IN THE SUPREME COURT OF OHIO

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

BRIEF OF *AMICUS CURIAE* BETTY MONTGOMERY, FORMER ATTORNEY GENERAL OF OHIO, IN SUPPORT OF APPELLANT CINCINNATI SMSA LIMITED PARTNERSHIP'S MEMORANDUM IN SUPPORT OF JURISDICTION

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I. INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE BETTY MONTGOMERY

The Supreme Courts of the United States and Ohio have held repeatedly that plaintiffs – whether in a class action or individual suit – must have a concrete injury-in-fact in order to have standing. See *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St. 3d 329, 2015-Ohio-3430, 49 N.E.3d 1224 and *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). For class actions, the standard is even higher: the injury-in-fact must be sustained by all class members and proven through common evidence. *Felix*, at ¶ 31. In the instant case, both the trial court and the Eighth District erroneously allowed certification without evidence of an injury suffered from the Defendants' conduct. Those Courts not only disregarded *Felix* and *Spokeo*[1] but attempted to eliminate the Constitutional limits on the judiciary imposed by the standing requirement.

This case is a cautionary example of litigation run amok. Plaintiffs have alleged that they may bring an action under R.C. 4905.61 which allows treble damages for persons injured by a PUCO violation. By their nature, public utilities often serve expansive geographic regions and large populations. The lower courts' decisions assume that anyone "downstream" from a PUCO violation suffered an injury. Such an assumption is inconsistent with the statute and unsupported by the evidence in this case. More importantly, however, if allowed to stand, the Eighth District's decision would open the floodgates to R.C. 4905.61 litigation and allow suits by all consumers in Ohio regardless of injury.

Amicus curiae Betty D. Montgomery served as Wood County Prosecuting Attorney from 1980 to 1988, State Senator from 1989 to 1995, the Ohio Attorney General from 1995 to 2003,

[1] Not to mention decades of earlier precedent.

and State Auditor from 2003 to 2007. As Attorney General, Attorney Montgomery enforced Ohio's consumer protection laws, promulgated consumer protection rules, and represented State agencies, including the Public Utilities Commission of Ohio. Effective regulatory enforcement requires clarity in the laws so that businesses and utilities know what is required of them and that real victims with real injuries are aware of their rights. The type of legal uncertainty exemplified by the lower courts' decisions will have a chilling effect on utility and business development due to unknown potential exposure. Moreover, the overextension of standing in class actions, as the lower courts have done here, will undermine legal precedent, overburden courts, and prevent effective and expedient adjudication of true victims' claims.

II. STATEMENT OF THE CASE AND FACTS

Attorney Montgomery adopts the statement of facts as articulated in the Memorandum in Support of Jurisdiction of Appellant Cincinnati SMSA Limited Partnership.

III. ARGUMENT

<u>Proposition of Law 1:</u> *Felix v. Ganley Chevrolet, Inc.*, applies to this, and all other, class actions in Ohio.

A. *Felix* restated the well-established principle that plaintiffs in a class action must have sustained an actual legally cognizable injury.

Proof of a legally cognizable injury might be the "most basic requirement of bringing a lawsuit" and has been "an indispensable part" of civil actions. *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St. 3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 36. In *Felix*, this Court held in no uncertain terms that proof of injury-in-fact sustained by all class members, proven through common evidence, is essential to *all* class actions. *Id.* at ¶ 31.

Class action suits are the "exception to the usual rule" that litigation is to be conducted by the individually named parties. *Id.* at ¶ 25. Trial courts must therefore conduct a "rigorous analysis" and exercise "careful consideration" to evaluate whether a plaintiff has affirmatively shown compliance with Civ.R. 23. *Id.* at ¶ 26 and 32, citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 2552, 180 L.Ed.2d 374 (2011). Where a plaintiff fails to demonstrate that all of the class members were damaged, there is no showing of predominance under Civ.R. 23(B)(3) and a class cannot be maintained. *Id.* at ¶ 35.

B. The Eighth District improperly limited *Felix* to CSPA claims.

The holding of *Felix* could not be more clear: actual injury by all class members is required to maintain a class action lawsuit. Nevertheless, the Eighth District's decision in this action disregarded *Felix* and found that it should be limited to actions under the Ohio Consumer Sales Practices Act, R.C. 1345.01, *et seq.* ("CSPA"). *Satterfield v. Ameritech Mobile Communs., Inc.*, 8th Dist. No. 104211, 2017-Ohio-928, ¶ 27, fn. 2 (*Felix* is "factually distinguishable as the instant case does not involve the OSCPA and the record demonstrates an injury to all class members."[2]).

This limitation of *Felix* is not justified in law nor grounded in good public policy. The standards for class-certification discussed in *Felix* are general. *Felix* is grounded in precedent from the U.S. Supreme Court which arose from a variety of different claims. Nothing in *Felix* held or implied that it should be limited to its facts. To hold otherwise would ignore decades of case law and undermine the policy that judicial standing exists for those who are truly injured.

[2] The finding that there was an injury to all class members was based on the assumption – which was not supported by evidence – that Ameritech's "anticompetitive conduct affected the market and proximately caused retail cellular prices to be artificially inflated is common to the class." As discussed *infra*, that is not a sufficient injury to maintain an action – particularly not a class action – under R.C. 4905.61.

C. If allowed to stand, the Eighth District's boundless standard would open the floodgates to class actions and undo decades of precedent.

At the moment, the *Satterfield* decision is only precedent in the Eighth District. Other Districts, however, could follow *Satterfield* and render *Felix* - not to mention the well-established case law cited in *Felix* - a nullity. If class actions are not grounded in some injury-in-fact sufficient to create standing, businesses would be exposed to countless class actions even where the class representatives and members were not injured. Further, as a former Ohio Attorney General, the undersigned is concerned that the multitude of meritless class actions that could follow would cause negative pushback from policy makers and lead to a weakening of existing consumer protection laws.

a. *Satterfield* is one of several attempts by the Eighth District to improperly expand class actions.

Within the last five years this Court twice reversed the Eighth District Court of Appeals' improper class certification where the alleged damages were suspect. *Felix* and *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St. 3d 373, 2013-Ohio-4733, 999 N.E.2d 614 (2013). In *Cullen*, for example, the Eighth District affirmed class certification without reviewing evidence and, rather, accepted the plaintiff's theories and argument of predominance and commonality as true. *Cullen*, 137 Ohio St. 3d at 383. This Court reversed, holding that "[a] colorable claim does not satisfy the requirements of Civ.R. 23. Nor can compliance with the rule be presumed from allegations in a complaint." *Id.*

Two years later, this Court issued its decision in *Felix* and, again, reigned in the scope of class actions. Citing *Cullen*, Chief Justice O'Connor, wrote "If the class plaintiff fails to establish that all of the class members were damaged (notwithstanding questions regarding the individual damages calculations for each class members), there is no showing of predominance under Civ.R. 23(b)(3)." *Felix*, at ¶ 35. The *Satterfield* decision was issued two years later and is the latest in a pattern of decisions attempting to expand class actions.

b. *Satterfield* conflicts with principles announced by the recent U.S. Supreme Court case, *Spokeo, Inc. v. Robins*.

The U.S. Supreme Court recently held that standing to sue (whether in a class or otherwise) does not arise automatically from a statutory violation without a concrete injury. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).[3] In *Spokeo*, a 7-2 Opinion, the Court noted that standing arises from "irreducible constitutional minimum[s]" which requires a "case or controversy." *Id.* at 1547. The foremost element in a standing analysis is the presence of an "injury-in-fact." *Id.* To establish an injury in fact, a plaintiff must show that s/he suffered an "invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 1548, quoting *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 559-560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). With these concepts in mind, the Supreme Court held that the plaintiff's allegation that Spokeo violated the federal Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681, *et seq.*, by having inaccurate information about the plaintiff in its records, without more, was insufficient to demonstrate an injury-in-fact.[4]

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[3] *Spokeo* concerned standing under U.S. Const. Art. III, § 1. Although standing in Ohio is governed by Ohio Const. Art. I, § 16, Ohio Courts, including this Court, follow U.S. Supreme Court precedent on matters of standing. See *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062 (1998), *Ohio Contractors' Ass'n v. Bicking*, 71 Ohio St. 3d 318, 643 N.E. 2d 1088 (1994), and *Cincinnati City Sch. Dist. v. State Bd. of Educ.*, 113 Ohio App.3d 305, 680 N.E.2d 1061 (1996) (collecting cases). Federal court case law is also persuasive authority on class certification matters. *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 378, 2013-Ohio-4733, 999 N.E.2d 614.

[4] Following *Spokeo*, the Sixth Circuit Court of Appeals recently found a lack of standing where a plaintiff alleged that a violation of the Ohio Rules of Civil Procedure was *ipso facto* a violation

Here, the Appellate Court's decision effectively disregarded the requirement of an injury-in-fact. Intermessage's theory of lost profits and market share and consumer injury from artificially-inflated prices at the wholesale level are without evidentiary support.

1. Intermessage's "lost profit" and "market share" damages theories are speculative and not linked to the PUCO violation.

First, Intermessage did not establish an injury. Intermessage was a retail subscriber, whereas the PUCO violation in *Cellnet*[5] occurred at the wholesale level. Moreover, Intermessage admitted that it passed the cellular service expenses onto its customers and, therefore, suffered no out-of-pocket losses. In a creative, but meritless, argument, Intermessage claims that it lost profits because, in the absence of the PUCO violation, its services would have been less expensive and it would have enrolled more customers and earned greater profit. The belief that lower prices would result in Intermessage achieving greater market share assumes without evidence that consumers of alarm systems are so price-sensitive that they would have enrolled with Intermessage. It also assumes that Intermessage's competitors' prices would not have lowered. The theory assumes that, if wholesale prices were lower, Intermessage and all of their competitors would pass these cost savings on to their customers. Those assumptions were not supported by sufficient evidence.

Further, the violation in *Cellnet* was a legal fiction created as a penalty and it did not reflect the actual market conditions in the relevant time period. To explain, PUCO found that Ameritech could not present evidence regarding the price Ameritech's wholesale operation

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of the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692. *Lyshe v. Levy*, 2017 U.S. App. LEXIS 6855 (6th Cir. 2017).

[5] *In the Matter of Complaint of Westside Cellular, Inc. d.b.a. Cellnet v. New Par Cos. d.b.a. Airtouch Cellular & Cincinnati SMSA Ltd. P'ship*, PUCO Case No. 93-1758-RC-CSS, 2001 Ohio PUC LEXIS 18 (Jan. 18, 2001).

charged its retail operation. Therefore, PUCO assumed, for purposes of its decision, that this price was $0.00. This was a sanction against Ameritech for its record-keeping practices. It wasn't a true finding that the correct price for those services was $0.00. Ameritech was not giving away its services for free and Plaintiffs' cannot contend otherwise. The fact that the PUCO violation was based on a legal fiction compounds the speculation underlying Plaintiffs' claims. Stated differently, there is insufficient proof of damages flowing from this violation because the violation was premised on a legal fiction.

2. Intermessage's alleged damages are not typical of the class of retail consumers; alleged retail damages are too remote.

Intermessage also failed to show any injury to the putative class members at the retail level. This argument, again, assumes that wholesalers passed their costs on to the retail level and caused prices to be artificially inflated. See *Satterfield,* at ¶ 26. That assumption was not demonstrated by evidence. The purported injuries of Intermessage (lost profits) and retail consumers (inflated bills) are so different that Intermessage should not be a class representative. Moreover, as explained *infra*, even if Intermessage's damages were typical, the U.S. Supreme Court rejected "indirect purchaser" damages or "indirect liability" argument nearly four decades ago.

As a result, the evidence of an injury in fact arising from Ameritech's statutory violation is much more remote than the injury in *Spokeo* where the plaintiff was a direct victim of a statutory violation. Here, the Plaintiffs are many steps removed from the PUCO violation and have presented **no evidence** (outside of a promised theoretical model) that they were harmed. The trial court's certification of the class, and the appellate court's affirmance, were in direct conflict with both U.S. Supreme Court precedent (*Spokeo*) and Ohio Supreme Court precedent (*Felix*).

c. ***Felix*'s standing requirements are particularly important to protect due process when treble damages, statutory damages, and punitive damages are at stake.**

Statutes providing for treble damages and punitive damages are designed to prevent, discourage, and deter misconduct, and to punish wrongdoing. *Preston v. Murty*, 32 Ohio St. 3d 334, 512 N.E.2d 1174 (1987); *State Farm Mut. Ins. Co. v. Blevins*, 12th Dist. Warren No. CA87-12-103, 1988 Ohio App. LEXIS 3238, 1988 WL 82406 (Aug. 8, 1988). By their nature, such damages pose an acute danger of arbitrary deprivation of property which implicates the Due Process Clause of the Fourteenth Amendment. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432, 114 S. Ct. 2331, 129 L. Ed. 2d 336 (1994); *BMW of N. Am. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

Courts have therefore struck down (1) awards that are "grossly excessive," *Honda Motor Co., id.* at 420, (2) awards based on injuries to persons who were not parties to the litigation, *Philip Morris v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed. 2d 940 (2007), and (3) awards where the plaintiff suffered no actual or compensatory damages. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St. 3d 486, 2009-Ohio-3626, 912 N.E.2d 595 (2009) (Moyer, C.J.) (analyzing R.C. 2315.21). Among the risks of such awards is that they may deprive a defendant of fair notice of the severity of the penalty that the state may impose. *Philip Morris*, 127 S. Ct. at 1062.

The same considerations should apply to treble damages awards under R.C. 4905.61. The instant case illustrates the risk of a clearly excessive damages award. Plaintiff and the class it purports to represent were not parties to the PUCO action and were not injured by the defendants' conduct. To allow anyone without proof of causation and damages (as in this case) to maintain a class action under the statute would deprive regulated utilities of fair notice of the severity of the penalty. *Philip Morris, id.* Actions by persons who were not even in the same market as the PUCO violation are not foreseeable. The ease with which a creative plaintiff, like Intermessage, can promise to craft a damages model underscores the need for stringent trial court review of a class application in matters involving statutory, treble, and/or punitive damages.

D. Analogous statutory actions require actual injury.

a. The Clayton Act prohibits "indirect purchaser" actions.

Similar to R.C. 4905.61, the Clayton Act § 4 provides a treble damages remedy to "[any] person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. Courts have applied a traditional proximate cause analysis to determine whether a particular injury was **too remote** from an alleged violation. See *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982). "Indirect puchasers'" claims under that analogous statute are too remote. *Illinois Brick Co. v. Ill.*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977).

Similar to the plaintiffs' theory in this case, the plaintiffs in *Illinois Brick* were "downstream" consumers alleging an injury from a higher level in the supply chain. *Id.* at paragraph one of the syllabus. There, the manufacturer was accused of price fixing in violation of the Sherman Act. *Id.* The manufacturer sold its bricks to masonry contractors who submitted bids to general contractors who, in turn, submitted bids to customers, including the plaintiff. *Id.* The only plausible theory of injury to the plaintiff was if all or part of the overcharge was passed on by the contractors it hired. The Court held that indirect purchasers could not use a "pass-on" theory to recover under section 4. To allow otherwise would create a serious risk of multiple liability for defendants and weigh down treble damages actions with the "massive evidence and complicated theories" to prove such an injury. *Id.* at 741.

1. *Illinois Brick* applies to utility consumers.

Subsequent decisions agree that the legislature "did not intend to allow every person tangentially affected by [a violation] to maintain an action to recover threefold damages for the injury to his business or property." *Blue Shield*, *id.* In fact, the *Illinois Brick* holding has been applied in the context of utility companies. In *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990), a group of natural gas suppliers overcharged a public utility company for natural gas and the utility company passed those charges on to its customers. The utility companies, consumers, and a group of states filed a treble damages action against the gas suppliers. *Id.* at 204. The Court explained:

> Like the State of Illinois in *Illinois Brick*, the consumers in this case have the status of indirect purchasers. In the distribution chain, they are not the immediate buyers from the alleged antitrust violators. They bought their gas from the utilities, not from the suppliers said to have conspired to fix the price of the gas. Unless we create an exception to the direct purchaser rule established in *Hanover Shoe* and *Illinois Brick*, any antitrust claim against the defendants is not for them, but for the utilities to assert.

Id. at 207. The Court went on to reiterate the rationale behind the "direct purchaser" requirement and held that only the utility companies – not the consumers – could bring an action.

These same concepts should apply to this R.C. 4905.61 claim. Intermessage and the other plaintiffs' claims are too remote. They were retail customers. The violations were at the wholesale level. Accordingly, they are claiming "indirect purchaser" standing which is too remote and tangential. As with *Utilicorp* and *Illinois Brick*, this action will be bogged down in damages theories that are complicated and questionable in their application. There is also a risk of incurring multiple liability. Ameritech has already settled and paid the claims of the wholesalers (i.e., direct purchasers). The plaintiffs' claims in this case overlap and are duplicative of the amounts paid to the wholesalers. To allow this case to go forward would expose Ameritech to overlapping recoveries while at the same time allowing exceedingly remote claims of persons who were not actual victims with real injuries.

b. Ohio's Valentine Act also prohibits "indirect purchaser" actions.

Ohio follows the federal rule of prohibiting an indirect purchaser from filing a private suit for an antitrust violation. *Johnson v. Microsoft Corp.*, 106 Ohio St. 3d 278, 2005-Ohio-4985, 834 N.E.2d 791.[6] The Valentine Act, R.C. 1331.01, *et seq.*, is patterned after the federal laws. R.C. 1331.08 permits any "person injured in the person's business or property…by reason of anything forbidden or declared to be unlawful in [R.C. 1331.01 to .14]" to recover treble damages. Because the Valentine Act is similar to federal antitrust laws, Ohio has looked to federal case law for guidance. *Id.* at 281. Thus, the Ohio Supreme Court has followed *Illinois Brick* and held that "indirect purchaser of goods may not assert a Valentine Act claim for alleged violations of Ohio antitrust law." *Id.* at 284.

R.C. 4905.61 and R.C. 1331.08 are similar in import. Both allow private parties to recover treble damages for statutory violations if they can show the violation proximately caused damages. In light of these similarities, the "indirect purchaser" rule of *Johnson* should be applied in this case to prohibit the Plaintiffs' claims.

IV. CONCLUSION

If allowed to stand, the *Satterfield* decision would be a striking deviation from the longstanding Constitutional requirement that lawsuits may only be brought by real victims with real injuries. Recent precedent from the U.S. and Ohio Supreme Courts – *Spokeo* and *Felix*, respectively – reiterated the requirement of standing in class actions.

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[6] The plaintiff in *Johnson* bought a computer with Microsoft software pre-installed. Microsoft licensed its software to retailers who installed them in the computers. Retail customers, like the plaintiff, were therefore indirect purchasers.

As with so many other actions, R.C. 4905.61 requires not only proof of a violation of a PUCO law, but an injury proximately caused by that violation. The Plaintiffs' indirect injury and indirect purchaser theories have been roundly rejected in analogous cases by the U.S. and Ohio Supreme Courts.

The undersigned *amicus curiae* is concerned about clarity in the law. Clarity is crucial for victims to know their rights and for businesses to know their responsibilities. The Eighth District's boundless and ambiguous decision has the potential to overwhelm courts with class action litigation. Courts would be unable to render effective and expedient relief for victims with real, concrete injuries-in-fact. The undersigned urges the Court to accept jurisdiction and to reverse the Eighth District's decision and to articulate once again that standing exists only for real victims of real injuries.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief of *Amicus Curiae* Betty Montgomery, Former Attorney General of Ohio, in Support of Appellant Cincinnati SMSA Limited Partnership's Memorandum in Support of Jurisdiction was served on the following persons by email and regular mail this 22nd day of May, 2017:

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