

IN THE SUPREME COURT OF OHIO

JEFFREY FELIX, <i>et al.</i> ,	:	Case No. 13-1746
	:	
<i>Plaintiffs-Appellees,</i>	:	
	:	
v.	:	On Appeal from the Cuyahoga County
	:	Court of Appeals, Eighth Appellate District
	:	Case No. CA-12-098985
GANLEY CHEVOLET, INC., <i>et al.</i> ,	:	
	:	
<i>Defendants-Appellants.</i>	:	

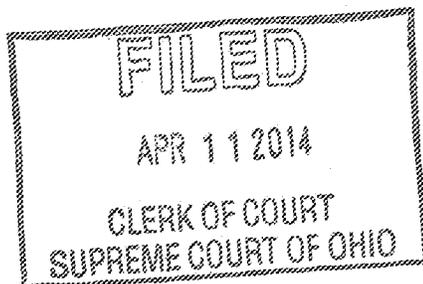
BRIEF OF AMICI CURIAE
AMERICAN TORT REFORM ASSOCIATION,
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
OHIO ALLIANCE FOR CIVIL JUSTICE, OHIO CHAMBER OF COMMERCE,
NFIB SMALL BUSINESS LEGAL CENTER, AND
AMERICAN INSURANCE ASSOCIATION
IN SUPPORT OF DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
STATEMENT OF FACTS	3
INTRODUCTION	3
ARGUMENT	6
Proposition of Law No. 1	6
A class action cannot be maintained on behalf of a putative class that includes individuals who did not sustain actual harm or damage as a result of the challenged conduct, which is a required part of the rigorous analysis under Ohio R. Civ. P. 23	6
A. A Class That Includes Many Satisfied Customers is Overbroad	7
B. The Court of Appeals Disregarded <i>Stammco II</i>	9
C. Courts Reject Shortcuts for Determining Classwide Damages	12
Proposition of Law No. 2	15
In a class action brought under the Ohio Consumer Sales Practices Act, R.C. 1345.09(B) requires the consumers to have sustained actual damages as a result of the challenged conduct.	15
A. Ohio Should Not Permit “No Injury” Consumer Class Actions	15
B. Stretching Ohio Law is Unnecessary to Protect Consumers	20
C. Minimum Damages, However Labeled, Are Not Authorized in Class Actions	21
CONCLUSION	23
CERTIFICATE OF SERVICE	end

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Aspinall v. Philip Morris Cos.</i> , 813 N.E.2d 476 (Mass. 2004).....	17
<i>Barber v. Meister Protection Servs.</i> , 8th Dist. No. 81553, 2003-Ohio-1520	8
<i>BP P.L.C. Securities Litig.</i> , No. 4:10-md-2185, 2013 WL 6388408 (S.D. Tex. Dec. 6, 2013).....	14
<i>Briehl v. General Motors Corp.</i> , 172 F.3d 623 (8th Cir. 1999).....	16
<i>Comcast Corp. v. Behrend</i> , 133 S. Ct. 1426 (2013)	12
<i>Cowden v. Parker & Assocs., Inc.</i> , No. 6:09-323-KCC, 2013 WL 2285163 (E.D. Ky. May 22, 2013)	13
<i>Cullen v. State Farm Mut. Auto. Ins. Co.</i> , 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614	4, 11, 12
<i>Diacakis v. Comcast Corp.</i> , No. C11-3002, 2013 U.S. Dist. LEXIS 64523 (N.D. Cal. May 3, 2013)	14
<i>District of Columbia ex rel. Walker v. Merck & Co.</i> , 874 F. Supp.2d 599 (E.D. La. 2012)	16
<i>Felix v. Ganley Chevrolet, Inc.</i> , 8th Dist. Cuyahoga No. 98985, 2013-Ohio-3523	4
<i>Felix v. Ganley Chevrolet, Inc.</i> , Proposed Order of Class Certification and for Partial Judgment on the Merits, Cuyahoga C.P. No. CV-01-454238, CV-01-442143 (Sept. 10, 2012)	3, 20
<i>Frank v. DaimlerChrysler Corp.</i> , 292 A.D.2d 118 (N.Y.A.D. 1st Dept. 2002).....	16
<i>Frye v. L'Oréal USA, Inc.</i> , 583 F. Supp.2d 954 (N.D. Ill. 2008)	16
<i>Hershenow v. Enterprise Rent-A-Car Co.</i> , 840 N.E.2d 526 (Mass. 2006).....	17-18
<i>Hoang v. E-Trade Group, Inc.</i> , 151 Ohio App.3d 363, 2003-Ohio-151, 784 N.E.2d 151 (8th Dist.)	8, 9, 19
<i>In re Canon Cameras</i> , 237 F.R.D. 357 (S.D.N.Y. 2006)	16
<i>In re Hydrogen Peroxide Antitrust Litig.</i> , 552 F.3d 305 (3d Cir. 2008).....	6
<i>In re: Rail Freight Fuel Surcharge Antitrust Litig.</i> , 725 F.3d 244 (D.C. Cir. 2013).....	13
<i>Leardi v. Brown</i> , 474 N.E.2d 1094 (Mass. 1985)	17

<i>Lee v. Am. Express Travel Related Servs.</i> , N.D. Cal. No. C 07-04765 CRB, 2007 WL 4287557 (Dec. 6, 2007), <i>aff'd</i> , 348 F. App'x 205 (9th Cir. 2009)	7
<i>Maestle v. Best Buy Co.</i> , 197 Ohio App.3d 248, 2011-Ohio-5833 (8th Dist.)	8
<i>Messner v. Northshore Univ. HealthSystem</i> , 669 F.3d 802 (7th Cir. 2012)	4
<i>Miller v. Painters Supply & Equip. Co.</i> , 8th Dist. No. 95614, 2011-Ohio-3976.....	8, 9
<i>Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 259 F.3d 154 (3d Cir. 2001).....	6
<i>O'Neil v. Simplicity, Inc.</i> , 574 F.3d 501 (8th Cir. 2009).....	15
<i>Repede v. Nunes</i> , 8th Dist. Nos. 87277, 87469, 2006-Ohio-4117	8
<i>Rivera v. Wyeth-Ayerst Labs.</i> , 283 F.3d 315 (5th Cir. 2002).....	16, 17
<i>Roach v. T.L. Cannon Corp.</i> , No. 3:10-cv-0591, 2013 WL 1316452 (N.D.N.Y. Mar. 29, 2013)	14
<i>Stammco, L.L.C. v. United Tel. Co. of Ohio</i> , 136 St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408	<i>passim</i>
<i>Tietsworth v. Harley-Davidson, Inc.</i> , 677 N.W.2d 233 (Wis. 2004)	16
<i>Torres v. Nutrisystem, Inc.</i> , 289 F.R.D. 587 (C.D. Cal. 2013)	14
<i>Tyler v. Michaels Stores, Inc.</i> , 984 N.E.2d 737 (Mass. 2013)	18
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011)	10, 12
<i>Wallis v. Ford Motor Co.</i> , 208 S.W.3d 153 (Ark. 2005).....	16
<i>Washington v. Spitzer Mgmt., Inc.</i> , 8th Dist., No. 81612, 2003-Ohio-1735.....	21, 22
<i>Williams v. Purdue Pharma Co.</i> , 297 F. Supp.2d 171 (D.D.C. 2003).....	16
<i>Wilson v. Style Crest Prods., Inc.</i> , 627 S.E.2d 733 (S.C. 2006)	16
<u>OHIO CONSTITUTION, STATUTES AND RULES</u>	
Ohio Const., Art. IV, § 5(B)	9
R. Civ. P. 23.....	6
R.C. 1345.07	20, 21
R.C. 1345.09	9, 19, 20, 21

OTHER STATE STATUTES AND RULES

Ala. Code § 8-19-10.....22

Colo. Rev. Stat. § 6-1-11322

Ga. Code Ann. § 10-1-399.....22

La. Rev. Stat. Ann. § 51:1409.....22

Miss. Code Ann. § 75-24-15.....22

Mont. Code Ann. § 30.14-13322

N.Y. C.P.L.R. § 901.....22

N.M. Stat. Ann. § 57-12-1022

Or. Rev. Stat. § 646.638.....22

S.C. Code Ann. § 37-5-202.....22

Utah Code Ann. § 13-11-19.....22

OTHER AUTHORITIES

David G. Owen, Products Liability Law (2005).....16

Sheila B. Scheuerman, Against Liability for Private Risk-Exposure,
35 Harv. J. L. & Pub. Pol’y 681 (2013)..... 15-16

Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts:
Reconsidering the FTC Act as Rule Model*, 52 Ohio St. L.J. 437 (1991).....21

Victor E. Schwartz & Cary Silverman, *Common Sense Construction of Consumer
Protection Acts*, 54 Kan. L. Rev. 1 (2005).....22

INTEREST OF AMICI CURIAE

The issues presented in this case directly concern *Amici Curiae* and their members because their outcome could result in the proliferation of “no injury” consumer class actions and arbitrary classwide damage awards that have no relationship to a consumer’s actual pecuniary loss.

Founded in 1986, the American Tort Reform Association (“ATRA”) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues. ATRA has a longstanding interest in addressing unjustified expansions and abuses of private rights of action provided by state consumer protection laws. *See, e.g.*, Am. Tort Reform Found., “State Consumer Protection Laws Unhinged” (2013), available at <http://atra.org/sites/default/files/documents/CPA%20White%20Paper.pdf>.

The Chamber of Commerce of the United States of America (“U.S. Chamber”) is the world’s largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive agencies. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation’s business community.

The Ohio Alliance for Civil Justice (“OACJ”) is a group of small and large businesses, trade and professional associations, professionals, non-profit organizations, local government

associations, and others. The OACJ strongly supports laws that provide stability and predictability in the civil justice system, including class action litigation. OACJ members support a balanced civil justice system that not only awards fair compensation to injured persons, but also imposes safeguards to ensure that defendants are not unjustly penalized and plaintiffs are not unjustly enriched.

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization. The Ohio Chamber works to promote and protect the interests of its more than 6,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena. The advocacy efforts of the Ohio Chamber are dedicated to the creation of a strong pro-jobs environment – an Ohio business climate responsive to expansion and growth.

The National Federation of Independent Business (“NFIB”) is the nation’s leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the rights of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. NFIB/Ohio represents over 25,000 members in the state, including small business owners in all 88 counties, and is the state's largest small business advocacy organization.

The American Insurance Association (“AIA”), founded in 1866 as the National Board of Fire Underwriters, is a leading national trade association representing major property and

casualty insurers writing business nationwide and globally. AIA members range in size from small companies to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases before federal and state courts.

STATEMENT OF THE FACTS

Amici adopt Defendants-Appellants' Statement of the Facts as relevant to the legal arguments herein.

INTRODUCTION

This case presents the question of whether the class action mechanism and Ohio's consumer protection law should permit windfall awards to individuals who were not impacted in any way by a business's allegedly impermissible practice. It provides an opportunity for this Court to say no to no-injury consumer class actions.

The Court of Common Pleas (hereinafter "trial court") certified a class that includes any person who entered an automobile purchase agreement that contained an arbitration provision the same as, or similar to, one the court previously found unenforceable. Unlike the class representative, who had a dispute with his dealership over a financing rate, it is undisputed that the overwhelming majority of class members had no issue with their purchases and therefore had no need to resolve a disagreement through arbitration or otherwise. Nor is there any other record evidence showing that the class members suffered actual harm or loss. Faced with this lack of actual damages, the trial court arbitrarily awarded \$200 in "discretionary" damages to thousands of apparently satisfied customers who happened to purchase cars from any of 25 dealerships. *See Proposed Order of Class Certification and for Partial Judgment on the Merits, Cuyahoga C.P.*

No. CV-01-454238, CV-01-442143, at 7, 9 (Sept. 10, 2012) (“Trial Court Order”). The trial court’s certification order was affirmed by a divided panel of the Eighth Judicial District Court of Appeals. *See Felix v. Ganley Chevrolet, Inc.*, 8th Dist. Cuyahoga No. 98985, 2013-Ohio-3523 (“Court of Appeals Ruling”).

These underlying rulings are directly contrary to this Court’s directions in *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408 (“*Stammco I*”), and *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, and also the legislature’s requirement that plaintiffs in consumer class actions show actual damages. R.C. 1345.09(B). The Court of Appeals gave short shrift to this Court’s direction, conveyed just one month earlier, that when a class includes “a great number of members who for some reason could not have been harmed by the defendant’s unlawful conduct” it is “defined too broadly to permit certification.” *Stammco II* at ¶ 53 (finding class certification inappropriate where individualized inquiries would be necessary to determine whether each class member authorized third-party charges at issue) (quoting *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824 (7th Cir. 2012)). This Court then emphasized in *Cullen* that a proposed class cannot satisfy the predominance requirement of Rule 23(B)(3) if its members cannot show a common loss stemming from the defendant’s conduct. *See Cullen* at ¶¶ 48-50 (finding evidence did not support a difference in value between a windshield repair and replacement common to all class members).

Here, most class members, aside from the Felixes, have sustained no loss at all. Had the lower courts properly performed a rigorous analysis of the class prerequisites, they would have found that the presence of a significant number of uninjured class members precluded class certification. Instead, the Court of Appeals completely avoided consideration of whether the

class members suffered a loss, deeming the matter a merits issue despite its importance to basic class certification requirements. *See* Court of Appeals Ruling at ¶ 49 (finding the trial court’s ruling on damages was a partial judgment on the merits not subject to review).

Certifying this class is not only contrary to Ohio law, it runs counter to recent U.S. Supreme Court rulings rejecting “leave it to the merits” shortcuts to determining classwide damages. It is also counter to a nationwide trend in which most courts have rejected consumer class actions when they allege speculative, hypothetical, or fabricated losses.

If not corrected, the lower courts’ rulings may open the door to a proliferation of “empty suit” consumer class actions in Ohio. A single person affected by a questionable business practice could proceed with a class action lawsuit on behalf of numerous fully satisfied customers. An unnoticed provision buried in a form contract that is found unenforceable or invalid in a particular case could serve as the basis for certifying a large class action. If Ohio businesses are subject to liability for arbitrary “discretionary” amounts that have no relationship to consumer loss, multiplied by potentially thousands of unharmed purchasers, the result will undermine the predictability and fairness of Ohio’s civil justice system. Class actions of this kind do not compensate people for actual losses; to the contrary, they harm Ohio consumers by needlessly leading to higher prices for goods and services. They will also make Ohio a litigation center for needless and meritless class action litigation.

ARGUMENT

Proposition of Law No. 1

A class action cannot be maintained on behalf of a putative class that includes individuals who did not sustain actual harm or damage as a result of the challenged conduct, which is a required part of the rigorous analysis under Ohio R. Civ. P. 23.

The certified class in this case includes all consumers who purchased vehicles regardless of whether they had a dispute in which the arbitration clause was relevant to them. This class very likely includes many satisfied customers. Their only common “injury” is that they signed a purchase agreement that included an arbitration clause the same as, or similar to, a provision in the Felixes’ contract. The trial court certified this class with scant analysis of whether the proposed class met the Rule 23 prerequisites and the Court of Appeals affirmed the decision by sidestepping critical matters that it considered “merits issues.”

Applying a rigorous analysis is essential because “denying or granting class certification is often the defining moment in class actions (for it may sound the ‘death knell’ of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants).” *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001)). Due process considerations underpin this requirement, which protects both the right of absent class members to seek recovery for their injuries and the right of defendants to establish defenses as to individual class members.

Had the courts below carefully considered the proposed class—one in which the class representatives claim harm from an impermissible business practice, but seek to represent thousands of consumers who experienced no injury—they would have found both that the class is overbroad and that common issues of fact do not predominate.

A. A Class That Includes Many Satisfied Customers is Overbroad

In certifying the class, the trial court did not examine how customers who had no dispute with their dealership, and who therefore were not impacted by the arbitration provision, could possibly have claims that are common to those who actually had such disputes. Trial Court Order at 4. Nor did the trial court address how the Felixes' claim is aligned with the claims of other class members when the Felixes had a dispute over the financing of their vehicle and others did not. At its core, the trial court disregarded the need for a common factual element that is central to each claim: that each class member had a dispute regarding his or her purchase that placed the arbitration provision at issue. *See Lee v. Am. Express Travel Related Servs.*, N.D. Cal. No. C 07-04765 CRB, 2007 WL 4287557, at *5 (Dec. 6, 2007) (holding that credit card holders had no standing to bring a class action where their dispute was “merely the presence” of a provision precluding arbitration of class actions and had “ask[ed] this Court to presume damages from the mere insertion of the allegedly unconscionable clauses in a contract”), *aff'd*, 348 F. App'x 205 (9th Cir. 2009).

The inclusion of individuals for whom the arbitration provision was irrelevant to their purchases—who, in other words, experienced no injury—is particularly problematic and concerning to *amici*. If sustained, this result is likely to encourage other “empty suit” litigation when plaintiffs' counsel seek certification on behalf of “all customers” where the actual dispute is limited to just two parties—the plaintiff and the defendant. Ohio law does not and should not permit use of the class action mechanism in this unfair and arbitrary manner.

As this Court has wisely recognized, a class is defined too broadly when it “include[s] a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct.” *Stammco II*, 136 St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, at

¶ 53. For instance, a proposed class cannot include “all individuals, businesses, or other entities” that received a third-party charge on a phone bill when, for some, the charge was proper. *Id.*

¶ 56. Nor can a class definition include “all” credit card holders who were assessed interest or finance charges for any reason, including when the charges were unrelated to the improper practices at issue in the lawsuit. *See Maestle v. Best Buy Co.*, 197 Ohio App.3d 248, 2011-Ohio-5833, ¶ 23. Similarly, when an online investment account experiences occasional technical difficulties, a class cannot consist of every Ohio resident who has an account when some customers did not trade that day and others may have benefited from any delay. *See Hoang v. E-Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-151, 784 N.E.2d 151 (8th Dist.), ¶¶ 24-25. Likewise, a person who inadvertently receives unsolicited facsimile advertisements cannot bring a class action on behalf of “all persons and entities” who received such advertisements, including customers who consented. *See Miller v. Painters Supply & Equip. Co.*, 8th Dist. No. 95614, 2011-Ohio-3976, ¶¶ 14, 24. In these situations, common questions do not predominate. Such classes, like that before this Court, should not be certified as a matter of law and sound policy.

Had the trial court properly limited the scope of the class definition to customers who suffered injury as a result of the arbitration provision, it would become evident that class treatment is inappropriate. *See, e.g., Repede v. Nunes*, 8th Dist. Nos. 87277, 87469, 2006-Ohio-4117, 2006 WL 2299853, ¶¶ 17, 19 (finding class certification of “all Ohio residents” who were customers of the defendant tax service provider improper where an individual analysis would be needed to distinguish which of the 4,000 class members were injured and which suffered no harm or damage at all); *Barber v. Meister Protection Servs.*, 8th Dist. No. 81553, 2003-Ohio-1520, ¶ 34 (finding, in a class defined as all persons who entered a security contract with the defendant, that the individualized inquiry necessary to distinguish class members “affected” by

the alleged illegal conduct from those “who undoubtedly have no claim whatsoever” would “obviate the purpose of a class action”). Extensive individual inquiries would be needed to determine: (1) did the customer have a dispute with the dealership related to the purchase of a vehicle; (2) was the arbitration provision invoked by the dealership; (3) was the customer injured as a result; and, if so, (4) what was his or her financial loss? The trial court short-circuited the need for a case-by-case analysis of each customer’s situation by presuming, without any factual basis, that every customer who signed a purchase agreement with an arbitration provision was injured and by arbitrarily setting each class member’s damages at \$200. *See Hoang* at ¶¶ 22, 27 (recognizing that “absent proof of classwide pecuniary loss, class certification is inappropriate” and that “[s]imple loss of services without economic loss does not create a compensable claim”).

The trial court used the class action mechanism in a manner that awarded monetary damages to individuals without requiring them to show an injury, causation, or damages. These are required elements of a claim under the Ohio Consumer Sales Practices Act (“CSPA”), R.C. 1345.09. A proposed class is overbroad when it “extends beyond the scope of the statute upon which the claims are based.” *Miller* at ¶ 24. In sum, the court’s certification of this overbroad class and its award of \$200 to each class member violate the core principle that rules of practice and procedure “shall not abridge, enlarge, or modify any substantive right.” Ohio Const., Art. IV, § 5(B).

B. The Court of Appeals Disregarded *Stammco II*

The Court of Appeals issued its order affirming class certification and denying consideration of the trial court’s award of \$200 in damages to each class member on August 15, 2013. Court of Appeals Ruling at ¶¶ 50-53. One month earlier, this Court decided *Stammco II*, which directly addressed, in significant depth, the very issues present in the *Felix* case.

Stammco II spoke directly to the rigorous analysis that was lacking below, the impermissibility of including uninjured people in a class, and the refusal to consider “merits issues” that were integral to evaluating compliance with class certification prerequisites. The Court of Appeals’ ruling nevertheless included just a single gratuitous reference to *Stammco II*, inserted into the concluding paragraph of the majority opinion. *See id.* ¶ 50. Its failure to fully consider this binding precedent, as well as the Court’s recent decision in *Cullen*, necessitates reversal by this Court.

Several aspects of the Court of Appeals’ decision are directly contrary to *Stammco II*. For example, the *Stammco II* Court recognized that “Rule 23 does not set forth a mere pleading standard,” and that the party seeking class certification must affirmatively demonstrate compliance with Rule 23. *Stammco II*, 136 St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, at ¶ 30 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). The Court of Appeals, however, did little more than recite the trial court’s findings with respect to the Rule 23 prerequisites, which mimicked the plaintiffs’ assertions and lacked a rigorous analysis. *See* Court of Appeals Ruling at ¶¶ 17-27.

Stammco II held that a proposed class is overbroad if it is defined in a manner that includes people who were not harmed by the allegedly unlawful conduct. *Stammco II* at ¶ 53. The Court of Appeals did not heed this instruction when it affirmed certification of a class that is largely composed of customers who purchased a vehicle from one of the subject automobile dealerships, received the benefit of their bargain, and were not impacted by the mere presence of the arbitration provision in their purchase agreement. *See* Court of Appeals Ruling at ¶ 36.

In addition, *Stammco II* clarified that a rigorous analysis “may include probing the underlying merits of the plaintiff’s claim” for the purpose of determining whether the Rule 23

prerequisites are satisfied because there is often overlap between merits and class certification issues. *Stammco II* at ¶ 44. The trial court's lack of a finding of a common injury and its award of \$200 in "discretionary" damages to all class members is intertwined with its decision on class certification. This unprecedented approach circumvented full and careful consideration of the class prerequisites, since many, if not most, class members experienced no loss or other harm from an uninvoked arbitration provision in their purchase agreements. Despite *Stammco II*, the Court of Appeals declared the trial court's entry of partial judgment off limits on appeal. See Court of Appeals Ruling ¶ 44 ("The propriety of the trial court's award, however, is outside the scope of our review on appeal because Ganley has only assigned as error the trial court's certification of the class, not the court's entry of partial judgment on the merits, and the partial judgment on the merits is not a final appealable order.").

The Court of Appeals reasoning echoes that which this Court firmly rejected in *Cullen*, where the Eighth District avoided considering whether the language of the insurance policy supported the plaintiffs' allegations on behalf of class members, finding this issue went "to the heart of merits of the case and is inappropriate of this point." *Cullen*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, at ¶ 33 (quoting 2011-Ohio-6621, 970 N.E.2d 1043, at ¶ 55). In response, this Court found that "[b]ecause the appellate court rejected any consideration of the underlying merits, it did not review whether the trial court conducted a rigorous analysis or whether sufficient evidence supported the trial court's findings." *Id.* ¶ 34. In evaluating class certification, *Cullen* reaffirmed that courts must consider merits issues when they impact proof of predominance, *see id.*, such as whether the bulk of class members have experienced a common loss as a result of the arbitration provision. The Eighth Circuit did not heed this clear instruction.

C. Courts Reject Shortcuts for Determining Classwide Damages

This Court's previous approval of the reasoning of *Wal-Mart Stores, Inc. v. Dukes* in *Stammco II* and *Comcast Corp. v. Behrend* in *Cullen* suggest that it would reject judicial shortcuts for determining damages on a classwide basis.

In *Dukes*, the U.S. Supreme Court reversed certification of a class consisting of 1.5 million current and former employees of the retailer across the United States. 131 S. Ct. at 2547. The lower courts certified the class and planned to avoid individual issues by evaluating liability and back-pay damages for select claimants, using the results of these trials to establish a percentage of valid claims and an average back pay amount, and then applying these figures to arrive at an amount of recovery for the entire class. *See id.* at 2561. The U.S. Supreme Court rejected this novel and highly speculative approach, which it dubbed "Trial by Formula." *Id.* Of significance to the case before this Court, the *Dukes* Court recognized that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury, which does not mean merely that they have all suffered a violation of the same provision of law." *Id.* at 2551.

More recently, in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013), the U.S. Supreme Court interpreted the federal rules to require proof that both injury and damages are amenable to class treatment before a class can be certified. In *Comcast*, which this Court cited with approval in *Cullen*, the district court certified a class of two million current and former residential and commercial, Comcast cable television subscribers. *See id.* at 1429-30. Class members alleged that they overpaid for cable services due to Comcast's alleged anticompetitive practices. *See id.* The trial court certified the class, relying on a model developed by an expert for the plaintiff that estimated hypothetical market prices that would have prevailed but for the

alleged anticompetitive activities. *See id.* at 1431. The Court of Appeals affirmed, refusing to consider flaws in the expert's computation at the class certification stage because it viewed doing so as an "attack on the merits" of the plaintiffs' case. *Id.* (quoting *Behrend v. Comcast*, 655 F.3d 182, 207 (3d Cir. 2011) (alteration omitted)).

In reversing the lower courts, the U.S. Supreme Court noted that Rule 23(b)(3) obligates plaintiffs to establish "injury" as a prerequisite for awarding damages. *Id.* at 1433-34. If a plaintiff cannot show that damages are measurable on a classwide basis, then the "adventurous innovation" of Rule 23(b)(3) is unavailable to them. *Id.* at 1432. Class certification is precluded. *See id.* The Supreme Court found that the Court of Appeals' refusal to consider whether the method of computing damages of class members was "a just and reasonable inference or speculative" strayed from its obligation to perform a rigorous analysis of class certification prerequisites. *Id.* at 1433. "Under that logic," the Court concluded, "at the class-certification stage any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.*

Lower federal courts have applied *Comcast* to require plaintiffs to "show that they can prove, through common evidence, that all class members were in fact injured" because "[w]hen a case turns on individualized proof of injury, separate trials are in order." *In re: Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) (reversing class certification where the plaintiffs' model for showing classwide damages did not sufficiently distinguish shippers who were overcharged from those who were not). Courts have firmly rejected assertions by plaintiffs that evaluation of whether a proposed class satisfies Rule 23 need not consider damages. *See, e.g., Cowden v. Parker & Assocs., Inc.*, No. 6:09-323-KCC, 2013 WL

2285163, *6 (E.D. Ky. May 22, 2013) (citing *Roach v. T.L. Cannon Corp.*, No. 3:10-cv-0591, 2013 WL 1316452, at *3 (N.D.N.Y. Mar. 29, 2013). Rather, the rigorous analysis required by *Comcast* does not permit “disconnects between damages and liability.” *BP P.L.C. Securities Litig.*, No. 4:10-md-2185, 2013 WL 6388408, at *17 (S.D. Tex. Dec. 6, 2013). “Plaintiffs cannot avoid this hard look by refusing to provide the specifics of their proposed methodology.” *Id.*

As the D.C. Circuit recognized, measuring classwide damages “is not just a merits issue” but is “essential to the plaintiffs’ claim [that] they can offer common evidence of classwide injury. No damages model, no predominance, no class certification.” *Id.* at 253 (citation omitted); *see also Torres v. Nutrisystem, Inc.*, 289 F.R.D. 587, 591-95 (C.D. Cal. 2013) (denying certification of a class of all callers to a customer service line whose conversations were recorded when automated system allowed them to bypass required disclosure because whether each class member had an expectation of confidentiality and consented to recording required individualized factual inquiries); *Diacakis v. Comcast Corp.*, No. C11-3002, 2013 U.S. Dist. LEXIS 64523, at *11 (N.D. Cal. May 3, 2013) (holding that plaintiff, who alleged Comcast representatives omitted charges when selling her a bundled cable, internet, and telephone service package, could not represent a class of all subscribers to the package, finding that “[s]ince the proposed class includes persons who were not injured in the same manner as Plaintiff, the proposed class is overbroad”).

The trial court’s approach to damages in the case before this Court, which the Court of Appeals refused to consider, is just as problematic as “Trial by Formula” in *Dukes* or the faulty computation of damages by an expert in *Comcast*. As Judge Rocco recognized in dissent, the CSPA’s requirement that plaintiffs show actual damages “impacts not only the damages that may ultimately be recovered by a properly certified class but whether a putative class may be properly

certified as a Civ.R. 23(B)(3) CSPA class in the first instance.” Court of Appeals Ruling at ¶ 72. Arbitrarily requiring a payment to each person who purchased a vehicle is not a substitute for considering class members’ proof of actual injury, causation, and damages. Class actions should not circumvent consideration of key individual questions, which, here, depend on whether a particular class member had a dispute with a dealership that resulted in a pecuniary loss.

Proposition of Law No. 2

In a class action brought under the Ohio Consumer Sales Practices Act, R.C. 1345.09(B) requires the consumers to have sustained actual damages as a result of the challenged conduct.

A. Ohio Should Not Permit “No Injury” Consumer Class Actions

Perhaps the most fundamental requirement to bringing a lawsuit is that the plaintiff has experienced an injury. This core principle ensures that courts decide only actual disputes and do not use their power in cases based on hypothetical, speculative, or nonexistent harms. This Court should find that individuals who purchased a product, but have not experienced a pecuniary loss caused by the transaction, cannot recover monetary damages through a class action under the CSPA.

Amici have observed that filings of “no injury” consumer class actions are proliferating throughout the country. For example, some class action lawyers persist in filing what are essentially product liability claims as consumer class actions on behalf of people who have not experienced a physical injury. They often seek recovery for “economic loss” due to an alleged product defect. They typically claim that the product, as sold, was worth less than the product allegedly promised. Most courts have wisely rejected such claims.¹ *See* Sheila B. Scheuerman,

¹ *See, e.g., O’Neil v. Simplicity, Inc.*, 574 F.3d 501, 504 (8th Cir. 2009) (holding that when the crib plaintiffs purchased had not exhibited a defect, they received the benefit of their bargain and could not support their claim based on the performance of cribs purchased by (Footnote continued on next page)

Against Liability For Private Risk-Exposure, 35 Harv. J. L. & Pub. Pol’y 681, 716 (2013); *see also* David G. Owen, *Products Liability Law* 273 n.84 (2005) (finding that courts “have been singularly unreceptive to these ‘no-injury claims’”). They are “empty suits.” Courts have recognized that the class members have received the “benefit of their bargain” because the product they bought performed as expected. As the U.S. Court of Appeals for the Fifth Circuit recognized in dismissing one such consumer class action, the plaintiff has essentially said: “you

others); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320 (5th Cir. 2002) (“[Plaintiff] paid for an effective pain killer, and she received just that—the benefit of her bargain.”); *Briehl v. General Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (“Where . . . a product performs satisfactorily and never exhibits an alleged defect, no cause of action lies.”); *District of Columbia ex rel. Walker v. Merck & Co.*, 874 F. Supp.2d 599, 606 (E.D. La. 2012) (“There is no obvious, quantifiable pecuniary loss that Plaintiff incurred from purchasing a drug that worked for him and did not cause him any harm.”); *Frye v. L’Oréal USA, Inc.*, 583 F. Supp.2d 954, 958 (N.D. Ill. 2008) (dismissing consumer claim where “there [was] no allegation that the presence of lead in the lipstick had any observable economic consequences”); *In re Canon Cameras*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006) (“A plaintiff who purchases a digital camera that never malfunctions over its ordinary period of use cannot be said to have received less than what he bargained for when he made the purchase.”); *Williams v. Purdue Pharma Co.*, 297 F. Supp.2d 171, 176-77 (D.D.C. 2003) (holding that class members who were prescribed a drug for pain, but suffered no ill effects and were not deceived by any representations, received the benefit of the bargain and cannot recover the purchase cost); *Wallis v. Ford Motor Co.*, 208 S.W.3d 153, 161-62 (Ark. 2005) (dismissing consumer class action seeking economic loss on behalf of individuals whose vehicles had not malfunctioned because, under Arkansas law, a private cause of action is limited to instances where a person has suffered “actual damage or injury as a result of an offense or violation”); *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 128 (N.Y. App. Div. 2002) (“[P]laintiffs have not been involved in any accidents and have not suffered any personal injuries or property damage. Moreover, plaintiffs do not allege that any seat has failed, been retrofitted or repaired, nor have plaintiffs attempted to sell, or sold an automobile at a financial loss because of the alleged defect.”); *Wilson v. Style Crest Prods., Inc.*, 627 S.E.2d 733, 736 (S.C. 2006) (“There is no evidence that the [mobile home] anchor systems have not, to date, been exactly what the Homeowners bargained for.”); *Tietzworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 240 (Wis. 2004) (“[A]n allegation that a product is diminished in value because of an event or circumstance that might—or might not—occur in the future is inherently conjectural and does not allege actual benefit-of-the-bargain damages. . . .”).

sold the product, we bought it, there was a problem with it, *other people* were harmed, and we want our money back, even though the product worked fine for us.”²

While this claim does not allege an unmanifested defect in a product, it basically alleges an unmanifested defect in a contract. Here, too, consumers received the benefit of their bargain: they purchased the car they wanted at a price they negotiated. They have no dispute with the dealer from whom they purchased their car. In fact, the claim before this Court is even more extreme than the product-liability variety of no-injury class actions. Those who purchased vehicles from the dealerships at issue do not and cannot allege even a purely economic loss, *e.g.* that their cars were worth less or that they paid too high a price for the vehicle due to inclusion of a dormant arbitration provision buried in the sales contract. Rather, the trial court awarded the class monetary damages without a showing that its members experienced an injury of any kind.³

Some courts have considered no-injury class actions outside of the product liability context. For example, even as Massachusetts developed a reputation as having among the most plaintiff-friendly consumer protection laws in the country,⁴ its highest court rejected a consumer class action that, like the Felix case, involved a problematic contract provision. *See Hershenow v. Enterprise Rent-A-Car Co.*, 840 N.E.2d 526 (Mass. 2006). In *Hershenow*, a proposed class of

² *See Rivera*, 283 F.3d at 321 (“Rivera’s claim to injury runs something like this: Wyeth sold Duract; Rivera purchased and used Duract; Wyeth did not list enough warnings on Duract, and/or Duract was defective; other patients were injured by Duract; Rivera would like her money back. The plaintiffs do not claim Duract caused them physical or emotional injury, was ineffective as a pain killer, or has any future health consequences to users. Instead, they assert that their loss of cash is an ‘economic injury.’”).

³ If a dispute between a consumer and dealership arose in the future, it would appear consumers already have a remedy: proceed with litigation on the basis that the arbitration clause has already been found unenforceable.

⁴ *See, e.g., Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476 (Mass. 2004); *Leardi v. Brown*, 474 N.E.2d 1094 (Mass. 1985).

consumers who rented vehicles from Enterprise claimed that the collision damage waiver (“CDW”) provision in the standard form rental contract violated the state’s consumer protection statute. *See id.* at 528. The Massachusetts Supreme Judicial Court granted summary judgment for the rental company, finding that plaintiffs were required to demonstrate that “even a per se deception caused a loss.” *Id.* at 533. Since the plaintiffs returned the vehicles without damage and never had to make a claim under the provision, the court found:

[T]he statutorily noncompliant terms in Enterprise's automobile rental contracts did not and could not deter the plaintiffs from asserting any legal rights. Nor did the plaintiffs experience any other claimed economic or noneconomic loss. The CDW made neither rental customer worse off during the rental period than he or she would have been had the CDW complied in full with the requirements of [Massachusetts law].

Id. at 534-35. The Court reached this conclusion even though Massachusetts’ consumer protection law, unlike Ohio law, authorizes recovery of statutory damages in class actions. *See id.* at 533 n.18 (finding plaintiffs were mistaken in their assumption that “the availability of statutory damages in the amount of twenty-five dollars . . . in lieu of actual damages, eliminates the need to prove a loss resulting from a defendant's deceptive conduct”). In sum, the court properly rejected the plaintiffs’ contention that “any consumer contract, oral or written, that violates the requirement of law in any respect, i.e., is noncompliant with any statute, rule regulation or court decision, automatically constitutes an ‘injury’ . . . entitling the plaintiff to recover statutory damages, attorney's fees, and costs, even though the plaintiff cannot demonstrate that the illegal contract . . . causes any loss.” *Id.* at 535; *see also Tyler v. Michaels Stores, Inc.*, 984 N.E.2d 737, 745 (Mass. 2013) (reaffirming that a violation of a consumer’s legal right, even where it is expressly declared an unfair or deceptive practice, “does not necessarily mean the consumer has suffered an injury or a loss entitling her to at least nominal damages and attorney’s fees; instead, the violation of the legal right that has created the unfair or

deceptive act or practice must cause the consumer some kind of separate, identifiable harm arising from the violation itself”).

This case presents an opportunity for this Court to declare that the Ohio system of justice, consistent with many other courts around the country, says no to no-injury cases. It should reject “empty suit” litigation in Ohio. Litigation in absence of injury provides no benefit to Ohio consumers; it actually harms them. This class action, if affirmed, will provide an unexpected and unearned rebate to those who happened to purchase cars from particular dealerships during a specific time period. If such “no injury” litigation is permitted, and its “discretionary” damages sustained, then the principal beneficiaries will be attorneys who bring such claims. The cost of doling out money to individuals who did not experience a loss will impact ordinary consumers, who will likely experience higher prices to account for liability that serves no compensatory purpose. It will also foster costly and unnecessary litigation in the courts of this State.

While the statutory language of consumer protection acts varies from state to state, the text of the CSPA supports the basic principle that an individual who has not experienced an injury caused by an impermissible business practice does not have a claim for damages. *See* R.C. 1345.09(A), (B), (G) (repeatedly referring to a “consumer’s actual economic damages,” defined as “damages for direct, incidental, or consequential pecuniary losses resulting from a violation of Chapter 1345”). Since there was no harm resulting from the mere inclusion of arbitration provisions in the purchase agreements of class members, the Court should find that the proposed class action seeking damages is not viable. *See Hoang*, 151 Ohio App.3d 363, 2003-Ohio-151, 784 N.E.2d 151, at ¶ 20 (holding that nominal damages are not a substitute for proof of actual injury and causation, which are required liability elements of a claim).

B. Stretching Ohio Law is Unnecessary to Protect Consumers

Due to the lack of actual economic damages, the trial court “exercised its discretion” to award \$200 to each class member. Trial Court Order at 9. The trial court imposed these damages on the Defendants as a fine for including unconscionable provisions in their sales contracts. *See id.* (imposing such damages because allowing Defendants “to emerge from this seven-year legal battle . . . without sanction” would “reward lawlessness”). It provided no basis for the amount of the award, other than observing that the “Legislature set a minimum damage award of \$200 for *individual* violations of the CSPA.” *Id.* (emphasis added). The CSPA, however, explicitly does not permit statutory damages in class actions. It does not authorize such ad hoc regulation and punishment from the bench.

The CSPA provides a variety of means to protect the public from illegal business practices. For example, in the case before this Court, any consumer who had an actual dispute in which the arbitration clause became a factor may bring an individual action to rescind the transaction, or recover the greater of treble damages or \$200 plus as much as \$5,000 in noneconomic damages. *See* R.C. 1345.09(B). A consumer may also seek a declaratory judgment, an injunction, or other appropriate relief to challenge an improper contract provision. R.C. 1345.09(D). Where a business knowingly violated the law, the CSPA also authorizes the court to award a prevailing consumer a reasonable attorney’s fee for the work performed. R.C. 1345.09(F).

In addition, the CSPA provides a means to stop illegal business practices before they harm consumers. In such instances, the Attorney General can seek a declaratory judgment, or a temporary restraining order or injunction, to stop the act or practice. *See* R.C. 1345.07(A). Violation of such an order is punishable by a civil penalty of up to \$5,000 for each day of

violation. R.C. 1345.07(A)(2)(b). The Attorney General can also bring a class action on behalf of the state's consumers, but, as with actions brought by private individuals, this remedy must be "for damage caused by" a violation. *See* R.C. 1345.07(A)(3).

C. Minimum Damages, However Labeled, Are Not Authorized in Class Actions

While the CSPA provides several means to address deceptive business practices, what it expressly does not permit are consumer class actions that award minimum damages as a substitute for showing an actual injury and a pecuniary loss caused by a prohibited act. *See* R.C. 1345.09(B). Section 1345.09(B) "limits damages available in a class action to actual damages." *Washington v. Spitzer Mgmt., Inc.*, 8th Dist., No. 81612, 2003-Ohio-1735, ¶ 33. While the courts below referred to the \$200 per class member as "discretionary" damages, such awards are simply minimum statutory damages in disguise.

The Ohio legislature had sound public policy reasons for incorporating into R.C. 1345.09(B) the "but not in a class action" language, restricting the availability of statutory damages in class actions. The legislature recognized that statutory damages serve little purpose in class actions. Statutory damages are intended to provide an incentive to bring an *individual* lawsuit when the anticipated damages are otherwise low. *See* Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 Ohio St. L.J. 437, 462 (1991) ("Consumer cases are typically for small stakes; that is why it is necessary to offer statutory, multiple, and punitive damages, and attorney's fees—because otherwise few consumers would sue."). Class actions serve a similar purpose, but provide an incentive through aggregation of claims. Thus, the incentive-creating effect of statutory damages is rendered duplicative when these minimum amounts are available in a class action.

As the CSPA recognizes, the combination of statutory damages, aggregation of thousands of claims through a class action, and the potential for an award of attorneys' fees provides a likelihood of windfall recovery that over-incentives such lawsuits. *See Washington* at ¶ 33 (“Ohio’s CSPA specifically authorized class actions and limits damages in class actions to protect defendants from huge damage awards in class actions.”) (emphasis in original); *see also* Victor E. Schwartz & Cary Silverman, *Common Sense Construction of Consumer Protection Acts*, 54 Kan. L. Rev. 1, 61 (2005). For this reason, the CSPA, as well as many other state consumer protection laws, limit relief in class actions to actual damages, or preclude class treatment entirely.⁵ Several states go further. They eliminate the potential for excessive liability by precluding class actions under their consumer protection statutes entirely.⁶

The Court should reaffirm that damages recoverable under the CSPA are established by the statutory text. Minimum damages, whether labeled “statutory” or “discretionary,” are not permitted. Ohio should reject such empty-suit litigation.

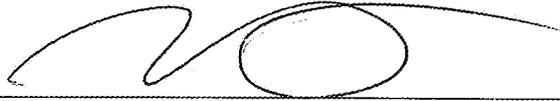
⁵ *See, e.g.*, Colo. Rev. Stat. § 6-1-113(2); N.Y. C.P.L.R. § 901(b); Utah Code Ann. § 13-11-19(2); *see also* N.M. Stat. Ann. § 57-12-10(E) (limiting treble damages to class representatives while allowing class members to recover only actual damages); Or. Rev. Stat. § 646.638(8)(a) (permitting statutory damages in class actions only when the members sustained an ascertainable loss of money or property as a result of a reckless or knowing violation of certain prohibitions).

⁶ *See, e.g.*, Ala. Code § 8-19-10(f); Ga. Code Ann. § 10-1-399(a); La. Rev. Stat. Ann. § 51:1409(A); Miss. Code Ann. § 75-24-15(4); Mont. Code Ann. § 30.14-133(1); S.C. Code Ann. § 37-5-202(1), (3).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to reverse the decision below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Memorandum in Support of Jurisdiction of *Amici Curiae* upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the U.S. Postal Service on April 11, 2014, addressed to the following:

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