

ORIGINAL

No. 2012-0535

In the Supreme Court of Ohio

MICHAEL E. CULLEN,	:	Case No. 2012-0535
	:	
Plaintiff/Appellee,	:	
	:	
vs.	:	
	:	
STATE FARM MUTUAL AUTOMOBILE	:	On Appeal from the Cuyahoga County
INSURANCE	:	Court of Appeals, Eighth Appellate District
COMPANY,	:	Case No. CA-10-095925
	:	
Defendant/Appellant.		

**BRIEF OF AMICUS CURIAE
 AMERICAN FINANCIAL SERVICES ASSOCIATION
 IN SUPPORT OF APPELLANT**

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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 interested in the propositions 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 year¹ must

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 a car is leased (see, e.g., Cal. Civ. Code, §§ 2985.8, 2985.9, 2986.3).

Similarly, the nine million consumer contracts for new cars each year² must comply with the Truth-in-Lending Act (15 U.S.C. § 1601, et seq.), its implementing regulation (12 C.F.R. pt. 1026; formerly 12 C.F.R. pt. 226) and state law (e.g., Ohio R. C. § 1317.01 et seq.). So must millions of retail installment contracts for purchase of other consumer goods and services. To comply with these legal requirements, almost all of these consumer finance contracts are written on standard forms. “[T]he times in which consumer contracts were anything other than adhesive are long past.” *AT&T Mobility, LLC v. Concepcion*, __ U.S. __, 131 S.Ct. 1740, 1750 (2011); see also *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004) (“[F]ew consumer contracts are negotiated one clause at a time. Forms reduce transaction costs and benefit consumers” by lowering prices.).

To assure compliance with legal requirements and exercise appropriate managerial control over a company’s operations, most financial institutions adopt uniform policies which their employees are urged to follow. Indeed, federally regulated depository institutions are required to adopt policies and procedures to guide their employees’ activities and are regularly examined to assure they have done so.³

² See U.S. Dept. of Transp., *supra* n. 1, Table 1-17. New car sales ranged from a high of 17.4 million in 2000 to a low of 10.5 million in 2009, averaging 15.5 million over the 11 year period from 2000 through 2010. Of those sales, 59% were to consumers. *Id.*, Table 1-18.

³ See, e.g., 12 C.F.R. pt. 364 App. A, Interagency Guidelines Establishing Standards for Safety and Soundness, § II.A.4; OCC, Comptroller’s Handbook, § 502 Management & Board Processes, pp. 5-6, 14-16.

If standardized contracts and common policies alone suffice to assure class certification in Ohio, virtually any claim against a company engaged in consumer transactions, such as a consumer credit finance company, can be transformed at the consumer's option, from a relatively small individual matter into a costly and time-consuming class action, often with huge potential exposure, exerting an undue pressure to settle regardless of the claim's merit.

Ford Motor Credit Co. v. Agrawal, No. 2012-0462 illustrates the point. AFSA filed an amicus brief in support of jurisdiction in *Agrawal*. Though briefing is stayed in *Agrawal* pending a decision in this case, AFSA mentions it below to illustrate the broad impact of the Court of Appeals' erroneous understanding of Ohio's class certification standards, not just in insurance cases like this one, but also in consumer finance cases, such as *Agrawal*, which affect AFSA's members. Also, here an Ohio-only class was certified; whereas, *Agrawal* certified a nationwide class, raising even greater concerns for AFSA and its members.

Ohio's lengthy limitations periods and lack of a borrowing statute prior to April 2005 exacerbate the untoward effects of the Court of Appeals' 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.

II

RULE 23 REQUIRES CAREFUL ANALYSIS OF THE LIKELY PROOF OF EACH ELEMENT OF A PUTATIVE CLASS' CLAIMS AND OF DEFENSES

Here, the Court of Appeals wrongly short-circuited the required predominance analysis under Civ. R. 23, holding that predominance could be established simply by showing standard-

ized contracts and common policies or procedures. That holding does not comport with Civ. R. 23 and would adversely affect Ohio class action law if allowed to stand.

Proper adherence to Civ. R. 23 requires a much more extensive examination of the evidence likely to be produced at trial by both parties on all issues in the case. Predominance is an inherently comparative standard. It is not met simply by identifying some issues that may be established by common proof.

Instead, a court must consider the common or individual nature of the evidence each party is likely to rely upon at trial, if a class is certified, to prove or disprove each element of plaintiff's claims and the defendant's defenses. Then, it must compare those likely to be proved or disproved by common evidence with those on which individual evidence will be introduced and decide whether the former or the latter predominate in terms of anticipated trial time and importance to resolving the controversy.

The Court of Appeals failed to engage in that required analysis and so reached incorrect results in both *Cullen* and *Agrawal*.

A. Proper Predominance Analysis Requires Rigorous Analysis Of The Issues To Be Tried, The Character Of The Evidence To Be Introduced, And The Way A Class Trial Will Proceed

“Framed for situations in which ‘class-action treatment is not as clearly called for’ ..., Rule 23(b)(3) permits certification where class suit ‘may nevertheless be convenient and desirable.’” *Amchem Prods., Inc. v. Windsor*. 521 U.S. 591, 615, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). To obtain certification under this rule, “the party seeking certification [must] show that ‘questions of law or fact common to class members predominate over any questions affecting only individual members.’” *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010).

The predominance requirement serves to “ensure[] that the class will be certified only when it would ‘achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.’ ” *Amchem Prods., Inc.*, 521 U.S. at 615; *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 104 (2d Cir. 2007).

“Thus, the notion that the adjudication of common issues will help achieve judicial economy is an integral part of the predominance test.” *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009). To achieve those economies, it is not enough that one or even several issues are “common.” Individual evidence on other issues in the case may prevent trial on a class basis from achieving the desired judicial economy. *See Rodney v. Nw. Airlines, Inc.*, 146 Fed.Appx. 783, 786 (6th Cir. 2005) (“[T]he Rule 23(b)(3) analysis helps ‘prevent[] the class from degenerating into a series of individual trials.’ ”).

“Whether judicial economy will be served in a particular case turns on close scrutiny of ‘the relationship between the common and individual issues.’ ” *Id.* For that reason, “the Rules demand ‘a close look at the case before it is accepted as a class action’ ” under Rule 23(b)(3). *Amchem Prods., Inc.*, 521 U.S. at 613. A “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.” *Howland v. Purdue Pharma L.P.*, 2004-Ohio-6552, 104 Ohio St.3d 584, 821 N.E.2d 141, ¶ 25.

That rigorous analysis should proceed in three steps. First, a court must identify the issues that will be tried. Second, it must determine whether each of those issues is individual or common. Third, it must weigh the common against the individual issues to decide which pre-

dominate in terms of trial time and importance to resolution of the controversy. Each steps is further discussed below.

1. Step One: Identify The Issues For Trial

To decide whether a class trial will promote judicial efficiency, a court must “consider ‘how a trial on the merits would be conducted if a class were certified.’ ” *Madison v. Chalmette Refining, LLC*, 637 F.3d 551, 555 (5th Cir. 2011); *see also Petty v. Wal-Mart Stores, Inc.*, 2002-Ohio-1211, 148 Ohio App.3d 348, 356, 773 N.E.2d 576, ¶¶ 24, 26, 27.

In particular, 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); *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 court should also identify any issues raised by affirmative defenses to the class claims since “a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its ... defenses to individual claims.” *Wal-Mart Stores, Inc. v. Dukes*, 531 U.S. ___, 131 S.Ct. 2541, 2561, 180 L.Ed.2d 374 (2011). “[C]ourts must consider potential defenses in assessing the predominance requirement.” *Myers*, 624 F.3d at 551; *see also Gene & Gene, LLC v. BioPay, LLC*, 541 F.3d 318, 327 (5th Cir. 2008) (“[T]he ‘predominance of individual issues necessary to decide an affirmative defense may preclude class certification.’ ”); *Rodney*, 146 Fed.Appx. at 786 (“the Advisory Committee Notes to Rule 23(b)(3) advise against class certification where a defendant has a defense to liability that will vary with each individual class

member”). In assessing predominance, there is no reason to give a defense less weight than an element of the plaintiff’s claims. *Myers*, 624 F.3d at 551.

2. Step Two: Determine Which Issues Are Common

Once a court has identified the issues that will be tried, it must decide which issues are common. At the class certification stage, a court “may, and must, examine the nature of the underlying claims for the purpose of determining whether common questions predominate.” *Petty*, 2002-Ohio-1211, ¶24; *see also Cowit v. Cellco P’ship*, 2009-Ohio-1596, 181 Ohio App.3d 809, ¶47 (same);

As the United States Supreme Court explained last year, an issue is not “common” for class certification purposes just because it arises from “a common nucleus of operative facts, or a common liability issue” or can be framed as a question applicable to each class member’s claim. *Wal-Mart Stores, Inc.*, 131 S.Ct. at 2551. Any competently drafted class action complaint phrases common liability questions. *Id.*

Common answers, not common questions, are what counts. *See 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”). What matters is “the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc.*, 131 S.Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 132 (2009)).

In other words, a question or issue is “common” for Civ. R. 23 purposes only if “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 question must

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 v. Martin*, 79 So.3d 960, 969 (La. 2011).

“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). “Determining whether the plaintiffs can clear the predominance hurdle set by Rule 23(b)(3) ... requires us to consider how a trial on the merits would be conducted if a class were certified.” *Rodney*, 146 Fed.Appx. at 786. To establish it is common, “a plaintiff must ‘demonstrate that the element of [the legal claim] is capable of proof at trial through evidence that is common to the class rather than individual to its members.’ ” *Marcus v. BMW of N. Am., LLC*, ___ F.3d ___, 2012 WL 3171560, at *13 (3d Cir. 2012).

In some instances, a plaintiff may be able to rely on a class-wide inference or presumption to establish that an issue is capable of classwide, common proof. *See, e.g., Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 436, 696 N.E.2d 1001 (1998) (presumption of reliance on material omission); *Basic, Inc. v. Levinson*, 485 U.S. 224, 243-47, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (“fraud on market” presumption of reliance when misrepresentations are made to an efficient securities market).

However, great care must be taken to assure the inference or presumption is applied only in circumstances which truly support its application. *See, e.g., Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666-67 (9th Cir. 2004) (presumption of reliance unavailable in case alleging both misrepresentations and omissions); *Teamsters Local 445 Freight Division Pension Fund v. Bombardier, Inc.* 546 F.3d 196, 205-10 (2d Cir. 2008) (affirming denial of class certification on

finding plaintiff had not proven the security traded in an efficient market sufficient to allow the “fraud on the market” presumption).

Also, there are few of these class-wide inferences or presumptions. Lower courts should not be permitted to create new ones simply to allow certification of more class actions or to avoid the often arduous task of rigorously analyzing predominance or other class certification criteria. A presumption is proper only when (a) direct proof is difficult, (b) the presumption promotes fairness or public policy, and (c) the presumed fact is more likely than not true if the predicate fact is proven. *See Basic, Inc.*, 485 U.S. at 246-47; *Wilson v. City of Cincinnati*, 46 Ohio St.2d 138, 145-46, 346 N.E.2d 666 (1976). In a breach of contract, like this one, or breach of warranty case, no class-wide presumption of breach, causation or damage arises from proof of standard form contracts or common policies. *Compare Newell v. State Farm Gen. Ins. Co.*, 118 Cal.App.4th 1094, 1103, 13 Cal.Rptr.3d 343, 350 (2004); *Marcus*, 2012 WL 3171560, at *16-17 with *Cullen v. State Farm Mut. Auto. Ins. Co.*, 2011-Ohio-6621, 970 N.E.2d 1043, ¶ 33; *Ford Motor Credit Co. v. Agrawal*, 2011-Ohio-6474, 2011 WL 6317451, ¶ 39.

Even when the plaintiff may rely on a classwide inference or presumption to prove an element of a class claim, a court should also consider whether the defendant can and will be able to offer substantial individual evidence to rebut that inference or presumption.

[T]he trial court did not determine whether the evidence submitted by [defendant] rebutted a class-wide inference of causation. Instead, the trial court rested its conclusion on Plaintiff’s allegation that they were not relying on face-to-face transactions to prove causation and its determination that causation could be inferred from [defendant’s] standard sales documents. This analysis falls short of that required by C.R.C.P. 23 The decision is further problematic given that individual evidence that tends to rebut the class-wide inference of causation relied on by Plaintiffs could cause individual rather than common issues to predominate for purposes of C.R.P.C. 23(b)(3).

Garcia v. Medved Chevrolet, Inc., 263 P.3d 92, 101 (Colo. 2011) (citation omitted).

In other cases, a plaintiff may rely on expert testimony to establish that the class claim may be proven by common evidence. However, when the plaintiff does so, a court may not simply accept that testimony without question.

[T]he court's obligation to consider all relevant evidence and arguments [on a motion for class certification] extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it." We explained that "[e]xpert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis." Therefore, "[w]eighing conflicting expert testimony at the certification stage is not only permissible[, but] it may be integral to the rigorous analysis Rule 23 demands," especially when a party opposing certification offers its own competing expert opinion ... [as to] whether the plaintiff's claims were susceptible to common proof.

Marcus, 2012 WL 3171560, at *14 (citations omitted).

In short, to decide whether an issue is common, a court must consider not just the evidence plaintiff will introduce to prove that, but also the evidence defendant will adduce to disprove it. *See Rodney*, 146 Fed.Appx. at 787 ("[A] court performing a 'predominance' inquiry under Rule 23(b)(3) may consider not only the evidence presented in the plaintiff's case-in-chief but the defendant's likely rebuttal evidence.")

3. Step Three: Weigh Comparative Importance

Once it has decided which issues are common—that is, likely to be proved or disproven by common evidence—and which are not, the trial court must then compare the two sets of issues to determine which predominates. *Madison*, 637 F.3d at 556; *see also Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 301 (5th Cir. 2003).

“Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action.” Common issues of fact and law predominate if they “ha[ve] a *direct impact* on every class member’s effort to establish liability” *that is more substantial than the impact of individu-*

alized issues in resolving the claim or claims of each class member.’ ” *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010) (emphasis in original).

Predominance is inherently a comparative test. It is not satisfied simply by showing that some issues—even some issues of central importance—are susceptible of common proof. Instead, a court must compare whatever issues that will be established by common proof against those that require individual evidence and determine which of the two is more substantial in terms of resolving the putative class claims. In other words, the “predominance inquiry focuses on ‘whether the proof at trial will be predominantly common to the class or primarily individualized.’ ” *Garcia*, 263 P.3d at 98 (citation omitted).

In short, 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 and the defenses to those claims. *Howland*, 2004-Ohio-6552, ¶¶ 21, 26; *see also Gintis v. Bouchard Transp. Co., Inc.*, 596 F.3d 64, 66-68 (1st Cir. 2010).

B. The Court Of Appeals’ Truncated Analysis Should Be Disapproved

The Court of Appeals’ truncated analysis of predominance does not measure up to the just-described standards. Misinterpreting this Court’s decision in *Cope*, 82 Ohio St.3d 426, the Court of Appeals found predominance based solely on a few common issues rather than assessing the importance of those issues against that of the case’s other issues on which individual evidence will be offered. The Court of Appeals’ shortcut does not fulfill Civ. R. 23(b)(3)’s requirements or purpose. It fails to assure that a class is certified under 23(b)(3) only when doing so will achieve economies of time, effort, and expense.

1. The Court Of Appeals Misinterpreted *Cope*

The Court of Appeals based its analysis in part on its misreading of this Court's decision in *Cope*. The Court should correct that misunderstanding.

In this case, the Court of Appeals cited *Cope* for the proposition that “generalized evidence that proves or disproves an element of the claim obviates the need to examine individual issues of reliance.”⁴ *Cullen*, 2011-Ohio-6621, ¶ 33 (citing *Cope*, 82 Ohio St.3d at 436).

Contrary to the Court of Appeals' statement, *Cope* did not hold that generalized evidence of some other element of a claim “obviates the need to examine individual issues of reliance.” *Cullen*, 2011-Ohio-6621, at ¶ 33. Instead, *Cope* held that when there was common proof of the same material omission to all class members, “then at least an inference of inducement and reliance ... arise as to the entire class, thereby obviating the necessity for individual proof on these issues.” *Cope*, 82 Ohio St.3d at 436.

Furthermore, as already noted, even in cases where a plaintiff may properly rely on a presumption of reliance, a court may not accept that presumption blindly, ignoring individual evidence the defendant may offer to disprove the presumption. *See Garcia*, 263 P.3d at 101; pp. 8-9 above. *Cope* allows no escape from the rigorous analysis required of a court in deciding a class certification motion.

This is not the only case in which the Eighth District Court of Appeals has misconstrued *Cope*. In *Agrawal*, that same court relied on two isolated snippets of *Cope*'s general

⁴ The reference to reliance underscores the Court of Appeals' error at the first step of the predominance analysis. It did not identify the issues for trial properly. *Cullen* alleged only breach of contract and insurance bad faith claims, not fraud. So reliance was not an issue in the case anyway.

observations⁵ to draw the erroneous conclusion that class certification is appropriate once the plaintiff shows the case arose from standardized contracts and a common company policy.

Ford Credit's lease agreement and inspection procedure documents, standing alone, constitute evidence of class-wide injury. ... "[W]hen evidence of a defendant's deceitful or fraudulent conduct is set forth in a standardized contract distributed to many and resulting in class-wide injury, then such a case is ideal for class certification."

Ford Motor Credit Co., 2011-Ohio-6474, ¶ 39.⁶

The Court of Appeals misinterpreted *Cope* as adopting, or at least supporting, an utterly new rule of law: Standardized contract plus common policy equals class certification—no further analysis, rigorous or otherwise, of Civ. R. 23's predominance criteria is required. Thus, it said:

Ford Credit's lease agreement and inspection procedure documents, standing alone, constitute evidence of class-wide injury. ... "[W]hen evidence of a defendant's deceitful or fraudulent conduct is set forth in a standardized contract distributed to many and resulting in class-wide injury, then such a case is ideal for class certification."

The two *Cope* snippets on which the Court of Appeals relied are general observations, not holdings. As generalizations, they may be correct. Claims arising from standardized docu-

⁵ Those observations were: "It is now well established that 'a claim will meet the predominance requirement when there exists generalized evidence which proves or disproves *an element* on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.'" *Cope*, 82 Ohio St.3d at 429-30 (emphasis added). Courts ... *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. *Id.* at 430 (emphasis added).

⁶ Similarly, in concluding that a class had properly been certified, the Court of Appeals emphasized the trial court's findings that "Agrawal has presented evidence that the challenged wear and use terms are substantially similar, if not identical, and are stated in the standard lease forms utilized by Ford Credit for its Red Carpet Lease program. Furthermore, the challenged lease-end practices are governed by written operating procedures created and utilized by Ford Credit for the Red Carpet Lease program." *Ford Motor Credit Co.*, 2011-Ohio-6474, ¶ 44.

ments or procedures are, indeed, often appropriate for class certification. So, too, when common or generalized proof establishes (or disproves) the elements⁷ of a claim, a class may be properly be certified.

However, these general observations do not create any alternative test of predominance. They allow no shortcutting of the “rigorous analysis” of Civ. R. 23 criteria which must be undertaken on any class certification motion. Not every case involving standardized documents and procedures is properly certified as a class action. Nor is common proof of a single element of a claim or defense enough to satisfy the predominance criterion. Civ. R. 23 requires a rigorous analysis of how all issues may be proved or disproved (i.e., by common or individual evidence); it does not permit the Court of Appeals’ shortcuts.

The Court of Appeals’ short-circuited predominance analysis is out of step with more recent class certification decisions of the United States Supreme Court, this Court and federal Courts of Appeals. This Court should clarify *Cope*’s holding to avoid similar misinterpretations in the future.

2. Standard Documents Or A Common Policy Is Not Enough

Based on its misunderstanding of *Cope*, the Court of Appeals, in this case, did not properly analyze all the issues and evidence to arrive at a proper resolution of the predominance issue. Instead, it jumped to the conclusion that certification under Civ. R. 23(b)(3) was warranted once

⁷ The first *Cope* snippet refers to common proof of “an element” rather than “the elements,” but the Court plainly did not mean that Civ. R. 23’s predominance criterion is satisfied so long as any single element of a claim may be proved by common evidence. Otherwise, *Cope* would have stopped upon observing that the claims in that case arose from standard form insurance policies and that MetLife was subject to a common administrative regulation requiring it to give all class members a particular disclosure. But *Cope* implicitly recognized that common proof of those two elements would not alone suffice, and so it went on to address MetLife’s contention that other elements of the claim, such as falsity, reliance and causation, required individual proof. *Cope*, 82 Ohio St.3d at 1007-08.

it had found that plaintiffs proposed to prove one or two elements of their case by common evidence.

Specifically, the Court of Appeal determined that Cullen's theory of the case posited a common scheme to mislead class members into choosing windshield repair rather than replacement or cash payment. *Cullen*, 2011-Ohio-6621, at ¶ 21. "[U]se of a common script," it said, "creates ... a common class-wide contention making this case suitable for class litigation." *Id.*, at ¶ 26.⁸ And, as to the portion of the class with claims arising before the script was created, the Court of Appeals held predominance satisfied by Cullen's claim that State Farm was obliged to restore a claimant's windshield to pre-loss condition and his proposed expert testimony that a windshield can never be restored to that condition. *Id.*, at ¶¶ 32, 33.

The Court of Appeals stopped short after having addressed two class issues and the evidence that the plaintiff proffered to prove them. Notably missing from its analysis was any attempt to identify the other issues raised by their claims or defenses to those claims. Equally absent was any consideration of the evidence defendants relied on to refute plaintiffs' claims or establish the defenses. Also, the Court of Appeals simply accepted the testimony of Cullen's expert without evaluating State Farm's objections to it.

Again, the Eighth District's analytical error is not unique to this case. In *Agrawal*, the Court of Appeals found predominance satisfied upon determining that Ford Credit used standardized lease contracts and had promulgated a common policy or guide for dealers to use when inspecting vehicles for excess wear and use. *Ford Motor Credit Co.*, 2011-Ohio-6474, ¶ 39 ("In this matter, individualized inquiry into whether the 'clean' standard was actually applied to the detriment of each individual lease holder is not required. ... Ford Credit's lease agreement and

⁸ See also *id.*, at ¶ 31 ("The existence of the Lynx script or 'word track' offers evidence of class-wide treatment that can reasonably establish evidence of Cullen's claim.").

inspection procedure documents, standing alone, constitute evidence of class-wide injury.”); *see also id.* at ¶¶ 44, 47, 48.

This short-cut analysis does not satisfy Civ. R. 23(b)(3). Predominance is *not* established simply by “a common class-wide contention” and the plaintiff’s expert testimony or by standard form contracts and a common policy.

Many cases illustrate why the Court of Appeals’ curtailed analysis will not work. *Wal-Mart Stores* is merely the most recent and prominent example. 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. *Wal-Mart Stores, Inc.*, 131 S.Ct. at 2554-56; *Amchem Prods., Inc.*, 521 U.S. at 624.

Similarly, in *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), plaintiffs claimed 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.⁹

⁹ “[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 [including] 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; *accord Rutstein v. Avis Rent-A-*

So, too, when liability under wage-and-hour laws turns on individual issues regarding each employee's actual job duties and performance, certification is denied despite an employer's policy uniformly classifying all employees bearing the same job title as exempt. *See, e.g., Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 948 (9th Cir. 2011); *Myers*, 624 F.3d at 549-50; *Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d at 958-59; *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 195-96 (3d Cir. 2009).

Gene & Gene, LLC, 541 F.3d 318 provides another telling illustration. There, the Fifth Circuit criticized the district court for having engaged in the same sort of short-cut analysis as the Court of Appeals employed:

The district court determined that the predominance requirement was satisfied based on a "common course of conduct, fax blasting." The district court did not, however, identify the substantive issues that will control the outcome of the case, assess which of these issues will predominate, or determine whether these issues are common throughout the proposed class. ... The district court did not explain how the common course of conduct it described would affect a trial on the merits.

Id. at 326.

The Fifth Circuit went on to point out, "one substantive issue undoubtedly will determine how a trial on the merits will be conducted if the proposed class is certified. This issue ... is whether [defendant's] fax advertisements were transmitted without the prior express invitation or permission of each recipient." *Id.* at 327. Since it found no convincing showing that plaintiff could prove lack of consent by common evidence, the Court concluded that despite the defendant's common policy and common course of conduct with respect to all class members, the predominance factor was not satisfied and no class could be certified. *Id.* at 328-29.

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).

tion's annual Judicial Hellholes report¹³ to much more serious and long-lasting drains on the state's economy. *See, e.g.*, David E. Dismukes, Ph.D., The Impact 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).

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.

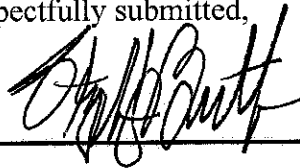
¹³ Am. Tort Reform Ass'n, Judicial Hellholes 2001|2012, publicly available at <<http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf>>.

III

CONCLUSION

For the reasons set forth above, the Court should reverse the Court of Appeals' judgment and remand with directions to enter a new order denying the motion for class certification.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing has been forwarded by regular U.S. Mail, postage prepaid, this

17th day of August 2012, to:

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Michael E. Cullen: *Farm Mutual Automobile Insurance*
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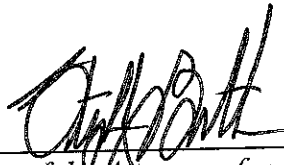
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