without elaboration) that the trial court did not abuse its discretion in determining that these common questions predominated over individual questions of fact, but (as was also true of the trial court) it did not discuss any of the individual questions of fact. Op. ¶¶ 31, 33.

With respect to Civ.R. 23(B)(2) certification, the appeals court dismissed the relevance of the U.S. Supreme Court's discussion (in its *Wal-Mart* decision) of federal Rule 23(b)(2), noting that *Wal-Mart* "did not address the specific question here – whether a class should be certified under both Civ.R. 23(B)(2) and (B)(3)." Op. ¶ 48. State Farm argued that Civ.R. 23(B)(2) certification is inappropriate whenever (as was the case here) damage claims constitute a more-

than-incidental part of the lawsuit. The appeals court disagreed, asserting that a 23(B)(2) assessment of whether damages play more than an incidental role in the suit “does not represent a useful expenditure of energy.” Op. ¶ 49. It went on to conclude that, in any event, money damages were an “incidental” part of Cullen’s claims. Op. ¶ 50. It did not address Cullen’s lack of standing to pursue equitable relief as a former policyholder, nor the inappropriateness of seeking declaratory relief solely as a predicate to a damages claim.

Judge Stewart dissented, concluding that Cullen had failed to meet Civ.R. 23(A)’s commonality requirement because “this class encompassed far too many theories of recovery under a ‘common’ question to present a unified class.” Op. ¶ 62. She explained, “While there may be an initial common question of State Farm’s obligation to offer a cash payment in lieu of repair, the many permutations of the underlying claim do not present common issues sufficient to justify certification into a single class of policyholders.” *Id.*

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Amici support each of the propositions of law set forth in State Farm’s brief on the merits and in addition they urge this Court to consider the following propositions:

Proposition of Law No. 1: Rule 23(B)(3)'s predominance requirement is not satisfied when there are numerous individual questions regarding whether the 100,000 class members were misled regarding their settlement options and/or were dealt with in bad faith.

This Court has indicated that “the test for commonality under Civ.R. 23(A) is typically met without difficulty.” *Howland*, 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d 141, ¶ 19. The Court may wish to re-examine that position in light of *Wal-Mart*’s tightened interpretation of federal Rule 23(a)’s commonality requirement. While the court of appeals quoted that

interpretation, it did not faithfully apply it. Even the broad “issue” of the alleged use of a “common script” does not raise a common question here, because the record does not and could not show that injury to each class member from its alleged use is a matter of common proof.

Moreover, even if the commonality requirement were satisfied, this Court has long recognized that to satisfy the more exacting Civ.R. 23 predominance requirement, “it is not sufficient that common questions merely exist; rather, the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication.” *Id.*, quoting *Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1984).² Neither the trial court nor the appeals court made any effort to consider whether—in light of the numerous individual issues identified by State Farm—class-wide adjudication of the common questions they identified could actually resolve a significant portion of the claims presented by Cullen. A trial court may not properly certify a Civ.R. 23(B)(3) class without undertaking that claim-by-claim analysis.

The predominance requirement is not satisfied merely because Cullen contends that State Farm’s policies all contained similar terms. Cullen contends that State Farm’s automobile insurance policies include a “cash out” option to receive a cash payment equal to the cost of replacing his windshield (less his deductible) and then to decide for himself whether to replace or repair his windshield, or simply to keep the payment. State Farm denies that its policies offer such an option. Resolution of that contractual issue will not, however, resolve any of the class

² An action may proceed as a class action if all the prerequisites of Civ.R. 23(A) are satisfied and in addition the requirements of either Civ.R. 23(B)(1), (B)(2), or (B)(3) have been met. The trial court certified the class under Civ.R. 23(B)(3), which requires a finding that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.”

members' claims, because Cullen does not allege that class members actually requested cash payouts, and he concedes that State Farm was contractually entitled to pay for repair of a damaged windshield if the policyholder agreed. Rather, he alleges that State Farm breached its contract, acted in bad faith, and breached its fiduciary duties to policyholders by failing to inform glass-only claimants of their alleged right to exercise a "cash out" option and by improperly persuading them instead to allow State Farm to pay to repair their windshields. The appeals court identified a "common issue" with respect to those claims: "[T]he use of a common plan to steer claimants to opt for repair rather than replacement or disclosure of a cash payment for the value of the glass, less deductible, is a significant class-wide issue." Op. ¶ 21. But the appeals court made no effort to demonstrate that this "significant class-wide issue" is a common question that predominates over individual questions.

The single class-wide issue identified by the appeals court does not satisfy Civ.R. 23(B)(3)'s predominance requirement. Cullen's common-question argument is based on the claim that employees of Lynx Services (which handled most glass-only claims in Ohio after 1997) were instructed to use standardized scripts when speaking with claimants. As State Farm has shown, however, the phone conversations were not identical. The undisputed evidence showed that what was said to each policyholder varied with the questions, if any, asked by the individual policyholder. Moreover, policyholders with damaged windshields routinely also spoke with their State Farm agents and glass repair shop employees regarding what claims options to pursue. Those were unscripted, unique discussions. In light of the thousands of alternative scenarios that policyholders faced before deciding to opt for repair of their windshields, one cannot credibly argue that the "common question" cited by the trial court and

appeals court (use of standardized scripts to guide statements by Lynx employees) predominates over individual questions. Cullen cannot even remember what Lynx said to *him*, or whether he was offered the choice set forth in his policy of windshield replacement or repair when he agreed to windshield repair. Whether *the other 100,000* potential class members were misled, and whether *they* agreed to windshield repairs are issues that cannot be determined on a class-wide basis.

Furthermore, whether (as Cullen alleges) State Farm/Lynx employees acted in bad faith in recommending the repair option is almost entirely an individual question of fact. In order to demonstrate bad faith, class members will need to show not only that their policies entitled them to a “cash out” but also that the State Farm and Lynx representatives with whom they dealt both knew of the availability of a “cash out” option *and* deliberately steered policyholders away from that option. State Farm denies the existence of a “cash out” option. But even if the courts ultimately were to conclude that State Farm policies include such an option, each class member would need to provide individualized evidence regarding the state of mind of the State Farm representative with whom he or she dealt in order to establish bad faith.

As the court of appeals recognized, the allegedly “common” issue (use of “identical” scripted conversations to steer class members to the repair option) does not apply to claims submitted before Lynx was retained in 1997 or to the 5% of post-1997 claims that were handled by State Farm claims personnel. Op. ¶ 32. With respect to pre-1997 claims, Cullen submitted expert testimony regarding the alleged inherent deficiencies of windshield repairs and will argue, based on that testimony, that State Farm breached the contracts of all class members by failing to

pay to restore their cars to pre-loss condition. Op. ¶ 33.³ That testimony ignores the fact that whether a windshield has been restored to its pre-loss condition (assuming the policy even requires as much) is an inherently individualized factual question because it depends on the pre-loss condition of each windshield. *Augustus v. Progressive Corp.*, 8th Dist. No. 81308, 2003-Ohio-296, ¶ 25-27. For example, older windshields that have been subject to wear and tear may have been scratched or abraded, have lost their clarity, or have had earlier chips, cracks, or repairs. Based on variations in wind-shield age and quality, State Farm will have the right at trial to contest failure-to-restore claims on an individualized basis. *See Wal-Mart*, 131 S. Ct. at 2561 (“a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims”).

In his Memorandum Opposing Jurisdiction, Cullen managed merely to raise more individualized issues of fact. For example, he alleged that a State Farm director “conceded that part of the sales pitch included advising the policyholders that their damaged windshields could not be recycled, even though she knew that was untrue.” Cullen Juris. Br. 13-14. If Cullen seeks to rely on this allegation, he will need to demonstrate on an individual basis which class members heard and relied on the alleged statements.

In sum, the lower courts upheld class certification without undertaking the requisite predominance analysis, and the evidence indicates that any such analysis would have led to the conclusion that certification was improper under Civ.R. 23(B)(3) because individual issues

³ The appeals court stated that this expert testimony was “dubious.” Op. ¶ 56. Also, *amici* question how Cullen can adequately represent the pre-1997 subclass when he is not himself a member of that subclass. *Amici* also note that State Farm convincingly argues that its policy’s single reference to “pre-loss condition” has no applicability to windshield repairs.

predominate over any common issues. Accordingly, the order certifying a Rule 23(B)(3) class should be reversed.

Proposition of Law No. 2: A non-opt-out Civ.R. 23(B)(2) class is not appropriately certified in a case in which the plaintiff seeks significant monetary damages and in which no “cohesiveness” finding has been made.

When the prerequisites of Civ.R. 23(A) are satisfied, one permissible ground for certifying a class is that “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.” Civ.R. 23(B)(2). In addition to certifying a 23(B)(3) class, the trial court (in two sentences) certified the class under Civ.R. 23(B)(2), and the court of appeals affirmed. The 23(B)(2) certification sharply conflicts both with *Wal-Mart* and this Court’s precedents, and it raises significant due process concerns.⁴

⁴ Among those concerns is that Cullen, because he is no longer a policyholder and thus does not have an interest in prospective relief, does not have standing to pursue such relief and does not adequately represent the interests of the Civ.R. 23(B)(2) class. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986 (9th Cir. 2011). In *Costco*, two named plaintiffs in an employment discrimination lawsuit requested Fed.R.Civ.P. 23(b)(2) certification of a class of Costco employees seeking injunctive relief against their employer. The Ninth Circuit rejected their request, explaining:

Plaintiffs not employed by Costco throughout this case do not have standing to seek injunctive relief. As former employees, Ellis and Horstman [two named plaintiffs] would not share an interest with class members whose primary goal is to obtain injunctive relief. Thus, as the class currently stands, Ellis and Horstman will not adequately protect the interests of the class as a whole.

Id. Similarly, because Cullen is no longer a State Farm policyholder and thus does not share the interests of current policyholders regarding future interpretations of State Farm policies, he cannot adequately represent the interests of a Civ.R. 23(B)(2) class seeking forward-looking injunctive/declaratory relief.

A. *Wal-Mart* Is Not Distinguishable Simply Because the Trial Court Certified a Class Under Both Civ.R. 23(B)(2) and 23(B)(3)

The appeals court recognized the conflict with *Wal-Mart*, noting that “the Supreme Court found that Rule 23(b)(2) ‘does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.’” Op. ¶ 48, quoting *Wal-Mart*, 131 S. Ct. at 2557. The court nonetheless sought to distinguish *Wal-Mart* by stating that the U.S. Supreme Court “did not address the specific question here—whether a class should be certified under both Civ.R. 23(B)(2) and (B)(3).” *Id.* That effort to distinguish *Wal-Mart* is unavailing; nothing in the Supreme Court’s decision (which *unanimously* overturned certification of a Rule 23(b)(2) class) suggested that the (b)(2) issue would have been decided differently if the lower courts had also certified a (b)(3) class.

Moreover, Civ.R. 23(B)(2) certification raises a significant number of constitutional concerns that are not present when certification is sought under Civ. 23(B)(3); those concerns cannot be assumed away simply because a trial court has also certified a plaintiff class under Civ.R. 23(B)(3). For example, members of a Civ.R. 23(B)(2) class (unlike members of a Civ.R. 23(B)(3) class) have no opt-out rights. State Farm policyholders who do not wish to participate in this lawsuit could have exercised their opt-out rights had the district court certified only a (B)(3) class; by certifying a class under Civ.R. 23(B)(2) as well, the trial court eliminated that option. Accordingly, even after certifying a Civ.R. 23(B)(3) class, the trial court was required to undertake the same careful examination of a Civ.R. 23(B)(2) certification motion that it would have undertaken in the absence of a Civ.R. 23(B)(3) class, to ensure that the rights of absent State Farm policyholders were being fully protected.

B. The Civ.R. 23(B)(2) Class Should Not Have Been Certified in the Absence of Any Evidence of Class Cohesiveness and the Potential for “Final” Relief

Certification is never appropriate under Civ.R. 23(B)(2) unless the plaintiff proves that the proposed class is “cohesive.” *Wilson*, 103 Ohio St.3d at 541, 2004-Ohio-5847, 817 N.E.2d 59, ¶ 13. The appeals court upheld (B)(2) certification without even discussing the cohesiveness issue. Yet, as this Court has explained, “a (b)(2) class may require more cohesion than a (b)(3) class. This is so because in a (b)(2) action, unnamed members are bound by the action without the opportunity to opt out.” *Id.* at 544, quoting *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998). For the same reasons that Cullen cannot meet the (B)(3) predominance requirement, the (B)(2) class cannot plausibly be deemed cohesive. Furthermore, the class includes both Cullen and numerous other *former* State Farm policyholders who have no basis for seeking equitable relief against State Farm’s current claims-settlement practices.

The U.S. Court of Appeals for the Seventh Circuit recently overturned certification of a Rule 23(b)(2) class under similar circumstances, after determining that the class was insufficiently cohesive. *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012). The suit, filed by seven special education students against the Milwaukee Public Schools (MPS), sought a class-wide injunction against the allegedly deficient manner in which MPS handled the educational placement of disabled students. The trial court certified a (b)(2) class of thousands of potentially disabled students (regardless whether they had been identified as such) and entered broad injunctive relief in favor of the class. The relief included requiring MPS to: (1) send notice to thousands of parents; (2) invite the parents to have their children evaluated to see whether they qualified as disabled; and (3) undertake a detailed evaluation of the child of each parent who

responded. *Id.* at 489. Finding the class insufficiently cohesive, the Seventh Circuit reversed the (b)(2) certification. *Id.* at 498-99. Noting that Rule 23(b)(2) provides for certification only where “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate,” the appeals court held that (b)(2) certification was improper because the plaintiffs’ requested equitable relief was not “‘final’ to ‘the class as a whole.’” *Id.* at 499. The court explained:

That the plaintiffs have superficially structured their case around a claim for class-wide injunctive and declaratory relief does not satisfy Rule 23(b)(2) if as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made; this kind of relief would be class-wide in name only, and it certainly would not be final. *See [Wal-Mart, 131 S. Ct. at 2557]* (“The key to the (b)(2) class is the ‘indivisible nature of the injunctive or declaratory remedy warranted’”) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

Jamie S., 668 F.3d at 499.

Cullen’s Civ.R. 23(B)(2) class suffers from a similarly fatal deficiency with respect to the finality of the requested declaratory relief. The relief that Cullen seeks on behalf of the (B)(2) class is a declaratory judgment that State Farm automobile insurance contracts provide policyholders with a “cash out” option with respect to damaged windshields. *Op.* ¶¶ 41-51. Such declaratory relief cannot, however, be deemed “*final* injunctive relief or corresponding declaratory relief with respect to the class as a whole,” within the meaning of Civ.R. 23(B)(2) (emphasis added). A declaration that State Farm insurance contracts include a “cash-out” option would still require the trial court to conduct individual-by-individual determinations regarding such issues as what the Lynx/State Farm employee told each policyholder, whether the employee intended to deceive the individual, whether the individual believed himself to have been misled,

whether the individual voluntarily agreed to a windshield repair, and whether (with respect to pre-1997 claims) the individual's windshield was restored to its pre-loss condition.⁵ As in *Jamie S.*, a request for declaratory relief of the sort sought by Cullen cannot serve as the basis for Civ.R. 23(B)(2) class certification, because "this kind of relief would be class-wide in name only, and it would certainly not be final." 668 F.3d at 499.⁶

In addition, because class members are denied the right to opt out, the (B)(2) class raises "serious due process concerns." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). Mandatory class actions "implicate the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Id.* at 846, quoting *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Recognizing this "inherent tension between representative suits and the day-in-court ideal," *id.*, the U.S. Supreme Court has authorized use of class actions but has made them subject to strict constitutional controls. For example, it has held that a State court

⁵ Cullen's only response is to assert that review of the Civ.R. 23(B)(2) certification is "premature" (because no injunctive or declaratory relief has yet been issued) and that State Farm will have "a full and fair opportunity upon remand to contest the merits of Plaintiffs' claims once discovery has been completed." Cullen Juris. Br. 15. Whether Cullen or anyone else is entitled to declaratory relief on "the merits" is not the issue, however. The issue is whether a Civ.R. 23(B)(2) class was properly certified, and Cullen has not demonstrated that the class he seeks to represent is cohesive or that any declaratory relief issued by the trial court could be "final" as to "the class as a whole."

⁶ Moreover, as the court below noted, *Wal-Mart* held that (b)(2) class certification is categorically barred when, as here, "each class member would be entitled to an individualized award of monetary damages." Op. 48, quoting *Wal-Mart*, 131 S. Ct. at 2557. In light of the U.S. Supreme Court's *unanimous* holding on that issue, this Court should consider adopting the U.S. Supreme Court's categorical approach.

may not bind absent class plaintiffs concerning *a claim for money damages or similar relief at law* unless it provides “minimal procedural due process protection.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Those “minimal” protections include adequate representation “at all times” by the named plaintiffs, and a right to “opt out” of the class. *Id.* at 812.

Certification of the (B)(2) class in this case violated those constitutional principles.

Absent class members have no opportunity to opt out; yet if the trial court ultimately determines that State Farm is *not* liable to the class, absent class members will be bound by the judgment (under normal preclusion rules) and will not be entitled to file suit on their own. That would be true even for absent class members who could present individualized evidence that they were affirmatively misled by State Farm and thus might be entitled to monetary damages. In light of the potential unfairness inflicted on absent class members by the trial court’s decision to certify a Civ.R. 23(B)(2) class, that decision should be reversed.⁷

Proposition of Law No. 3: Certification of a class action under the circumstances of this case will improperly encourage further attempts to certify essentially untriable classes in order to coerce settlements from defendants.

Underlying each of the issues raised by State Farm in its jurisdictional brief are the distortions being imposed on the litigation process by the many class actions being certified by Ohio courts under Civ.R. 23. As numerous commentators have recognized, defendants that face

⁷ It is well settled that defendants such as State Farm have standing to complain that a court has improperly failed to provide an opt-out right to absent class members. *Shutts*, 472 U.S. at 805 (“The only way that a class action defendant like petitioner can assure itself [that class members will be bound by an adverse judgment] is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit.”).

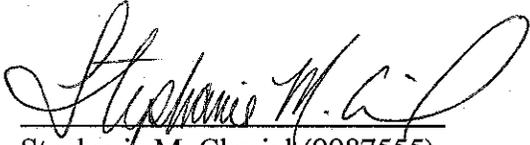
a large certified class and hence enormous potential damages are “under intense pressure to settle.” *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.). Unless they want to “roll the dice,” they must settle, often without regard to the merits of the plaintiffs’ claims. *Id.* Such settlements can in many instances legitimately be deemed “blackmail settlements.” H. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

When a lack of predominance of common questions over individual questions means that many issues will have to be tried on an individual basis, a putative class action is unlikely to result in a significant saving of judicial resources. The only result of certifying such a class is to pressure defendants into settling the claims, regardless of their merits. This is not a proper purpose of class certification. The appeals court’s ruling, if allowed to stand, is likely to result in a significant increase in the filing of class actions that do not serve any of the purposes for which class actions were created. By permitting class actions without any demonstration of predominance or cohesion, the court of appeals has opened the door to a whole new category of class actions that will only serve to further clog the judicial process. *Amici* respectfully request that this Court close that door.

CONCLUSION

Amici curiae respectfully request that the Court reverse the decision below and rule that this case may not proceed as a class action.

Respectfully submitted,



Stephanie M. Chmiel (0087555)
Thompson Hine LLP
41 South High Street
Suite 1700
Columbus, OH 43215-6101
Phone: 614-469-3247
Facsimile: 614-469-3361
Stephanie.Chmiel@thompsonhine.com

Date: August 20, 2012

Elizabeth B. Wright (0018456)
Brian A. Troyer, Counsel of Record (0059671)
Thompson Hine LLP
3900 Key Center, 127 Public Square
Cleveland, OH 44114-1291
Phone: 216-566-5716
Facsimile: 216-566-8500
Brian.Troyer@thompsonhine.com

Counsel for *amici curiae*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of August, 2012, copies of the foregoing Brief on the Merits of Washington Legal Foundation, *et al.* as *Amici Curiae* in Support of Defendant-Appellant were served on counsel in this case by email, by sending the brief to the email addresses listed below:

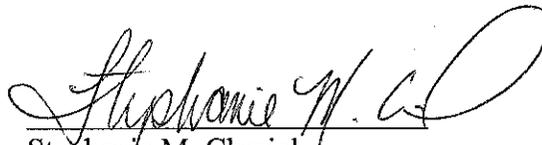
Mark A. Johnson
Baker & Hostetler LLP
65 East State Street, Suite 2100
Columbus, OH 43215-4260
mjohnson@bakerlaw.com

W. Craig Bashein
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113-2216
cbashein@basheinlaw.com

Michael K. Farrell
Baker & Hostetler LLP
3200 National City Center
1900 East Ninth St.
Cleveland, OH 44114-3485
mfarrell@bakerlaw.com

Paul W. Flowers
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113-2216
pfw@pfwco.com

John P. Hurst
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113-2216
jhurst@basheinlaw.com


Stephanie M. Chmiel