

IN THE SUPREME COURT OF OHIO

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

**MERIT BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION
 OF MUTUAL INSURANCE COMPANIES AND OHIO
 INSURANCE INSTITUTE IN SUPPORT OF APPELLANT**

Thomas E. Szykowny (0014603)
 Michael Thomas (0000947)
 VORYS, SATER, SEYMOUR AND PEASE LLP
 52 E. Gay Street
 PO Box 1008
 Columbus, OH 43216-1008
 Tel: (614) 464-5671
 Fax: (614) 719-4990
teszykowny@vorys.com

W. Craig Bashein (0034591)
 Counsel of Record
 John P. Hurst (0010569)
 Terminal Tower, 35th Floor
 50 Public Square
 Cleveland, OH 44113-2216
 Tel: (216) 771-3239
 Fax: (216) 781-5876

and

*Counsel for Amici Curiae National Association of
 Mutual Insurance Companies and Ohio Insurance
 Institute*

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

Counsel for Appellee Michael E. Cullen

FILED
 AUG 20 2012
 CLERK OF COURT
 SUPREME COURT OF OHIO

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, OH 43215-4260
Tel: (614) 228-1541
Fax: (614) 462-2616

and

Michael K. Farrell (0040941)
BAKER & HOSTETLER LLP
3200 PNC Center
1900 East Ninth Street
Cleveland, OH 44114-3485
Tel: (216) 621-0200
Fax: (216) 696-0740

*Counsel for Appellant State Farm Mutual
Automobile Insurance Company*

Kurtis A. Tunnell (0038569)
Anne Marie Sferra (0030855)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215
Tel: (614) 227-2300
Fax: (614) 227-2390
ktunnell@bricker.com

*Of Counsel for Amicus Curiae Ohio Alliance for
Civil Justice*

Victor E. Schwartz (0009240)
SHOOK, HARDYS & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
Fax: (202) 783-4211
vschwartz@shb.com

*Counsel for Amici Curiae Ohio Chamber
of Commerce, Ohio Alliance for Civil
Justice, Chamber of Commerce of the
United States of America, and American
Tort Reform Association*

Elizabeth B. Wright (0018456)
Brian A. Troyer (0059671)
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114-1291
Tel: (216) 566-5716
Fax: (216) 566-8500
brian.troyer@thompsonhine.com

and

Stephanie M. Chmiel (0087555)
THOMPSON HINE LLP
41 South High Street
Columbus, OH 43215-6101
Tel: (614) 469-3247
Fax: (614) 469-3361
Stephanie.chmiel@thompsonhine.com

*Counsel for Amici Curiae Washington
Legal Foundation and Ohio Chemistry
Technology Council*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE AND FACTS 7

ARGUMENT 7

Proposition of Law No. 1:

 In ruling on class certification, courts may and should examine merits issues that are relevant to Civil Rule 23 requirements. 7

Proposition of Law No. 2:

 In ruling on class certification, courts may and should examine the reliability and admissibility of expert testimony that is relevant to Civil Rule 23 requirements..... 13

Proposition of Law No. 3:

 A class definition may not condition class membership on disputed, individual elements of liability..... 15

Proposition of Law No. 4:

 In ruling on class certification, courts may not rely on allegations that hypothetical “computer algorithms” can identify class members..... 18

Proposition of Law No. 5:

 Where class members’ claims are based upon different communications with different persons, and only some of these communications were allegedly scripted, individual issues predominate over common issues. 21

Proposition of Law No. 6:

 It is an abuse of discretion to certify a subclass in the absence of a class representative who is a member of the subclass. 24

Proposition of Law No. 7:

 Rule 23(B)(2) does not authorize class certification when the named plaintiff lacks standing to seek declaratory or injunctive relief..... 24

CONCLUSION..... 28

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

	Page
CASES	
<i>Baxter Intern., Inc. v. American Guar. & Liab. Ins. Co.</i> , 369 Ill. App. 3d 700, 861 N.E.2d 263 (2006).....	9
<i>Berkshire Mut. Ins. Co. v. Moffett</i> , 378 F.2d 1007 (5th Cir. 1967).....	9
<i>Broussard v. Meineke Discount Muffler Shops, Inc.</i> , 155 F.3d 331 (4th Cir. 1998)	12
<i>Broussard v. State Farm Fire & Cas. Co.</i> , 2007 WL 2264535 (E.D. La. Aug. 2, 2007)	9
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579 (1993)	2, 13, 14
<i>Dombrosky v. Farmers Ins. Co. of Washington</i> , 928 P.2d 1127 (Wash. App. 1996).....	9
<i>E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.</i> , 241 F.3d 154 (2d Cir. 2001).....	9
<i>Ellis v. Costco Wholesale Corp.</i> , 657 F.3d 970 (9th Cir. 2011)	14
<i>Estate of Mikulski v. Centerior Energy Co.</i> , 8th Dist. No. 94536, 2010-Ohio-6167.....	12
<i>General Telephone Co. of Southwest v. Falcon</i> , 457 U.S. 147 161 (1982).....	11
<i>Gibbs Properties Corp. v. Cigna Corp.</i> , 196 F.R.D. 430 (M.D. Fla. 2000).....	20
<i>Hamilton v. Ohio Savings Bank</i> , 82 Ohio St.3d 67 1999-Ohio-365, 694 N.E.2d 442.....	19, 26, 27
<i>In re Hydrogen Peroxide Antitrust Litig.</i> , 552 F.3d 305 (3rd Cir. 2008)	5
<i>In re New Motor Vehicles Canadian Exp. Antitrust Litig.</i> , 522 F.3d 6 (1st Cir. 2008)	5
<i>In re Rail Freight Surcharge Antitrust Litig.</i> , MDL No. 1869, 2012 U.S. Dist. Lexis 97178 (D.D.C., 2012)	11
<i>In re Rhone-Poulenc Rorer, Inc.</i> , 51 F.3d 1293 (7th Cir. 1995).....	5
<i>Insurance Co. v. Insurance Co.</i> , 38 Ohio St. 11 (1882)	8
<i>Judd v. Queen City Metro.</i> , 31 Ohio App.3d 88 (1st Dist. 1986)	9
<i>McLaughlin v. American Tobacco Co.</i> , 522 F.3d 215 (2d Cir. 2008)	4, 12
<i>Newton v. Merrill Lynch, Pierce, Fenner & Smith</i> , 259 F.3d 154 (3d Cir. 2001).....	5
<i>Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 259 F.3d 154 (3d Cir. 2001).....	20

<i>Philip Morris USA, Inc. v. Scott</i> , 131 S.Ct. 1, 3 (2010).....	4
<i>Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho</i> , 52 Ohio St.3d 56, 556 N.E.2d 157 (1990).....	19
<i>Sikes v. Teleline, Inc.</i> , 281 F.3d 1350 (11th Cir. 2002)	13
<i>Sprague v. GMC</i> , 133 F.3d 388 (6th Cir. 1998)	12
<i>Stammco v. United Telephone Co. of Ohio</i> , 125 Ohio St.3d 91, 2010-Ohio-1042.....	24
<i>Star Freight, Inc. v. Sheffield</i> , 587 So. 2d 946 (Ala. 1991)	9
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S.Ct. 2541 (2011)	passim
<i>Warner v. Waste Mgt., Inc.</i> , 36 Ohio St.3d 91, 96, 521 N.E.2d 1091 (1988).....	18, 27
<i>Wilson v. Brush Wellman, Inc.</i> , 103 Ohio St.3d 538, 2004-Ohio-5847.....	25
STATUTES	
28 U.S.C. 2072(b).....	4
Mass. Code Regs. 133.04(3).....	17
RULES	
Ohio Rule of Civil Procedure 23	passim
Ohio Rule of Civil Procedure 23(a).....	3, 11, 26
Ohio Rule of Civil Procedure 23(b).....	25
Ohio Rule of Civil Procedure 23(B)(2)	24, 25, 26, 27
Ohio Rule of Civil Procedure 23(B)(3)	passim
Ohio Rule of Civil Procedure 23(C)(4)(b).....	24
CONSTITUTIONAL PROVISIONS	
Ohio Constitution, Article IV, Section 5(B).....	4
OTHER AUTHORITIES	
<i>Insurance Law & Practice</i> , § 7001, at 11 (1983 ed.).....	9

STATEMENT OF INTEREST OF AMICI CURIAE

The issues raised by this appeal are extremely important to amici curiae National Association of Mutual Insurance Companies and Ohio Insurance Institute, and to insurers and policyholders throughout Ohio. The ruling by the Court of Appeals diluted critical requirements of Ohio Rule of Civil Procedure 23 that are essential to the fair and efficient resolution of class claims, and insurers have been among the primary targets of over-reaching class actions. In this case, the lower courts did not require plaintiff to prove the factual and legal allegations underlying his motion for class certification, and the class members' shared status as State Farm policyholders was treated as sufficient commonality to warrant class certification. The only thing this class has in common – that they reported windshield damage under a State Farm automobile insurance policy during the past 21 years and chose to have their windshields repaired rather than replaced – is not dispositive of their claims; liability as to each class member depends upon highly individual, noncommon issues.

A class action that merely conglomerates tens of thousands of disparate individual claims is neither efficient nor economical. Even worse, it is fundamentally unfair. In this case, it will be impossible for State Farm to challenge the varying factual and legal deficiencies in each separate class member's claim at a class-wide trial. Yet every one of the approximately 100,000 class members' claims must be considered individually due to (1) differences in certain relevant provisions of their insurance policies, which changed several times over the course of 21 years; (2) differences in the individual conversations different class members had with different State Farm agents, Lynx telephone representatives, and independent glass-shop employees about repairing or replacing their windshields; (3) differences in the costs of replacement windshields for the different years, makes, and models of class members' vehicles,

in different time periods and in different geographical areas; and (4) differences in the amounts of the deductibles specified in their individual insurance policies.

Plaintiff purported to carry his burden of proving that the class meets Civil Rule 23 certification requirements by relying upon a legal contention – i.e., that the State Farm insurance policies provide all policyholders with a “cash replacement option” for damaged windshields – and a factual assumption – i.e., that a cracked windshield can never be adequately repaired and must always be replaced. The Court of Appeals presumed that plaintiff’s legal contention and factual assumption were correct and granted class certification on that basis. It acknowledged that the language of the State Farm insurance policies appears to rule out any “cash replacement option”, but it declined to resolve that legal question prior to ruling on class certification. 2011-Ohio-6621, at ¶¶ 23-24. It similarly accepted the opinion of plaintiff’s expert witnesses that windshield repairs are never proper, holding that this “provides a means of resolving a significant question of breach of contract without the need to examine individual issues” (id., at ¶ 33), but it declined to resolve a pending *Daubert* challenge to those witnesses despite contrary testimony by State Farm’s two technical experts, as well as the expert opinion of a former Ohio Superintendent of Insurance that it “is widely known that . . . windshield repairs benefit consumers”. See Covington Report at 4, 14-17, 24-26 (attached as Exhibit 10 to State Farm’s Memo in Opp. to Plaintiff’s Motion for Class Certification).

The Court of Appeals thus excused plaintiff from carrying his burden of proving by a preponderance of the evidence that his class meets the requirements of Civil Rule 23. Instead of resolving plaintiff’s legal and factual class action allegations prior to ruling on class certification, the Court of Appeals assumed that they are true. The United States Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551-52 (2011) that

“certification is proper only if ‘the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied’ . . . [and] ‘actual, not presumed, conformance . . . remains indispensable.’ Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.” (Citations omitted; emphasis added.) Plaintiffs are required to prove actual conformance with class action requirements, even if that proof overlaps with merits issues, because the requirements ensure that class action proceedings are manageable and fair.

In the present case, the Court of Appeals affirmed class certification because it assumed as a matter of law that the State Farm insurance policies provide a “cash replacement option,” and because it assumed as a matter of fact that windshields with any damage must always be completely replaced. That ruling effectively prevents State Farm from defending itself at a class-wide trial, by showing that individual class members would have chosen to repair their windshields, rather than to replace them, irrespective of anything that State Farm or Lynx representatives said or did not say to them. Depending upon the individual circumstances, many people prefer windshield repairs for various reasons:

- the repair process is much easier and less time consuming than windshield replacement, and it can often be done at the claimant’s home or workplace;
- windshield repairs are more economical for policyholders who want to avoid paying a large out-of-pocket deductible and incurring an expensive loss in their claims history;
- the replacement process necessarily breaks the factory windshield seal, raising fears of leaks and other problems; and

- a crack may have no effect whatsoever on driver visibility due to its size and location.

Even if plaintiff could prove at a class-wide trial that he, personally, would have chosen to replace his windshield, State Farm could not properly be found liable on a class-wide basis unless every individual class member separately proved that they also would have chosen windshield replacement rather than repair despite the additional expense, time, inconvenience and other problems.

Class certification cannot be used to manufacture liability to an unnamed class member that would not exist if the class member had brought an individual action. The Ohio Constitution, Article IV, Section 5(B), expressly mandates that rules of practice and procedure “shall not abridge, enlarge, or modify any substantive right.” This is nearly identical to the language in the Rules Enabling Act, 28 U.S.C. 2072(b), that the United States Supreme Court relied upon to reverse class certification in *Dukes*, supra. “[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its...defenses to individual claims.” 131 S.Ct. at 2561.

A defendant’s due process rights are violated when “individual plaintiffs who could not recover had they sued separately, can recover only because their claims were aggregated with others through the procedural device of the class action.” *Philip Morris USA, Inc. v. Scott*, 131 S.Ct. 1, 3 (2010). A constitutional violation occurs because “the right of defendants to challenge the allegations of individual plaintiffs is lost” following improper class certification. *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008). In the present case, class members who would have chosen to repair their windshields in any event, for one or more of the reasons described above, are not entitled to recover damages from State Farm even if

plaintiff, as class representative, could prove that he would have chosen to replace his windshield. “[D]efendants have the right to raise individual defenses against every class member.” *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 192 (3d Cir. 2001).

Certification of a sprawling plaintiff class that does not meet Civil Rule 23 requirements has other profoundly unfair consequences for defendants, particularly in insurance litigation involving tens or hundreds of thousands of policyholders. It can “raise[] the stakes of litigation so substantially that the defendant likely will feel irresistible pressure to settle” even if plaintiffs’ claims are meritless. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008) (quotations omitted). “[C]lass 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....[T]he potential for unwarranted settlement pressure is a factor we weigh in our certification calculus.” *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3rd Cir. 2008). Defendants in a class action “may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.” *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

No one except class counsel benefits when insurance companies must pay exorbitant litigation expenses and extortionate settlements to resolve contrived class actions that were certified on the basis of unsupported legal and factual assumptions. In this case, plaintiff obtained certification of claims by approximately 100,000 class members, to “indemnify” them for the wholly hypothetical costs of replacing windshields that were never replaced. The enormous costs of resolving those claims distorts the risk/premium calculus on which the price of insurance coverage is based and can lead to increased premiums for policyholders,

particularly when, as in this case, the defendant is a mutual insurance company that is essentially owned by its members.

Amici curiae National Association of Mutual Insurance Companies (“NAMIC”) and Ohio Insurance Institute (“OII”) are gravely concerned about the consequences of the ruling below for insurers and insureds alike. NAMIC is the largest property and casualty insurance trade and advocacy association in the United States, and more than 40 of its member companies provide automobile insurance to Ohio residents. It has been active in promoting sensible and fair insurance laws and regulations since its inception in 1895, and its 1,400 members include mutual insurance companies, stock insurance companies, and reinsurers. NAMIC participates as amicus curiae in significant insurance cases before appellate courts, including this Court and the United States Supreme Court, to promote a stable legal environment in which the insurance industry can meet the needs of individuals and businesses alike.

Amicus curiae OII is a professional trade association representing property and casualty insurance companies and reinsurers doing business in Ohio. It provides a wide range of insurance-related services to its members and to the public, media, and government officials. Among other activities, OII monitors litigation in Ohio courts that raises important issues of insurance law, and it has participated as amicus curiae in many landmark insurance cases decided by this Court.

The Court of Appeals’ decision is one of several recent Ohio appellate rulings that have loosened rigorous class certification requirements of Civil Rule 23 that ensure the efficiency and fundamental fairness of class action litigation. If this Court does not reverse the ruling below, it will encourage attorneys to use Ohio courts to convert simple and straight-forward

disputes into complex and expensive class actions on behalf of vast numbers of hypothetical class members whose theoretical claims have no relevant issues in common.

Amici curiae NAMIC and OII are uniquely qualified to provide this Court with a broad perspective on the impact of the ruling below on the insurance industry, as well as practical insight into the specific problems it will create for both insurers and insureds. NAMIC and OII each identified this appeal as having especially important ramifications for the Ohio insurance industry, and they join in urging the Court to reverse the ruling below.

STATEMENT OF THE CASE AND FACTS

Amici curiae NAMIC and OII adopt and incorporate Appellant's Statement of Facts.

ARGUMENT

Proposition of Law No. 1:

In ruling on class certification, courts may and should examine merits issues that are relevant to Civil Rule 23 requirements.

Plaintiff's motion for class certification is based upon his assertion that State Farm automobile insurance policies provide a "cash replacement option" that entitles every policyholder to a cash payment for the replacement cost of a damaged windshield, less any applicable deductible, even if the windshield is not replaced. This "cash replacement option" purportedly gives rise to common issues that warrant class certification because, according to plaintiff, no policyholders would have chosen to repair their damaged windshields unless they were improperly "steered" to do so by State Farm.

State Farm pointed out that no such "option" appears in the terms of the insurance policies. On the contrary, the policies provide:

We have the right to settle a loss with you or the owner of the property in one of the following ways:

1. pay the agreed upon actual cash value of the property at the time of the loss***
2. pay to:
 - a. repair the damaged property or part, or
 - b. replace the property or part***

(Ohio Auto Policy, attached as Exhibit 13 to State Farm’s Mem. in Opp. to Plaintiff’s Motion for Class Certification.) In addition, the insurance policy contains a “Limit of Liability” provision that limits State Farm’s obligation to the lower of “the actual cash value” or “the cost of repair or replacement,” less any applicable deductible. (Id.; emphasis added.) The policy explains that “the cost of repair or replacement” is based upon one of the following:

1. the cost of repair or replacement agreed upon by you and us;
2. a competitive bid approved by us; or
3. an estimate written based upon the prevailing competitive price***We will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition***

(Id.) There is thus no “cash replacement option;” State Farm is obligated to pay only the cost of repair or replacement whenever that is less than “the actual cash value.”

The trial court’s certification order relied in part upon its characterization of the insurance policies at issue as indemnity policies. (Order, at 2.) The policy language states that State Farm can “pay to repair” or “pay to replace” damaged property; it is not required to make cash payments to policyholders that are not used to repair or replace a windshield. (Id., at 3.) The trial court nevertheless certified a class that seeks payment for the full cost of windshield replacement even though the policyholder chose not to replace the windshield. The class members seek a windfall rather than indemnification for an insured loss.

Requiring State Farm to “reimburse” policyholders through a cash payment for expenses they did not incur is not only directly contrary to the policy language, it is also inconsistent with recognized principles of indemnity. See *Insurance Co. v. Insurance Co.*, 38 Ohio St. 11 (1882)

(recognizing the principle of indemnity underlying insurance); *Judd v. Queen City Metro.*, 31 Ohio App.3d 88, 89 n.1 (1st Dist. 1986) (holding that an insurer’s liability under an indemnity policy “arises only after the insured has paid the liability”). See also *Baxter Intern., Inc. v. American Guar. & Liab. Ins. Co.*, 369 Ill. App. 3d 700, 709, 861 N.E.2d 263, 269 (2006) (“an insurance policy should indemnify an insured for loss but not provide a windfall profit”); *Dombrosky v. Farmers Ins. Co. of Washington*, 928 P.2d 1127, 1136 n.4 (Wash. App. 1996) (“[u]nder the indemnity principle of insurance, an insured receives only that amount that will indemnify actual loss, not an additional windfall above this amount”); 12 John A. Appleman & Jean Appleman, *Insurance Law & Practice*, § 7001, at 11 (1983 ed.) (an insurance policy “cannot be made the subject of profit by the insured, and [the insured] may only recover such loss as [the insured] has actually sustained”).¹

Forcing State Farm and other insurers to make cash payments for the hypothetical cost of windshield replacements to insureds who chose not to replace their windshields violates the principle of indemnity by providing a windfall for an “expense” that was not incurred. This harms insureds and insurers alike by distorting the risk/premium calculus used to determine the price of insurance. As the former Ohio Superintendent of Insurance, J. Lee Covington II, stated in his Affidavit and Expert Report, the Ohio Department of Insurance has historically regulated the insurance marketplace with the goal of increasing efficiency and lowering premiums for

¹ See also *E.R. Squibb & Sons, Inc. v. Lloyd’s & Cos.*, 241 F.3d 154, 184-85 (2d Cir. 2001) (the principle of indemnity precludes windfall recoveries; insurance is “not a profit center”); *Berkshire Mut. Ins. Co. v. Moffett*, 378 F.2d 1007, 1011 (5th Cir. 1967) (“the purpose of the insurance contract is to indemnify the owner against loss, that is, to place him in the same position in which he would have been if no [loss] had occurred”); *Star Freight, Inc. v. Sheffield*, 587 So. 2d 946, 955 (Ala. 1991) (the “principle of indemnity” provides that an “insurer’s obligation” [is] to make the insured whole, but not more than whole”) (citations and quotations omitted); *Broussard v. State Farm Fire & Cas. Co.*, 2007 WL 2264535, at *5 (E.D. La. Aug. 2, 2007) (noting “[t]he well-established propositions that insurance contracts are contracts of indemnity and that an insured cannot recover an amount greater than her loss”).

policyholders. (Covington Report, *supra*, at 4.) It “is widely known” by insurance regulators that “windshield repairs benefit consumers by helping to lower repair costs and keeping auto insurance premiums lower than they would be without these provisions. Cost savings achieved through windshield repair . . . [result in insurers] lowering premiums or reducing increases in premiums.” (Id.) This is particularly so for State Farm and other mutual insurance companies, which are in essence owned by the policyholders, who receive dividends based on their financial performance. (Id., at 14.).

Here, the Court of Appeals affirmed class certification based on the purported existence of a “cash replacement option” that would undermine principles of indemnity and convert an insurance policy into a winning lottery ticket for any insured who suffers minor glass damage, while requiring other policyholders to bear the cost of that windfall payment. There is no language in the State Farm insurance policy that obligates State Farm to pay the cash replacement cost of a windshield to an insured, regardless of whether or not the windshield was replaced. This is a matter of contract construction and presents a pure question of law. If a “cash replacement option” is not provided by the terms of the insurance policies, then the common issues identified by plaintiff do not exist and class certification is improper.

The Court of Appeals nevertheless declined to rule on this legal question before it certified the class. It acknowledged that a “cash payment option...may be discretionary to be decided exclusively by State Farm” under the terms of the policy, but it decided that “none of those issues need be decided at this time because class certification is not akin to a motion for summary judgment.” 2011-Ohio-6621, at ¶¶ 23-24. However, the Court of Appeals then relied upon the purported “cash payment option” to find that plaintiff’s class meets class certification requirements.

Courts cannot assume the truth of a plaintiff's allegations for class certification purposes. The United States Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011), that "Rule 23 does not set forth a mere pleadings standard." 131 S.Ct. at 2551. Instead,

[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. ... "[A]ctual, not presumed, conformance with Rule 23(a) remains ... indispensable."

131 S.Ct. at 2551 (original emphasis), quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 161 (1982).

The *Dukes* Court stressed that a class cannot be certified unless the court finds "after a rigorous analysis" that all prerequisites of class certification have been met and, "[f]requently, that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Supra*, 131 S.Ct. at 2551, quoting *Falcon*, 457 U.S. at 160-61. "Nor is there anything unusual about that consequence: the necessity of touching aspects of the merits in order to resolve preliminary matters... is a familiar feature of litigation." 131 S.Ct. at 2552.

The issue here is not whether plaintiff has proven the elements of his substantive claims. The purpose of class certification proceedings is to determine whether plaintiff has proven by a preponderance of the evidence that he meets the requirements of Civil Rule 23. Courts must resolve factual and legal disputes that are relevant to plaintiff's burden of proof on class certification, even if that analysis overlaps with merits issues. *Dukes*, *supra*, 131 S.Ct. at 2552; *In re Rail Freight Surcharge Antitrust Litig.*, MDL No. 1869, 2012 U.S. Dist. Lexis 97178 (D.D.C., 2012). If the terms of the State Farm insurance policies do not give policyholders a

“cash payment option,” the legal predicate for class certification evaporates. The Court of Appeals erred by refusing to resolve this purely legal question of contract interpretation before it granted class certification.

A non-rigorous class certification ruling imposes tremendous burdens on defendants, courts, and society. This is a particular problem in the highly-regulated insurance industry because enormous expenses and extortionate settlements of class actions cause market inefficiencies that can lead to higher premiums for policyholders. Ironically, this adversely affects the absent class members in this case whose interests are supposedly represented by plaintiff.

The decision below is also unfairly prejudicial to State Farm. Because the class members’ claims are highly individualized, imposition of liability on a class-wide basis allows unnamed class members to recover damages even if they would have chosen to repair their windshields in any event, for the reasons described above, and thus have no legitimate claims. See *Sprague v. GMC*, 133 F.3d 388, 399 (6th Cir. 1998) (reversing a class certification that was ordered “without any necessary connection to the merits of each individual claim. Rule 23 does not permit that result”); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 220 (2d Cir. 2008) (“Rule 23 is not a one-way ratchet, empowering a judge to conform law to the proof”); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344-45 (4th Cir. 1998) (same).

The Court of Appeals’ ruling raises constitutional concerns by potentially imposing liability and damages with regard to individual class members who have no legal claims. See *Estate of Mikulski v. Centerior Energy Co.*, 8th Dist. No. 94536, 2010-Ohio-6167, at ¶ 5 (class certification is improper when injury cannot be proven on class-wide basis); *Sikes v. Teleline*,

Inc., 281 F.3d 1350, 1365 (11th Cir. 2002), certiorari denied, 537 U.S. 884 (2002) (courts have no authority “to allow recovery by persons who have not been injured or to allow recovery for an injury greater than that caused by the offending conduct”).

There are many reasons that an individual class member would prefer windshield repair rather than replacement. The Court of Appeals erred when it upheld class certification on the basis of plaintiff’s unproven factual and legal assertions, and its ruling should be reversed.

Proposition of Law No. 2:

In ruling on class certification, courts may and should examine the reliability and admissibility of expert testimony that is relevant to Civil Rule 23 requirements.

Plaintiff also argued that there are sufficient common issues to meet Civil Rule 23 requirements based on his experts’ opinion that a cracked or chipped windshield can never be repaired properly and must always be replaced. The Court of Appeals agreed that this warranted class certification:

In the case of claims submitted [to State Farm] before 1997, [plaintiff] argues that he only needs to show that State Farm had an obligation to restore the claimant’s vehicle to preloss condition, and he purports to offer expert testimony to show that a windshield can never be repaired to restore it to preloss condition...[T]he testimony and findings of [plaintiff’s] experts provides a means of resolving a significant question of breach of contract without the need to examine individual issues.

2011-Ohio-6621, at ¶ 33.

The trial court never ruled on State Farm’s *Daubert* motion, which challenged the reliability and admissibility of the experts’ opinions, even though they were central to its class certification ruling. This was improper. Plaintiff offered this evidence to carry his burden of proving that the class certification requirements were satisfied, and the lower courts could not simply assume that it is reliable and admissible.

The United States Supreme Court addressed this issue in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2553-54 (2011), where the plaintiff's sole evidence of defendant's alleged gender discrimination consisted of an expert opinion that Walmart's "corporate culture" made it "vulnerable" to gender bias, and the lower courts had relied upon that expert testimony to find that class certification requirements were satisfied. The Court strongly suggested that this was improper in the absence of a *Daubert* hearing:

The parties dispute whether [the expert] testimony even met the standards for the admission of expert testimony under Federal Rule of Evidence 702 and our *Daubert* case, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class action proceedings. 222 F.R.D. at 191. We doubt that is so, but even if properly considered [the expert] testimony does nothing to advance plaintiffs case [for class certification].

131 S.Ct. at 2553-54 (footnote omitted; emphasis added). Other courts have followed *Dukes* and have affirmatively required that expert opinions must, at a minimum, meet *Daubert* standards in order to be considered as part of plaintiff's proof regarding class certification requirements. See, e.g., *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982-83 (9th Cir. 2011).

Class certification is too important, and the resulting costs too high for insurers and policyholders, for courts to simply accept a plaintiff's word that his expert's opinion is reliable for class certification purposes. "Rule 23 does not set forth a mere pleadings standard," and "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Dukes*, supra, 131 S.Ct. at 2551.

There is no conceivable reason that courts should refrain from ruling on these types of issues and simply assume the truth of expert opinions offered in support of a class certification motion. This Court should reverse the ruling below and clarify for Ohio courts – as the *Dukes*

Court did for federal courts – that a party requesting class certification has the burden of affirmatively proving that all Rule 23 requirements are satisfied, and that this requires an evaluation of the factual and legal issues pertinent to class certification, including the admissibility of expert evidence, even if they overlap with merits issues.

Proposition of Law No. 3:

A class definition may not condition class membership on disputed, individual elements of liability.

When it certified plaintiff’s claims as a class action, the trial court adopted the following definition of the class:

All persons and business entities covered under an Ohio motor vehicle insurance policy issued by [State Farm] who made a “Glass Only” physical damage comprehensive coverage claim on or after January 1, 1991, for cracked, chipped or damaged windshields and received a chemical filler or patch repair, or payment thereof, instead of a higher amount for actual cash value or replacement cost of the windshield. The lesser of the amount of the actual cash value or the replacement cost of the windshield for each claim must exceed the insured’s applicable deductible.

2011-Ohio-6621, at ¶ 8. It also certified two subclasses, consisting of class members whose claims were administered by Lynx, and class members whose claims were administered by State Farm representatives. *Id.*, at ¶ 9.

The Court of Appeals observed that nearly 1,000 of the approximately 100,000 class members had been dissatisfied with their windshield repair, and State Farm had then replaced their windshields. *Id.*, at ¶ 35. “These individuals are included in the class under the current definition but would have no damages similar to the claims of the class because their windshields were replaced.” *Id.* The Court of Appeals directed that the class definition be amended to exclude these claimants. *Id.*

However, the Court of Appeals did not address the most glaring defect in the class definition: it does not distinguish between policyholders who have a potential cause of action against State Farm and policyholders who indisputably do not. According to plaintiff, every one of the 100,000 class members who reported glass damage were somehow tricked by State Farm into having their windshields repaired when they otherwise would have chosen to have their windshields replaced.

However, the class as defined includes all policyholders who reported glass damage, including those who preferred to repair their windshields, rather than replace them, regardless of anything State Farm did or said. Policyholders might choose windshield repairs because: (1) they could not afford to pay the policy deductible, which is generally hundreds of dollars, (2) they did not want to lose the use of their vehicle while it was at the shop for windshield replacement; (3) they did not want to break the factory seal around the windshield and risk leakage; (4) they did not want to incur an expensive loss in their claims history; and/or (5) the crack or chip was extremely small and did not affect driver visibility. As J. Lee Covington II, the former Ohio Superintendent of Insurance, explained:

Windshield repairs are also quick and convenient and can avoid the problems that are sometimes associated with replacing a windshield . . . In the past, I chose to have my windshield repaired under my auto insurance policy because that option met my particular needs at the time. Like me, other consumers may choose to have their windshields repaired for their own particular reasons, while others may choose replacement.

(Covington Report, *supra*, at 5.)

The repair process is indisputably less time-consuming and burdensome for policyholders than windshield replacement. It is also a more rational economic choice for many insureds. For example, some insureds were able to take advantage of a waiver of their deductible by choosing to repair rather than replace their windshields. See Affidavit of Wendy

Rogers (attached as Exhibit 2 to State Farm’s Mem. in Opp. to Plaintiff’s Motion for Class Certification) (discussing the impact of a deductible waiver on the number of consumers who choose the repair option). Choosing repair rather than replacement also avoids a more expensive loss on the insured’s claim history that might result in an increase of premiums. See Covington Report, *supra*, at 4. At least one state – recognizing that repair is a better economic choice than replacement in these circumstances and is in the best interests of insureds collectively – mandates repair rather than replacement. (*Id.*, at 4, citing Mass. Code Regs. 133.04(3).)

Insureds also choose to repair minor glass damage instead of replacing a windshield because they believe that windshield replacement can potentially lead to other problems, such as leaks, that will require insureds to expend additional time and effort. See Covington Report, *supra*, at 11 (noting that in many circumstances repair is more advantageous than replacement, and that “[s]ome vehicle owners express concern about the removal and replacement of the factory-installed seal of the original windshield that must be done during replacement, which, if not properly done, may result in air and water leaks”). Many industry experts have recognized that windshield repair is a safe and acceptable alternative that is arguably superior to windshield replacement. See Expert Report of Dennis McGarry, at 7 (attached as Exhibit 11 to State Farm’s Mem. in Opp. to Class Certification); Expert Report of Paul Syfko, at 7-8, Exhibit 12, *supra*; and Covington Report, *supra*, at 11-12.

Policyholders who preferred repair rather than replacement, for any of these reasons, are members of the certified class in this case, yet they have no possible claims against State Farm. Plaintiff alleges that every policyholder was automatically entitled to exercise a “cash payment option” for the cost of replacing a windshield, even when the policyholder chose to have the

windshield repaired rather than replaced. It is apparent from the face of the policy that policyholders who do not replace their windshield are not entitled to receive the (hypothetical) cost of replacing the windshield.

More importantly, the lower courts should have ruled on this pure question of law before they decided to certify the class. Plaintiff alleges that he was tricked into choosing windshield repair, even though he remembers nothing about the conversations he had with State Farm or Lynx. If he prevails on his claim at a class-wide trial, State Farm will be deemed liable for damages to all class members who reported glass damage, including those who would have chosen windshield repair in any event and who thus have no possible claims. There is no way to sort them out at a class-wide trial without hearing individualized evidence about the reasons why every class member chose repairs rather than replacement.

Accordingly, the class definition improperly bases class membership on criteria that are not determinative of their potential claims against State Farm, and the ruling below should be reversed.

Proposition of Law No. 4:

In ruling on class certification, courts may not rely on allegations that hypothetical “computer algorithms” can identify class members.

Class certification is also improper in this case because plaintiff failed to prove by a preponderance of the evidence that the class definition “permit[s] identification [of class members] within a reasonable effort.” *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91, 96, 521 N.E.2d 1091 (1988). This requirement “will not be deemed satisfied unless the description of [the class] is sufficiently definite that it is administratively feasible for the court to determine whether a particular individual is a member.” *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d

67, 72, 1999-Ohio-365, 694 N.E.2d 442, quoting 7A Charles Alan Wright, *Federal Practice and Procedure* (2d Ed. 1986), at 120-21. “The test is whether the means is specified at the time of certification to determine whether a particular individual is a member of the class.” *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho*, 52 Ohio St.3d 56, 63, 556 N.E.2d 157 (1990).

Plaintiff did not carry his burden of proving that his class meets this requirement. The class does not include all State Farm automobile insurance policyholders who made a “glass-only” claim during the past 21 years and requested repair, rather than replacement, of the windshield; it includes only those policyholders whose applicable deductible was less than the replacement cost of the damaged windshield for their specific vehicles. 2011-Ohio-6621, at ¶ 8. Thus, membership in the class depends upon proof of facts that differ for each individual class member: the year, make, and model of the class member’s vehicle; the cost of the various replacement windshields that were available for that vehicle on the date the claim arose; and the applicable deductible specified in the class member’s insurance policy.

The Court of Appeals upheld class certification on the basis of plaintiff’s allegation that “a mathematical calculation to determine whether a given windshield replacement is more expensive than a given deductible [i.e., whether a policyholder meets the class definition] can be accomplished... in a straight-forward, mechanical manner.” (2011 – Ohio – 6621, at ¶ 34.) The Court concluded, based on this allegation, that “computerized algorithms and State Farm’s databases” can be used to determine class membership. (*Id.*, at ¶ 36.) It simply assumed that the necessary information exists, and then further assumed, without explanation or citation to any evidence of record, that class membership can be ascertained from that information.

The dissenting member of the Court of Appeals panel disagreed:

[T]he court erred by concluding that the class it defined was manageable.... The court's confidence in its ability to wade through the difficulties posed by variable issues relating to damages assessments based solely on the rather nebulous idea that computers can sort it out is, I believe, misplaced.... The difficulties likely to be encountered in the management of the class as certified by the court are so numerous that I cannot confidently conclude that the case be fairly tried.

Id., at ¶¶ 63,69-70.

Class membership “must be ascertainable without a prolonged and individualized analytical structure.” *Gibbs Properties Corp. v. Cigna Corp.*, 196 F.R.D. 430, 442 (M.D. Fla. 2000). See also *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001) (a party's “assurance” that “an expert can devise a formula for calculating injury and damages” is not sufficient to meet class certification requirements). State Farm argued that it has neither the data nor the computer algorithms necessary to mechanically determine whether a policyholder is a member of the class. Even if they existed, determining whether the cost of a replacement windshield for each policyholder's vehicle exceeded that policyholder's deductible would require a painstaking individual review of the make, model, year, and date of repair for approximately 100,000 vehicles over a 20-year time period, and the costs of each of the multiple replacement windshields available for each of those vehicles.

Class certification was improper in this case in the absence of proof that State Farm has a database that contains the necessary information and that it is possible to develop computer algorithms to ascertain class membership. The ruling below should accordingly be reversed.

Proposition of Law No. 5:

Where class members' claims are based upon different communications with different persons, and only some of these communications were allegedly scripted, individual issues predominate over common issues.

The trial court found that issues common to plaintiff's class predominate over individual issues and that the class should therefore be certified pursuant to Civil Rule 23(B)(3). Two members of the Court of Appeals panel agreed with that ruling, and one member dissented. The majority relied upon plaintiff's allegation that State Farm had failed to tell policyholders that they were entitled to a cash payment for the value of the glass, less the applicable deductible, instead of having the glass repaired or replaced, and concluded that this is "a significant class-wide issue." 2011-Ohio-6621, at ¶ 21. The dissent pointed out that this "was merely a threshold question" that did not resolve or advance the class claims. *Id.*, at ¶¶ 60-62.

As discussed supra, the Court of Appeals majority recognized that the language in the insurance policy gives State Farm the option to "settle a loss with [a claimant] in any of the following ways . . . 'pay the actual cash value' of the property at the time of loss, 'pay to repair' the damaged property or part, or 'pay to replace' the property or part." *Id.*, at ¶ 23. In the absence of any "cash replacement option" in the policy, plaintiff's alleged "common issue" disappears and cannot justify class certification under Civil Rule 23(B)(3). However, the Court of Appeals improperly declined to resolve that legal question, as discussed supra.

The Court of Appeals further erred when it found that, under plaintiff's theory of the case, "the use of a common script" by Lynx employees during calls from policyholders "constituted a common issue where liability could be determined based on whether this conversation improperly prompted claimants to elect repair without having their options properly explained to them." *Id.*, at ¶¶ 26, 30. However, the Court of Appeals acknowledged

that “Lynx was not involved in claims filed before August, 1997, and its script cannot be used for claims made before this period.” *Id.*, at ¶ 32. Thus, the “common issue” on which the Rule 23(B)(3) certification was based is not common to the claims made during almost one-third of the class time period, and is also not common to the claims made after 1997 that were administered by State Farm rather than Lynx. The Court never explained how that uncommon “common issue” predominates as to all class members’ claims.

For the tens of thousands of members of plaintiff’s class who made a claim prior to August, 1997, or who made a claim after that time that was administered by State Farm, there is no common legal or factual basis for determining whether the claimant was “steered” to choose repair rather than replacement or the alleged “cash payment option.” Each of these class members must individually prove the content of the conversations they had with State Farm representatives up to two decades ago.

Moreover, there is no predominant common issue even as to the members of the subclass whose claims were administered by Lynx after 1997. The alleged “steering” cannot be inferred from the fact that some claimants chose to repair their windshields; the record below establishes many legitimate reasons that policyholders may prefer windshield repairs. In addition, different class members had conversations about repairing or replacing their windshields with different State Farm agents and glass shop technicians, none of which were scripted. No evidence was presented that the conversations between class members and State Farm were scripted or standardized at any time, and many class members had other relevant unscripted conversations with unrelated glass-shop employees about whether their windshields should be repaired or replaced.

In *Dukes*, the Court emphasized that an issue is not “common” issue for purposes of class certification unless it is “of such a nature that it is capable of class wide 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.” 131 S.Ct. at 2550. Class members may share any number of “common issues” – e.g., they may all be State Farm policyholders who chose to have damaged windshields repaired rather than replaced – but those issues do not predominate for purposes of Rule 23(B)(3) unless plaintiff establishes that their resolution will be dispositive of disputed elements of each of the individual class members’ claims.

In this case, plaintiff alleged that State Farm directed Lynx to use a “common script” to persuade policyholders to choose windshield repairs rather than windshield replacement. But the Court of Appeals acknowledged that no such script existed during the first seven years of the class period. 2011-Ohio-6621, at ¶32. Moreover, policyholders also had unscripted conversations in later years about windshield repair and replacement with various State Farm agents and with various glass-shop workers. The contents of each conversation, during each time period, depended upon the individual circumstances of each policyholder. The alleged use of a Lynx “script” with some policyholders during some of the conversations during part of the class period does not present a common issue whose resolution would help determine the validity of all class members’ claims.

Here, every class member in each subclass must prove from the totality of his or her own personal conversations with different people at different times that they were “steered” into choosing windshield repairs. This will require evidence at trial of every relevant conversation each individual class member had about repairing or replacing a windshield. Liability cannot be

established on a common class basis, common issues do not predominate over individual issues, and certification under Civil Rule 23(B)(3) was improper.

Proposition of Law No. 6:

It is an abuse of discretion to certify a subclass in the absence of a class representative who is a member of the subclass.

State Farm correctly points out that certification of the subclass of policyholders whose claims were administered by Lynx was improper because, inter alia, there is no class representative who is a member of that subclass. See, e.g., *Stammco v. United Telephone Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, at ¶ 6 (“the named representatives must be members of the class”). A subclass must independently satisfy all class certification requirements. See Civil Rule 23(C)(4)(b). This requirement ensures that the representative who is prosecuting claims on behalf of other class members has the same interests as those class members.

Plaintiff’s windshield claim was administered by Lynx in 2003, and he is not a member of – and cannot represent – the subclass of policyholders whose windshield claims were not administered by Lynx. Once again, the ruling below improperly loosens the requirements of Civil Rule 23, and it should be reversed by this Court.

Proposition of Law No. 7:

Rule 23(B)(2) does not authorize class certification when the named plaintiff lacks standing to seek declaratory or injunctive relief.

The Court of Appeals also held that plaintiff’s class was properly certified under Civil Rule 23(B)(2) because he requests declaratory and injunctive relief with respect to the same conduct by State Farm for which he requests monetary damages – paying to repair a windshield rather than replacing it. See 2011-Ohio-6621, at ¶ 43 (agreeing with the trial court that plaintiff claims “that the same practices are still ongoing” and “[d]eclaratory and injunctive relief are

thus potentially available remedies... in the event that he prevails upon the merits”). The Court of Appeals accordingly held that “[t]he class is maintainable under both Civil Rule 23(B)(2) and (B)(3).” 2011-Ohio-6621, at ¶ 50.

This Court should also reverse the certification of the class under Civil Rule 23(B)(2). The Court of Appeals recognized that “[c]ertification under Civil Rule 23(B)(2) depends upon what type of relief is primarily sought, so where the injunctive relief is merely incidental to the primary claim for monetary damages, Civil Rule 23(B)(2) certification is inappropriate.” 2011-Ohio-6621, at ¶ 46, quoting *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, at ¶ 17. It also recognized that the United States Supreme Court clarified this requirement last year in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2557 (2011), and held that “claims for individualized relief (like the backpay at issue here) do not satisfy [Civil Rule 23(B)(2)],” which “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.” The *Dukes* Court explained:

Permitting the combination of individualized [damages] and classwide [injunctive] relief in a (b)(2) class is ... inconsistent with the structure of Rule 23(b).... In the context of a class action predominantly for money damages, we have held that absence of notice and opt-out [rights for class members] violates due process.... We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request – even a “predominating request” – for an injunction.

131 S.Ct. at 2558-59.

It is undisputed that the primary relief sought by plaintiff’s class consists of individual damage awards, in varying amounts, for each individual class member. The Court of Appeals nevertheless felt that the ruling in *Dukes*, supra, is inapplicable because it “did not address the specific question here – whether a class should be certified under both Civil Rule 23(B)(2) and

(B)(3).” 2011-Ohio-6621, at ¶ 48. However, nothing in Rule 23 or in the case law applying it suggests that the requirements of Rule 23(B)(2) are somehow reduced or eliminated if the plaintiff also seeks certification under Rule 23(B)(3). On the contrary, the courts have consistently held that a trial court’s discretion to certify a class “is bounded by and must be exercised within the framework of Civil Rule 23;” the court “is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civil Rule 23 have been satisfied.” *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 1998-Ohio-365, ¶ 17. The Court of Appeals did not explain why it believed plaintiffs should be allowed to nullify the protections of Rule 23(B)(3) by simply joining a request for (B)(2) certification with a request for (B)(3) certification.

The Court of Appeals believed that this Court created an exception to the “rigorous analysis” requirement when it stated in *Hamilton*, supra, that “[i]f the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (B)(2).” 2011-Ohio-6621, at ¶ 49, quoting *Hamilton*, supra. Significantly, the two subclasses in *Hamilton* that were certified under Rule 23(B)(2) were not the same subclasses that were certified under Rule 23(B)(3); the former subclasses consisted of class members whose loans from the defendants had been paid off, while the latter subclasses included only class members whose loans from the defendant were still outstanding. See 82 Ohio St.3d at 72, 1998-Ohio-365.

In the present case, all class members – including those who presently have State Farm policies and those who no longer have State Farm policies – are included in the same class, and that class was certified under both Civil Rule 23(B)(2) and Civil Rule 23(B)(3). See *Dukes*, supra, 131 S.Ct. at 2560 (holding that a class could not be certified under federal Rule 23(b)(2)

where it included class members who no longer worked for the defendant and “have no claim for injunctive or declaratory relief at all” because they are no longer subject of the defendant’s allegedly unlawful practices). Here, the lower courts approved certification of a Rule 23(B)(2) class even though it includes many class members who are no longer insured by State Farm and thus have no possible claim for declaratory or injunctive relief regarding State Farm’s allegedly unlawful practices. This was error.

Moreover, the sole class representative – plaintiff Michael Cullen – is no longer insured by State Farm and thus has no standing to seek declaratory or injunctive relief with respect to State Farm’s treatment of glass-only insurance claims. “[T]he named representatives must be members of the class.” *Hamilton*, supra. See also *Warner v. Waste Mgt. Inc.*, 36 Ohio St.3d 91, 97 (1988) (holding that the trial court must determine “whether the representatives have an action for such injunctive relief before such claims may be pursued” on a class basis).

In short, the lower courts’ certification of plaintiff’s class under Civil Rule 23(B)(2) was improper because: (1) the class includes members who no longer have State Farm automobile insurance and thus have no possible claims for injunctive and declaratory relief; (2) all members of the class primarily seek individualized damage awards; and (3) the named class representative is not presently insured by State Farm and thus lacks standing to pursue injunctive claims in the absence of any potential risk of prospective injury from State Farm’s practices. This Court should adopt the reasoning of the United States Supreme Court in *Dukes*, supra, and reverse the ruling below.

CONCLUSION

For the reasons set forth above, amici curiae NAMIC and OII urge this Court to reverse the class certification order of the Court of Appeals and remand this case for further non-class proceedings.

Respectfully submitted,



Thomas E. Szykowny (0014603)
Michael Thomas (0000947)
VORYS, SATER, SEYMOUR AND
PEASE LLP
52 E. Gay Street
PO Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-5671
Fax: (614) 719-4990
teszykowny@vorys.com

*Counsel for Amici Curiae National
Association of Mutual Insurance
Companies and Ohio Insurance Institute*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Memorandum in Support of Jurisdiction of National Association of Mutual Insurance Companies, and Property Casualty Insurance Association of America* was served by U.S. mail this 20th day of August, 2012, on the following:

W. Craig Bashein (0034591)
Counsel of Record
John P. Hurst (0010569)
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113-2216
Tel: (216) 771-3239
Fax: (216) 781-5876

and

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

Counsel for Appellee Michael E. Cullen

Victor E. Schwartz (0009240)
SHOOK, HARDYS & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
Fax: (202) 783-4211
vschwartz@shb.com

Counsel for Amici Curiae Ohio Chamber of Commerce, Ohio Alliance for Civil Justice, Chamber of Commerce of the United States of America, and American Tort Reform Association

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, OH 43215-4260
Tel: (614) 228-1541
Fax: (614) 462-2616

and

Michael K. Farrell (0040941)
BAKER & HOSTETLER LLP
3200 PNC Center
1900 East Ninth Street
Cleveland, OH 44114-3485
Tel: (216) 621-0200
Fax: (216) 696-0740

Counsel for Appellant State Farm Mutual Automobile Insurance Company

Elizabeth B. Wright (0018456)
Brian A. Troyer (0059671)
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114-1291
Tel: (216) 566-5716
Fax: (216) 566-8500
brian.troyer@thompsonhine.com

and

Stephanie M. Chmiel (0087555)
THOMPSON HINE LLP
41 South High Street
Columbus, OH 43215-6101
Tel: (614) 469-3247
Fax: (614) 469-3361
Stephanie.chmiel@thompsonhine.com

*Counsel for Amici Curiae Washington Legal
Foundation and Ohio Chemistry Technology
Council*

Kurtis A. Tunnell (0038569)
Anne Marie Sferra (0030855)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215
Tel: (614) 227-2300
Fax: (614) 227-2390
ktunnell@bricker.com

*Of Counsel for Amicus Curiae Ohio Alliance
for Civil Justice*



Thomas E. Szykowny (0014603)