NO. 06-1347

IN THE SUPREME COURT OF ARKANSAS

BOBBIE FAY GRAMMER AND, SHERYL LAREY, INDIVIDUALLY, AND ON BEHALF OF ALL SIMILARLY SITUATED PERSONS,

v.

SUNBEAM PRODUCTS, INC.,

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

---

Of Counsel:

Robin S. Conrad
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

John H. Beisner
Jessica Davidson Miller
Charles Borden
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, D.C. 20006

Submitted by:

David M. Donovan
Bar Id. No. 81184
Watts, Donovan & Tilley, P.A.
200 South Commerce Street, Suite 200
Little Rock, AR 72201-1769
(501) 372-1406
(501) 372-1209 Fax

Counsel for *Amicus Curiae*

NO. 06-1347

IN THE SUPREME COURT OF ARKANSAS

BOBBIE FAY GRAMMER AND, SHERYL LAREY, INDIVIDUALLY, AND ON BEHALF OF ALL SIMILARLY SITUATED PERSONS,

v.

SUNBEAM PRODUCTS, INC.,

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

---

Of Counsel:

Robin S. Conrad
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

John H. Beisner
Jessica Davidson Miller
Charles Borden
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, D.C. 20006

Submitted by:

David M. Donovan
Bar Id. No. 81184
Watts, Donovan & Tilley, P.A.
200 South Commerce Street, Suite 200
Little Rock, AR 72201-1769
(501) 372-1406
(501) 372-1209 Fax

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

I.
POINTS ON APPEAL

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

II.

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

BOOKS AND TREATISES

MISCELLANEOUS

III.
STATEMENT OF THE CASE

This is an appeal from an order of class certification. Appellant, Sunbeam Products, appeals the Circuit Court's order certifying a nationwide class.

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*, 84 F.3d 734 (5th Cir. 1996). Accordingly, the Chamber submits this amicus brief in support of Appellant.

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 Sunbeam Products, Inc.'s appeal, but also in more broadly addressing how choice-of-law requirements affect class certification analysis.

IV.
ARGUMENT

The Circuit Court's class certification ruling is predicated on two erroneous legal propositions. ***First***, the Circuit Court misinterpreted the Arkansas Supreme Court's decision in *Security Benefit Life Insurance Co. v. Graham*, 306 Ark. 39, 810 S.W.2d 943 (1991), as holding that a trial court need not address potential legal variations in certifying a class because "[s]uch differences, if actual, are a manageability issue" and "do not defeat predominance of the common wrong." (Order and Findings of Fact and Conclusions of Law Regarding Class Certification (Miller Cty. Cir. Ct. Aug. 15, 2006) ("Order") at 21.)) ***Second***, the court compounded this error by suggesting that, even if it did examine the question of what law applied to the class's claims, such an inquiry likely would not preclude certification because "it is doubtful that the differences in state law are significant or may even need be applied." (*Id.*) Finally, the court ignored factual variations inherent in fraud and implied warranty claims that make them presumptively uncertifiable.

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

The trial court's first error was its conclusion that choice-of-law issues are irrelevant to the initial class certification analysis. 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.

The Circuit Court's statement that potential legal variations are simply "a manageability issue" and therefore need not be considered at the certification stage is wrong on two counts.

(Order at 21.) For starters, potential legal variations do preclude a finding of predominance. *See Castano v. Am. Tobacco*, 84 F.3d 734, 741 (5th Cir. 1996) (holding that the need to apply numerous states' laws precludes certification because "variations in state law may swamp any common issues and defeat predominance"); *Zehel-Miller v. AstraZenaca Pharms., LP*, 223 F.R.D. 659, 664 (M.D. Fla. 2004) (the fact that plaintiffs' claims are "not treated uniformly throughout the United States creates a myriad of individual legal issues that defeat the predominance requirement of Rule 23(b)(3)"). 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 Sunbeam generally committed a "common wrong" as to all class members nationwide. (Order at 21.) Moreover, even if the Circuit Court were correct that legal variations are simply a manageability issue, the court's suggestion that manageability concerns need not be addressed at the certification stage is also incorrect. 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. *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") (quoting *Van Buren Sch. Dist. v. Jones*, 365 Ark. 610, ____, 2006 Ark. LEXIS 201, at *21, (2006)). 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 make an adequate determination that a single class trial would be manageable – and

thus the superior method for resolving plaintiffs' claims – without first considering which states' law(s) apply to the case.

The trial court's certification order is 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. As the committee of federal judges responsible for recommending changes to the Federal Rules of Civil Procedure explained in urging the change, conditional certification encourages the certification of cases that plainly do not satisfy the rigorous 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 (September 2002), *available at* http://www.uscourts. gov/rules/reports.htm (explaining that 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."). Arkansas Rule of Civil Procedure 23 was amended in 2006 to remove a similar 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.

Prior to the amendments to Federal Rule 23, court after court criticized the practice of conditional certification as contrary to the very purpose of the class action procedure. For example, in *Castano*, 84 F.3d at 741, the U.S. Court of Appeals for the Fifth Circuit reversed the

district court's decision to conditionally certify a nationwide class of smokers alleging claims against tobacco manufacturers without first addressing possible legal variations, noting that the "district court's duty to determine whether the plaintiff has borne its burden on class certification requires that a court consider variations in state law when a class action involves multiple jurisdictions." *Id.* For this reason, the appellate court rejected the lower court's assertion that its certification order was "conditional" upon it being determined at a later date that the class was manageable. "In order to make the findings required to certify a class action under Rule 23(b)(3)," the could held, "one must initially identify the substantive law issues which will control the outcome of the litigation." *Id.*; *see also Silzone Heart Valve Prods. Liab. Litig. v. St. Jude Med. Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) (reversing certification of nationwide consumer fraud class where "the district court did not conduct a thorough conflicts-of-law analysis with respect to each plaintiff class member" because "protection of out-of-state parties' constitutional rights requires an inquiry into their claims' contacts" with all potentially applicable states before allowing class claims to proceed under one state's law); *Walsh v. Ford Motor Co.*, 807 F.2d, 1000, 1017 (D.C. Cir. 1986) (rejecting conditional certification; in order to "establish commonality of the applicable law, nationwide class action movants must creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles'") (Ruth Bader Ginsburg, J.) (quoting *Jenkins v. Raymark Indus.*, 782 F.2d 468, 470 (5th Cir. 1986)); *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.").

The Circuit Court here attempted to justify its "figure-it-out-as-we-go-along approach" by relying on a single Arkansas Supreme Court decision, *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 annuitants residing in 39 states. (Order at 21.) However, *Security Benefit* does not support the Circuit Court's contention that it need not consider potential differences in applicable state laws before ordering certification. (*Id.*) In fact, the *Security Benefit* decision says nothing about whether courts may postpone consideration of choice-of-law issues. Rather, the Court held that the laws of multiple states were not likely to apply in 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. 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, under the facts of that particular case, variations in governing law were not an issue.

The United States District Court for the Eastern District of Arkansas examined this issue in *In re Prempro Products Liab. Litig.*, 230 F.R.D. 555 (E.D. Ark. 2005). The court denied class certification of a proposed nationwide class of consumers of prescription drugs. The court ruled that the varying laws of different states could not be efficiently incorporated in a trial plan or understandable set of jury instructions, therefore making class action unmanageable.

The Circuit Court's approach not only conflicts with the Arkansas Rules of Civil Procedure and volumes of caselaw recognizing that a court must conduct a full Rule 23 analysis prior to certification, but is also troubling as a matter of policy. It is well established that a case is only supposed to 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 Sunbeam blankets 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 multiple states' laws apply to plaintiffs' claims and therefore class treatment will be wholly unmanageable. Thus, the court will be forced to require that another round of notices be sent to all purchasers in every state in the country, informing them 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.

A cavalier approach to class certification like that adopted by the trial court is also contrary to public policy because it essentially transforms 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. 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 cannot be squared with fundamental fairness principles; it creates 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.

B. 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 it is "doubtful that the differences in state law are significant or may even need be applied." (Order at 21.)

First, it is clear that one state's law 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 electric blankets at issue in the litigation. Indeed, a

construction of Arkansas's choice-of-law standard that required the extraterritorial application of one state's law to purchases of Sunbeam products in other states would contravene basic constitutional principles of federalism and due process, by allowing that state to effectively overturn other states' policy choices regarding which conduct they choose to penalize within their own borders.

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 implied warranty, the construction and application of these common law causes of action vary from state to state. Accordingly, a nationwide class trial – like the one proposed here – that would implicate the widely varying laws of most, if not all fifty, states, would be unmanageable.

1. The Law Of A Single State Does Not Govern All Class Members' Claims Because, Under Arkansas's "Governmental Interest" Choice-Of-Law Approach, The State Of Purchase Has The Strongest Interest In The Adjudication Of Each Class Member's Case.

This Court has embraced the five-factor choice influencing considerations of Professor Robert A. Lefflar in its choice-of-law analysis: (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 considerations clearly shows that each class member's claims are governed by the law of the state where he or she purchased the product 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). *See* Leflar, *American Conflicts Law*, 3rd Ed. § 103. If Arkansas law could be applied to all plaintiffs' claims – apparently for the sole reason that the named plaintiffs reside in Arkansas and the case was filed in the state – it follows that plaintiffs have been able to select the law they wanted to apply to their claims simply by deciding to file in that state. Thus, such a finding would actively encourage forum-shopping. Similarly, if Florida law could apply to all claims simply because the defendant is headquartered there, it would create an incentive for plaintiffs' attorneys to file nationwide class claims against companies located in states with plaintiff-friendly product liability laws. By 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 putative class is comprised of all purchasers of Sunbeam electric blankets nationwide who have not sustained physical injury as a result of their injury. Thus, the overwhelming majority of purchasers do not live in Arkansas and did not purchase the product there. The fact that Sunbeam "regularly conducts [business] within the State of Arkansas" (Plaintiffs' Third Amended Class (Miller Cty. Cir. Ct. Sept. 23, 2005) ¶ 9) is an insufficient basis for Arkansas to apply its law to regulate Sunbeam's conduct – and the effects of that conduct – in other states. As a result, Arkansas has no real interest in applying its

law. Similarly, while Sunbeam was headquartered in Florida for at least part of this controversy, the conduct at issue in this case – the alleged fraudulent sales of electric blankets – took place elsewhere. While Florida may have an interest in regulating the conduct of businesses headquartered in that state, that fact alone is not sufficient to trump the interests of other states in which Sunbeam's products were sold in enforcing their own laws. The state where each class member purchased his/her electric blanket has a substantial interest in regulating conduct that occurs within the state 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 favored application of Arkansas law). As this 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) (applying Texas law to resolve wrongful death action arising from accident occurring in Texas because "that is the state with the more substantial concern with the problem, as every actor and event was situated in that state").

Third, "simplification of the judicial task" also supports application of the law of the place of purchase. Where "out-of-state law is outcome-determinative and easy to apply, there is no good reason not to consider importing it as the law governing the case." *Schubert*, 360 Ark. at 411, 201 S.W.3d at 922. However, this Court has noted that this factor "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." *Id.* Thus, in cases such as this one, where no one state's law clearly stands out as outcome determinative and easier than all others to apply,

this factor does not affect the choice-of-law determination. *Id.*

Fourth, with respect to the governmental interest factor, this Court has held that in the context of products liability actions involving out-of-state plaintiffs alleging injury arising from the purchase of a product 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 all terrain vehicle in Louisiana). Indeed, this 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 Arkansas law would produce better results in this case than the laws of every other state in the country. *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 trial court explicitly 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 – at the very least – neutral), plaintiffs' claims in this action must be governed by the substantive law of the 50 states where they purchased their

blankets – not the one state where defendant is located or plaintiff's counsel chose to bring the suit. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(2) & cmt. j (1971) (noting that in fraud actions, court should apply the law of the state where "the plaintiff acted in reliance upon the defendant's representations" by making the purchase, particularly if that also is the state where the "plaintiff received the representations" and is domiciled).

The trial court's suggestion that one state's law could govern purchases of Sunbeam electric blankets in all 50 states is not only contrary to Arkansas choice-of-law principles but also incompatible with "constitutional limitations on choice of law" that preclude a state from applying its law to regulate conduct occurring primarily in other states and whose effects are primarily experienced in other states. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985). "It is a firmly established principle of American jurisprudence that the law, statutory or otherwise . . . of one state has no extraterritorial effect in another state." 16 Am. Jur. 2d Conflict of Laws § 9 (1998). In *Shutts*, the U.S. Supreme Court applied this principle to reject the application of Kansas law to class members' claims against a defendant with significant Kansas property and business interests, where the conduct at issue occurred primarily outside the state. 472 U.S. at 819. The fact that the defendant "own[ed] property and conduct[ed] substantial business in the State" meant that "Kansas certainly ha[d] an interest in regulating [the defendant's] conduct in Kansas," the Court acknowledged, *id.* (emphasis added), but it did not suffice to give the Kansas court authority to apply Kansas law to the defendant's out-of-state conduct, at least insofar as Kansas law reflected different policy choices from the state laws that would otherwise govern the conduct. *Id.* at 821-22. *See also Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("[l]aws have no force of themselves beyond the jurisdiction of the state which enacts

them, and can have extraterritorial effect only by the comity of other states"); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

The same reasoning applies here: the fact that Sunbeam is located in Florida does not give the state a legitimate interest in overriding the policy choices of the other states where Sunbeam chooses to sell its products. Because it is a "basic principle of federalism" that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders," *Campbell*, 538 U.S. at 422, neither Florida nor Arkansas law can be applied to those class members who purchased their Sunbeam electric blankets in other states.

2. The Need To Apply The Law Of Fifty States Defeats Certification Of Plaintiffs' Claims.

The Circuit Court's class certification ruling also errs in suggesting that even if plaintiffs' claims were governed by the laws of all fifty states, differences in states laws are not "significant" enough to preclude class treatment. (Order at 21.)

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 v. Am. Tobacco*, 84 F.3d 734, 741 (5th Cir. 1996); *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.) ("The complexity of the trial would be further exacerbated to the extent that the laws of forty-eight states must be consulted . . . ."), *amended*, 273 F.3d 1266 (9th Cir. 2001); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir.

1996) ("scrutinizing [the transactions] under the provisions of fifty jurisdictions complicates matters exponentially"); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996) (observing that non-common issues were "compounded exponentially" by choice of law considerations), *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 reason behind this rule is simple: "[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). On the one hand, it would be impossible for any one jury to understand the nuanced differences among various state laws and reach 50 different verdicts reflecting those differences. 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 1293, 1300 (7th Cir. 1995).

The three 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 – such as California and Alaska – allow recovery if fraud is proven by a mere "preponderance of the evidence," *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964); *Liodas v. Sahadi*, 562 P.2d 316, 321 (Cal. 1977), other jurisdictions – such as Illinois, Kansas and Maryland – require proof by "clear and convincing evidence." *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 explain to the jury the meaning of the preponderance standard, the clear and convincing standard, and all other variations. The jury would then have to consider the subtle differences in these standards, weighing the evidence differently as to each class member's claim according to the law of the state in which he or she purchased the product.

Beyond having different standards of proof, the states also have varying substantive standards for establishing fraud claims. For example, plaintiffs have alleged that Sunbeam knowingly defrauded blanket purchasers by concealing material facts about the safety of its products. However, the level at which Sunbeam must have "known" the material facts that it purportedly concealed varies across jurisdictions. Some states, like Kansas, require that the defendant actually know of the material fact that was not disclosed. *See, e.g., 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, like Vermont, will allow liability on a showing that the defendant had the means of knowing the information allegedly concealed. *See, e.g., 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, like North Carolina, the defendant must know or have culpable ignorance of the material fact. *See, e.g., 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 Sunbeam 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 – such as Arkansas and Minnesota – 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, 829-30 (Minn. Ct. App. 1985) ("[t]he representer must intend to have the other person induced to act"). However, other states, like Kansas, 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, 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.

By the same token, multi-state breach of implied warranty claims are not suited 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 (Ct. App. 1988) (U.C.C. "is not applied in the same fashion everywhere"). For example, states use very different standards to determine whether a product fulfills its "warranty of merchantability." In Massachusetts, the test focuses on the "expectations" of the "***reasonable consumer***." *Venezia v. Miller Brewing Co.*, 626 F.2d 188,

190 (1st Cir. 1980) (applying Massachusetts law) ("the question of fitness for ordinary purposes is largely one centering around ***reasonable consumer*** expectations") (emphasis added). By contrast, New York focuses (at least in part) on the expectations of the ***particular*** plaintiff at issue. *See Denny v. Ford Motor Co.*, 662 N.E.2d 730, 736 (N.Y. 1995), (implied warranty "inquiry focuses on [consumer] expectations" and the "'ordinary purpose' for which the product was marketed and sold to ***the plaintiff***") (emphasis added). Still other jurisdictions use different standards. *See, e.g., Overland Bond & Inv. Corp. v. Howard*, 292 N.E.2d 168, 172-73 (Ill. App. Ct. 1972) (merchantable product "should be in a safe condition and substantially free of defects"); *Welch v. Fitzgerald-Hicks Dodge, Inc.*, 430 A.2d 144, 148 (N.H. 1981) (product is unmerchantable if it is "not of average quality or fit for the ordinary purpose for which" it is used). Thus, a class trial in this case would require the jury to apply countless different legal standards to determine whether each class member's electric blanket was "merchantable" when sold.

In addition, state laws vary on the question whether vertical privity is required in implied warranty claims. For example, some states – like Virginia and Hawaii – bar implied warranty claims for purely economic losses against a manufacturer where the plaintiff did not purchase the product from the manufacturer directly. *See Larsen v. Pacesetter Sys., Inc.*, 837 P.2d 1273, 1277 (Haw.) (privity required in implied warranty where "purely economic loss is the gravamen of the complaint"), *amended, on recons., in part, recons. denied, in part*, 843 P. 2d 144 (Haw. 1992); *Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc.*, 491 S.E.2d 731, 734 (Va. 1997) (where no injury to persons or property involved, privity of contract required). Other states – such as Colorado, New Jersey, Pennsylvania, and Texas – do not. *See Prutch v. Ford Motor Co.*,

618 P.2d 657 (Colo. 1980) (en banc); *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660, 663 (N.J. 1985); *Williams v. W. Penn Power Co.*, 467 A.2d 811, 817-18 (Pa. 1983); *Walter Oil & Gas Corp. v. NS Group, Inc.*, 867 F. Supp. 549, 554 (S.D. Tex. 1994). As one commentator has noted, the states are "almost evenly divided between those retaining . . . and those rejecting" the vertical privity requirement. William H. Henning, *et al.*, *The Law of Sales Under the Uniform Commercial Code* §11.51, at 11-178 (2002). Thus, the claims of every Sunbeam electric blanket purchaser who brought the product from a retail store – rather than from Sunbeam directly – will turn on whether the state law applicable to his or her claims recognizes a privity requirement.

As the U.S. Court of Appeals for the Seventh Circuit noted in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 674 (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.* 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.* Once again, the trial court's ruling flies in the face of well-established, sound precedent.

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 Sunbeam was "unjustly enriched."

As noted by the court in *In re Prempro Products Liab. Litig.*, 230 F.R.D. 555 (E.D. Ark. 2005), the law varies significantly from state-to-state on the elements of fraud, unjust enrichment, and breach of warranty. Given these differences in state law, Judge Wilson concluded:

> In the absence of a satisfactory showing that the variations in state laws can be reasonably reconciled with, at the very least, jury instructions capable of being understood by a jury, and a trial plan that adequately sets forth how the case will proceed, class certification is not warranted. [footnote omitted]
>
> When proposed classes "threaten to undermine whatever benefits class certification might otherwise provide . . . [a court] is 'not content merely to certify an action as a proper class suit and then suggest that all the problems raised by the parties may be adjusted or handled at a later stage.'" n. 76 *In re Paxil*, 212 F.R.D. at 545 (quoting 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 1754 (2d ed. 1986). While a multitude of subgroups might solve the variatoins of laws problem, it would lead to monumental case management problems. Plaintiffs must establish that the variances in state laws could be overcome in a reasonable way. They have failed to meet this burden.

[emphasis in original].

In short, because there is no uniform law that could be applied to resolve the claims of all members of the purported class, and application of the laws of multiple states will create unavoidable legal variations destroying predominance, the Circuit Court erred in granting class certification.

C. FACTUAL VARIATIONS INHERENT IN PLAINTIFFS' FRAUD, BREACH OF WARRANTY, and UNJUST ENRICHMENT CLAIMS ALSO PRECLUDE CLASS CERTIFICATION.

In addition to ignoring the legal variations posed by nationwide classes, the Circuit Court

also ignored the factual variations among plaintiffs' claims that similarly doom a finding of predominance in this case.

The gist of plaintiffs' lawsuit is that Sunbeam defrauded purchasers of electric blankets because Sunbeam knew its blankets were defective when they were sold and failed to adequately warn purchasers about those defects. In order to prevail on plaintiffs' various claims, each class member will need to demonstrate – among other things – that: (1) he or she purchased a Sunbeam blanket; (2) the blanket he or she purchased was defective; (3) Sunbeam knew its blankets were defective at the time that the particular plaintiff purchased the product; and (4) Sunbeam's alleged failure to warn about the alleged defect actually caused that plaintiff to purchase the product. 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 product and whether that decision would have differed had Sunbeam provided more or different information about the safety of the product. These inquiries will necessarily vary from class member to class member.

In this respect as well, the trial court's order is directly contrary to volumes of authority recognizing that products-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); *In re Prempro Products Liab. Litig.*, 230 F.R.D. 555 (E.D. Ark. 2005).

In this manner too, the trial court's ruling contravened fundamental class action principles.

D. AFFIRMANCE OF THE ORDER BELOW WOULD MAKE ARKANSAS A MAGNET FOR CLASS ACTION LAWSUITS AND WOULD HAVE ADVERSE CONSEQUENCES FOR ARKANSAS COURTS, 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 decision contains no indication that it was not necessary to consider potential legal and factual variations before certifying the class here because of the specific facts present in this case. To the contrary, the Circuit Court decision suggests that multi-state class actions are easily certified under Arkansas law because courts need not consider potential legal variations at the certification stage. Plaintiffs will view the Court's opinion 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 that has usually only ceased when the appellate courts of the

jurisdiction in question have stepped in and reasserted the 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. 2004) (rejecting mass joinder product liability cases) *modified and reh'g denied*, 2004 Miss. LEXIS 1002 (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 policy-holders. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005) (reversing certification of nationwide insurance class action) *cert. denied*, 126 S. Ct. 1420 (2006).

There is no reason to think that the result will be different for Arkansas if this Court leaves the Circuit Court's decision intact. Simply put, 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. 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, plaintiffs may 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.

V.

CONCLUSION

For the reasons set forth above, the Court should reverse the Circuit Court's Order granting class certification.

Watts, Donovan & Tilley, P.A.
200 South Commerce Street, Suite 200
Little Rock, AR 72201-1769
(501) 372-1406
(501) 372-1209 Fax

David M. Donovan (81184)
Attorney for Amicus Curiae
United States Chamber of Commerce

Of Counsel:
Robin S. Conrad
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

John H. Beisner
Jessica Davidson Miller
Charles Borden
O'Melveny & Myers, LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
(202) 383-5414 Fax

VI.

CERTIFICATE OF SERVICE

On February 7, 2007, a copy of the foregoing was served by U.S. mail on:

Honorable Jim Hudson
Miller County Circuit Judge
Miller County Circuit Court
400 Laurel St., Rm. 202
Texarkana, AR 71854

Ms. Darby Vincent Doan
Haltom & Doan, LLP
P.O. Box 6227
Texarkana, TX 75505-6627

Mr. Stephen Engstrom
Wilson, Engstrom, Corum & Coulter
P.O. Box 71
Little Rock, AR 72203-0071

Mr. George L. McWilliams
Attorney at Law
P.O. Box 6128
Texarkana, TX 75505-6128

Mr. Nicholas H. Patton
Patton, Tidwell & Schroeder, L.L.P.
P.O. Box 5398
Texarkana, TX 75505-5398

Mr. James M. Pratt, Jr.
Attorney at Law
P.O. Box 938
Camden, AR 71711-0938

Mr. John C. Goodson
Attorney at Law
P.O. Box 618
Texarkana, AR 75502-0618

David M. Donovan

DAVID M. DONOVAN