NO. 07-437

BEFORE THE ARKANSAS SUPREME COURT

BOYD BRYANT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED — **APPELLEE**

v.

GENERAL MOTORS CORPORATION, D/B/A CHEVROLET, GMC, CADILLAC, BUICK AND OLDSMOBILE — **APPELLANTS**

On Appeal From The Circuit Court of Miller County
Honorable Jim Hudson, Presiding Judge

Brief Of The Chamber Of Commerce Of The United States Of America As *Amicus Curiae* In Support Of Appellants

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I. Whether the Circuit Court erred in certifying a nationwide class of certain vehicle purchasers prior to considering choice-of-law issues and despite the highly individualized factual and legal inquiries necessitated by the class members' claims.

STATEMENT OF THE CASE

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs involving issues of national concern to American business.

Few issues are of more concern to American business than those pertaining to class certification. The Chamber regularly files *amicus* briefs in significant appeals involving class certification issues, including *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), *State Farm Mutual Auto Insurance Co. v. Speroni*, 525 U.S. 922 (1998), and *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

The Chamber and its members have a substantial interest in the procedures courts employ in determining whether class certification is appropriate, particularly in the context of proposed nationwide classes. The Chamber believes that its familiarity with class certification issues can be of assistance to the Court not just in resolving the issues raised in General Motors' appeal, but also in more broadly addressing how choice-of-law requirements affect class certification analysis.

ARGUMENT

INTRODUCTION

In certifying a nationwide class of vehicle purchasers asserting claims for fraudulent concealment, unjust enrichment and breach of express and implied warranty, the trial court in this matter ducked the question of how it plans to conduct a class trial involving the 50 states' different legal standards. Instead, the court concluded that state law variations have no relevance to the class certification inquiry, adopting a "certify now, worry later" approach that ignores the dictates of Arkansas's Rule 23 and is contrary to sound public policy. Had the court conducted a proper analysis, it could have reached only one conclusion: that a class action involving the varying laws of all 50 states simply cannot satisfy the predominance and manageability requirements of the Arkansas class action rule.

Absent reversal, the trial court's approach will have negative ramifications far beyond this case. ***First***, the cavalier approach to class certification found in this opinion – that is, uncritically certifying a class without determining whether it actually satisfies the applicable certification prerequisites – would result in confusion and waste because trial courts using that approach frequently will be obliged to decertify classes and retract the notices sent to class members. ***Second***, the trial court's approach would transform class certification from a procedural tool for adjudicating large numbers of nearly identical claims to a device that aggregates disparate claims for the sole purpose of leveraging settlement. And ***third***, the Circuit Court's decision will send a message to lawyers throughout the country that Arkansas courts, in contrast to virtually every other state, will allow certification of multi-state class actions predicated on state law claims. Accordingly, if the lower court's order is upheld, Arkansas will

likely become the latest "magnet" jurisdiction for the plaintiffs' bar, imposing huge costs on companies that do business in the state and placing an unnecessary strain on Arkansas courts by forcing them to devote substantial resources to managing large-scale litigation matters that have only a minimal connection to Arkansas consumers.

The Circuit Court's class certification ruling is predicated on three erroneous legal propositions. ***First***, the Circuit Court concluded that a trial court need not address legal variations in certifying a class because "potential application of many states' laws [is] not germane to class certification." (Findings of Fact and Conclusions of Law Regarding Class Certification, and Order Certifying Class (Miller Cty. Cir. Ct. Jan. 11, 2007) ("Order") at 37.) ***Second***, the court compounded this error by suggesting that even if it did examine the choice-of-law dispute, such an inquiry would not preclude certification because "[w]hile some legal variations may exist amongst different states, the Court does not perceive them to create any barrier to class certification." (*Id.* at 39.) ***Finally***, the court ignored the factual variations inherent in plaintiff's fraud, warranty, and unjust enrichment claims that make them presumptively uncertifiable.

I. THE CIRCUIT COURT ERRED IN FINDING CHOICE-OF-LAW ISSUES IRRELEVANT TO THE CLASS CERTIFICATION INQUIRY.

The Circuit Court's statement that potential legal variations are simply "a task for the trial court to undertake later" and therefore need not be considered at the certification stage (Order at 37), is erroneous. If the trial court's approach were correct, class certification would be a meaningless exercise since courts would not address the most difficult and important class certification-related questions – *i.e.*, whether a class trial is fair or feasible – until long after a

class had been certified.

Most significantly, the trial court's decision is wrong because potential legal variations preclude a finding of predominance. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (holding that the need to apply numerous states laws precludes certification because ariations in state law may swamp any common issues and defeat predominance ; *Zehel-Miller v. AstraZenaca Pharms., LP*, 223 F.R.D. 659, 663 (M.D. Fla. 2004) (the fact that plaintiffs claims are ot treated uniformly throughout the United States creates a myriad of individual legal issues that defeat the predominance requirement of Rule 23(b)(3); *cf. Farm Bureau Mut. Ins. Co. v. Farm Bureau Policy Holders & Members*, 323 Ark. 706, 709, 918 S.W.2d 129, 130 (Ark. 1996) (we have said that we will interpret Ark. R. Civ. P. 23 in the same manner the federal courts interpret the comparable Fed. R. Civ. P. 23. After all, if each class member's claim must be evaluated under a different state's law – and therefore a different legal standard – there can be no common finding as to whether General Motors committed a common wrong as to all class members nationwide.

While Arkansas's Rule 23 does not contain an express manageability requirement, the Arkansas Supreme Court has recognized that a finding of manageability is inherent in the superiority requirement set forth in the Rule. *See Asbury Auto. Group, Inc. v. Palasack*, 366 Ark. 601, ___, 2006 Ark. LEXIS 371, at *19 (2006) ("the superiority requirement is satisfied if class certification is the more 'efficient' way of handling the case, and it is fair to both sides") (quotation omitted). Accordingly, "when a trial court is determining whether class-action status is the superior method for adjudication of a matter, it may be necessary for the trial court to evaluate the manageability of the class." *Id.* Where, as here, there is a potential that class

members' claims will be governed by different states' laws, a court cannot determine that a single class trial would be fair and manageable – and is thus the superior method for resolving plaintiffs' claims – without first considering which states' laws apply to the case.

The court's refusal to address choice of law renders its order akin to conditional class certification – a practice that has been soundly rejected in recent years by state and federal courts and is now prohibited under both the Arkansas Rules of Civil Procedure and the federal rules on which they are modeled. *See Castano*, 84 F.3d at 741 (rejecting lower court's assertion that certification order was "conditional"; in order to assess class certification, a court "must initially identify the substantive law issues which will control the outcome of the litigation"); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 147 (E.D. La. 2002) ("[c]onditional certification of a class action involving multiple state laws without analyzing the effect of this variation on ... manageability" is prohibited); *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 425-26 (5th Cir. 2004) (decertifying class of plaintiffs alleging antitrust claims against a large number of defendants because in its "certification order, the court did not indicate that it has seriously considered the administration of the trial. Instead, it appears to have adopted a figure-it-out-as-we-go-along approach that . . . cases have not endorsed."). Although Arkansas Rule of Civil Procedure 23 was amended in 2006 to remove the reference to conditional certification and to bring the state rule "into conformity with the federal Rule," Ark. R. Civ. P. 23, reporter's note to 2006 amendment, the court here relied upon the older version of the rule permitting conditional certification. (*See* Order at 38 ("Rule 23 of the Arkansas Rules of Civil Procedure specifically states that 'an order under this section may be conditional'" (citation omitted).)

The reason conditional certification has been almost uniformly rejected is simple:

conditional certification encourages the certification of cases (like the one at issue here) that do not satisfy the requirements of Rule 23 and will eventually have to be decertified. *See* Report of the Judicial Conference Committee on Rules of Practice and Procedure at 12 (Sept. 2002), *available at* http://www.uscourts.gov/rules/ reports.htm (deletion of "conditional certification" language from Rule 23(e) is intended "to avoid the unintended suggestion, which some courts [had] adopted, that class certification may be granted on a tentative basis, even if it is unclear that the rule requirements are satisfied"); *see also* Fed. R. Civ. P. 23(c)(1), 2003 advisory comm. note ("A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.").

The Circuit Court here attempted to justify its "figure-it-out-as-we-go-along approach" by relying on *Security Benefit Life Insurance Co. v. Graham*, 306 Ark. 39, 810 S.W.2d 943 (1991), in which the Court upheld the certification of a class of 600 annuity holders residing in 39 states. (Order at 36-37.) Contrary to the Circuit Court's interpretation, however, the Court in *Security Benefit* did not conclude that choice of law is "not germane to class certification." (*Id.* at 37.) Rather, the Court held that the laws of multiple states were not central to that case because the class had asserted insurance-based claims arising from a single Master Policy that was, by its own terms, ***governed by Arkansas law***. 306 Ark. at 44, 810 S.W.2d at 945-46. Thus, any state-law variations were only relevant to the affirmative defense of novation, and the court was "not convinced" that it would be necessary to apply the laws of thirty-nine states to that defense. *Id.* In other words, *Security Benefit* does not forgo the requirement that a court must consider choice-of-law issues in determining the propriety of class certification – the Court there merely concluded that, on the facts of that particular case, variations in governing law did not

preclude class certification.

The Circuit Court also attempted to justify its decision to ignore the choice-of-law dispute by reliance on the well-established principle that "trial courts are not permitted to delve into the merits of a case in deciding whether to certify it as a class action." (Order at 37.) But the court provided no support – either logical or precedential – for its conclusion that "there is no greater merits-intensive determination than the one regarding choice of law" (*id.*), and there is none. Choice of law is a threshold question that ultimately ***permits*** a court to reach the merits of the dispute by establishing the governing legal rules, but the selection of the proper law cannot conceivably be termed a "merits-intensive determination" (*id.*).

The Circuit Court's approach not only conflicts with the Arkansas Rules of Civil Procedure and volumes of caselaw, but also is troubling as a matter of policy. It is well-established that a case should only proceed as a class action if "a class action would achieve economies of time, **effort,** and expense." *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997). However, certifying a class without paying heed to the prerequisites for certification or the manageability of a class trial leads to a tremendous waste of time and resources for plaintiffs, defendants, and the court. For example, if the Circuit Court's certification order is allowed to stand, the court will spend substantial time and resources overseeing the publication of class notices to all purchasers of certain GM vehicles across the country explaining that a class has been certified and informing them of their rights as putative class members. However, for the reasons set forth in Section II, *infra*, there is a substantial probability that the court will later determine that class treatment will be wholly unmanageable because multiple states' laws apply to plaintiffs' claims. Thus, the court will be forced to require that another round of notices be

sent, informing these same purchasers of the decision to decertify the class. Certification of a class – only to decertify it or reclassify it later – needlessly consumes considerable time, effort, and money and therefore undermines the basic goals of consolidated treatment. Moreover, it tends to confuse class members about their rights and duties.

The Circuit Court's cavalier approach to class certification is also contrary to public policy because it essentially transforms class certification from a procedural tool for adjudicating large numbers of nearly identical claims into a device that aggregates disparate claims for the sole purpose of leveraging settlement. It is no secret that "a 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." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). The reason is obvious: "a grant of class status can propel the stakes of a case into the stratosphere," and "[m]any corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation." *Id.*; *see also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (companies facing millions of dollars in potential liability "may not wish to roll the[ ] dice. That is putting it mildly."). Certifying a class without knowing whether it satisfies the requirements of Rule 23 misuses a procedural device to create settlement pressure where none should exist.

In short, the Circuit Court's failure to consider manageability concerns at the class certification stage is contrary both to Arkansas Rule 23's bar on conditional certification and to public policy interests that demand care and consistency in class certification decisions. For this reason alone, the certification order should be vacated.

II. HAD THE COURT CONDUCTED A PROPER CHOICE-OF-LAW ANALYSIS, IT WOULD HAVE RECOGNIZED THAT PLAINTIFFS'

CLAIMS ARE GOVERNED BY THE VARYING LAWS OF FIFTY STATES, PRECLUDING CLASS CERTIFICATION.

The Circuit Court also erred in suggesting that if it does ever get around to analyzing choice-of-law issues, that analysis will not preclude certification because "[w]hile some legal variations may exist amongst different states, the court does not perceive them to create any barrier to class certification." (Order at 39.) It remains unclear whether the court believes legal variations are irrelevant because the class claims can be tried under the laws of a single state, or if it believes the jury can manageably apply the fraud, warranty and unjust enrichment laws of the 50 states to the claims in this case. Neither approach is sound. ***First***, it is clear that one state's laws cannot be applied to all class members' claims. Under Arkansas choice-of-law principles, the class members' claims will be governed by the law of the state where they purchased the vehicles at issue in the litigation. ***Second***, despite the Circuit Court's suggestion otherwise, the variations among different states' laws are in fact quite significant and do preclude certification. Although all states provide for common law claims such as fraud, unjust enrichment, and breach of warranty, the construction and application of these causes of action vary from state to state. Accordingly, a nationwide class trial that would implicate the widely varying laws of all fifty states – like the one proposed here – would be unmanageable.

A. Under Arkansas's Choice-Of-Law Test, The Law Of The State Of Purchase Governs Each Class Member's Claims.

The Arkansas Supreme Court has adopted Professor Robert Leflar's choice influencing considerations to decide choice-of-law questions involving tort claims: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better

rule of law. *Ganey v. Kawasaki Motors Corp., U.S.A.*, 366 Ark. 238, ___, 2006 Ark. LEXIS 294, at *13 (2006). Here, application of the five factors clearly shows that each class member's claims are governed by the law of the state where he or she purchased the vehicle at issue.

First, the "predictability of results" factor is premised on the "ideal that a decision following litigation on a given set of facts should be the same regardless of where the litigation occurs in order to prevent forum shopping." *Schubert v. Target Stores, Inc.*, 360 Ark. 404, 410, 201 S.W.3d 917, 922 (2005). But if the law to be applied to a particular class member's claim was determined simply by the residence of the named plaintiffs and the state of filing, then it would be impossible to predict in advance which law would govern that claim, and plaintiffs' lawyers would be encouraged to file their lawsuits in the most plaintiff-friendly forum. In contrast, application of the law of the place of purchase would mean that the same state's law would apply to each class member's claims regardless of where the lawsuit was filed – encouraging predictability of results and discouraging forum manipulation.

Second, the maintenance of interstate and international order also favors the law of the place of purchase because that state has the "more significant relationship to the parties." *Ganey*, 366 Ark. at __, 2006 Ark. LEXIS 294, at *23. The overwhelming majority of the putative class in this case neither live in Arkansas nor purchased their vehicles here, and the mere fact that GM does business in the state would not supply Arkansas with a sufficient interest to apply its law to regulate GM's conduct elsewhere. Similarly, while GM is headquartered in Michigan, the conduct at issue in this case – the alleged sale of defective vehicles – took place elsewhere. Michigan may have an interest in regulating the conduct of businesses headquartered in that state, but that fact alone is not sufficient to permit nationwide application of Michigan

law. In contrast, the state where each class member purchased and used his or her vehicle has a substantial interest in regulating consumer transactions within its borders and protecting its citizens through compensation and deterrence. *See Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 632-33, 550 S.W.2d 453, 458 (1977) (noting that Arkansas's interest in protecting its own citizens favors application of Arkansas law). As the Arkansas Supreme Court has noted, "deference to sister state law in situations in which the sister state's substantial concern with a problem gives it a real interest in having its law applied" will "further . . . the law's total task." *Gomez v. ITT Educ. Servs.*, 348 Ark. 69, 78, 71 S.W.3d 542, 547 (2002).

Third, simplification of the judicial task "is not a paramount consideration, because the law at issue does not exist for the convenience of the court that administers it, but for society and its members." *Schubert*, 360 Ark. at 411, 201 S.W.3d at 922. Here, because no one state's law stands out as being "outcome-determinative" and particularly "easy to apply," this factor does not affect the choice-of-law determination. *Id.*

Fourth, with respect to the governmental interest factor, the Arkansas Supreme Court has held that in the context of product liability actions involving the purchase of a product by out-of-state plaintiffs in their home state, the "advancement of the forum's governmental interests favors [the plaintiff's home state's] law because ***that state has an interest in protecting its citizens from defective products introduced into the stream of commerce in that state.***" *Ganey*, 366 Ark. at ___, 2006 Ark. LEXIS 294, at *24 (applying Louisiana law to Louisiana plaintiff's personal injury suit alleging injuries sustained as a result of his purchase of an allegedly defective vehicle in Louisiana) (emphasis added). Indeed, the Arkansas Supreme Court specifically recognized in *Ganey* that a state's "right to protect its citizens through application of

its products-liability laws is a significant factor that outweighs any interest" the forum state might have in the action. *Id.* at ___, 2006 Ark. LEXIS 294, at *25.

Fifth, application of the "better law" factor is not applicable in this case, as there has been no showing by appellees – or by the Circuit Court – that any single state's law would produce better results in this case than any other state's law. *Id.* (finding that the better law rule is not informative of the choice-of-law inquiry where there is no evidence that one state's law is superior to the laws of other potentially applicable states). Indeed, the Circuit Court did not engage in such a comparison.

Because the three most important factors applied by Arkansas courts weigh in favor of applying the law of the state in which each individual class member purchased the product in question (and the other two factors are neutral), plaintiffs' claims in this action must be governed by the substantive law of the 50 states where they purchased their vehicles – not the one state where defendant is located or plaintiff's counsel chose to bring the suit.

B. The Need To Apply The Laws Of Fifty States Defeats Certification Of Plaintiffs' Claims.

The Circuit Court also erred in suggesting that even if plaintiffs' claims were governed by the laws of all fifty states, the differences in these states' laws are not significant enough to preclude class treatment. (*See* Order at 39 ("While some legal variations may exist amongst different states, the Court does not perceive them to create any barrier to class certification.").) Over the last decade, the overwhelming majority of federal and state courts have recognized that nationwide class actions involving application of varying state laws are presumptively uncertifiable because "variations in state law may swamp any common issues and defeat

predominance." *See, e.g.*, *Castano*, 84 F.3d at 741; *Spence v. Glock, GES.m.b.H.*, 227 F.3d 308, 311-13 (5th Cir. 2000); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2000), *amended by* 273 F.3d 1266 (9th Cir. 2001); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). In short, "[n]o class action is proper unless all litigants are governed by the same legal rules." *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1015 (7th Cir. 2002).

The rule reflects simple practicality and fairness: "[i]f more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law." *In re Am. Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996). Likewise, it would be impossible for any one jury to understand the nuanced differences among state laws and reach 50 different verdicts reflecting those differences. Thus, the trial court's simplistic suggestion that "jury interrogatories" could be used to account for state-law variations is untenable. (Order at 42.) On the other hand, providing a jury with "a kind of Esperanto instruction, merging the [legal] standards of the 50 states and the District of Columbia" into one set of principles, is contrary to basic due process. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1300.

The claims asserted by plaintiffs here are no exception to this rule. For example, the law governing plaintiffs' common law fraud claims varies substantially from state to state. As an initial matter, the standards of proof for fraud claims vary greatly. While some states allow recovery if fraud is proven by a mere "preponderance of the evidence," *see Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964); *Liodas v. Sahadi*, 562 P.2d 316, 321 (Cal. 1977), other jurisdictions require proof by "clear and convincing evidence," *see Hofmann v. Hofmann*, 446 N.E.2d 499,

506 (Ill. 1983); *OMI Holdings, Inc. v. Howell*, 918 P.2d 1274, 1299 (Kan. 1996); *Gross v. Sussex, Inc.*, 630 A.2d 1156, 1161 (Md. 1993). By further contrast, Iowa asks for a "preponderance of clear, satisfactory and convincing evidence." *See Bates v. Allied Mut. Ins. Co.*, 467 N.W.2d 255, 260 (Iowa 1991). Thus, in a nationwide class trial, the court would have to instruct the jury on the meaning of these (and other) standards, and the jury would have to grasp and apply the subtle differences in the standards, weighing the evidence differently as to each class member's claim according to the law of the state in which the vehicle was purchased.

The states also have varying substantive standards for establishing fraud claims. For example, plaintiffs have alleged that GM knowingly defrauded vehicle purchasers by concealing material facts about the safety of its products. However, the level at which GM must have "known" the material facts that it purportedly concealed varies across jurisdictions. Some states require that the defendant actually know of the material fact that was not disclosed. *See Ensminger v. Terminix Int'l Co.*, 102 F.3d 1571, 1573 (10th Cir. 1996) (holding that under Kansas law, "to prove a cause of action for fraud by silence, plaintiff must set forth by clear and convincing evidence . . . that the defendant had knowledge of material facts which plaintiff did not have"). Other states permit liability on a showing that the defendant had the means of knowing the information allegedly concealed. *See Silva v. Stevens*, 589 A.2d 852, 857 (Vt. 1991) ("Fraudulent concealment involves concealment of facts by one with knowledge, or the means of knowledge."). In still other states, the defendant must know or have culpable ignorance of the material fact. *See Harton v. Harton,* 344 S.E.2d 117, 119 (N.C. Ct. App. 1986) (requiring knowledge or recklessness for fraudulent concealment claim); *Rosenthal v. Perkins*, 257 S.E.2d 63, 65 (N.C. Ct. App. 1979) (defendant must have knowledge of falsity or culpable

ignorance). Thus, a jury could reach very different determinations as to whether GM acted "knowingly" depending on which state's law is applied.

The level of culpability required to impose liability for fraud also varies from state to state. In most states, the plaintiff must demonstrate that the defendant actually intended to mislead the plaintiff. *Baskin v. Collins*, 305 Ark. 137, 141, 806 S.W.2d 3, 5 (1991) (defendant must intend to induce plaintiff to act); *Yost v. Millhouse*, 373 N.W.2d 826, 830 (Minn. Ct. App. 1985) ("[t]he representer must intend to have the other person induced to act"). However, other states do "not infuse [the duty to disclose] with a specific intent to deceive." *Ensminger*, 102 F.3d at 1575 (applying Kansas law). For these reasons and many more, there is general consensus that the fraud laws of the 50 states materially conflict with one another, precluding certification of multi-state fraud claims. *See, e.g.*, *Georgine*, 83 F.3d at 618; *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1367 & n.43 (11th Cir. 2002); *Castano*, 84 F.3d at 741.

Multi-state breach of warranty claims are similarly unsuited for certification because "[t]he Uniform Commercial Code is not uniform" in practice among the states. *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) (Ruth Bader Ginsburg, J.) (quoting J.J. White & R.S. Summers, *Uniform Commercial Code* 7 (2d ed. 1980)); *see also Osborne v. Subaru of Am., Inc.*, 243 Cal. Rptr. 815, 820 (Cal. Ct. App. 1988) (U.C.C. "is not applied in the same fashion everywhere"). As the U.S. Court of Appeals for the Seventh Circuit noted in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001), the need to apply multiple states' laws "cut[s] strongly against nationwide classes" in warranty cases because states differ substantially in their willingness to accept warranty claims and standard for imposing liability. *Id.* at 674. Those variations "account for the fact that few warranty cases ever have been certified as class

actions – let alone as nationwide classes, with the additional choice-of-law problems that complicate such a venture." *Id.*

For example, states use very different standards to determine whether a product fulfills its implied "warranty of merchantability." Some states focus on the "expectations" of the "reasonable consumer," *see, e.g.*, *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 190 (1st Cir. 1980) (applying Massachusetts law), while others focus (at least in part) on the expectations of the particular plaintiff at issue, *see, e.g.*, *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 736 (N.Y. 1995). In addition, state laws vary on the question whether vertical privity is required in implied warranty claims. For example, some states bar implied warranty claims for purely economic losses against a manufacturer where the plaintiff did not purchase the product from the manufacturer directly, *see, e.g.*, *Larsen v. Pacesetter Sys., Inc.*, 837 P.2d 1273, 1277 (Haw.), *amended, on recons., in part, recons. denied, in part*, 843 P.2d 144 (Haw. 1992), while other states do not, *see, e.g.*, *Prutch v. Ford Motor Co.*, 618 P.2d 657 (Colo. 1980) (en banc). As one commentator has noted, the states are "almost evenly divided between those retaining . . . and those rejecting" the vertical privity requirement for implied warranty claims. William H. Henning, *et al.*, *The Law of Sales Under the Uniform Commercial Code* § 11.51, at 11-178 (2002). Similarly, although most states no longer require privity for a breach of express warranty claim, at least four states continue to bar such claims in the absence of vertical privity. *See Flory v. Silvercrest Indus. Inc.*, 633 P.2d 383, 387 (Ariz. 1981); *T.W.M. v. Am. Med. Sys., Inc.*, 886 F. Supp. 842, 844 (N.D. Fla. 1995); *Lamb v. Georgia-Pacific Corp.*, 392 S.E.2d 307, 309 (Ga. Ct. App. 1990); *Oats v. Nissan Motor Corp.*, 879 P.2d 1095, 1102 (Idaho 1994). Thus, the warranty claims of every GM vehicle purchaser who bought the product from a dealer –

rather than from GM directly – will turn on whether the state law applicable to his or her claims recognizes a privity requirement.

In addition, despite the Circuit Court's conclusion that individual notice is not required (either because actual notice or the filing of the lawsuit suffices (Order at 41 n.16)), state laws vary considerably as to notice requirements. *See Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 674 (Tex. 2004) ("[C]ases from different jurisdictions interpret the notice requirement differently."). For example, some jurisdictions (like Arkansas) require that the plaintiff give notice directly to a remote manufacturer like GM, *see, e.g.*, *Williams v. Mozark Fire Extinguisher Co.*, 888 S.W.2d 303, 305-06 (Ark. 1994), while others forgo this requirement if the immediate seller receives notice, *see, e.g.*, *Seaside Resorts, Inc. v. Club Car, Inc.*, 416 S.E.2d 655, 663 (S.C. Ct. App. 1992), and still others have done away with the notice requirement altogether for retail (but not commercial) sales, *see Firestone Tire & Rubber Co. v. Cannon*, 452 A.2d 192, 197 (Md. Ct. Spec. App. 1982), *aff'd*, 456 A.2d 930 (Md. 1983).

Finally, multi-state unjust enrichment class actions are viewed as equally incapable of certification, because state standards differ over elements as basic as the meaning of "unjust" and the requirement of a defendant's knowledge of the conferred benefit by which he is enriched. *See Lilly v. Ford Motor Co.*, No. 00 C 7372, 2002 WL 507126, at *2 (N.D. Ill. Apr. 2, 2002) (denying certification of a nationwide class because the laws of unjust enrichment vary from state to state and require individualized proof of causation). As a result, it would be impossible for a jury to employ a single standard to determine whether GM was "unjustly enriched."

The court's only answer to these legal variations is its misguided suggestion that the trial could be bifurcated between common and individual issues. (Order at 40.) Whatever assistance

bifurcation might provide in managing individualized factual questions (*but see* p. 17, *infra*), it is of absolutely no use in solving choice-of-law dilemmas. The reason is simple: without first knowing what legal standards govern each plaintiff's claims, any purportedly common issues would be tried in a vacuum, with all parties unaware of what they need to prove to establish their claims or defenses. Indeed, the court betrays its own confusion in concluding that "given the identical wording in GM's written warranty to him and class members, GM's express-warranty liability can be litigated unconstrained by variations in state law warranty defect standards." (Order at 40.) This makes no sense – even assuming a uniform warranty creates a common ***factual*** issue, it says nothing about the varying state legal standards that must be applied to determine the ***legal import*** of that written warranty with respect to individual class members. Had the Court conducted a proper choice-of-law analysis, it would have determined that application of the laws of multiple states will create unavoidable legal variations in this case, destroying predominance and precluding class certification.

III. FACTUAL VARIATIONS INHERENT IN PLAINTIFFS' CLAIMS ALSO PRECLUDE CLASS CERTIFICATION.

In addition to ignoring the legal variations posed by nationwide classes, the Circuit Court also ignored the factual variations inherent in this case, which further doom any finding of predominance in this case. The gist of plaintiffs' lawsuit is that GM defrauded purchasers of certain vehicles because it knew its parking brakes were defective when they were sold and failed to adequately warn purchasers about that defect. In order to prevail on their various claims, each class member will need to demonstrate – among other things – that he or she purchased a GM vehicle, that the vehicle was defective, that GM knew about the alleged defect

at the time the particular plaintiff purchased the vehicle, that GM's alleged failure to warn about the alleged defect actually caused that plaintiff to purchase the vehicle, that the plaintiff has not had the defect repaired under warranty, and so on and so forth. As a result, each class member's claim will turn upon highly individualized factual evidence relating to the reasons for his or her decision to purchase the vehicle and whether that decision would have differed had GM provided more or different information about the vehicle. These inquiries will necessarily vary from class member to class member. In addition, individual use factors, including "component failure, rough road conditions, excessive dirt in the brake, owner modification, lack of service or maintenance, overloading, error by third-party service technician, or prior accidents" (Order at 30), all affect the potential for parking brake malfunction.

In ignoring these variations, the trial court's order is directly contrary to volumes of authority recognizing that product-based claims like plaintiffs' cannot be adjudicated on a classwide basis because of the individualized issues surrounding each plaintiff's purchase and use of the product at issue. These include ***fraud cases***, *see, e.g.*, Charles A. Wright *et al.*, 7AA *Federal Practice and Procedure: Civil 2d* § 1778, at 540 & n.30 (1982) ("[a]dditional examples of cases in which individual issues have been found to predominate [include] . . . actions claiming common law fraud" (collecting cases)); *Castano*, 84 F.3d at 745 ("fraud class action cannot be certified when individual reliance will be an issue"); ***breach of warranty cases***, *see, e.g.*, *Commander Props. Corp. v. Beech Aircraft Corp.*, 164 F.R.D. 529, 538-39 (D. Kan. 1995) (individualized issues "preclude certification of the breach of warranty claims"); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 347 n.8 (D.N.J. 1997) (to same effect); *McManus v. Fleetwood Enters.*, 320 F.3d 545, 550 (5th Cir. 2003) (reversing

certification of express warranty claims where plaintiffs "have failed to show that the representations were part of the 'basis of the bargain' to such a uniform extent that class certification is appropriate"); and ***unjust enrichment cases***, *see, e.g.*, *Lilly*, 2002 WL 507126, at *2; *Eldred v. Experian Info., Inc.*, 233 F.R.D. 508, 511-12 (N.D. Ill. 2005) (denying class certification because an individualized person-by-person evaluation of plaintiffs' claims, which included a claim for unjust enrichment, was required); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 500 (S.D. Ill. 1999) (denying certification of unjust enrichment claim in part because individual questions such as whether a class member spent any money on the product, whether the defendant's misconduct caused them to purchase it, and whether a class member's claim is barred by an equitable defense precludes a finding of predominance); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 75 (S.D.N.Y. 2002) (denying certification of a nationwide class on all counts, including unjust enrichment, where, for example, the question whether an individual class member got his or her money's worth is inherently individual); *Commander Props. Corp.*, 164 F.R.D. at 540 (denying class certification because claims for unjust enrichment involve significant individual inquiries, such as whether a particular plaintiff must establish that the defendant was unjustly enriched at its expense).

The Circuit Court's response – that the "alleged defect is [] present in all class vehicles" from day one and "manifest[s] itself each time a class vehicle is used" (Order at 31) – is flatly inconsistent with controlling Arkansas precedent. In *Wallis v. Ford Motor Co.*, 362 Ark. 317, 208 S.W.3d 153 (2005), plaintiffs asserted that certain alleged defects resulted in a propensity for vehicle rollovers. The Court took the opportunity to reject no-injury product liability suits, finding no merit in plaintiffs' argument that "damages are cognizable where there is a propensity

for a product to fail prematurely as a result of an alleged defect" in the absence of an allegation of actual malfunction. *Id.* at 323, 208 S.W.3d at 158. As the Court explained,

> The striking feature of a typical no-injury class is that the plaintiffs have either not yet experienced a malfunction because of the alleged defect or have experienced a malfunction but have not been harmed by it. Therefore, the plaintiffs in a no-injury products liability case have not suffered any physical harm or out-of-pocket economic loss.

Id. at 324, 208 S.W.3d at 158 (quoting *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 440, 455 n.4 (5th Cir. 2001)). Because "actual damage or injury is sustained when the product has actually malfunctioned or the defect has manifested itself," *id.* at 328, 208 S.W.3d at 161, plaintiffs have no claim absent actual manifestation of the alleged defect. In short, under *Wallis* – and under the laws of many other states rejecting so-called "no injury" lawsuits – no class member has a claim until he or she actually experiences a parking brake malfunction, necessitating individualized factfinding to determine whether such a malfunction has actually occurred in each case.[1]

Finally, bifurcation is no answer to the individualized factual inquiries necessitated by plaintiffs' claims because a bifurcated proceeding offers none of the efficiencies that Rule 23 seeks to promote. The benefits of class treatment would be illusory because GM would be entitled to present rebuttal evidence in the "common issues" stage that almost certainly would present individualized questions, and countless individual hearings would be required in the second stage to address all remaining individualized questions. *See In re Paxil Litig.*, 212 F.R.D.

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[1] *Wallis* is relevant here not because it goes to the merits of plaintiffs' claims (*see* Order at 49-50), bur rather because it defeats the Circuit Court's conclusion that individualized inquiries regarding ***actual*** parking brake failure are unnecessary in light of plaintiff's allegations that the vehicles have a common ***propensity*** to fail.

539, 547 (C.D. Cal. 2003) ("The theory and the benefits of bifurcation, when placed in actual practice, will prove to be ephemeral."); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 209 F.R.D. 323, 352-53 (S.D.N.Y. 2002) (denying certification; trial plan would not "materially advance this litigation" because "countless individual trials ... would follow the classwide trial"); *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (rejecting notion of trying "general causation" because "[c]ommonality among class members on issues of causation and damages can be achieved only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury").

In short, the trial court's ruling also contravened fundamental class action principles by failing to account for significant factual variations that further defeat any finding of predominance and would render a class trial in this case unmanageable.

IV. AFFIRMANCE OF THE ORDER BELOW WOULD MAKE ARKANSAS A MAGNET FOR CLASS ACTION LAWSUITS AND WOULD HAVE ADVERSE CONSEQUENCES FOR ARKANSAS CONSUMERS AND COMPANIES.

The Circuit Court's certification order is not only erroneous for the reasons discussed above, but absent modification, will have widespread negative repercussions for businesses and industries throughout the state of Arkansas. If allowed to stand, the trial court's relaxation of class certification requirements will serve as a clarion call to potential plaintiffs and their counsel that Arkansas courts are receptive to class actions that have been rejected elsewhere.

The Circuit Court's refusal to take seriously the factual and legal variations here was not the product of circumstances unique to this case, and the court does not pretend otherwise. To

the contrary, the decision suggests that multi-state class actions are easily certified under Arkansas law because courts need not consider potential legal variations at all at the certification stage, and factual variations can be dealt with – somehow – down the road. Plaintiffs will view the opinion below as an open invitation to file class action lawsuits in Arkansas courts that heretofore would not have been brought because of their obvious unsuitability for certification. The inevitable surge in class action filings will tax Arkansas courts and impose huge costs on companies that do business in the state, exposing them to increased litigation expenses and placing them at a competitive disadvantage vis-à-vis companies situated elsewhere that are not subjected to the same burdens.

Over the past decade, plaintiffs' lawyers have moved from jurisdiction to jurisdiction throughout the country in search of courts willing to relax traditional class certification and claims aggregation requirements. Whenever they have found such a court, they have bombarded it with a deluge of massive lawsuits having scant connection to the relevant state. Typically, that litigation blitzkrieg has only ceased when the appellate courts of the jurisdiction in question have stepped in and reasserted traditional class action and aggregate litigation principles. For example, when Alabama courts became a haven for abusive class actions in the 1990s, the Alabama Supreme Court stepped in and established bright-line rules for class certification. *See, e.g.*, *Ex parte Citicorp Acceptance Co.*, 715 So. 2d 199, 203 (Ala. 1997) (rejecting "drive by" class certification practice under which some Alabama state trial courts conditionally certified classes before service on defendants). Plaintiffs next found success with "mass actions" in Mississippi – but in due course, the Mississippi Supreme Court stepped in to stop the rampant abuses in such cases. *See Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 47-48 (Miss.)

(rejecting mass joinder product liability cases) *modified and reh'g denied*, 2004 Miss. LEXIS 1002 (Miss. Aug. 5, 2004). More recently, plaintiffs' efforts focused on Illinois, as certain county courts made known their willingness to rubber stamp class certification proposals and approve abusive settlements. *See, e.g.*, American Tort Reform Foundation, *Judicial Hellholes 2004* 14-15 (2004) (identifying Madison County, Illinois as "Number One Judicial Hellhole" because it has "become a magnet court" for class actions), *available at* http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf. But, as with Alabama and Mississippi, the Illinois Supreme Court ultimately intervened and ended the abusive rulings in a decision rejecting the trial court's application of Illinois insurance law to a nationwide class of automobile insurance policyholders. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005) (reversing certification of nationwide insurance class action).

There is no reason to think that the result will be different for Arkansas if this Court leaves the Circuit Court's decision intact. History has shown that every time a jurisdiction has loosened standards for mass litigation, the result has been the same – an influx of abusive lawsuits against businesses by plaintiffs' lawyers eager to take advantage of the newest mass tort haven. *See* Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997) ("Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam.").

Moreover, it is no answer to suggest that the enactment of the Class Action Fairness Act ("CAFA"), Pub. L. 109-2, 119 Stat. 4-14 (2005), has eliminated any negative consequences caused by the Circuit Court's ruling. Although most nationwide class actions are now

removable to federal court under CAFA, plaintiffs will inevitably attempt to expand the import of this decision beyond class action suits in various ways if the Circuit Court's decision is left undisturbed. For example, because single-state and certain multi-state class action suits brought against Arkansas companies in Arkansas courts generally cannot be removed to federal court under CAFA, the effects of this ruling will be felt disproportionately by Arkansas-based companies. In addition, out-of-state plaintiffs may seek to take advantage of the Circuit Court's relaxed choice-of-law standard in other contexts, such as personal injury, where Arkansas law may be more favorable to their claims than the law of their home state.

This Court should reverse the Circuit Court's decision before Arkansas courts become the next haven for class action abuse to the detriment of the state's consumers and businesses and the integrity of the state's legal system.

CONCLUSION

For the foregoing reasons and those set forth by Appellants, the Court should reverse the Circuit Court's Order granting class certification.

Respectfully submitted:

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