IN THE SUPREME COURT OF OHIO

CINDY SATTERFIELD, et al., *Plaintiffs-Appellees,* v. AMERITECH MOBILE COMMUNICATIONS, INC., et al., *Defendants,* and CINCINNATI SMSA LIMITED PARTNERSHIP, *Defendant-Appellant.*	)	Supreme Court Case No. 2017-0684 On Appeal from the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County Court of Appeals Case No. 16-104211

BRIEF IN SUPPORT OF DEFENDANT-APPELLANT BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE OHIO CHAMBER OF COMMERCE AS *AMICI CURIAE*

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The Chamber of Commerce of the United States of America and the Ohio Chamber of Commerce respectfully submit this brief as *amici curiae* in support of Defendant-Appellant Cincinnati SMSA Limited Partnership ("Ameritech").

INTRODUCTION

This appeal arises out of a decision from the Eighth Judicial District Court of Appeals that, if affirmed, could open the floodgates to abusive class action litigation in Ohio. Specifically, the Eighth District affirmed certification of a class of indirect claimants seeking statutory treble damages under R.C. § 4905.61 where: (i) the trial court failed to require common evidence of class-wide damages; and (ii) the order of the Public Utility Commission of Ohio (PUCO) on which the class based its standing did not establish a violation of any of the class members' rights.

In certifying a class, trial courts have an obligation to conduct a rigorous analysis to ensure that the plaintiff establishes the requirements for class certification. This includes ensuring that a plaintiff's damages model can measure damages on a class-wide basis and in a manner consistent with the theory of liability. The Supreme Court of the United States made clear in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2011), that this requirement applies under Federal Rule of Civil Procedure 23, and this Court should fully adopt the Comcast standard and make it applicable to all Ohio class actions. The trial court's obligation to protect against abuse is heightened where, as here, the putative class's claim to standing is indirect and far removed and yet the class

wields as a weapon a treble-damages provision that serves to extract a damages award or settlement that may be unsupported, disproportionate, and duplicative.

More broadly, the Eighth District's decision invites plaintiffs' attorneys across the nation to flock to Ohio in pursuit of certification of overly broad classes in order to strengthen their leverage to extract unwarranted settlements from risk-averse defendants. It is axiomatic that class litigation so magnifies the expense and risk of litigation that certification of a class often creates inexorable pressure for defendants to settle even meritless claims. When burdened with settlement and litigation costs, businesses often must pass those costs along to consumers through increased prices of goods and services, to employees through decreased wages, and to investors through decreased returns. The entire outcome of a case often hinges on the critical class-certification decision, and the requirements to certify a class in Ohio must thus be rigorously applied. The Eighth District's decision creates an untenable situation for our Nation's businesses and residents, as well as for the Ohio judicial system.

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country in matters before the courts, Congress, and the Executive Branch. To that

end, the Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community, including cases addressing the requirements for class certification.

Founded in 1893, the Ohio Chamber of Commerce ("Ohio Chamber") is Ohio's largest and most diverse statewide business advocacy organization. It works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.

Many of *amici curiae's* members are defendants in class action lawsuits. Accordingly, *amici curiae* and their members have a keen interest in ensuring that courts rigorously analyze whether plaintiffs in class action suits satisfy the requirements for class certification.

STATEMENT OF THE CASE AND FACTS

Amici curiae adopt Ameritech's Statement of the Case and Facts.

ARGUMENT

I. Propositions of Law

The Court accepted jurisdiction of this appeal on the following Propositions of Law:

Proposition of Law No. 1: A claimant lacks standing to sue under R.C. 4905.61 for "treble the amount of damages sustained in consequence of the violation" absent a prior determination by the Public Utilities Commission that the claimant's rights under a

specific public utilities statute or commission order were violated.

Proposition of Law No. 3: Where a plaintiff relies upon a damages model to establish that common issues would predominate, the model must demonstrate that injury-in-fact and damages can be proven on a class-wide basis.

II. Absent rigorous analysis of the class-certification and standing requirements, there is a serious risk for litigation abuse and extraction of undue settlements.

The most important part of a class action is often the class-certification decision. "As a practical matter, the certification decision is typically a game-changer, often the whole ballgame, for plaintiffs and plaintiffs' counsel." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012) (citation omitted). As the Supreme Court of the United States has recognized, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Gen. Motors Corp. v. City of New York*, 501 F.2d 639, 657 (2d Cir. 1974) (Mansfield, J., concurring in granting interlocutory appeal of class certification) ("[B]ecause of the sheer size and complexity of the action, the added time, expense and effort needed to defend it as a class suit may force the defendant, despite the doubtful merit of the claims, to settle rather than to pursue the long and costly litigation route required for review of the class action certification.") (citations omitted).

Defendants often must settle even tenuous claims following an adverse class-certification decision. *See, e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 151

(2d Cir. 1987) (affirming approval of a $180 million class settlement even though the trial court "viewed the plaintiffs' case as so weak as to be virtually baseless" and had granted summary judgment against plaintiffs who had opted out). This is especially true where a large class is certified: "Certification of a large class may so increase the defendant's potential damages liability and litigation costs" that even a defendant with the most surefire defense "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

Given the high post-certification settlement rates and enormous defense costs, class action suits take a heavy toll on our Nation's businesses. The cost to defend against a class action can range from "$5 million to $100 million." Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011).[1] In addition, businesses involved in class action disputes may suffer, as an indirect cost, significant harm to their reputation. *See, e.g.*, Matthew Grimsley, What Effect Will *Wal-Mart v. Dukes* Have on Small Businesses, 8 Ohio St. Entrepreneurial Bus. L.J. 99, 101 n.7, 124-25 (2013) (citations omitted). In the end, businesses subjected to class action litigation can either fight on, bearing significant defense costs and risking potentially

[1] Available at http://usa.marsh.com/Portals/9/Documents/FINPROFocusDukesvWalMartJuly2011.pdf (last visited May 19, 2017). *See also The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 14 (2015), available at http://classactionsurvey.com/pdf/2015-class-action-survey.pdf (last visited May 21, 2017) ("In 25 percent of bet-the-company class actions, companies spend more than $13 million per year per case on outside counsel. In 75 percent of such actions, the cost of outside counsel exceeds $5 million[.]").

ruinous liability, or yield to what amount to "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

In short, it is for these reasons that Ohio courts must conduct a rigorous analysis on issues of class certification, as well as a probing inquiry of whether the plaintiff class has standing. These requirements are critical in protecting against abuse.

III. The lower courts' decisions on the propositions of law exacerbate the risk of litigation abuse.

This case underscores the need for the Court to expressly adopt the U.S. Supreme Court's decision in *Comcast* and require courts to apply a rigorous analysis before certifying a class action.

In certifying a class, "a trial court must conduct a rigorous analysis" to determine "that sufficient evidence proves that all requirements of Civ.R. 23 have been satisfied." *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 2. One prerequisite to class certification is that "questions of law or fact common to class members predominate over any questions affecting only individual members[.]" Civ.R. 23(B)(3).

In this case, the trial court certified (and the Court of Appeals affirmed) a class of "all retail subscribers of [Ameritech] who purchased service with an Ohio area code within geographic areas in which the PUCO decision found wholesale price discrimination during the period October 18, 1993 through September 8, 1995." *Satterfield v. Ameritech Mobile Commc'ns, Inc.*, 8th Dist. Cuyahoga No. 16-104211, 2017-

Ohio-928, ¶ 10 (Mar. 16, 2017) (the "Court of Appeals Opinion"). This was problematic for at least two reasons.

First, the Court of Appeals did not require the plaintiffs to prove a class-wide damages model—a decision that is inconsistent with the decision of the Supreme Court of the United States in *Comcast*. As the Supreme Court explained, damages must be "susceptible of measurement across the entire class for purposes of Rule 23(b)(3)," and a plaintiff's damages model must be consistent with its theory of liability. *Comcast*, 133 S.Ct. at 1433 (citations omitted). The Court further stated that "for purposes of Rule 23, courts must conduct a 'rigorous analysis' to determine whether" these requirements have been satisfied. *Id*. (citation omitted).

The trial court here certified the plaintiffs' proposed class, and the Court of Appeals affirmed, despite recognizing that the plaintiffs' expert did not offer a damages model for alleged damages in this case. The model plaintiffs' expert was familiar with purported to measure damages to *one reseller*, not to the class of *retail purchasers* for whom the plaintiffs claim damages. Court of Appeals Opinion, ¶ 26. Because the plaintiffs relied on a mere promise that its reseller model could somehow be amended to measure damages across the entire class such that common issues predominated, the decisions of the courts below improperly departed from the requirements of *Comcast*.[2]

[2] "*Comcast* reiterated that damages questions should be considered at the certification stage when weighing predominance issues," and a court errs where it does "not evaluate whether the individualized damages questions predominate over the common

This Court should make clear that the damages requirement of *Comcast* applies to class actions in Ohio state courts.

Second, the Court of Appeals' decision likely invites abusive class action suits and expensive settlements of meritless claims. The features of this particular case highlight that concern. This is an extraordinarily stale case (filed in 2003) concerning a class period that is even older (1993–1995). Injuries are speculative; damages, at least on a class-wide basis, even more so. Yet, the case is brought under a statute that was enacted in the early 1900s, pre-dates the passage of Civ.R. 23, and imposes trebles damages.

Moreover, the district court further expanded the threat of liability by holding that the class members could allege standing based on a 2001 order of the PUCO finding that two providers of cellular services, including Ameritech, engaged in price discrimination against Cellnet, an independent wholesale reseller of cellular services (the "Cellnet Order"). *In re Westside Cellular, Inc. d/b/a Cellnet*, PUCO Case No. 93-1758-RC-CSS, 2001 Ohio PUC LEXIS 18 (Jan. 18, 2001). None of the class members were parties to the PUCO proceedings resulting in the Cellnet Order, and the Cellnet Order did not find violations of any of the class members' rights. Thus, in certifying the class

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questions of liability." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 408 (2d Cir. 2015) (citing *Comcast*, 133 S.Ct. 1426) (collecting cases); *see also Bussey v. Macon County Greyhound Park, Inc.*, 562 Fed. Appx. 782, 791 (11th Cir. 2014) (reversing class certification where trial court failed "to conduct the 'rigorous analysis' required by the Supreme Court's *Comcast* decision regarding whether calculation of the class members' damages would necessitate such individual inquiry that individual issues would predominate over common ones").

in this case, the lower courts exponentially increased Ameritech's liability under the Cellnet Order by permitting treble damages claims for a finding that the PUCO *did not make*, i.e., that the violations found in the Cellnet Order minimized competition and resulted in higher cellular service prices at the retail level.

The Eighth District's holding not only excuses plaintiffs from establishing a core element of their claim, but also dramatically increases the risk of a double recovery. Indeed, Ameritech paid millions of dollars in settlement to Cellnet based on Cellnet's position that many retail customers would have purchased service from Cellnet instead of Ameritech but for the discrimination found by the PUCO in the Cellnet Order. Under the Eighth District's decision, the consumer class here will be permitted to seek *those same damages* from Ameritech—extracting a double recovery from Ameritech, which becomes *sixfold recovery* under the mandatory trebling feature of R.C. 4905.61. The number of potential plaintiffs seeking recovery against Ameritech will be unlimited; each and every consumer can potentially recover against Ameritech whether they paid the allegedly discriminatory price or not.

All of these factors taken together suggest that, while plaintiffs would likely not be capable of successfully litigating this case to judgment, the class-certification decision in this case *was the whole case*, and, if left to stand, could drive this matter to an unjustified settlement, with the costs potentially being passed on to the consumers.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the Court of Appeals' decision, and accept Ameritech's positions on the two propositions of law at issue.

Dated: April 2, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

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