No.

In the Supreme Court of Ohio

FORD MOTOR CREDIT COMPANY,	:	Case No. ~~12~~- 2012-462
	:	
Counter-Defendant/Appellant,	:	Court of Appeal Case No. CA-11-096413
	:	
vs.	:	Cuyahoga Cty. Common Pleas Ct.
	:	No. CV-04-536588
SUDESH AGRAWAL,	:	
	:	On Appeal from the Cuyahoga County
Counter-Claimant/Appellee.	:	Court of Appeals, Eighth Appellate District

MEMORANDUM OF AMICUS CURIAE AMERICAN FINANCIAL SERVICES ASSOCIATION IN SUPPORT OF JURISDICTION

Anand N. Misra (0067594)
THE MISRAH LAW FIRM
3659 Green Rd., Ste.. 100
Cleveland, OH 44122-0000
Tel: 216-752-3330

Robert S. Belovich (0024187)
9100 South Hills Blvd., Ste. 300
Broadview Heights, OH 44147-0000
Tel. 440-838-8883

Attorneys for Counter-Claimant/Appellee Sudesh Agrawal

Attorneys for Counter-Defendant/Appellant Ford Motor Credit Company listed on next page

Stephen J. Butler (0010401)
THOMPSON HINE LLP
312 Walnut Street, 14th Floor
Cincinnati, Ohio 45202-4029
Telephone: (513) 352-6587
Facsimile: (513) 241-4771

E-mail:Steve.Butler@ThompsonHine.com

Jan T. Chilton (pro hac vice motion pending)
SEVERSON & WERSON,
A Professional Corporation
One Embarcadero Center, 26th Floor
San Francisco, California 94111
Telephone: (415) 398-3344
Facsimile: (415) 956-0439
E-mail: jtc@severson.com

Attorneys for Amicus Curiae American Financial Services Association

Counsel for Counter-Defendant/ Appellant
Ford Motor Credit Company

Jonathan D. Hacker (*pro hac vice*)
Loren L. AliKhan (*pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye St. N.W.
Washington, D.C. 20006
Tel: (202) 383-5300
E-mail: jhacker@omm.com
lalikhan@omm.com

Irene C. Keyse-Walker (0013143)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414
Tel: (216) 592-5000
Fax: (216) 592-5009
E-mail:ikeyse-walker@tuckerellis.com

Brett K. Bacon (0022826)
Colleen C. Murnane (0064840)
Gregory R. Farkas (0069109)
FRANTZ WARD LLP
127 Public Square Bldg., 25th Floor
Cleveland, OH 44114-1999
Tel: (216) 515-1660
Fax: (216) 515-1650
E-mail: bbacon@frantzward.com
cmurnane@frantzward.com
gfarkas@frantzward.com

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I

INTEREST OF AMICUS CURIAE

Amicus American Financial Services Association ("AFSA") is the nation's largest trade association representing market-funded providers of financial services to consumers and small businesses. AFSA has a broad membership, ranging from large international financial services firms to single-office, independently owned consumer finance companies.

For over 90 years, AFSA has served the consumer credit industry, protecting access to credit and consumer choice. AFSA represents financial services companies that hold a leadership position in their markets and conform to the highest standards of customer service and ethical business practices. AFSA's officers, board, and staff are dedicated to continuing this legacy of commitment through the addition of new members and programs, and increasing the quality of existing services.

AFSA encourages ethical business practices and supports financial education for consumers of all ages. AFSA advocates before legislative, executive and judicial bodies on issues affecting its members' interests. It has appeared as an amicus before many of the nation's highest courts on issues of concern to the consumer credit industry.

AFSA's members are vitally concerned in the proposition of law raised by this appeal. Most consumer credit transactions are heavily regulated by state and federal law. For that reason, almost all consumer credit contracts are written on standardized forms. For example, all of the nearly 1.75 million consumer leases of new cars and light trucks entered into each year[1] must

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[1] *See* U.S. Dept. of Transp., Bureau of Transp. Statistics, National Transportation Statistics, Table 1-17, publicly available at <http://www.bts.gov/publications/national_transportation_statistics/html/table_01_17.html>, showing new vehicle (passenger car and light truck) leases for 2010 totaled 2,970,000, and ranged from 5,460,000 in 1999 to 2,503,000 in 2009. Consumers account for about 59% of all new car sales and leases. *Id.*, Table 1-18.

be written on standard-form contracts to comply with the detailed disclosure and other requirements of the Consumer Leasing Act (15 U.S.C. § 1667a) and its implementing regulation (12 C.F.R. pt. 213) as well as statutes of the state in which the car is leased (see, e.g., Cal. Civ. Code, §§ 2985.8, 2985.9, 2986.3).

Moreover, to assure compliance with legal requirements, most financial institutions adopt uniform policies which their employees are urged to follow.

If standardized contracts and common policy are enough to assure class certification in Ohio, virtually any claim against a consumer credit finance company can be transformed at the consumer's option, from a relatively small individual matter into costly and time-consuming class action, often with huge potential exposure, exerting an undue pressure to settle regardless of the claim's merit. Ohio's lengthy limitations periods and lack of a borrowing statute prior to April 2005 exacerbate the untoward effects of such an overly permissive approach to class certification.

Lax standards for class certification, long limitations periods, and lack of a borrowing statute before 2005 will make Ohio a haven for class claims that could not be brought anywhere else. This case illustrates the point. Here, the lower courts have certified a nationwide class on a claim which had already been denied certification in California and on which limitations periods had long since expired in most other states.

II

THIS APPEAL IS OF PUBLIC OR GREAT GENERAL INTEREST; THE COURT SHOULD GRANT JURISDICTION

Are class certification's commonality and predominance criteria satisfied simply by showing that class members signed standardized contracts and that the defendant wrote a policy,

allegedly at odds with the contract? This appeal squarely raises that question. It is of public or great interest, justifying this Court's review.

In *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 430, 696 N.E.2d 1001 (1998), this Court observed that "[c]ourts ... ***generally*** find that a wide variety of claims may be established by common proof in cases involving similar form documents or the use of standardized procedures and practices." (Emphasis added.)

In this case, the Court of Appeals deleted the "generally" and converted *Cope's* observation into a rule of law: Standardized contract plus common policy equals class certification—no further analysis, rigorous or otherwise, of Civ. R. 23's commonality and predominance criteria is required.

The Court of Appeals' short-cut to class certification misconstrues *Cope's* observation, is out of step with this Court's and the United States Supreme Court's more recent class certification decisions, and threatens to make Ohio a Mecca for class actions that cannot be maintained elsewhere. This Court should grant jurisdiction to prevent that untoward result and to restore Ohio class action law to its proper course.

A. "Generally" Is Not "Always"; Rigorous Analysis Is Required To Determine Whether A Case Fits The General Rule Or Is An Exception

Even *Cope* observed only that a defendant's use of "similar form documents or ... standardized procedures and practices" may "***generally***" allow a class claim to "be established by common proof," thus making class certification proper.

What is "generally" true, however, is not "always" so. Standardized documents and procedures or policies do not guarantee that a class claim may be established by common proof or that it is properly certified. The existence of standard documents and/or policies does not, *ipso facto*, establish that class members were all treated in the same, allegedly wrongful manner.

The cases proving this point are legion. *Wal-Mart Stores, Inc. v. Dukes*, 531 U.S. __, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) is the most recent and prominent of them. There, Wal-Mart had a company-wide policy of allowing its local supervisors to use their discretion making employment decisions, including hiring and promoting employees and setting their pay. Despite that standard policy, however, the high court found that plaintiffs had not proven commonality, let alone predominance's "far more demanding" standard. *Id.*, 131 S.Ct. at 2554-56; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) provides another illustration. There, the plaintiffs alleged a putative nationwide class claiming that Motel 6 had a uniform policy of discriminating against African-Americans by denying them hotel accommodations, placing them in separate units, and giving them substandard service. *Id.* at 1001. Despite that allegedly uniform policy, the court held plaintiffs could not establish predominance because they could not show, through common evidence, that each class member had been adversely affected by the policy.[2] *Id.* at 1006; *accord Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1235 (11th Cir. 2000) (class certification reversed; individual issues predominated on claim Avis had a corporate policy of discriminating against Jewish customers).

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[2] "[T]he single common issue in the Jackson case—whether Motel 6 has a practice or policy of discrimination—is not rendered predominant over all the other issues that will attend the Jackson plaintiffs' claims by the fact that class treatment of these claims may be more efficient and uniform than case-by-case adjudication. ... [¶] ... The issues that must be addressed include not only whether a particular plaintiff was denied a room or was rented a substandard room, but also whether there were any rooms vacant when that plaintiff inquired; whether the plaintiff had reservations; whether unclean rooms were rented to the plaintiff for reasons having nothing to do with the plaintiff's race; whether the plaintiff, at the time that he requested a room, exhibited any non-racial characteristics legitimately counseling against renting him a room; and so on. ... These issues are clearly predominant over the only issue arguably common to the class ...." *Jackson,* 130 F.3d at 1006.

Similarly, the fact that a defendant employer has a uniform policy classifying all employees bearing the same job title as exempt from wage and hour laws does not guarantee class certification of claims the employer violated those laws. Certification is properly denied when liability turns on individual issues regarding each employee's actual job duties and performance.[3]

Individual issues may predominate even on breach of contract claims based on standardized documents and common policies. For example, certification has been denied of class claims for wrongful denial of insurance claims even though the claims arose under standard policies and the insurer denied the claims under an allegedly wrongful common policy.

> Even if State Farm and Farmers adopted improper claims practices to adjust Northridge earthquake claims, each putative class member still could recover for breach of contract and bad faith only by proving his or her individual claim was wrongfully denied, in whole or in part, and the insurer's action in doing so was unreasonable. Thus, each putative class member's potential recovery would involve an individual assessment of his or her property, the damage sustained and the actual claims practices employed. In such cases, class treatment is unwarranted.

Newell v. State Farm Gen. Ins. Co., 118 Cal.App.4th 1094, 1103, 13 Cal.Rptr.3d 343, 350 (2004).[4]

As these cases illustrate, the existence of standardized contracts and uniform policies does not assure that a class claim may be established by common proof so as to satisfy the commonality and predominance criteria of Civ. R. 23(a)(2) and (b)(3). Proof of standardized documents and common policies is not enough, in itself, to warrant class certification. Instead, a

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[3] *See, e.g., Marlo v. United Parcel Serv., Inc.,* 639 F.3d 942, 948 (9th Cir. 2011); *Myers v. Hertz Corp.,* 624 F.3d 537, 549-50 (2d Cir. 2010); *In re Wells Fargo Home Mortg. Overtime Pay Litig.,* 571 F.3d 953, 958-59 (9th Cir. 2009); *Vinole v. Countrywide Home Loans, Inc.,* 571 F.3d 935, 945-46 (9th Cir. 2009).

[4] *Accord Juarez v. Jani-King of Cal., Inc.,* 273 F.R.D. 571, 583-84 (N.D. Cal. 2011); *Campion v. Old Republic Home Protection Co., Inc.,* 272 F.R.D. 517, 530-31 (S.D. Cal. 2011); *Basurco v. 21st Century Ins. Co.,* 108 Cal.App.4th 110, 119, 133 Cal.Rptr.2d 367, 373 (2003).

"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."[5]

The required "rigorous analysis" must include a thorough, reasoned discussion of the opponent's objections to class certification and the evidence likely to be adduced at trial to prove or disprove each critical element of the putative class' claims. *Howland*, 2004-Ohio-6552, ¶¶ 21, 26; *see also Gintis v. Bouchard Transp. Co., Inc.*, 596 F.3d 64, 66-68 (1st Cir. 2010). The court must "consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317 (3d Cir. 2008) (citations omitted).[6]

Here, neither lower court engaged in that sort of rigorous analysis but, instead, stopped upon finding defendant used standardized contracts and had a common policy regarding inspection of cars for excess wear and tear. *See Ford Motor Credit Co. v. Agrawal*, 2011-Ohio-6474, ¶¶ 39, 48. Had the lower courts gone further, they would have seen that individual evidence will be required to prove or disprove key elements of the putative class' fraud and breach of contract claims.

In this case, as in *Basurco, Newell,* and *Campion*, a class member cannot establish that the defendant breached his or her lease simply by proving that the defendant adopted an excess wear and tear inspection standard that differed from the one the lease specified. Instead, a class member must also show that the independent dealer who conducted the inspection in fact applied

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[5] *Howland v. Purdue Pharma L.P.*. 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d 141, ¶ 25 (*quoting Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442 (1998)).

[6] *See also In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, 2012 WL 379944, at *8 (D. N.J. 2012) (The court must consider "the substantive elements of Plaintiffs' claims in order to make a qualitative assessment of whether or not Plaintiffs can prove their claims with common evidence.").

a divergent inspection standard and that, as a result, the class member was assessed higher wear and tear charges than if the dealer had applied the standard the lease specified.

This is not a case like *Hamilton*, 82 Ohio St.3d 67, 694 N.E.2d 442, where the same mistaken formula was mechanically applied to compute the amount each class member owed. Inspection for excess wear and tear requires the exercise of human judgment, not rote machine computation. The independent dealers who exercised that judgment had a strong incentive to under-estimate excess wear and tear. A happy lease-end customer is more likely to buy or lease again from the same dealer. Hence, the fact that Ford Motor Credit Company ("Ford Credit") directed the dealers to inspect using a particular standard provides no assurance that a dealer actually used that standard in assessing a particular class member's excess wear and tear liability. Individual evidence will be needed to show what standard a dealer actually applied in inspecting a class member's car.[7]

Similarly, individual evidence will be needed to prove that any difference in the inspection standard actually applied increased the excess wear and tear fee a class member was charged.[8] Some damage to a car would have to be repaired even under the lease's "normal" wear and tear standard. For example, a non-functioning battery would, most likely, have to be re-

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[7] The Court of Appeals' decision wrongly dismisses the necessity of individual proof on this element of the claim as an argument going to the merits of the lawsuit. *Ford Motor Credit*, 2011-Ohio-6474, at ¶ 48. To be sure, the proof will go to the merits. But the fact that the proof must be by individual evidence directly addresses the key class certification elements of commonality and predominance. *See Price v. Martin*, __ So.3d __, 2011 WL 6034519, at *8 (La. 2011) (The lower court "confused the issue before it—whether plaintiffs presented significant proof of common causation—with a merits determination.").

[8] *See Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 195-96 (3d Cir. 2009) ("[A]n employer's '100% healed' policy, even if deemed per se discriminatory, cannot give rise to a finding of liability and relief under the ADA without the statutorily required inquiry into whether those affected by policy are disabled and able to perform the essential functions of the jobs they seek or desire with or without reasonable accommodation." That individualized issue defeats class certification.).

placed under the "normal" standard. The replacement cost would likely be the same no matter what inspection standard was applied. So a class member charged only for battery replacement could not prove Ford Credit breached his lease or that he suffered any harm as a proximate result. Similarly, a class member charged only for dings and dents would have no viable claim without showing that he or she was charged for repair of dings or dents that would have passed inspection under the contractual "normal" standard or that it would have cost less to have dings or dents repaired to that standard.[9]

Thus, had the lower courts properly engaged in the required "rigorous analysis" of Civ. R. 23's requirements rather than stopping short when they saw the case involved standardized contracts and common policies, they would and should have reached a different conclusion, denying rather than granting class certification.

B. The Court Of Appeals' Curtailed Analysis Is Incompatible With This Court's And The United States Supreme Court's Recent Decisions

The Court of Appeals' abbreviated analysis cannot be reconciled with this Court's and the United States Supreme Court's recent class action jurisprudence.

In *Howland*, 2004-Ohio-6552, ¶¶ 21, 26, this Court directed this state's courts to rigorously analyze a defendant's objections to class certification, particularly when other jurisdictions' courts have denied class certification of similar claims for those reasons. The lower courts

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[9] The Court of Appeals held that the lease agreement and allegedly differing inspection procedure documents, "standing alone, constitute evidence of class-wide injury." *Ford Motor Credit*, 2011-Ohio-6474, ¶ 39. As the examples given in the text illustrate, the Court of Appeals was wrong. Class-wide reliance might be inferred from a uniform, material misrepresentation, but no class-wide inference may reasonably be drawn, at least under the circumstances of this case, that class members were injured by that reliance. *See Price,* 2011 WL 6034519, at *9. Proximately caused injury is a necessary element of a fraud claim. *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 169, 462 N.E.2d 407 (1984); *Hacker v. Nat'l College of Bus. & Tech.*, 186 Ohio App.3d 203, 2010-Ohio-380, 927 N.E.2d 38, ¶¶ 14, 16 (2d Dist.). That element may be proven or disproven only with evidence individual to each class member.

wrongly disregarded that instruction in this case, brushing aside with little analysis Ford Credit's objections which had led to denial of class certification in California on identical claims. *See* Memo. in Support of Juris., pp. 14-15.

The United States Supreme Court raised the bar even higher in *Wal-Mart Stores, Inc.*, 131 S.Ct. 2541. Before that landmark decision, courts gave the commonality criterion "a permissive application," finding the standard met so long as there was "a common nucleus of operative facts, or a common liability issue." *Hamilton*, 82 Ohio St.3d at 77. No longer will that lax standard be applied or such a minimal showing suffice.

As the high court pointed out, any competently drafted class action complaint phrases common liability issues. *Wal-Mart Stores, Inc.*, 131 S.Ct. at 2551. That is not enough to satisfy the commonality requirement. Instead, the common liability issue "must be of such a nature that it is capable of classwide resolution." *Id.* Common questions or issues are not what counts. "[R]ather, [what matters is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L.Rev. 97, 132 (2009)); *accord Carnetts, Inc. v. Hammond*, 279 Ga. 125, 129, 610 S.E.2d 529, 532 (Ga. 2005) ("a common question is not enough when the *answer* may vary with each class member").

To meet the new, heightened standard of commonality, a plaintiff cannot merely *allege* a claim common to class members or show that all class members' claims arise from a common nucleus of fact. Instead, the plaintiff must demonstrate through evidentiary proof that the case is based on a common contention and "that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc.*, 131 S.Ct. at 2551. The common contention is one that may be proven or disproven by common

evidence, so that "when answered as to one class member, [it] is answered as to all of them." *Price*, 2011 WL 6034519, at *6.

Predominance, the battleground in this case, remains a "far more demanding" standard than commonality. *Amchem Prods., Inc.*, 521 U.S. at 624. Like a boat on a rising tide, the predominance standard has been raised along with the new, heightened commonality standard.

"Because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual, a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case[.]" *Hydrogen Peroxide*, 552 F.3d at 311 (internal quotation marks & citations omitted). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Id.* In other words, the "predominance inquiry focuses on 'whether the proof at trial will be predominantly common to the class or primarily individualized.' " *Garcia v. Medved Chevrolet, Inc.*, 263 P.3d 92, 98 (Colo. 2011) (citation omitted).

In deciding whether common or individual proof will predominate at trial, a court may not view the case solely from the plaintiff's perspective, but must also consider the defenses the defendant will assert and the evidence it will introduce. For example, in a consumer fraud action, a plaintiff may present common circumstantial evidence giving rise to a class-wide presumption or inference of reliance. The defendant, however, may rebut that presumption or inference by presenting individual evidence of additional disclosures or interactions with class members which demonstrate that they were not misled or suffered no injury. In deciding whether

common issues predominate in such a case, it is error to consider only the plaintiff's evidence and ignore the defendant's. *Garcia,* 263 P.3d at 100-02 & n. 6.[10]

The reason for this rule is simple and persuasive. A defendant may not, consistent with due process, be prevented from introducing relevant individual evidence to rebut plaintiff's common proof or to establish legally permissible defenses to class claims. *Duran*, 2012 WL 366590, at *30-32.

> [I]t is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen. ... "Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going."

Granberry v. Islay Investments, 9 Cal.4th 738, 749, 38 Cal.Rptr.2d 650, 656, 889 P.2d 970, 976 (1995).

In this case, the lower courts improperly determined the predominance criterion was met based solely on the plaintiffs' evidence of standardized contracts and a common inspection guide. *See Ford Motor Credit Co.*, 2011-Ohio-6474, ¶¶ 39, 48. They utterly ignored the relevant individual evidence that Ford Credit proffered to rebut plaintiffs' claims: evidence that individual independent dealers used inspection standards no different from the lease's "normal" standard, and evidence that, even if a different inspection standard was applied, some class members suffered no injury since they would have been charged the same amount for excess wear and tear even under the lease's "normal" standard.

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[10] *See also Duran v. U.S. Bank Nat. Assn.*, __ Cal.Rptr.3d __, 2012 WL 366590, at *38 (Cal. App. 2012) ("If individualized issues arise out of a defendant's affirmative defense, the predominance factor can be defeated: 'In examining whether common issues of law or fact predominate, the court must consider the plaintiff's legal theory of liability. The affirmative defenses of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues.' ")

By failing to consider *all* the relevant evidence likely to be adduced at trial by *both* parties, the lower courts failed to perform the legally required "rigorous analysis" of Civ. R. 23(B)(3)'s predominance criterion. And, in certifying a class based solely on plaintiffs' proposed evidence, the lower courts set this case on a perilous course for trial. Then, Ford Credit's individual evidence cannot be ignored. Introducing that evidence will prolong trial beyond any jury's reasonable attention span. Excluding that evidence will infringe Ford Credit's due process rights. Either way, justice will not be served.

C. The Court Of Appeals' Short-Cut Analysis Will Lead To Unintended Deleterious Consequences

The lower courts' errors in granting class certification in this case are important and worthy of this Court's review and reversal.

Unfortunately, those errors are not limited to this one case. The Court of Appeal applied the same truncated analysis of only the plaintiff's evidence in affirming class certification in another appeal decided a week after this one. *See Cullen v. State Farm Mut. Auto. Ins. Co.*, 8th Dist., No. 95925, 2011-Ohio-6621, ¶¶ 21, 30-33.

Left unreviewed, this repeated error is likely to lead to untoward results. The problem is not just that two difficult-, or impossible-, to-manage trials may occur as a result of these mistaken class certification rulings. The problem is that these cases will signal that Ohio has the welcome mat at its door for all sorts of class actions that could never or can no longer be brought elsewhere.

As already mentioned, a California court several years ago denied class certification of exactly the same claim that plaintiffs assert against Ford Credit in this case. While the California decision may not be res judicata on the issue, *see Smith v. Bayer Corp.*, __ U.S. __, 131 S.Ct. 2368, 2379-82, 180 L.Ed.2d 341 (2011), both this Court and the United States Supreme Court

have cautioned lower courts not to disregard, but instead to apply principles of comity to, the class certification determinations of other jurisdictions' courts addressing a common dispute. *Id*, at 2382; *Howland*, 2004-Ohio-6552, ¶ 24.

There is good reason for doing so. Plaintiffs' class action counsel are often sophisticated litigators, well informed about the relative likelihood of success in proceeding in different forums. As their compensation depends on certifying a class and prevailing at trial or by settlement, they naturally seek courts that are receptive to their cases. A forum that shows itself to be more accommodating to class litigation is likely, in short order, to be flooded with class action lawsuits.[11]

Ohio is particularly vulnerable to this problem because its long limitations periods and its lack of a limitations borrowing statute before April 2005 already make this state an unusually favorable forum for class litigation. This state's 15-year limitations period for breach of written contract, for example, gives plaintiffs' lawyers a powerful incentive to file nationwide or multi-state class action suits in Ohio to pursue claims that would be dismissed as time-barred in the class members' own states.[12] *Compare* Ohio R.C. § 2305.06 (15 years) with Cal. Code Civ.

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[11] *See* Victor E. Schwartz et al., West Virginia as a Judicial Hellhole: Why Businesses Fear Litigating in State Courts, 111 W. Va. L. Rev. 757 (2009) (discussing why West Virginia continues to present one of the nation's worst legal climates); Lester Brickman, Anatomy of a Madison County (Illinois) Class Action: A Study of Pathology, Ctr. for Legal Pol'y Civ. Just. Rep., pp. 1-3 (Aug. 2002) (setting forth a case study of victims of "class action justice" in popular plaintiffs' haven, Madison County, Illinois); John H. Beisner & Jessica Davidson Miller, They're Making A Federal Case Out Of It ... In State Court, 25 Harv. J.L. & Pub. Pol'y 143 (2001) (discussed a study assembling substantial body of data confirming that certain state courts have become "magnets" for multi-state and nationwide class actions).

[12] This case illustrates the point. Here, though the suit was filed in 2006, the class includes persons who signed leases in 1995 and who were charged for excess wear and tear in 1998 or 1999, well outside the statute of limitations period in their home states of California, Florida, New York or Texas. *See Ford Motor Credit Co.*, 2011-Ohio-6474, ¶¶ 3, 17 & statutes cited in text. Similarly, in *Cullen*, a suit filed in 2005, the nationwide class includes persons who filed insurance claims as long ago as 1991. *Cullen*, 2011-Ohio-6621, ¶¶ 2, 8.

Proc., § 337(1) (4 years), Fla. Stat. § 95.11(2)(b) (5 years); N.Y. C.P.L.R. § 213(2) (6 years); Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(3); *Morriss v. Enron Oil & Gas Co.*, 948 S.W.2d 858, 869 (Tex. App. 1997) (4 years).

If this state's courts add to that great advantage for plaintiffs an Ohio-only rule allowing class certification in any case involving standardized contracts and a common, they will undoubtedly occasion a flurry of additional class action filings to take advantage of this state's uniquely plaintiff-friendly environment. Consumer class actions, in particular, are likely to be filed here in droves since standardized contracts and common policies are commonplace in consumer transactions. "[T]he times in which consumer contracts were anything other than adhesive are long past."[13] *AT&T Mobility, Inc. v. Concepcion,* __ U.S. __, 131 S.Ct. 1740, 1750 (2011) (citations omitted). Similarly, consumer retailers and finance companies typically adopt corporate policies to guide their employees and help assure compliance with the myriad laws and regulations governing their businesses. If that is all that is needed to secure class certification in Ohio, then virtually any consumer transaction has the makings of an Ohio class action.

Undoubtedly, adopting such a uniquely plaintiff-friendly rule would spur legal employment in Ohio. However, as other states have learned, short-term gains for lawyers can also occasion long-term disadvantages that range from star ranking in the American Tort Reform Founda-

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[13] "[F]ew consumer contracts are negotiated one clause at a time. Forms reduce transactions costs and benefit consumers because, in competition, reductions in the cost of doing business show up as lower prices (here, a slightly lower rate of interest on the loan)." *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004).

tion's annual Judicial Hellholes report[14] to much more serious and long-lasting drains on the state's economy.[15]

Before Ohio takes such a risky step, this Court should review the matter and decide whether this state's courts should rigorously analyze all of Civ. R. 23's requirements in light of all the evidence likely to be adduced at trial by both parties, or whether they may short-cut that process and certify a class based solely on the presence of standard contracts and policies.

III

CONCLUSION

For the reasons set forth above, the Court should grant jurisdiction to hear this case on the merits, accept the appeal and order the case to be briefed and heard on the merits

Respectfully submitted,

Jan T. Chilton (per SJB)

Stephen J. Butler (0010401)
THOMPSON HINE LLP
312 Walnut Street, 14th Floor
Cincinnati, Ohio 45202-4029
Telephone: (513) 352-6587
Facsimile: (513) 241-4771

Jan T. Chilton
SEVERSON & WERSON,
A Professional Corporation
One Embarcadero Center, 26th Floor
San Francisco, California 94111
Telephone: (415) 398-3344
Facsimile: (415) 956-0439

Attorneys for Amicus Curiae
American Financial Services Association

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14 Am. Tort Reform Ass'n, Judicial Hellholes 2001|2012, publicly available at <http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf>.

15 *See, e.g.,* David E. Dismukes, Ph.D., The Impart of Legacy Lawsuits on Conventional Oil and Gas Drilling in Louisiana (LSU Ctr. For Energy Studies, Feb. 28, 2012), publicly available at <http://www.enrg.lsu.edu/files/images/presentations/2012/DISMUKES_LEGACY_RPT_02-28-12_FINAL.pdf>; Mark A Behrens, Medical Liability Reform: A Case Study of Mississippi, 118:2 Obstetrics & Gynecology 335 (Aug. 2011); Mark A. Behrens & Cary Silverman, Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, 396 (2005).

CERTIFICATE OF SERVICE

A copy of the foregoing has been forwarded by regular U.S. Mail, postage prepaid, this 19th day of March 2012, to:

Attorneys for Counter-Claimant & Appellee Sudesh Agrawal:

Anand N. Misra (0067594)
THE MISRAH LAW FIRM
3659 Green Rd., Ste.. 100
Cleveland, OH 44122-0000
Tel: 216-752-3330

Robert S. Belovich (0024187)
9100 South Hills Blvd., Ste. 300
Broadview Heights, OH 44147-0000
Tel. 440-838-8883

Attorneys for Counter-Defendant and Appellant Ford Motor Credit Company:

Irene C. Keyse-Walker (0013143)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414

Jonathan D. Hacker (*pro hac vice*)
Loren L. AliKhan (*pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye St. N.W.
Washington, D.C. 20006

Brett K. Bacon (0022826)
Colleen C. Murnane (0064840)
Gregory R. Farkas (0069109)
FRANTZ WARD LLP
127 Public Square Bldg., 25th Floor
Cleveland, OH 44114-1999

One of the Attorneys for Amicus Curiae American Financial Services Association