IN THE SUPREME COURT OF OHIO

MON CHERI DAVENPORT, et. al.,	)	**APPEAL NO. 2025-Ohio-1102**
	)	
Plaintiffs/Appellees,	)	**On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District**
	)	
vs.	)	
	)	**Court of Appeals Case No. CA-24-114036**
PROGRESSIVE DIRECT INSURANCE, et al.	)	
	)	
Defendants/Appellants.	)	

MERIT BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANTS

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is an association of Ohio attorneys and corporate counsel who devote a substantial portion of their time to the defense of civil lawsuits. For over 50 years, OACTA has promoted fairness, excellence, and integrity in the civil justice system by providing resources and education to attorneys and others dedicated to the defense of civil actions. The issues in this appeal are significant to OACTA, its members, and its mission to encourage the fair resolution of civil disputes.

This case is one of a large number of putative class actions in Ohio and around the country involving breach of contract claims that challenge the calculation of actual cash value ("ACV") by insurance companies for vehicles that are declared total losses under automotive insurance policies.[1] Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). "[T]he existence of a class fundamentally alters the rights of present and absent members . . . . No less than due process is implicated, so a careful look is necessary." *Chavez v. Plan Ben. Servs.*, 957 F.3d 542, 547 (5th Cir.2020).

Class action litigation inevitably involves significant stakes for both plaintiffs and defendants. In the right cases, class actions allow plaintiffs to aggregate small claims and vindicate rights that would be difficult to pursue individually. *See, e.g., Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617 (1997). Improperly certified, class actions can have in terrorem effects that force expensive settlements of even meritless claims. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *Blair v. Equifax Check Servs*., 181 F.3d 832, 834 (7th Cir.

[1] *See* K. Zimmerman *Notable Third Quarter 2025 Updates in Insurance Class Action- Q3 2025* (last accessed February 6, 2025) https://www.bakerlaw.com/insights/notable-third-quarter-2025-updates-in-insurance-class-actions-q3-2025/ (discussing volume of litigation and decisions concerning same).

1999) (the "grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere."). As a result, a decision on class certification often determines the outcome of a case. *See, e.g.,* Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial."). Clear standards for class certification and consistent enforcement of the rigorous analysis required to certify a class are crucial to a fair civil justice system.

The two propositions of law at issue both impact the clarity and fairness of a class certification decision. . First, the Eighth District held that the mere presence of a single common line-item adjustment—"projected sold adjustments" ("PSA")—in total-loss vehicle valuations was sufficient to establish predominance under Civ.R. 23(B)(3), without analyzing whether use of the PSA breached the contracts or caused classwide damages. Both breach and resulting damages are necessary elements of Appellees' breach of contract cause of action. The Eighth District's failure to consider whether these elements could be proven on a class-wide basis misapplies the rigorous analysis standard adopted by the Court.

Second, the Eighth District improperly concluded that the mere existence of the PSA satisfied the predominance requirement, regardless of whether a class member was injured by the application of the PSA. This defeats the Court's holding that injury to each class member must be proven, not merely assumed, even if a contract provision is invalid. The Eighth District's decision (the "Decision") conflicts with the weight of authority across the country. This highlights the

Eighth District analytical misstep, especially because the Ohio standard for class certification mirrors the federal standard.

The Decision creates confusion and inconsistency concerning the standard for class certification. Given the significance of class certification, such consequences must be avoided. This Court should reverse the Decision and decertify the class.

II. STATEMENT OF THE FACTS AND CASE

Given the lengthy procedural history of this case and the extensive factual record, in the interest of brevity OACTA adopts Appellants' statement of the facts and case.

III. LAW AND ARGUMENT

A. PROPOSITION OF LAW 1. Undertaking a rigorous analysis of Rule 23 predominance requires an analysis of the essential elements of the class claims.

The Court established the framework for analyzing class certification in *Cullen v. State Farm Mut. Auto. Ins. Co.*, 2013-Ohio-4733 and *Felix v. Ganley Chevrolet, Inc.*, 2015-Ohio-3430. These decisions cited to, and relied heavily upon, the United States Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). This is understandable given that Ohio courts have long recognized that federal authority is persuasive in interpreting Civ.R. 23. *See, e.g., Cullen* at ¶ 14; *Marks v. C.P. Chem. Co., Inc*., 31 Ohio St.3d 200, 201 (1987). Such consistency is important, as aligning state standards with federal law gives parties present in more than one jurisdiction needed clarity and reduces the risk of forum-shopping between state and federal courts.

A class action is an exception to the general rule that litigation only binds the parties. *Felix* at ¶ 25, citing *Comcast* at 33. To come within the exception, "the representative of the putative class is required to affirmatively demonstrate that each requirement of Civ.R. 23 has been satisfied." *Cullen* at ¶ 2. Rule 23 is not a "mere pleading standard." *Felix* at ¶ 26. Rather, the

party seeking class certification must provide evidentiary proof "that there are in fact sufficiently numerous parties, common questions of law and fact, etc." *Id.* (internal quotations omitted and emphasis in original). Courts consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case. *Cullen* at ¶ 17 ("a trial court is permitted to examine the underlying merits of the claim as part of its rigorous analysis … to the extent necessary to determine whether the requirement of the [R]ule [23] is satisfied.") (citation omitted); *see also Felix* at ¶ 26 ("There can be no dispute that a trial court's rigorous analysis of the evidence often requires looking into enmeshed legal and factual issues that are part of the merits of the plaintiff's underlying claims. In doing so, however, the trial court may probe the underlying merits of the cause of action only for the purpose of determining that the plaintiff has satisfied Civ.R. 23") (internal citation omitted).

To determine whether a plaintiff has met their burden, courts undertake "a rigorous analysis" of the Rule 23 prerequisites. *Cullen* at ¶ 2. This rigorous analysis requirement serves an important role. As noted above, class certification is the exception, not the rule. *See, e.g., Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005) ("Recognizing the important due process concerns of both plaintiffs and defendants inherent in the certification decision, the Supreme Court requires district courts to conduct a rigorous analysis of Rule 23 prerequisites.").

A decision on class certification has immense consequences for the parties. The outcome of a motion for certification is "typically a game-changer, often the whole ballgame," for class litigants. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 (3d Cir. 2012). That is true regardless of the strength or weakness of the plaintiff's claim. As the Third Circuit has explained:

> Irrespective of the merits, certification decisions may have a decisive effect on litigation. As mentioned, if individual claims are small, then plaintiffs may not have the incentive or resources to pursue their claims if certification is denied—sounding the 'death knell' to the

> litigation. On the other hand, granting certification may generate unwarranted pressure to settle nonmeritorious or marginal claims.

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 167-68 (3d Cir. 2001). Thus, the rigorous analysis requirement is thus "not some pointless exercise." *Chavez v. Plan Benefit Services, Inc.*, 957 F.3d 542, 547 (5th Cir. 2020) (identifying settlement pressure created by a certified class as a reason for the "rigorous analysis mandate"). A trial court abuses its discretion when it certifies a class without conducting the required rigorous analysis. *Cullen* at ¶52; *Hamilton v. Ohio Savs. Bank*, 82 Ohio St.3d 67, 70 (1998); *Mozingo v. 2007 Gaslight Ohio*, 2012-Ohio-5157, ¶ 8 (9th Dist.).

Here, the Eighth District's 'rigorous analysis" consisted of the conclusion that, because the Appellee's mounted a common challenge to the GSA, the predominance requirement was satisfied. But determining whether the predominance requirement is satisfied, "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co*., 563 U.S. 804, 809 (2011). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d at 172 "To determine which issues in the case are common and which are individual, the court must first "consider the class underlying causes of action and determine which elements are amenable to common proof." *Sherman v. Trinity Teen Solutions, Inc.*, 84 F.4th 1182, 1194-1195 (10th Cir. 2023) (internal; quotation omitted).

"A cause of action for breach of contract requires the claimant to establish the existence of a contract, the failure without legal excuse of the other party to perform when performance is due, and damages or loss resulting from the breach." *Lucarell v. Nationwide Mut. Ins. Co.*, 2018-Ohio-15, ¶ 41. The Eighth District, while reciting these elements of a breach of contract action, did not explain its finding of predominance, and did not rigorously analyze how the elements of breach

and resulting damages could be proven on a class-wide basis. (Decision at ¶ 43.) Other Ohio courts have recognized that when damages must be shown on an individual basis, predominance is lacking. *See, e.g., Duke v. Ohio University*, 2022-Ohio-4694, ¶ 42-43 (10th Dist.) (reversing certification where absent a showing "that all of the class members were damaged . . . there is no showing of predominance under Civ.R. 23(b)(3)." (cleaned up); *Cross v. Univ. of Toledo*, 2022-Ohio-3825, ¶ 34 (10th Dist.) ("[I]n Mr. Cross's breach of contract claims, the predominance inquiry must ask whether the essential breach element of the breach-of-contract claim is an individualized fact question that justifies class certification." (cleaned up); *Est. of Mikulski v. Toledo Edison Co.*, 2021-Ohio-361, ¶ 44-46 (6th Dist.) (analyzing damages requirement in connection with evaluation of predominance).[2]

A rigorous analysis requires more than identifying a single common contract provision. As the Supreme Court has emphasized, predominance turns not on the number of shared questions, but on whether a class-wide proceeding can produce common answers that resolve the litigation:

> "What matters to class certification . . . is not the raising of common 'questions' -- even in droves -- but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

Wal-Mart, 564 U.S. at 350 (citation and quotation omitted). Because the trial court, and subsequently the Eighth District, did not conduct a rigorous analysis of how the breach and

[2] Indeed, the Eighth District itself has recognized that the need to prove damages on an individual basis defeats class certification. *See, e.g., Hoang v. E*Trade Grp., Inc.*, 2003-Ohio-301, ¶ 19-27 (8th Dist.) (analyzing the need to prove class-wide damages to satisfy predominance requirement); *Ford Motor Credit Co. v. Agrawal*, 2016-Ohio-5928, ¶ 25-36 (8th Dist.) ("[the defendant's] liability cannot be determined on a classwide basis …. Accordingly, we find that this action does not meet the requirements of Civ.R. 23(B)[](3) for class certification."). The Decision conflicts with federal law, other Ohio appellate certification decisions, and of course most importantly, cannot be reconciled with the precedent of the Court.

damages elements of Appellees' breach of contract claim could be proven on a class-wide basis, they erred in certifying the class.

B. PROPOSITION OF LAW 2: A putative class cannot satisfy Rule 23's predominance requirement by alleging that only a single adjustment in an insurance valuation process was flawed when liability for class members' claims turns on the undervaluation of insured property

The Eighth District acknowledged that Appellees' claims for breach of their insurance policies required them to prove "an underpayment of the ACV of their vehicles." (Decision at ¶ 30.) Yet the Eighth District ignored the inherently individualized question of valuation and held that predominance requirement was satisfied because Appellees focused their allegations on "one-line item deduction" in the valuation process. (*Id.* ¶ 43.)

Even so, damages are an element of a breach of contract claim. Even if Appellees are correct that the use of the line item PSA adjustment was improper, they must prove that the use of the adjustment actually injured them by the resulting ACV payment being less than they were entitled to. Even an invalid contract provision does not create a commonly provable injury that satisfies the predominance requirement.

Felix, 2015-Ohio-3430, is on point. In *Felix*, the plaintiffs sought to certify a class arguing that an arbitration clause in a form purchase contract was unconscionable. This Court reversed class certification, and explained that even if the clause was common to the class member, no class could be certified because of the need to prove injury:

> Plaintiffs in class-action suits must demonstrate that they can prove, through common evidence, that all class members were in fact injured by the defendant's actions. Although plaintiffs at the class-certification stage need not demonstrate through common evidence the precise amount of damages incurred by each class member, they must adduce common evidence that shows all class members suffered some injury.
>
> ***

> While determining the amount of damages does not defeat the predominance inquiry, a proposed class action requiring the court to determine individualized fact of damages does not meet the predominance standards of Rule 23(b)(3).
>
> 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). Indeed, a key purpose of the predominance requirement is to test whether the proposed class is sufficiently cohesive to warrant adjudication by representation.
>
> ***
>
> Here, the class, as certified, fails because there is no showing that all class members suffered an injury in fact. The broadly defined class encompasses consumers who purchased a vehicle at Ganley through a purchase contract that contained the unconscionable arbitration provision. But there is absolutely no showing that all of the consumers who purchased vehicles through a contract with the offensive arbitration provision were injured by it or suffered any damages.

Felix at ¶ 33-37 (internal citations and quotations omitted).

Appellant cites numerous federal and state decisions reaching the same conclusion with respect to Appellees' ACV theory. (Jurisdictional Memorandum at 12-14.) OACTA will not belabor the point by citing those authorities again here. Nor does it suggest that class certification can or should be decided simply by counting the number of similar cases from other jurisdictions that go one way or another.

Yet, the Ohio standards for class certification are based upon, and the same as, the federal standard. *Cullen,* 2013-Ohio-4733, at ¶ 14. The inconsistency between the Eighth District's Decision and the federal and state cases on the same issue cited by Appellants creates the potential for forum-shopping and can only result in confusion as to the appropriate standard for class certification. Given the "adventuresome" nature of a Civ. R. 23(B)(3) class action, clear standards and predictability are important to guide courts and parties on whether a class should be certified. *Amchem Prods. v. Windsor*, 521 U.S. 591, 614-15 (1997). The Decision fundamentally undercuts those goals.

IV. CONCLUSION

Class action litigation has enormous stakes for plaintiffs and defendants. Those stakes require rigorous analysis of the elements of the claims for which certification is sought and whether those elements, including damages and injury, can be proven on a class-wide basis. The Eighth District failed to conduct that rigorous analysis, resulting in a Decision that conflicts with the Court's prior precedents and analogous federal law. The Court should reverse the Decision and decertify the class.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Amicus Curiae The Ohio Association of Civil Trial Attorneys has been electronically filed with Supreme Court of Ohio on February 9, 2026. and has been separately served by electronic mail upon the following:

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