

IN THE SUPREME COURT OF OHIO

Michael E. Cullen,

Plaintiff-Appellee,

v.

State Farm Mutual Automobile
Insurance Company,

Defendant-Appellant.

:
:
: Case No. 12-0535
:
:
: ON APPEAL FROM THE CUYAHOGA
: COUNTY COURT OF APPEALS, EIGHTH
: APPELLATE DISTRICT
:
:
: Court of Appeals Case No. 10-095925
:
:
:

MEMORANDUM OF AMICI CURIAE NATIONWIDE PROPERTY AND CASUALTY
INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE INSURANCE
COMPANY OF AMERICA, NATIONWIDE ASSURANCE COMPANY, AND
NATIONWIDE GENERAL INSURANCE COMPANY IN SUPPORT OF APPELLANT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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I. STATEMENT OF THE FACTS.

A. Introduction.

Amici Curiae Nationwide Property and Casualty Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Mutual Insurance Company, Nationwide Insurance Company of America, Nationwide Assurance Company, and Nationwide General Insurance Company (“the Nationwide amici”) file this brief to urge this Court to reverse the Eighth District Court of Appeals’ decision in *Cullen v. State Farm*.¹

In doing so, this Court should take the opportunity to revisit its prior stated legal standard for class action certification under Civil Rule 23, and articulate—in the wake of the United States Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)—what role the trial court should play and what standards it should apply in deciding whether to grant or deny a motion for class certification. While this Court has previously and appropriately identified seven prerequisites for class certification under Civil Rule 23(A), the lower courts of Ohio continue to reach varying and inconsistent results in applying those factors. The recurring questions that arise in the lower courts include, *inter alia*:

- What it means for a class to be identifiable and ascertainable, what evidence is required to demonstrate that this threshold prerequisite to class certification is met, and at what point this inquiry becomes so factually intensive, individualized, and convoluted that the proposed class becomes an improper fail-safe class—*i.e.*, one in which there has to be an individualized pre-certification “merits” determination for

¹ Nationwide was formed in Ohio in 1925 as the Ohio Farm Bureau Federation, offering mutual automobile insurance to Ohio policyholders. Since that time, while still based in Columbus, Ohio, Nationwide has grown to become the sixth largest auto insurer in the United States. It employs some 13,000-14,000 Ohioans, and thousands more nationally, with many thousands of policyholders in Ohio and beyond.

each proposed absent class member in order to even know whether that person is part of the class or not;

- What it means for the named plaintiff to be a member of the class he or she purports to represent, what evidence is required to demonstrate that this threshold prerequisite to class certification is met, and how this requirement implicates important issues of standing, adequacy, typicality, and commonality;
- To what extent an examination of the “merits” can or should inform a class certification decision;
- What constitutes a “rigorous” analysis of the class certification factors, as required under this Court’s existing precedent, and in the wake of *Wal-Mart Stores, Inc.*; and
- Relatedly, to what extent the lower courts should probe the pleadings in order to ensure that all of the class certifications factors are met.

These important legal questions arise time and time again, and are the subject of intense debate among the parties in virtually every Ohio Rule of Civil Procedure 23 class action. A party, like plaintiff Mr. Cullen here, can pluck from Ohio’s class action cases isolated statements that seemingly support a variety of improper propositions, including that (i) a plaintiff can merely rely on complaint allegations to support a motion for class certification, and (ii) the lower courts should resolve all doubts in favor of certification, all without considering the “merits” of the plaintiff’s contentions or the evidence supporting class certification. Respectfully, however, the Nationwide amici submit that this Court has never held that such a superficial examination of the pleadings, coupled with a Civil Rule 12(B)(6)-type presumption in favor of the plaintiff, is the appropriate standard for an issue as important as class certification. This Court always has

required more, and this case represents an opportunity to define precisely how much more is required under Civil Rule 23.

Ohio companies, such as the Nationwide amici, and others doing business in Ohio, currently face shifting sands when sued in class action cases under Civil Rule 23. All of the Ohio courts purport to apply this Court's class action precedent, but on a court-by-court, case-by-case basis, the class action parties cannot predict whether (and to what extent) the trial court and intermediate court of appeals will follow this Court's prior "rigorous analysis" directive, and what evidence will be considered in the process. With the U.S. Supreme Court having provided its *Wal-Mart Stores, Inc. v. Dukes* guidance under the Federal Rule equivalent to Ohio's Civil Rule 23, this Court should use this opportunity to eliminate the lingering confusion in the lower courts as to what kind of examination is required by the trial court when deciding a Civil Rule 23 motion for class certification.

B. The Facts Of Cullen v. State Farm In The Trial Court.

The Nationwide amici incorporate by reference herein the statement of facts contained in the appellant's brief of State Farm Mutual Automobile Insurance Company ("State Farm"). Briefly summarized, the salient facts are as follows.

Michael Cullen was a State Farm policyholder whose windshield was damaged by a rock in March 2003. He contends that under his auto insurance policy with State Farm, State Farm could have and should have written him a check for the full replacement value of his windshield, less the amount of his deductible. Instead, Mr. Cullen claims that he was "steered" by a State Farm and/or third party administrator towards getting a less expensive repair to his windshield performed. Mr. Cullen paid nothing for the repair. He does not allege that the repair that was performed on his windshield caused the windshield to fail in any way. He does not allege that he

was required to later obtain a replacement windshield as a result of either the initial rock strike, or the subsequent repair. He does not allege that he ever complained about the quality of his windshield repair to State Farm prior to filing the lawsuit, or that he ever requested a replacement windshield from State Farm prior to filing the lawsuit. Instead, he appears to allege that he was deprived of the opportunity to pocket the difference between what a replacement windshield would have cost, and what a repair/replacement would have cost if he had arranged one on his own. Mr. Cullen's complaint does not allege what kind of vehicle he was driving in March 2003; what a replacement windshield would have cost for that unspecified vehicle in March 2003; what Mr. Cullen's windshield was allegedly worth in its pre-loss condition; what financial injury Mr. Cullen allegedly suffered; what Mr. Cullen's deductible was; or what, if anything, he would have done differently with respect to his windshield had he known that which he accuses State Farm of having concealed.

Mr. Cullen filed a lawsuit in Cuyahoga County Common Pleas Court on February 18, 2005. In his complaint, he asserted class action claims. He alleged he should be a class representative for a class of:

ALL OHIO RESIDENTS WHO SUBMITTED CLAIMS TO STATE FARM FOR CRACKED, CHIPPED, OR DAMAGED WINDSHIELDS UNDER THEIR MOTOR VEHICLE PHYSICAL DAMAGE COVERAGE WHICH WERE APPROVED BY THE INSURER BUT WHO ONLY RECEIVED A CHEMICAL FILLER OR PATCH INSTEAD OF PAYMENT SUFFICIENT TO COVER THE REPAIRS/REPLACEMENTS NECESSARY TO RESTORE THE WINDSHIELDS TO THEIR PRE-LOSS CONDITION.

Cullen Complaint ¶ 21.

The parties proceeded to brief and argue class certification. The parties also submitted proposed findings of fact and conclusions of law to the trial court after oral argument on class

certification issues. The trial court issued a decision certifying a class for what was effectively a 20-year period.

In its class certification decision, the trial court appeared to endorse the view that purported class members had been deprived of the opportunity to (1) get a check for the full replacement value of their windshields, and (2) then make their own arrangements to get inexpensive windshield repairs performed, so that they could (3) pocket the difference between their State Farm windshield replacement check and their inexpensive, self-arranged windshield repair. *See* Trial Court Class Cert. Decision at 4, ¶ 13 (“...In other words, a policyholder opting for payment of the replacement cost (instead of the repair) would on average receive a check for \$342.00. If they so desired, they could then arrange for the repairs themselves for substantially less and keep the difference.”). The trial court presumed that all absent class members over the last twenty years would have preferred a windshield replacement instead of a windshield repair, even though no record evidence was cited in support of that presumption.

The trial court acknowledged that this Court has set forth seven threshold requirements for any class action under Civil Rule 23(A), in addition to Civil Rule 23(B) requirements. As for the first class action requirement (an identifiable class), the trial court held that there was an identifiable class, because it believed “[t]he proposed classes in this case are easily identified through State Farm’s business records and databases.” Trial Court Class Cert. Decision at 9, ¶ 4. The trial court did not identify what specific business records could or would be used to identify putative class members, nor did it specify what databases it was referring to in reaching this conclusion. The most information the trial court provided as to what records or databases it might be referring to was contained in Finding of Fact No. 23, which stated that State Farm’s records were expected to show the names, addresses, and deductibles of absent class members.

The trial court did not explain—for any given class member—what the replacement cost of the particular windshield would have been at the specific time the windshield was damaged given the vehicle’s make, model, and year; how the pre-loss condition and actual cash value of any given windshield at the time it was damaged would be determined; what a self-arranged repair to the windshield would have cost at the time; or what the policyholder would have elected to do in terms of State Farm repair, self-arranged repair, or windshield replacement, in the event all of the options had been more fully presented (as plaintiff claims was required).

In similar conclusory fashion, the trial court also found that the remaining requirements of Civil Rule 23 were met. The trial court modified plaintiff’s proposed class definition slightly, however, in order to include the concept of a policyholder’s deductible. That is, the trial court recognized that plaintiff’s theory of “injury” to absent class members only works if the policyholder’s deductible was low enough in comparison to the price of a replacement windshield that there was something left to pocket. In the words of State Farm (in subsequent briefing), “[u]nder Plaintiff’s theory, each class member would have sustained actual injury only if the replacement cost for his windshield exceeded the amount of his deductible.” State Farm Eighth Dist. Reply Brief at 2. A policyholder with a \$500 deductible, for example, would not be entitled to any check if the replacement value of the windshield was \$500 or less—the deductible would swallow the entire replacement cost of the windshield, leaving no money (and no repair) for the policyholder who elected to refuse the State Farm repair. Only a policyholder with a windshield that was more expensive than the policyholder’s deductible could have a chance at prevailing under plaintiff’s theory of the case.

The trial court accounted for this possibility by building the deductible variable into the class definition. It certified this class:

All persons and business entities covered under an Ohio motor vehicle insurance policy issued by Defendant, State Farm Mutual Automobile Insurance Company, 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 amount of the actual cash value or the replacement cost of the windshield for each claim must exceed the insured’s applicable deductible.

Trial Court Class Cert. Decision at 8, ¶ 3 (emphasis added; subclasses omitted). The trial court did not explain where one would go to get the “lesser amount of the actual cash value or the replacement cost of the windshield” for each of the approximately 100,000 putative class members. Nor did the trial court identify any specific records that could be used to determine the replacement cost for each specific windshield encompassed in the certified class.

The trial court’s class certification decision was appealed by State Farm to the Eighth District Court of Appeals on an interlocutory basis.

C. The Eighth District Court Of Appeals Affirmed The Trial Court’s Class Certification Decision.

The Eighth District Court of Appeals, in a 2-1 decision, affirmed the trial court’s class certification decision. Prior to that decision issuing, plaintiff argued to the Eighth District:

- “A general presumption exists in favor of affirming a certification order,” Cullen Eighth Dist. Appellee’s Brief at 11;
- “[A]ll of the information needed to identify the class members and locate them is readily available in State Farm’s databases. All were, and many still are, State Farm policyholders who were required to submit their names, addresses, vehicle make, model, year, VIN number, and other personal information in order to obtain coverage.” *Id.* at 15;

- Pricing of plaintiff’s individual windshield—i.e., what a replacement windshield would have cost in 2003 for plaintiff’s 2001 Jetta--was performed by an autobody repair shop affiant using historical pricing guides; *id.* at 15-16;
- “[T]he Named Plaintiff’s claims are not only ‘typical’ of those of the proposed class—they are ‘identical.’” *Id.* at 19;
- “[N]o attempt has been made to contest the controlling authorities Plaintiff has been citing throughout these proceedings that squarely hold that the merits may not be considered during class certification proceedings.” *Id.* at 23 (citing cases, including *Ojalvo v. Bd. Of Trustees, Ohio State University*, 12 Ohio. St. 3d 230, 233, 466 N.E.2d 875 (1984)).

State Farm’s briefs pointed out the fallacies of plaintiff’s arguments, and in particular, noted that plaintiff had failed to explain—even for his own vehicle and own windshield—what one would look to to determine what the replacement value of that windshield was in March 2003, when a rock struck it. In fact, as State Farm pointed out, the record reflected some 11 different values for such a replacement windshield on plaintiff’s 2001 Jetta alone—some of which prices exceeded his deductible, and some of which did not.

The Eighth District Court of Appeals affirmed the lower court’s class certification decision, however. As for an identifiable class, the Eighth District Court of Appeals acknowledged that this is the threshold element necessary for any class action. *See* Eighth Dist. Decision at 6 (stating “the class must be identifiable and unambiguously defined”). While properly reciting this threshold criterion, the Eighth District did not begin its actual analysis of the *Cullen* case with a discussion of the “identifiable class” criterion, or a description of how the class would be identified here. Instead, the Eighth District jumped right into a discussion of

whether “predominance”—one of the Civil Rule 23(B)(3) factors—exists. As part of its predominance discussion, the Eighth District stated: “The trial court narrowed the class definition to only include damaged individuals, and difficulty in calculating damages should not stand as a reason to avoid class certification.” *Id.* at 11.

As part of this same discussion, and to further limit the class definition to only those persons who had suffered actual injury in its view, the Eighth District added yet another component to the class definition. It expressly excluded from the class those persons—of which there are approximately 990—who had received a State Farm windshield repair, and subsequently complained about its quality. Those 990 persons, the Court noted, were able to get their windshields fully replaced under State Farm’s windshield repair guarantee, and thus suffered no injury for purposes of the instant class. *See id.* at 13-14.²

In reaching its class certification decision, the Eighth District Court of Appeals gave a nod to a potential fatal flaw in plaintiff’s theory of the case. It noted that State Farm may be contractually entitled to make a choice and election as to whether it wants to repair, replace, or pay for a damaged windshield. *See id.* at 9 (noting the cash payment option promoted by plaintiff “may be discretionary to be decided exclusively by State Farm”). Nonetheless, the Eighth District deemed this essential question to be a “merits” determination that should not be considered at the class certification stage. *See id.* If a class member were entitled to an election of remedies under the State Farm policy (instead of State Farm having that choice, as the policy reads), the Eighth District’s decision offered no explanation as to how, in the context of a class

² While it is true that such persons did not suffer injury, the existence of such persons undercuts plaintiff’s theory of the case. Policyholders who were dissatisfied with their repairs had fulsome alternate remedies; persons who had no such dissatisfaction (*i.e.*, the members of this certified class) should not recover under a class action theory of recovery.

action, absent class members could be queried after the fact to determine what election they would have made back at the time their windshield was damaged.

Finally, without any express discussion of the “identifiable class” criterion, the Eighth District offered these conclusions about the availability of information to identify class members, in the context of its discussion of “manageability:”

Administration is facilitated by the careful records kept by State Farm and others and the ability to accurately calculate damages using computerized algorithms and State Farm’s databases of information (including the make and model of each claimant’s vehicle; the historic cost of windshield replacement, including labor, available in National Auto Glass Specification pricing guides; the percent difference from that cost as calculated through assigning various market designations to counties in Ohio, already done by State Farm; and the amount of individual deductibles at the time a claim was submitted).

Id. at 14. The decision did not cite any record evidence in support of its assertion that State Farm records will contain “historic cost of windshield replacement” for each absent class member’s vehicle. Nonetheless, the majority concluded: “State Farm’s records, in conjunction with available industry data, contain the necessary information to arrive at a reasonable estimation of damages for each putative class member and to determine class membership.” *Id.* at 15. State Farm denies that this is true.

II. LAW AND ARGUMENT.

Proposition of Law I: In Ruling On Class Certification, Courts May and Should Examine Merits Issues That Are Relevant To The Civ. R. 23 Requirements.

Proposition of Law III: A Class Definition May Not Condition Class Membership On Disputed, Individual Elements Of Liability.

Proposition of Law IV: Plaintiff's Assurance That Unspecified, Hypothetical Computer Algorithms Can Be Used To Identify Class Members Does Not Satisfy The Requirement That Class Members Can Be Identified With Reasonable Effort.

The Nationwide amici focus this submission on those class certification legal standard questions that, in their view, most commonly recur in Ohio. Because these questions are interrelated and in some ways overlapping, they will be discussed collectively.

A. This Court Properly Has Recognized That An Identifiable Class Is A Fundamental Prerequisite To Class Certification, But Needs To Clarify What This Standard Means As A Practical Matter.

In 1998, this Court issued the decision of *Hamilton v. Ohio Savings Bank*, 82 Ohio St. 3d 67, 694 N.E.2d 442 (1998). Citing the 1988 decision of *Warner v. Waste Mgmt., Inc.*, 36 Ohio St. 3d 91, 521 N.E.2d 1091 (1988), this Court wrote in *Hamilton*:

The following seven requirements must be satisfied before an action may be maintained under Civ. R. 23:

- (1) an identifiable class must exist and the class must be unambiguous;
- (2) the named representatives must be members of the class;
- (3) the class must be so numerous that joinder of all class members is impracticable;
- (4) there must be questions of law or fact common to the class;
- (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class;
- (6) the representative parties must fairly and adequately protect the interests of the class;
and
- (7) one of the three Civ. R. 23(B) requirements must be met.

Hamilton, 82 Ohio St. 3d at 71.

As to the threshold requirement of an identifiable class, this Court explained:

'The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.' Wright, Miller & Kane, *Federal Practice and Procedure*, Section 1760, at 120-121 (2 Ed. 1986). Thus, the class definition must be precise enough 'to permit identification with reasonable effort.' *Warner*, 36 Ohio St. 3d at 96, 521 N.E.2d 1091.

Id. at 71-72. *Hamilton* therefore imposes a requirement that identification of class members be "administratively feasible" with "reasonable effort."

Relatedly, under the second threshold requirement, the Court recognized "[i]n order to have standing to sue as a class representative, the plaintiff must possess the same interest and the same injury shared by all members of the class that he or she seeks to represent." *Id.* at 72.

Together, these two threshold requirements create the need for a class of people who can be identified with administrative feasibility and reasonable effort, and who are properly represented by a named plaintiff/class representative with the same injury and interests as the rest of the class. If these foundational requirements are not met, there can be no class action.

For example, this Court held in *Schmidt v. AVCO Corp.*, 15 Ohio St.3d 310, 315, 473 N.E.2d 822 (1984) that there could be no class action where the "presence of complex individual issues" would have to be dealt with in order to figure out who was in the proposed class. More recently, this Court held that there was no identifiable class where "expending more than a reasonable effort" would be required to determine who is in or out of the class. *Stammco, LLC v. United Telephone Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶ 11. Specifically, because the class "cannot be ascertained merely by looking at appellants' records," this Court in *Stammco* concluded that it was an abuse of discretion for the class to have been certified.

As to an identifiable class, "[t]he 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 Ass'n. of Cincinnati v. Project Jericho, 52 Ohio St.3d 56, 63, 556 N.E.2d 157

(1990). If the identifiable class criterion is to have teeth, and any practical application, the lower courts should be required to specify and articulate what means will be used to determine who is in or out of a proposed class. Neither the trial court nor the Eighth District Court of Appeals specified any proper, reasonable means of identifying class members in this case. To the extent these courts alluded to records outside of State Farm's system, their tacit proposal for identifying class members does not satisfy the "administrative feasibility" and "reasonable effort" prerequisites required by this Court's precedent. Rather, plaintiff's proposed class, and the classes certified by the trial court and the Eighth District Court of Appeals, involve improper, individualized, fact-specific research on each class member at the class certification stage to determine the basic question of who is in or out of the class. That kind of pre-certification, individualized analysis and research creates an improper fail-safe class, in which the parties and the Court must engage in a threshold extensive research and fact-finding mission as to each potential class member to first determine whether they are in the class.

If this case is remanded to the trial court with a certified class in place, the very next task of the trial court and parties will be to ensure that due process-compliant class notice is delivered to every member of the class. This is so that class members can exercise their due process and Civil Rule 23(B)(3) opt out rights, and so that any remaining class members can be properly bound, in res judicata terms, to the eventual outcome of this case. As it stands now, neither the parties to the *Cullen* case, nor the trial court, nor any similarly situated litigants in future cases, will have any idea of how, practically, to go about generating the list of persons who are to receive class notice. The practical inability to ascertain class members is one of the key reasons this case never should have been certified as a class action.

B. There Must Be A Practical, Efficient, And Real Means Of Identifying Putative Class Members—Not A Mere Vague Assurance That “Records,” “Databases,” Or “Computers” Will Be Able To Do It.

The trend, in the experience of the Nationwide amici, is for putative class representatives to assure the courts that “business records,” “databases,” or “computer files” will sort class members from non-class members with the proverbial (or literal) press of a magic button.

But it is one thing to observe that the world now contains a lot of electronic data, some of which can be processed very quickly, and quite another thing to demonstrate what specific data is available, and through what means, to determine whether a given person is in or out of a proposed class with a particular definition. A company’s database is not “Google.” It is necessarily subject to limitations as to what information it contains, in what format, and how that information can be accessed. In this case, plaintiff, the trial court, and the intermediate court of appeals have all failed to describe the means through which class members will be identified.

Plaintiff’s argument was of the “database solves everything” variety. According to plaintiff below:

[A]ll of the information needed to identify the class members and locate them is readily available in State Farm’s databases. All were, and many still are, State Farm policyholders who were required to submit their names, addresses, vehicle make, model, year, VIN number, and other personal information in order to obtain coverage.

Cullen Eighth Dist. Appellee’s Brief at 15. Plaintiff, however, did not argue—much less demonstrate—that the State Farm database of basic policyholder information will contain any information on what a replacement windshield would have cost at the point in time when a given policyholder’s windshield claim arose, if windshield replacement had been chosen by the policyholder in lieu of windshield repair. Nor did plaintiff explain how the parties or the Court would determine what self-arranged windshield work would have cost the policyholder who

elected to refuse the free State Farm repair in favor of receiving a check and arranging his or her own repair or replacement.

Instead, plaintiff argued that for his particular vehicle, his affiant—Autobody Repair Shop Owner Thomas Uhl—was able to use historical pricing guidebooks to determine a price range for what a replacement windshield would have cost for plaintiff’s 2001 Jetta in 2003 (when the windshield strike occurred for plaintiff). According to plaintiff, Mr. Uhl was able to determine that a replacement windshield for the 2001 Jetta in 2003 would have cost either \$437.51 for a Volkswagen-brand, original equipment manufacturer windshield replacement, or \$329.89 for an aftermarket, non-name brand, non-original equipment manufactured replacement. By introducing the concepts of expert research on individual vehicles and guidebooks, however, plaintiff expressly leaves the realm of any computer database maintained by State Farm. And in doing so, plaintiff crosses over into the realm and the problem of the fail-safe class, as will be more fully set forth below in section II(C), *infra*, of this memorandum.

The trial court, for its part, wrote nothing more than “the proposed classes in this case are easily identified through State Farm’s business records and databases.” Trial Court Class Cert. Decision at 9, ¶ 4. The trial court described what information it believed to be in the State Farm database, but did not specify where in the database (or elsewhere) one could go to get historical windshield replacement cost pricing for the vast array of make, model, and year vehicles implicated by the proposed class. It wrote only:

23. State Farm’s claim system contains all of the information about insureds sufficient and necessary to identify the members of the proposed Class, including their names, addresses and comprehensive deductibles. In addition, Allstate [sic] tracked vehicle identification information including VIN numbers, which can be used to identify the precise windshield that was on each insured vehicle; information that is available for each claim and insured.

Id. at 7, ¶ 23. *See also id.* at 9, ¶ 4 (“The proposed classes in this case are easily identifiable through State Farm’s business records and databases.”); *id.* at 11, ¶ 12 (“Here, all of the information needed to identify the class members and the amounts they are owed should be readily available in State Farm’s databases.”). At most, the trial court concluded that State Farm’s records would show what deductible was at issue and what make, model, and year vehicle was at issue—the trial court was silent on the critical question of where one would go to get the price of a replacement windshield for each separate year, make, and model vehicle, for each year in the 20+ year time frame implicated by the certified class. Instead, the trial court wrote—without citation or further specification—that “Plaintiff demonstrated that pricing data for windshield replacements (including labor) is readily available[.]” *Id.* at 11, ¶ 13. Did the trial court mean through Mr. Uhl? Is the court intending to appoint plaintiff’s affiant to look up the range of prices for replacement windshields for all 100,000+ vehicles in the putative class? Which guidebook is Mr. Uhl or his equivalent to use? What evidence is there before the Court that all of the vehicles at issue will be contained in the guidebooks for each of the years? Is Mr. Uhl, or his equivalent, supposed to use the higher original equipment manufacturer prices contained in his purported guidebooks, or the lower non-original equipment manufacturer prices? What value will be used where—as for plaintiff’s Jetta alone—there are as many as eleven different windshields available for a single vehicle? And what will the Court and the parties do to determine what each class member would have paid in labor for a self-arranged replacement or repair, back in the particular time period and geographical portion of Ohio where each windshield strike claim arose over the 20-year class period? None of these questions are answered, or even addressed, in the trial court’s class certification decision.

The trial court's failure to identify where or how to get windshield pricing is significant, because it acknowledged that unless the replacement cost of a given windshield exceeded a given person's applicable deductible, the person suffered no injury and could not be part of a class. That is why the trial court amended plaintiff's proposed class definition to state that "[t]he 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." Trial Court Class Cert. Decision at 8, ¶ 3. Thus, as an essential component of the trial court's class definition, one must know what the windshield replacement price is for each and every make, model, and year vehicle—in the year that each individual vehicle suffered its windshield strike—but the trial court offered no direction whatsoever as to where one would find these prices, or how they would be considered and applied with "administrative feasibility" and "reasonable effort."

Finally, the Eighth District Court of Appeals concluded that State Farm databases must somehow contain all of the information needed to know who would have subjectively elected to receive a replacement windshield that was more expensive than his or her deductible. The Eighth District majority decision seemed confident that State Farm's database would necessarily include "the historic cost of windshield replacement, including labor, available in National Auto Glass Specification pricing guides[.]" Eighth Dist. Decision at 14. But there was no record evidence cited in support of this proposition. And plaintiff, for his part, never even argued to the Eighth District that such information is contained in State Farm's records. Rather, in his Eighth District merits brief, plaintiff only argued the following limited information is in the State Farm database:

names, addresses, vehicle make, model, year, VIN number, and other personal information in order to obtain coverage. ... An identifiable class therefore exists.

Cullen Eighth Dist. Appellee's Brief at 15. There was no representation by plaintiff that State Farm's database of policyholder or claims information would contain the historical replacement cost for each make, model, and year vehicle that suffered a windshield strike. Plaintiff did not argue such a proposition, and did not cite to any evidence for such a proposition. When it comes to historic pricing information for windshields, plaintiff only argued that his affiant was able to research a range of prices for plaintiff's 2001 Jetta windshield in 2003 when plaintiff's claim arose. *See id.* at 15-16. Plaintiff never went the next step of explaining how such research could be accomplished for all absent class members with their varying year, make, and model vehicles, and the varying 20-year time period in which their individual windshield strike claims arose. And by expressly admitting that expert research and opinion testimony was necessary to get to a range of windshield values for his own car, plaintiff in effect admitted that such expert research and opinion testimony would be necessary for each and every vehicle in the putative class. *See id.* at 16 (arguing based on the affidavit and research of Mr. Uhl that "[t]he trial court could therefore find that the cost of windshield replacement at the time of the Named Plaintiff's claim in 2003 was well above his \$250 deductible amount (\$435.71 for an original equipment manufacturer (OEM) replacement and \$329.89 for an after-market windshield.").

Plaintiff did argue that "determining the windshield replacement cost for each class member, once identified, can be accomplished with independent parts pricing databases and through existing claims administration operations." Cullen Eighth Dist. Appellee's Brief at 36. But plaintiff never claimed that the information was in State Farm's existing database; never identified what specific "independent parts pricing databases" would or could be used; never explained whether the databases are available for each year and contain each vehicle permutation; never explained how the Court or the parties would gain access to them (are they

proprietary? subscription only?); and never explained who would be tasked with looking up each vehicle in these unspecified databases. On this record, there was no basis for the Eighth District Court of Appeals' conclusion that class members could be readily identified through State Farm's existing records. There is also no basis to conclude that class members would be identified with administrative ease. In fact, the record below is completely silent as to how, as an administrative matter, class members will be identified so that they can get class notice and otherwise be afforded the opportunity to participate or not participate in the *Cullen* lawsuit as they see fit.

Allowing a proposed class representative to gloss over the important question of how to identify absent class members with the requisite "reasonable effort" and "administrative feasibility" does a disservice to all class action litigants. This Court properly recognizes that the very first and most primary criterion for class certification is an identifiable class. *See Hamilton*, 82 Ohio St. 3d at 71. This Court should clarify that where the existence of an identifiable class that can be determined with administrative ease is in dispute, it is incumbent upon the lower courts to (1) consider competent evidence on the topic, not just vague references to "computers," "databases," and "records," and (2) specify the particular means through which class members can and will be identified. Had the lower courts here affirmatively engaged in that exercise, they would have recognized there is nothing in State Farm's existing records that permits identification of class members who would have had a replacement windshield value in excess of his or her deductible. They would have likewise recognized that plaintiff—other than describing the research that his autobody affiant had to do on plaintiff's own 2001 Jetta to get a range of windshield prices in 2003—has offered no means, and no mechanism, through which such research could be done on a class-wide basis with administrative ease, ex ante, in order to

determine who is in or out of the class. Lower courts faced with a dispute about an identifiable class and administrative ease should have to do more than merely state that unspecified databases, business records, or electronic data will somehow solve the questions of class member identification and administrative ease.

Moreover, where individualized research is required to determine at the outset the basic question of who is in or out of the class, a fail-safe problem develops. Requiring the lower courts to specifically determine how class members will be identified will assist the courts in realizing when the twin concepts of “administrative feasibility” and “reasonable effort” have been lost, and when the problem of a fail-safe class has emerged in their place.

C. The Whole Purpose Of A Class Action Is Defeated If, In Order To Know Who Is In Or Out Of The Class As An Initial Matter, One Must Look At The Individual Facts And Circumstances Of Each Absent Putative Class Members And Perform Individualized Extrinsic Research On The Merits Of His Or Her Claim.

A fail-safe class, as that term is used by the Nationwide amici herein, is one in which—to know who is in or out of a class as an initial matter—the Court and the litigants must conduct a detailed, individualized review of the specific facts and circumstances of each absent class member in order to assess whether they should be part of the class or not. As the Sixth Circuit Court of Appeals explained in *Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 353 (6th Cir. 2011), where “determining liability would require an examination of each individual” transaction, such that liability turns on “a highly individualized inquiry,” class certification must be denied. The problem with a fail-safe class is that it requires individualized research into each absent class member up front. That kind of individualized inquiry is anathema to a class action—the principle of the class action is supposed to be that the named plaintiff is representative of all absent class members, such that the named plaintiff’s case can be tried with

confidence that the same result should apply to all absent class members. Where individualized research has to go into each absent potential class member's transaction, facts, and circumstances at the outset, this Court's required administrative feasibility and reasonable effort are destroyed.

Others have asked this Court to look at the question of what constitutes an improper "fail-safe" class. In *Stammco*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, this Court stopped short of reaching those issues. *See id.* at ¶ 13 ("Because we remand the case to the trial court to clarify and complete the class definition, we do not reach appellants' arguments that the class is a fail-safe class[.]"). This case represents an opportunity for these important issues to be clarified and addressed.

When plaintiff filed his complaint, his proffered ascertainable class was of all State Farm policyholders who had had a windshield strike claim and received windshield repairs instead of a replacement from State Farm. It certainly seems possible that such persons could be identified, with relative ease, through State Farm's own records. But the trial court, and rightfully so, grew concerned that the definition proposed by plaintiff would be over inclusive. It would include persons whose deductible was such that they never could have received a check from State Farm for their replacement windshield under plaintiff's theory of the case. So the trial court attempted to build in a "deductible" variable into the class definition. In the words of the Eighth District: "The trial court narrowed the class definition to only include damaged individuals[.]" Eighth Dist. Decision at 11. The trial court's class definition—expressly and on its face—requires the parties and the Courts to (i) consider each individual absent class member, (ii) determine the replacement cost of the windshield each person had in his or her specific make, model, and year vehicle, and (iii) compare that replacement cost to the particular deductible that person had in

place at the time the windshield strike occurred. Only then, according to the trial court, will one know who is in or out of the class.

The trial court's class definition thus requires, on its face, both expressly and impliedly, individualized research into the particular facts and circumstances of each potential class member in order to know whether they should be deemed a class member or not. State Farm appropriately pointed out in its Eighth District briefing that this creates a fail-safe class. *See, e.g., State Farm Eighth Dist. Appellant's Brief at 15* (arguing "the trial court's incorporation of the liability element of actual injury in the class definition simply creates 'larger problems' in identifying class members, and results in an impermissible 'fail-safe' class.") (internal citations omitted).

Here, the Eighth District was aware of State Farm's fail-safe argument:

State Farm argues that by placing a calculation of damages within the class definition, Cullen has created an impermissible 'fail-safe class.' This 'refers to a class definition that is improper because the members of the class cannot be known until a determination has been made as to the merits of the claim or the liability of the opposing party. *Adashunas v. Negley*, 626 F.2d 600, 603 (7th Cir. 1980). Thus, a fail-safe class 'puts the cart before the horse.' *Mims v. Stewart Title Guar. Co.*, 254 F.R.D. 482, 486 (N.D. Tex. 2008).

Eighth Dist. Decision at 13. But having acknowledged the fail-safe case law, the Eighth District nonetheless held:

Here, that is not the case because a mathematical calculation to determine whether a given windshield replacement is more expensive than a given deductible can be accomplished without trying the issues of the case and can be done in a straight forward, mechanical manner.

Id. Alas, the decision says nothing more than that. Where does one get the values to plug into the "straight forward, mechanical" mathematical calculation envisioned by the Eighth District majority? The Eighth District merely assumed, without demonstrating or explaining, that class members could be identified with administrative ease even under the trial court's modified class

definition. In actuality, doing the kind of sorting of potential class members envisioned by the trial court requires a complicated, individualized, person-by-person, claim-by-claim review, all at the very outset of the case, before there is any judgment in favor of the class.

To start with, it can be reasonably anticipated in a 20+ year class involving 100,000 different vehicles that there is a virtual infinite variety of windshields at stake. Where does one go to find out what a 1995 Saab 900's windshield should cost to replace when damaged in 2007? 1997? 2012? To use the example of plaintiff's own vehicle, where does one go to determine what a 2001 Jetta windshield would cost to replace in 2003? State Farm at the class certification stage pointed to 11 different possible values in 2003 for a replacement windshield for plaintiff's 2001 Jetta alone, all at varying costs. Which of the 11 are the parties to work from? Does the replacement windshield need to come from Volkswagen itself, or will an equivalent non-original equipment manufacturer windshield suffice? Will the replacement windshields be brand new, or can they be reconditioned, or lifted from salvage vehicles? Plaintiff's affiant, Mr. Uhl, referred to guidebooks, including Mitchell's and NAGS, that he used to get the range of prices for the 2001 Jetta windshield in 2003. Which specific guidebooks should the Court and the parties use? How are the guidebooks obtained? Do the different brands of guidebooks contain differing values for the same proposed windshield? Does each guidebook contain references to each make, model, and year vehicle owned by class members? Is each guidebook available for each of the class years? Are the guidebooks specific to Ohio, and Ohio's various geographic markets? Are the guidebook prices retail, or wholesale, or something else? Are the guidebook prices for the windshield glass alone, or a kit, or for an entire installation?

Even assuming that there are guidebooks available for all 20+ years of the class, and that each guidebook contained each make, model, and year vehicle, and each guidebook had a price

for a replacement windshield for all these vehicle permutations, who exactly is going to be tasked with looking up the replacement cost for each windshield for each potential class member? That certainly does not sound like mechanical task. It sounds manual and individualized. And all of this is before one gets to the part of the “straight forward, mechanical calculation” of labor costs.

Per the Court of Appeals’ direction, on a vehicle-by-vehicle basis, someone (who is not clear) will have to find out what make, model, and year vehicle had a damaged windshield, and in what year that damage occurred. Then that person will have to determine from an unidentified source what the replacement cost of the windshield would be. Then comes another complicated step: determining what the repair should have cost if the policyholder elected to refuse a State Farm repair, demand a check for replacement cost, and have the repairs performed elsewhere. After all, class members could not have accepted a State Farm replacement check, and then elected to drive around with a broken windshield—Ohio law requires the vehicle owner to have a broken windshield addressed. What would the unknown estimates have been for those hypothetical historical repairs that did not actually occur? Where would one go find out what a windshield repair or replacement installation would have cost the owner of a 1999 Ford F-350 pickup in Cadiz, Ohio in 2006? Or a 2005 Toyota Corolla in Hamilton, Ohio in 2008? Which estimate would the policyholder have chosen for each vehicle?

Of course, if the answer is that the policyholder would have chosen the State Farm repair, and/or that the cost of the State Farm repair could be used for purposes of the “straight forward, mechanical” mathematical calculation, that just calls into question the entire theory of the case. A policyholder who chose (and who would still choose) a State Farm repair is not also entitled to a check for the replacement value of the windshield, too. It is difficult, if not impossible, to

determine how plaintiff got the notion that a policyholder could demand both the replacement value of a windshield from the insurance company, and that the windshield be repaired by the insurance company. The State Farm policy is not written that way. Courts have never construed an insurance policy that way. Regardless of who is contractually entitled to make the election (policyholder or the insurance company), it is clear under the State Farm policy that an election of remedies is required. The policyholder does not have a contractual entitlement to double recovery.

Finally, there is the trial court's added step of making sure that the windshield selected, less repair/installation cost, is more than each policyholder's applicable deductible. For those policyholders who had no deductible whatsoever, this step may not be difficult. But what about the person with a \$250 deductible, faced with a \$600 replacement windshield? Would that person have elected to have the windshield replaced instead of repaired, thereby having to pay the \$250 deductible? Why should there be any legal presumption that the person would have refused the free State Farm repair in favor of having to pay \$250 out of his or her own pocket? And \$250, of course, is just an example. The applicable deductibles evidently range from \$0 to \$2000, depending on the particular policyholder and year. Comparing the particular deductible at stake to the particular price of a particular replacement windshield is necessarily individualized. This kind of research does not come from any single database. Neither plaintiff nor the lower courts have described how this individualized research would be performed.

The problem with the trial court's class definition, as well as that of the Eighth District, is that there has to be (1) an individualized review of each windshield claim, the year it occurred, the year, make, and model of the vehicle involved, coupled with (2) extrinsic research on what the windshield would have cost to replace at that specific moment in time for that specific year,

make, and model of vehicle, coupled with (3) a historical analysis—using unknown sources—of what it would have cost the policyholder to have self-arranged windshield repairs performed back at that moment in time. And all of that would have to be compared to (4) the dollar value of each policyholder’s deductible, in order to find out if the deductible would have paid for all of this, or whether some portion of the claim would have been paid by State Farm.

All of that time, effort, individualized inquiry, and vehicle-by-vehicle extrinsic research would be required up front, just to determine who is in the class or not. And who is in the class or not is a very important question. If class certification were affirmed by this Court, and the case were remanded to the Common Pleas Court, then the next step is that the parties and the Court would have to prepare a class notice to absent class members. Who should receive that notice? Who will be given the chance to opt out? Who will be bound by the ultimate outcome on the merits? These are not mere academic questions, but essential due process questions that go to the very heart of what a class action is all about. Unfortunately, however, neither class certification decision in the courts below provides any clarity on how, as a practical matter, the identity of class members will be ascertained. Where, as here, that level of individualized inquiry is required up front, just to identify class members, this Court should hold that (1) the requirement of an identifiable class, whose members can be determined with “reasonable effort” and “administrative ease,” is not met, and (2) an improper fail-safe class definition exists.

D. Under Rule 23(A), This Court’s Decision In *Kincaid v. Erie* Forecloses The No-Injury Class Action That Plaintiff Attempts To Assert Here Because Of Lack Of Standing.

Rule 23(A) does not just require an identifiable class that can be ascertained with reasonable ease and in an administratively feasible manner. This Court also properly recognizes that a proposed class representative under Civil Rule 23(A) must have standing in his or her own

right, and must be a member of the class he or she purports to represent. *See Hamilton*, 82 Ohio St.3d at 72, 694 N.E.2d 442 (holding “to have standing to sue as a class representative, the plaintiff must possess the same interest and the same injury shared by all members of the class that he or she seeks to represent.”). Standing is a threshold issue that must be addressed before any merits discussion. *See, e.g., State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, 872 N.E.2d 912, ¶ 15 (“A preliminary inquiry in all legal claims is the issue of standing.”) (internal citation omitted); *Util. Serv. Partners v. PUCO*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 49 (“A party must have standing to be entitled to have a court decide the merits of a dispute.”) (internal citations omitted); *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 30 (“Before a court may decide the merits of a case, the party seeking relief must have standing to do so.”); *Torres v. City of Cleveland*, Eighth Dist. No. 80695, 2002-Ohio-4431, ¶ 26 (“It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue.”).

In order for standing and a justiciable controversy to exist, the matter must be ripe for review, and there must be an actual controversy between the parties. *See Keller v. City of Columbus*, 100 Ohio St. 3d 192, 2003-Ohio-5599, 797 N.E.2d 964, ¶ 26 (“In order to be justiciable, a controversy must be ripe for review.”). That means a real and present controversy, not a potential or hypothetical one. *See, e.g., State ex rel. Elyria Foundry Co. v. Industrial Comm’n*, 82 Ohio St.3d 88, 89, 694 N.E.2d 459 (1998) (explaining that the principle of ripeness requires “problems which are real or present and imminent,” not “abstract or hypothetical or remote”); *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970) (“It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential

controversies.”). This Court adheres to and applies “the longstanding tradition that a court does not render advisory opinions,” and holds:

Not every conceivable controversy is an actual one. ...[I]n order for a justiciable controversy to exist, the danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events and the threat to his position must be actual and genuine and not merely possible or remote.

Scott v. Houk, 127 Ohio St. 3d 317, 2010-Ohio-5805, 939 N.E.2d 835, ¶ 22 (O’Connor, J., concurring). See also *Cleveland Trust Co. v. Eaton*, 21 Ohio St.2d 129, 146, 256 N.E.2d 198 (1970) (Schneider, J., concurring) (“The parties here have not demonstrated on the record that an actual, as opposed to an academic, controversy exists between them.”); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 524-25, 715 N.E.2d 1062 (1999) (“The concept of legal standing is based on the principle that courts decide only cases or controversies between litigants whose interests are adverse to each other, and do not issue advisory opinions.”).

Since the time plaintiff first moved for class certification in the trial court below, this Court has issued a very important pronouncement on the issue of class action standing in a putative insurance class action. In the case of *Kincaid v. Erie Insurance Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036; 944 N.E.2d 207, Mr. Cullen’s lawyers brought suit on behalf of another insurance policyholder, Donald Kincaid, alleging that he had expense reimbursement payments that he was entitled to under his insurance policy that his insurance company allegedly failed to disclose to him. Prior to filing the lawsuit, the policyholder plaintiff, Mr. Kincaid, never requested that his insurance company provide him with those alleged additional policy benefits. Instead, Mr. Kincaid sued for Erie Insurance Company’s (“Erie’s”) alleged failure to provide those unrequested additional policy benefits.

In his briefing in the lower courts (including, as here, the Cuyahoga County Common Pleas Court, and the Eighth District Court of Appeals), Mr. Kincaid argued that Erie violated

OAC § 3901-1-54(E) by allegedly failing to fully inform him of his right to receive additional policy benefits. (That Ohio Administrative Code provision is the very one cited by Mr. Cullen below and to this Court.) Mr. Kincaid also cited the decision of *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 696 N.E.2d 1001 (1998), arguing that it supported an additional duty of disclosure of policy benefits. Under these purported authorities, Mr. Kincaid argued that he could recover for breach of contract and bad faith because of Erie's alleged failure to more fully disclose to him his policy rights. Mr. Kincaid took that position notwithstanding the fact that the cited OAC provision expressly states it creates no private right of action, and notwithstanding the fact that *Cope* did not apply OAC § 3901-1-54(E).

The *Kincaid* case, as this Court is aware, came before this Court. In briefing to this Court and in oral argument, Mr. Kincaid's lawyers (also Mr. Cullen's lawyers) persisted in arguing that OAC § 3901-1-54(E) and *Cope* created an affirmative duty of disclosure on the part of the insurance company, which putative duty was allegedly violated by the failure to more fully disclose the availability of additional policy benefits. This Court specifically rejected that argument, noting that each policyholder receives a written insurance policy that he or she is presumed to have read under Ohio law:

The insurer provides each policyholder with a copy of the written insurance policy that expressly discloses the potential availability of benefits, including reimbursement for expenses. The insured has a duty to examine the coverage provided and is charged with knowledge of the contents of the policy.

Kincaid, 128 Ohio St. 3d at 325, ¶ 16. This Court held that where the policyholder's claim was that the insurance company had failed to disclose and pay additional policy benefits, the policyholder had no standing, and no ripe, justiciable controversy without first alleging and proving that he made a claim for additional policy benefits that was denied. This Court held:

We hold that there is no actual controversy between adverse parties in this case because Erie has not refused to pay Kincaid for expenses that may be covered by the 'additional payments' provision of the policy. Unless and until the insured has presented a claim to his or her insurer and (where appropriate) proof of how much is owed, and the insurer has either (1) denied the claim or (2) failed to respond to the claim after having had an adequate opportunity and reasonable time within which to respond, then there is no controversy and the insured has no standing to file a complaint in litigation.

Id. at ¶ 20.

Kincaid is instructive, and actually dispositive, here. The essence of Mr. Cullen's claim in this case is that he had a policy right to windshield replacement (or the cash equivalent thereof, less deductible), not just repair. He contends State Farm failed to adequately remind him that his policy permitted replacement, in addition to permitting repair. Mr. Cullen received only windshield repair. Notably, however, Mr. Cullen:

- Does not allege in the complaint that he actually, subjectively wanted replacement instead of repair back in 2003;
- Does not allege he asked State Farm for replacement instead of repair back in 2003;
- Does not allege that at any point after 2003 and before the filing of the lawsuit that he complained about the quality of his windshield repair;
- Does not allege that at any point after 2003 and before the filing of the lawsuit that he requested windshield replacement;
- Does not allege that he ever made any request for windshield replacement that was refused by State Farm;
- Does not allege that his repaired windshield failed, or failed to perform in some way;
- Does not allege that he made any warranty or guarantee claim to State Farm on his repaired windshield; and

- Does not allege that he ever demanded payment of the cash equivalent of a windshield repair (less the applicable deductible).

Instead, the very first time that Mr. Cullen complained to State Farm about his repaired windshield was when the complaint itself was filed. That is, Mr. Cullen's request for additional benefits under his policy (in the form of the cash equivalent of a replaced windshield, instead of an actual repaired windshield) came when the lawsuit was filed, not before.

The certified class is comprised, in principle, of people similarly situated to Mr. Cullen. Mr. Cullen contended in his Eighth District Court of Appeals appellee's brief, for example, that he is not just "typical" of absent class members, but actually "identical." Cullen Eighth Dist. Appellee's Brief at 19. That means the entire certified class is of people who never manifested any request or demand for windshield replacement (or its cash equivalent, less applicable deductible) to State Farm at any time prior to the lawsuit being filed. The Eighth District Court of Appeals made sure this was so by expressly excluding from the class any person who (1) received a windshield repair, and (2) subsequently complained to State Farm. Those 990 persons, according to the Eighth District majority, suffered no injury, because when they came forward to complain about their repair, State Farm responded to their complaint by voluntarily supplying them with a replacement windshield. Thus, the only people who actually took issue with their windshield repair were fully remediated by State Farm, without the need for any lawsuit or class action litigation.

Stripping out the only people who ever took issue with windshield repairs leaves a class of people who never had any complaint regarding windshield repair and never made any demand of State Farm for windshield replacement. But *Kincaid* teaches that such persons—either individually or as a class—lack standing. Unless and until the policyholder makes a demand for

additional policy benefits (replacement or its cash equivalent, not just actual repair), and that demand is refused by the insurance company, “then there is no controversy and the insured has no standing to file a complaint in litigation.” *Kincaid*, 128 Ohio St.3d 322, 2010-Ohio-6036; 944 N.E.2d 207 ¶ 20.

What Mr. Cullen is improperly inviting the court system to do is to presume that policyholders were dissatisfied with their windshield repairs (when actually no dissatisfaction was expressed, manifested, or recorded), presume that they would have elected a replacement windshield in lieu of a simple repair, presume that they would want to pay their deductible towards a replacement windshield, imagine what windshield they would have chosen from the array available, imagine what repair shop they would have chosen from the array available, imagine what installation of a new windshield would have cost (5, 10, 15, or 20 years ago when the windshield claims arose) in the area where each person lived, and calculate—on the basis of these imagined, hypothetical facts—what economic position each person would have been in if any of these hypothetical facts had actually transpired. None of these imagined events actually occurred. Plaintiff wants to create an imaginary world after the fact in order to pursue a theory of class action liability. But the mere fact he would like to pursue a class action does not give him the ability to make up facts on behalf of himself or absent class members. Rather:

To have standing, a party must have a personal stake in the outcome of a legal controversy with an adversary. *Ohio Pyro[, Inc. v. Ohio Dep't of Commerce*, 115 Ohio St. 3d 375, 2007-Ohio-5024, 875 N.E.2d 550,] ¶ 27. This holding is based upon the principle that ‘it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.’ *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 257 N.E.2d 371. *See also* Ohio Constitution, Article IV, Section 4(B).

Kincaid, 128 Ohio St. 3d at 323-24, ¶ 9. Mr. Cullen’s theory of the case is nothing more than an elaborate, imagined, hypothetical “potential controversy,” in which he thinks (but does not know, cannot prove, and has no evidence) that class members may have potentially preferred replacement windshields (or their cash equivalent, less deductibles) to actual repaired windshields.

That plaintiff failed to allege any concrete, pre-suit demand on his part of a replaced windshield is of great significance, both to his individual claim, and by extension, to his class claims. A class representative must have standing in his or her own right in order to represent a class. “A plaintiff may not use the procedural device of a class action to boot strap himself into standing he lacks under the express terms of the substantive law.” *Paoletti v. Travelers Indem. Co.*, 6th Dist. No. L075-196, 1977 Ohio App. LEXIS 10181, * 8 (May 6, 1977) (citation omitted). “With regard to class actions, the named plaintiff must be a member of the class he or she seeks to represent and, in connection with this requirement, must have standing. . . . ‘The fact that a plaintiff seeks to bring a class action does not change this standing requirement. Individual standing is a threshold to all actions, including class actions.’” *Hoban v. Nat’l City Bank*, 8th Dist. No. 84321, 2004-Ohio-6115, ¶¶ 10–11 (quoting *Woods v. Oak Hill Community Med. Ctr.*, 134 Ohio App.3d 261, 269, 730 N.E.2d 1037 (4th Dist. 1999)). In *Kincaid*, Mr. Kincaid, after all, was a putative class representative. When his individual claims failed for lack of standing, so too did his putative class claims.

It would be one thing if plaintiff here alleged and showed that he made a demand for windshield replacement (or its cash equivalent, less deductible) that was refused by State Farm. If Mr. Cullen alleged and proved such a demand, and alleged and proved refusal by State Farm to comply with that demand, he might at least have a justiciable controversy with State Farm in

Kincaid terms. If he could establish some common refusal of a common, class-wide demand for windshield replacement, he might at least satisfy the threshold Rule 23(A) requirements for class certification (the Civil Rule 23(B) factors would remain to be dealt with). But instead, he alleges none of that. He instead wants the courts to recreate imaginary hypothetical scenarios, by having the courts go back to imagine what he and class members would have done differently, and calculate what economic effects they would have faced under such hypothetical circumstances. That is not what Civil Rule 23 is for, and it is not what Civil Rule 23(A) requires. This Court should hold that where plaintiff lacks standing in his own right (having failed to allege and demonstrate an actual, justiciable controversy), he necessarily cannot represent a class of persons similarly situated who likewise lack standing. Class certification should be reversed on the basis of these insurmountable standing defects.

E. This Court Should Clarify Once And For All That There Is No Presumption In Favor Of Class Certification, And That The Lower Courts Must Examine The Evidence—Not Just Arguments Or Assurances—As To Whether Each Prerequisite Is Met.

In 1984, this Court issued a decision called *Ojalvo*, 12 Ohio St. 3d 230, 466 N.E.2d 875. In that case, the Court of Claims denied class certification in a case in which the allegation was that an entire swath of Ohio State employees had been wrongly denied a uniform percentage increase in their salaries. The Court of Claims held that the differing damage calculations that would result from applying the uniform percentage increase to salaries of varying amounts precluded class certification. This Court disagreed, pointing out that because a uniform percentage increase was at stake, there could be a class action. In describing its belief that the Court of Claims erred, this Court included language that has been subsequently cited, by numerous class action plaintiffs and several trial and appellate courts since. It wrote:

In addition, it appears that the Court of Claims was not reviewing the propriety of class certification but was attempting, contrary to applicable law, to reach the merits of the claim. Class certification does not go to the merits of the action. See *Eisen v. Carlisle & Jacqueline* (1974), 417 U.S. 156, 177.

Id. at 233 (emphasis in the original). The Court further clarified “no arguments were made, nor need have been made, with respect to the actual merits of the case beyond the necessity of establishing the validity of certification under Civ. R. 23.” *Id.* (citing *Eisen*) (emphasis added). Thus, the *Ojalvo* decision itself expressly recognized that the courts must reach the merits to the extent the merits touch on and affect the class certification criteria.

But the clarification was of little moment: plaintiff after plaintiff, and a great many lower courts, seized upon “class certification does not go to the merits” language, and the citation to *Eisen*, to declare that the courts could not and should not touch on the merits in any way in deciding class certification. See, e.g., *Asset Acceptance, LLC v. Caszatt*, 11th Dist. No. 2009-L-090, 2010-Ohio-1449, ¶ 31 (“Class certification does not go to the merits of the action.”) (quoting *Ojalvo*); *Pyles v. Johnson*, 143 Ohio App. 3d 720, 731, 758 N.E.2d 1182 (4th Dist. 2001) (stating “the trial court must assume the truth of the allegations in the complaint and not consider the merits of the case”) (citing *Ojalvo*); *Lucio v. Safe Auto Ins. Co.*, 183 Ohio App.3d 849, 2009-Ohio-4816, 919 N.E.2d 260, ¶ 15 (7th Dist.) (“When a trial court considers a motion to certify a class, it accepts as true the allegations on the complaint, without considering the merits of those allegations and claims.”) (quoting *Setliff v. Morris Pontiac, Inc.*, 9th Dist. No. 08CA009356, 2009-Ohio-400, ¶ 6). The Ohio courts ruling in this fashion have gone on to declare things like “[i]n many cases, no evidentiary hearing is needed in order for a court to certify a class, and class certification may be granted on the basis of the pleadings, alone.” *Id.* (citing cases). In this very case, for example, plaintiff argued to the Eighth District:

State Farm fully appreciates that it can only prevail in this appeal if this Court can be convinced to wade into the merits of the causes of action that have been brought. The insurer has dredged up a few appellate decisions from other districts that supposedly support this illogical view. But no attempt has been made to contest the controlling authorities Plaintiff has been citing throughout these proceedings that squarely hold that the merits may not be considered during class certification proceedings. *Ojalvo v. Board of Trustees* (1984), 12 Ohio St. 3d 230, 233, 466 N.E.2d 875; *Nagel v. Huntington Nat'l Bank* (8th Dist. 2008), 179 Ohio App. 3d 126, 132, 2008-Ohio-5741, 900 N.E.2d 1060, 1064; *Dublin v. Security Union Title Ins. Co.* (8th Dist. 2005), 162 Ohio App.3d 97, 2005-Ohio-3482, 832 N.E. 2d 815, ¶ 21-25.

Given that only the jury can resolve factual disputes, and certainly not before discovery has been completed, all of Plaintiff's allegations must be accepted as true at this stage in the proceedings.

Cullen Eighth Dist. Appellee's Brief at 23-24.

That is not what this Court intended. In *Warner*, 36 Ohio St. 3d at 99, fn. 9, this Court held it would be "rare" that class certification could be decided on the pleadings alone, and noted that almost every class action would require an evidentiary hearing as to whether class criteria were met. In *Hamilton*, 82 Ohio St. 3d 67, this Court specifically instructed that: "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." *Id.* at 70. This Court's "rigorous analysis" requirement should have closed the door on arguments and holdings that the lower courts must turn a blind eye to problems in the merits of a would-be class representative's claims. It should have ended the arguments and holdings that the lower courts are somehow barred from probing the pleadings in order to determine whether the prerequisites for class certification are met.

Some lower courts have gotten it right, and have emphasized the "rigorous analysis" and evidence required by this Court's precedent. *See, e.g., Hoang v. E*Trade Group, Inc.*, 151 Ohio App. 3d 363, 2003-Ohio-301, 784 N.E.2d 151, ¶ 11, 14 (8th Dist.); *Linn v. Roto-Rooter, Inc.*, 8th Dist. No. 82657, 2004-Ohio-2559, ¶ 16 (holding "mere allegation" is no substitute for evidence

of actual injury to class members, required for class certification); *Shaver v. Standard Oil Co.*, 68 Ohio App. 3d 783, 589 N.E.2d 1348, 1359 (6th Dist. 1990) (remanding for trial court to “adduce evidence” as to class certification factors, including on several merits issues). But the damage had been done with the “merits” language and *Eisen* cite in *Ojalvo*: a great many courts in Ohio continue to proclaim that they are barred under *Ojalvo* from making any merits determinations, even where some analysis of the merits is necessary to understand whether the class certification criteria have been met. These same courts have done what plaintiff urged below, and have declared, in some instances, that they will presume complaint allegations to be true.

Because this Court made it clear in *Hamilton* that a rigorous examination is required, and because these issues are so timely under the U.S. Supreme Court’s *Wal-Mart Stores, Inc. v. Dukes* decision, this Court should take this opportunity to expressly clarify that the “rigorous” examination of class certification criteria may and often must include some examination of the merits, including weighing of the evidence, as it relates to whether class certification criteria have been met. The U.S. Supreme Court in *Wal-Mart Stores, Inc.* provided exactly this sort of clarification. It stated:

Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule[.] We recognized in *Falcon* that ‘sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification questions,’ 457 U.S., at 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740, and that certification is proper only if ‘the trial court is satisfied, after a rigorous analysis, the prerequisites of Rule 23(a) have been satisfied,’ ...Frequently, that ‘rigorous analysis’ will entail some overlap with the merits of plaintiff’s underlying claims. That cannot be helped.

Wal-Mart Stores, Inc. at ___ U.S. ___, 131 S. Ct. at 2551, 180 L. Ed. 2d 374. In so holding, the U.S. Supreme Court in *Wal-Mart Stores, Inc.* “retired” the no-merits language of *Eisen*, calling its “no-merits” language “the purest dictum” which is “contradicted by our other cases.” *Id.* at fn. 6.

This Court should do the same, and “retire” *Ojalvo*’s citation to *Eisen* and its no-merits language. That would have the salutary effect of guiding all of Ohio’s courts under Civil Rule 23. Regardless of whether this Court concludes that a “rigorous analysis” was or was not accomplished here by the trial court, it should utilize this opportunity to clarify that the law of Ohio Civil Rule 23 is in accordance with the most recent pronouncements of the U.S. Supreme Court regarding Federal Rule 23. *See generally Marks v. C.P. Chemical Co., Inc.*, 31 Ohio St. 3d 200, 200-201, 509 N.E.2d 1249 (1987) (“Since the Ohio rule is identical to Fed. R. Civ. P. 23, with the exception of Civ. R. 23(F) which is not involved in the discussion here, federal authority is an appropriate aid to interpretation of the Ohio rule.”).

III. CONCLUSION.

The standards that Ohio courts apply to class certification motions are of tremendous consequence to all litigants in Ohio, and are of special interest to those companies, like the Nationwide amici, that from time to time face class action lawsuits under Ohio’s Civil Rule 23. This Court appropriately established a framework for determining how class certification motions should be decided when it laid out the seven necessary prerequisites for Civil Rule 23(A) certification in its prior decisions. Unfortunately, the lower courts have not always applied these seven factors with consistency, and a seven-factor test that is applied with inconsistency and lack of predictability does not help Ohio citizens, litigants, or businesses govern their conduct or assess their rights and responsibilities. Accordingly, and in order to address recurring problems and questions that arise in class certification cases, this Court should take the opportunity to address the class certification in *Cullen*, reverse the lower courts’ class certification rulings in *Cullen*, and in the process, clarify that:

1. The courts may and should consider evidence regarding whether the prerequisites of class certification are met, even where such evidence touches on or implicates the merits of the parties' respective positions (instead of merely accepting the plaintiff's complaint allegations as true);

2. Where the existence of an identifiable class is disputed, the courts should specify the actual means through which class members will be identified given the particular record evidence in the case (instead of leaving the parties to guess how such identification is to be practically accomplished, and instead of merely generally referencing that identification will be possible through unknown "records," "databases," "computers," or "algorithms");

3. Where individualized, multi-step, multi-record fact determinations are necessary on a person-by-person basis in order to determine whether each person is in or out of the class, an improper fail-safe class exists, and the "identifiable class" prerequisite to class certification is not met; and

4. Where a plaintiff's theory of the case is constructed around a series of hypothetical historical events that did not actually occur and imagined controversies and injuries that did not actually arise, the plaintiff and the proposed class lack standing, and no class action is possible (especially where, as here, plaintiff's claim is founded on a demand for additional policy benefits that was never made by the plaintiff, nor denied by the insurance company, as would be required under *Kincaid*).

The Nationwide amici for the reasons set forth herein respectfully urge reversal of the class certification decisions below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Of Amici Curiae Nationwide Property And Casualty Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Mutual Insurance Company, Nationwide Insurance Company Of America, Nationwide Assurance Company, And Nationwide General Insurance Company In Support Of Appellant State Farm Mutual Automobile Insurance Company has been served upon the following via ordinary U.S. mail, postage prepaid, this 20th day of August, 2012:

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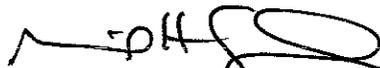
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