IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

DELMAS FORD, JANE DOE, SHIRLEY CARTWRIGHT, BERT CROSSLAND, MARGARET CROSSLAND, and JOHN DOE, Plaintiffs/Appellees, vs. THE GENERAL MOTORS CORPORATION, a Delaware Corporation, Defendant/Appellant.	Appeal No. 100474 Appeal from the District Court of Bryan County Case No. CJ-2002-424

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AS AMICI CURIAE IN SUPPORT OF DEFENDANT/APPELLANT

Appeal from The District Court of Bryan County, State of Oklahoma, Case No. CJ-2002-424
The Honorable Farrell M. Hatch, District Judge
National Class Action Asserting Contract and Tort Theories
Based on Claims of Automotive Defects

Erika Z. Jones
Adam C. Sloane
Carl J. Summers
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Robin S. Conrad
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Clyde A. Muchmore, OBA #6482
Harvey D. Ellis, Jr., OBA #2694
CROWE & DUNLEVY
20 N. Broadway Ave., Suite 1800
Oklahoma City, OK 73102-8273
(405) 235-7734
(405) 272-5211 (Fax)

Attorneys For Amici Curiae

John T. Whatley
ALLIANCE OF AUTOMOBILE
MANUFACTURERS, INC.
1401 Eye Street, N.W.
Washington, D.C. 20005
(202) 326-5500

Of Counsel

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IDENTITY OF THE AMICI CURIAE

The Chamber of Commerce of the United States of America is the nation's largest federation of business companies and associations. The Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, sector, and geographic region of the country. The Chamber serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

The Alliance of Automobile Manufacturers, Inc. is a nonprofit trade organization formed in 1999. Its mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to emerging challenges associated with the manufacture of new automobiles. Petitioner General Motors is a member of the Alliance, along with eight other major auto manufacturers operating in North America.

INTRODUCTION

As more fully set forth in the Statement of the Case in the appellants' Brief in Chief, the Honorable Farrell M. Hatch, District Judge, of the District Court of Bryan County, certified a nationwide class of approximately 500,000 General Motors vehicle owners based on allegations that the air bags in two of their 1997, 1998 and 1999 models are defective.

ARGUMENT

I. PLAINTIFFS' PROPOSED CLASS ACTION WOULD INAPPROPRIATELY MAKE OKLAHOMA'S COURTS NATIONAL AIR BAG REGULATORS

Reduced to their essence, all of plaintiffs' claims, including their purported "warranty" claims, simply ask an Oklahoma state court (and Oklahoma lay jury) to impose a

nationwide recall of approximately 500,000 General Motors vehicles so that air bag systems that allegedly are overly sensitive can be replaced. *See Plf's Br.* at 25 (suggesting that an appropriate remedy would be "a coupon or credit for the necessary fix, with the stipulation that the coupon or credit will not become cash if not utilized to remediate the airbag system").[1] Thus, even though they cast their claims as seeking damages, plaintiffs effectively ask this State's courts to enter into the business of promulgating nationwide regulations for air bag systems. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). Such a course would be profoundly misguided and would open the courthouse doors of this State to a cavalcade of claimants demanding that Oklahoma courts become national regulators of a myriad of goods and services.

A. Plaintiffs' Proposed Class Remedy Should Be Directed To The Expert Federal Agency With Responsibility For Nationwide Motor Vehicle Safety Regulation.

Congress has determined that certain products — among them automobiles, child restraints, pharmaceuticals, and pesticides — require regulation at the national level and has designated expert federal agencies to regulate the products, often by means of rules promulgated in proceedings in which the public is afforded notice and an opportunity to

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[1] As the trial court said, plaintiffs have requested compensation "in an amount sufficient to allow them to have these safer air bag systems installed in their automobiles." Certification Order, Feb. 19, 2004. Other courts have recognized that, however styled, proposed remedies like those that plaintiffs seek here *are* requests for recalls. *See, e.g., Solarz v. DaimlerChrysler Corp.*, No. 2033, 2002 WL 452218, at *2 (Pa. Ct. Com. Pl. Mar. 13, 2002).

comment. Congress also has provided these agencies with the authority to investigate product problems, enforce regulations, penalize violations of regulations, and receive public complaints concerning the products.

Thus, Congress has given the National Highway Traffic Safety Administration ("NHTSA") statutory authority — pursuant to the National Traffic and Motor Vehicle Safety Act (49 U.S.C. § 30101 *et seq.*) — to regulate the safety of motor vehicles on a national basis. NHTSA has been authorized by Congress to promulgate Federal motor vehicle safety standards, conduct defect and noncompliance investigations, undertake independent research and testing, and, if appropriate, order recalls or other remedies for defective or noncompliant vehicles or equipment. *See* 49 U.S.C. §§ 30111(a), 30118, 30120, 30121(b), (c), 30165, 30166, 30168. Pursuant to its authority, NHTSA has regulated air bag and other restraint systems extensively over the years. *See* 49 C.F.R. § 571.208 (2003). Even a cursory glance at the pertinent regulations and notices reveals the complexity of the technical issues with which NHTSA deals in regulating air bag systems. *See, e.g.*, 49 C.F.R. parts 552, 571, 585, 595, *available at* http://www.nhtsa.dot.gov/cars/rules/rulings/index_airbag.html.

In fact, pursuant to this authority, NHTSA has already considered the very claims that plaintiffs seek to bring here as a nationwide class action. *See* Office of Defects Investigation, National Highway Traffic Safety Administration, *EA99-030: Engineering Analysis Closing Report* (Mar. 25, 2002), *available at* http://152.122.48.12/prepos/files/Artemis/Public/Pursuits/1999/EA/IN-EA99030-NN.pdf. That investigation followed allegations that "[the 1998 Oldsmobile Cutlass's] air bag can deploy as a result of road debris striking the floor of the vehicle * * * an undercarriage impact * * * severe rough road

inputs, or following a low speed frontal crash." *Id.* After devoting over two years to examining the issue, NHTSA closed the investigation because there was insufficient evidence of a defect. *Id.* However, closing the investigation does not mean that NHTSA decided that there was no defect, only that there was "insufficient evidence" to continue the investigation. *Id.* And it most certainly did not signal the end of NHTSA's authority over these claims, as the closing dossier made perfectly clear, "[t]he agency reserves the right to take further action if warranted by the circumstances." *Id.*

If, as plaintiffs allege (*Plf's Br.* at 2), General Motors submitted false information to NHTSA during its initial consideration of these allegations, or if there is new information sufficient to show the defect that plaintiffs' allege, then plaintiffs need only ask NHTSA to reopen its investigation in light of the new, correct, data. There is nothing preventing NHTSA from taking action on such a request or providing plaintiffs with the full relief they are seeking, if such action is warranted. Plaintiffs' statements to the contrary (*Plf's Br.* at 25-26) and the trial court's acceptance of them (Order at 15), are simply mistaken.

Furthermore, to the extent that plaintiffs affirmatively allege that General Motors submitted fraudulent information to NHTSA (*Plf's Br.* at 2), their claims are impliedly preempted by the federal regulatory scheme. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) ("fraud-on-the-FDA claims conflict with, and are therefore impliedly pre-empted by, federal law"). And even if plaintiffs only seek to introduce evidence contrary to General Motors' submissions to NHTSA without affirmatively arguing that General Motors committed fraud, as a practical matter, the federal agency that has already analyzed General Motors' original submissions is obviously in a much better

position than an Oklahoma state court to compare the competing sets of information and decide whether a finding of fraud, a recall, or some other action is now warranted.

Thus, despite NHTSA's closing of its investigation, the agency continues to provide the superior forum for evaluating plaintiffs' claims, and it is fully capable of addressing any new evidence or arguments that plaintiffs wish to present: A petition to reopen the NHTSA defect investigation is the best procedure for resolving these claims. *See, e.g.*, *American Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526, 531 (Cal. Ct. App. 1995) ("The remedy which will best promote consumer safety, and which will address real parties' concern that 'tragic consequences' will result if the defect is not remedied, is to petition the National Highway Traffic Safety Administration (NHTSA) for a defect investigation.") (footnote omitted); *Frank v. DaimlerChrysler Corp.*, 741 N.Y.S.2d 9, 17 (N.Y. App. Div. 2002) (similar); *Ziegelmann v. DaimlerChrysler Corp.*, 649 N.W.2d 556, 565 (N.D. 2002) (similar).

B. The Courts Of Oklahoma Should Not Allow Themselves To Be Used As National Air Bag Regulators.

The nationwide class action that the district court certified would, in effect, make the courts of this State de facto national regulators of air bag safety in General Motors vehicles. And allowing Oklahoma courts to fulfill that regulatory function here will only invite further cases making similar requests. As noted above, arrogating such national regulatory power to the courts of one state may directly contradict Congressional intent to institute a federal regulatory scheme. It also would be bad for both consumers and members of regulated industries, contrary to the interest of other states, and an unacceptable burden upon the courts and citizens of Oklahoma.

And, as noted above, this is not a problem unique to the subject of motor vehicle safety. Other products and other industries are subject to similar national regulatory schemes. If Oklahoma allows regulatory litigation in the area of air bags, lawsuits attempting to develop alternative pathways for national regulation in a host of other fields are likely to follow. The issues discussed below thus offer concrete examples — in the specific context of air bag safety — of general problems and risks that are present whenever state courts permit plaintiffs to circumvent the fora and remedies provided by national regulators.

At the most general level, it is inadvisable for a court (and, perforce, a jury) of this State to assume the role of national air bag safety regulator because *no* court or jury is up to such a task. Plaintiffs' defect claims relate to highly complex passenger restraint systems that are regulated on the basis of technical engineering analyses and carefully considered risk/benefit decisions. The choices among different kinds of air bag systems and different degrees of air bag sensitivity involve a complicated weighing of different risks to different groups. Designers and regulators must make informed, technical, expert decisions that take account of such issues as the crash pulses and interior design features of specified vehicles, the physical characteristics and likely driving habits of the vehicles' owners, *and* policy-oriented trade-offs among the risks and benefits of alternative systems in various situations. These choices are not binary — that is, they do not involve a choice between only two alternative air bag systems. To the contrary, there are a range of alternative systems to choose from, and each will present a different profile of risks and benefits in different situations.

For instance, to take just one dimension of the myriad factors facing vehicle and air bag designers and regulators: Although an air bag system that is designed to be less "sensitive" than some theoretical baseline system may avoid unwanted deployment when the vehicle is exposed to extreme terrain, that same "less sensitive" system may, when compared to the baseline system, fail to deploy when desirable. An air bag system designed with the assumption that it is better to guarantee deployment in all potentially dangerous situations will be different than a system designed to protect against the dangers of unwanted deployments even at the cost of failing to deploy in some situations where the air bag could prevent injury. The choice among these competing paradigms will be influenced by such factors as: whether the vehicle is expected to be driven off-road or not; the speeds at which the vehicle is expected to be driven; and various aspects of the expected driver profile, such as whether typical drivers are expected to wear seatbelts, to have children in the car, or to be of smaller build.

Of course, in reality, the individual components of a vehicle's air bag system cannot be considered in abstraction: Air bag system characteristics must be considered in light of such other features as the type of seat belt, the stiffness and crash characteristics of the vehicle's frame, and myriad other factors. But even when considered in isolation, questions such as "[w]hether a vehicle needs a multi-point sensing system or can use a single point crash sensor system depends on a variety of factors, including the vehicle crush characteristics over a wide range of crash pulses." NHTSA, *Final Economic Assessment, FMVSS No. 208, Advanced Air Bags*, § V.B.3 (May, 2000), *available at* http://www.nhtsa.dot.gov/airbag/AAPFR/econ/chapter5.html.

Moreover, even absent these complex and competing factors, deciding what constitutes a "safer" system is itself a controversial matter — for example, some alternatives offer a trade-off between fatalities and injuries. *See, e.g.*, Federal Motor Vehicle Safety Standards No. 208; Occupant Crash Protection, 65 Fed. Reg. 30680, 30735 (May 12, 2000) (noting that one particular air bag design choice "could provide 229 or 394 more lives saved" but "could result in an additional 1,345 serious injuries"). Thus, the challenge for the regulators and the designers of vehicles is to balance the multi-dimensional, cross-cutting risks and benefits involved in any particular air bag system design. This is a challenge that Congress authorized *NHSTA* to meet. *See* Transportation Equity Act for the 21st Century ("TEA-21"), Pub. L. No. 105-178, § 7103(a), 112 Stat.107, 466 (1998) (directing the Secretary of Transportation to issue an advanced air bag regulation under Federal Motor Vehicle Safety Standard 208).[2]

Furthermore, because the choices among air bag systems are not binary, there are a range of different interest groups and stakeholders with often conflicting positions on the appropriateness of various choices.[3] Thus, even among so-called "consumer advocates," there may be disagreements about the appropriate kinds of air bag systems, with some favoring less sensitive air bags because of concerns about the risk of unnecessary

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[2] Pursuant to the TEA-21 mandate, NHTSA issued a regulation on advanced air bags. *See* 65 Fed. Reg. 30,680 (May 12, 2000); 66 Fed. Reg. 65,376 (Dec. 18, 2001). Last month, this rule was upheld by the United States Court of Appeals for the District of Columbia Circuit. *See Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, 374 F.3d 1251, (D.C. Cir. 2004).

[3] There is great public interest in the air bag rulemaking. In fact, this rulemaking is one of the twenty-five most frequently visited dockets on the Department of Transportation's docket management website. *See* "DMS Web Top Requested Dockets," *available at* http://dms.dot.gov/reports/topdock_rpt.htm (last visited Aug. 5, 2004).

deployments, and others taking a contrary position, because they are concerned that less sensitive air bags may fail to deploy when their protection is needed. Plaintiffs' implication that there is a platonic ideal of an airbag system that deploys every time it is needed and never deploys when it is not (*Plf's Br.* at 3-4), simply does not reflect reality.

Similar complex trade-offs and controversies over safety and risks may arise with regard to other regulated products, as well. Thus, the acceptability of a risk-benefit profile for a prescription drug or a pesticide may depend upon the product's intended uses, the characteristics of the foreseeable users, the conditions under which the product is likely to be used, the economic and health risks of not using the product, and the costs and benefits of alternatives. Different stakeholders may have different views and interests with respect to each of these issues. Expert agencies provide opportunities for all stakeholders to be heard and considered, and then apply technical expertise to resolve problems in a way that balances these competing considerations.

Courts, however, are simply not equipped to resolve such multi-dimensional issues. Courts generally can take into account only the views of the limited number of parties before them, and they depend on the initiative of the parties to obtain and present the evidence upon which the decision is to be made.[4] Furthermore, the restrictive rules and regulations that demarcate what evidence a jury or judge sees and considers have no place in resolving the very real and very complex safety issues involved in choosing among specific air bag configurations. Courts and juries lack both the expertise and the access to the range of

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[4] Even class actions are typically presented as binary disputes between two, and only two, opposed positions. Other interested parties are not heard at all in such actions, or, if allowed to participate as intervenors or *amici*, participate only on a limited basis.

perspectives necessary to assess the public policy issues raised by plaintiffs' claims in this case — issues such as the effect of possible decisions on non-parties; how various options would fare under an engineering, cost-benefit, or risk-benefit analysis; and whether a given decision would create incentives that advance or impede overall safety and public policy objectives.[5] Indeed, the interjection of Oklahoma courts and juries into the field of national air bag regulation poses the very real possibility of harming the public interest by skewing automobile manufacturers' balancing of the risks, benefits, and costs of various alternatives (*e.g.* by focusing them on the factors that apparently matter to an Oklahoma jury when reaching its verdict rather than the realistic, objective comparison of alternatives).

Administrative rulemaking proceedings, by contrast, can accommodate polycentric issues and diverse multi-coalition disputes because the public is given notice of proposed rule changes, and participation by *all* interested parties (with the right to present evidence) is both welcomed by the agency and relatively inexpensive. Moreover, as noted (note 5, *supra*), agencies can use a variety of information-gathering mechanisms to obtain the data necessary to understand a broad range of potential ramifications of various policy choices and to undertake the careful balancing of risks, costs, and benefits that is required for rational safety administration and enforcement. Thus, there are substantial reasons to doubt that a nationwide class action is a minimally appropriate, much less a superior, method for

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[5] In considering such issues, regulators not only can consider evidence and arguments presented by commenters who offer pertinent information on their own initiative, but also can propound information requests to regulated entities or conduct their own tests and surveys. Courts and juries very rarely, if ever, seek information beyond that offered by the parties, and they generally are not qualified to engage in the sophisticated engineering, cost-benefit, and risk-benefit analyses that are matters of course for regulatory agencies.

adjudicating plaintiffs' claims — amounting, as they do, to an attempt to recall 500,000 General Motors vehicles.

And there is an additional reason why it would be inappropriate to certify a nationwide class action to effectively promulgate a new national standard for air bag systems: Unlike Federal regulators, state juries and class action plaintiffs' counsel are utterly unaccountable for the outcomes of their "regulatory" action. NHTSA is subject to Congressional oversight, and its proceedings are closely scrutinized by the press, public interest groups, industry members, and other entities that participate in its proceedings. These "outside checks" enforce a measure of responsiveness and public accountability that class action litigation unfortunately does not, and cannot, provide.

Finally, the citizens of Oklahoma are ill served by diverting the limited resources of their courts to the burdens of adjudicating these technically complex claims and supervising an immensely burdensome remedy on behalf of people across the nation. Devising, supervising, and enforcing a national product recall is not a simple task. Again, NHTSA has the experience and resources necessary for conducting enormous recall efforts (*see* NHTSA's Recall Process (brochure for consumers), Safety Recall Compendium (guide for manufacturers), Recall and Quarterly Guide/Form (periodic reporting form for manufacturers conducting recalls), all *available at* http://www-odi.nhtsa.dot.gov/cars/problems/recalls/), whereas a trial court in Oklahoma does not. And it does not serve the interests of Oklahoma citizens for their courts to strive, inefficiently and at great expense, to provide a remedy that a federal agency could provide just as easily, with greater efficiency, and at a cost that is shared by citizens of all states included in this class action rather than the citizens of Oklahoma alone.

The courts of this State should not accept plaintiffs' invitation to become national air bag regulators. Such a role is inappropriate for courts and juries, either with respect to air bags or any other highly regulated product. Instead, that function should be left to the Federal agencies with the necessary expertise and with the statutory responsibility for developing, implementing, and enforcing nationally applicable regulatory standards.

II. THE DISTRICT COURT FAILED TO CONDUCT AN ADEQUATE CHOICE-OF-LAW ANALYSIS BEFORE CERTIFYING THIS NATIONWIDE CLASS ACTION.

Like its federal counterpart, the Oklahoma class action statute limits use of the class action device to very specific situations where it can provide a more efficient, and in some cases more fair, method of adjudicating multiple claims while still protecting the traditional principles and values that have informed our legal system. 12 Okla. Stat. § 2023. But because "a class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," use of the class action device is properly constrained by rules and procedures carefully designed to protect the rights of litigants and avoid abuses. *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (internal quotation marks omitted). A court cannot properly decide whether a class action is appropriate, therefore, unless it has fully and rigorously applied these rules and procedures, which include resolving any choice-of-law issues in the case. *See, e.g.*, *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) ("[A] court must understand the claims, defenses, relevant facts and applicable substantive law in order to make a meaningful determination of the certification issues."); *Spence* v. *Glock Ges.m.b.H.*, 227 F.3d 308, 313 (5th Cir. 2000) ("The district court is required to know which law will apply before it makes its predominance determination."); *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) (class action plaintiffs must provide an extensive analysis of

state law to allow courts to determine whether these pose insuperable obstacles to certification); *Davoll* v. *Webb*, 160 F.R.D. 142, 143 (D. Colo. 1995) (courts must "analyze the substantive claims and defenses of the parties and the essential elements of those claims and defenses" in order to determine if class action requirements have been met) (internal quotation marks omitted), *aff'd*, 194 F.3d 1116 (10th Cir. 1999). Deciding what law will apply to class members' claims is a necessary prerequisite to any class certification decision, especially where the proposed class spans state lines and thus implicates the laws of more than one jurisdiction.

Here, the District Court did not decide whether it would apply the laws of other states to the claims of class members from those states or, instead, would apply the law of Oklahoma to the entire class. Nor did the court either (i) analyze the various states' laws and determine whether conflicts among them would necessitate the application of multiple states' law, and if so, describe how trial of this class could remain manageable and fair despite the need to apply multiple legal regimes, or (ii) explain why it was appropriate to apply Oklahoma law to the claims of all class members. Instead, the court simply asserted that *if* it needed to apply the laws of other states, and *if* there were relevant differences in those laws, then it would be able to solve any conflicts by creating subclasses. Order at 13-14. There are several fundamental problems with this approach.

First, the District Court's optimistic prediction that subclasses can be used to solve any as-yet-undetermined choice-of-law problems cannot excuse the court's failure to address and resolve the serious manageability problems and questions of constitutional due process that would attend the trial of claims that accrued in all 50 states and the District of

Columbia.[6] Plaintiffs' exclusive focus on the predominance requirement fails to account for these factors. *See Plf's Br.* At 14-18. Defendants were entitled to have this analysis performed *before* the court certified this immense class.

Second, the decision to certify a class action has enormous implications for both parties, which grow with the size of the class. Certification often "creates insurmountable pressure on defendants to settle" because "facing an all-or nothing verdict presents too high a risk, even when the probability of an adverse judgment is low."[7] *Castano,* 84 F.3d at 746;

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[6] For example, many states have rejected the kind of "no-injury," non-manifest defects, or tendency-to-fail allegations raised by plaintiffs here. Indeed, in a similar case, the Seventh Circuit observed that, "most states would not entertain the sort of theory that plaintiffs press" in their no-injury "warranty" claim. *In re Bridgestone/Firestone, Inc.,* 288 F.3d 1012, 1017 (7th Cir. 2002), *cert. denied by Gustafson v. Bridgestone/Firestone, Inc.*, 537 U.S. 1105 (2003). *See also Briehl v. General Motors Corp.*, 172 F.3d 623 (8th Cir. 1999); *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 803 (E.D. La. 1998); *Lee v. General Motors Corp.*, 950 F. Supp. 170 (S.D. Miss. 1996); *Martin v. Ford Motor Co.*, 914 F. Supp. 1449, 1455 (S.D. Tex. 1996); *Yost v. General Motors Corp.*, 651 F. Supp. 656, 658 (D.N.J. 1986); *American Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526, 527 (Cal. Ct. App. 1995); *Frank v. DaimlerChrysler Corp.*, 741 N.Y.S.2d at 12-16; *Ziegelmann v. DaimlerChrysler*, 649 N.W.2d at 559-565. Thus, by permitting residents of states that would not recognize a no-injury cause of action to be members of a nationwide class in Oklahoma, this case would violate the Supreme Court's directive that class actions cannot "abridge, enlarge or modify any substantive right." *Amchem Prods., Inc. v. Windsor*, 521, U.S. 591, 615 (1997) (quoting the Rules Enabling Act, 28 U.S.C. § 2072(b)).

Similarly, the certification of a nationwide class in this case ignores the possibility that other states might find plaintiffs' proposed recall remedy preempted or otherwise barred, or might choose, as a matter of sound policy, to refer plaintiffs' complaints to NHTSA under the doctrine of primary jurisdiction. *Cf., e.g., Lilly v. Ford Motor Co.*, No. 00 C 7372, 2002 WL 84603, at *5 (N.D. Ill. Jan. 22, 2002); *Namovicz v. Cooper Tire & Rubber Co.*, 225 F. Supp. 2d 582, 584 (D. Md. 2001); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 153 F. Supp. 2d 935 (S.D. Ind. 2001); *Nelson v. Blue Shield of Mass., Inc.*, 387 N.E.2d 589 (Mass. 1979); *Atlantic Satellite Communications Inc. v. Duffy*, 705 N.Y.S.2d 170, 171 (N.Y. Sup. Ct. 2000); *Solarz v. DaimlerChrysler Corp.*, No. 2033, 2002 WL 452218, at *2.

[7] Although the concern with undue settlement pressure may not fully materialize here because of the nature of the remedy that plaintiffs are seeking, it will certainly be a factor in future cases decided under the rule of law established here.

see also Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999) ("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. * * * [A] grant of class status can propel the stakes of a case into the stratosphere."); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002), *cert. denied by Gustafson v. Bridgestone/Firestone, Inc.*, 537 U.S. 1105 (2003); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). Empirical evidence suggests that most defendants succumb to this pressure well before the first day of trial — an outcome that plaintiffs typically count on. *See* Thomas E. Willging, *et al.*, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996), *reprinted in* 10 NEWBERG ON CLASS ACTIONS at App.XI (4th ed. 2002) (A 1995 study conducted by the Federal Judicial Center found that for the four federal district courts studied, the percentage of certified non-settlement-only class actions terminated by a class settlement ranged from 62% to 100%.).[8]

Hence, when a court certifies a class action without fully resolving the choice-of-law issues, it exposes defendants to increased costs, risk, and settlement pressure without the due process guarantees that class action rules and procedures are designed to afford. And if the

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[8] *See also* Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 IND. L.J. 497, 501 (1987) (reporting settlement rate of more than 78% for certified and consolidated class actions based upon a sample from the Northern District of California); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291 (2002) ("[T]he vast majority of certified class actions settle."); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 522 (1997) (observing that "virtually every mass tort class action that has been successfully certified has settled out of court rather than been litigated to judgment").

full and fair analysis that defendants are entitled to receive would have revealed that certification was inappropriate, then the court has wrongly and unfairly put the defendants in a highly unfavorable settlement posture, potentially exposing them to enormous unjustified liability. Defendants who find themselves in such a situation are left with the Hobson's choice of settling a class action for which a full certification decision was never conducted or exposing themselves to the immense liability risk of a trial while hoping that the court will change its assessment once it is forced to confront the details of adjudicating the class action that it has already certified.

Third, this approach may discourage companies from locating business or manufacturing operations in Oklahoma. If the district court's decision is upheld, then a company considering whether to subject itself to the jurisdiction of Oklahoma's courts by, for example, building a manufacturing or assembly facility in this state, must take into account that it can be exposed to the costs and risks of a national class action even though choice-of-law and manageability problems should foreclose certification of such a sprawling class. Because this risk encompasses not just the company's potential activities in Oklahoma, but its conduct in every other state, the potential cost to a company is enormous. Moreover, by refusing to provide defendants with a full and fair due process determination *before* certifying this class, the district court has created the impression that courts of Oklahoma give little weight to the rights of businesses that are sued here.

The court should have conducted a full and fair analysis of all aspects of its certification decision — including the choice-of-law issues raised by the parties — up front,

before it certified the class.[9] Anything less violates these defendants' due process rights, sets a dangerous precedent for future cases, and threatens to alienate the business community and inhibit investment in Oklahoma.

III. SETTLED PRINCIPLES OF FEDERALISM AND COMMERCE COUNSEL AGAINST NATIONWIDE CLASS ACTIONS.

Because the district court failed to adequately analyze the choice-of-law issues raised by this nationwide class, and because these issues are not as easily resolved as the court's casual treatment of the issue implied, it is possible, if not likely, that the court will choose to apply Oklahoma law to all plaintiffs on at least some legal issues. Such a result would threaten to work a radical change in the legal foundation on which U.S. commerce proceeds. For more than two hundred years, the several states have regulated the conduct of business within their respective borders. Only Congress has the power to encroach on a state's sovereignty by imposing a system of uniform national regulation on interstate commerce. U.S. CONST. art. I, § 8, cl. 3.

The U.S. Constitution contemplates that each of the 50 states is a sovereign of "equal dignity" with a distinct sphere of authority. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959). Accordingly, the United States Supreme Court has consistently and unambiguously rejected states' efforts to apply local law to transactions that occurred entirely in other states. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-23 (1985) (Kansas court could not apply forum law to claims of class members with no connection to Kansas); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) ("A

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[9] The Court of Civil Appeal's contrary decision in *Lobo Exploration Co. v. Amoco Prod. Co.*, 1999 OK CIV APP 112, 991 P.2d 1048 cannot be squared with these due process, as well as practical, considerations and should not be followed.

basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-73 (1996) (Alabama jury could not apply Alabama law to punish defendant for transactions taking place in other states); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders") (internal quotation marks omitted); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) (rejecting New York's attempt to "project its legislation" into other states); *Edgar v. MITE Corp.*, 457 U.S. 624, 641-43 (1982) (plurality op.) (Illinois anti-takeover statute impermissibly regulated transactions occurring entirely outside of Illinois); *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State * * * without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends"); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction.").

Through common law and legislation, each of the 50 states is free to develop its own standards for regulating business, based upon its own assessment of the relevant policy interests. But if choice of law in a nationwide class action may depend upon where the

product at issue is assembled — rather than, for example, where the product at issue is sold or delivered (*see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 191 & cmts. e, f (1971)) — then each state necessarily loses the ability to apply the standard of its choosing to business conduct within its own borders. Thus, in this case, because of a state court decision in Oklahoma, the law of Alabama may not govern the breach of warranty claims of class members who reside in Alabama and who purchased vehicles in Alabama from an Alabama dealership for use in Alabama.

The practice of ignoring or trivializing differences in states' laws in order to facilitate nationwide class litigation also has the deleterious effect of concentrating tremendous regulatory power (*see* Section I, *supra*) in the courts of a few class-friendly jurisdictions around the country. In Madison County, Illinois, for example, plaintiffs' lawyers often file cookie-cutter lawsuits against many different defendants in the same industry. If the courts of Madison County, Illinois applied the same dismissive approach to the choice-of-law analysis that the district court applied here, then the Madison County courts would turn these cases into nationwide or multistate class actions, with Madison County juries and judges acting as national regulators who can override *Oklahoma*'s governance of the activities within this state — a power properly reserved to Congress alone under the Commerce Clause.

The prohibition on the extraterritorial application of state law is not just a matter of constitutional jurisprudence; it is also a practical necessity. Under the approach adopted by the trial court, the same General Motors product assembled in different states would be subject to conflicting state-court imposed *national* standards. For example, the air bags in General Motors' model P-90 automobiles manufactured in *Oklahoma* could be subject to the

application of *Oklahoma* law on a national basis in a nationwide class action brought in an Oklahoma court. The air bags for the P-90 automobiles manufactured in *Delaware*, by contrast, could be subject to the application of *Delaware* law on a national basis in a nationwide class action brought in an Delaware court. Thus, General Motors, could find itself facing conflicting *national* standards for the same product.

General Motors would not be the only company faced with such irrational, conflicting legal requirements. To the contrary, amici are aware of numerous businesses that manufacture or assemble the same product in multiple states and that, therefore, would find themselves facing the same conundrum.[10]

This is no way to run an economy (or to regulate the safety of automobiles). The orderly process of commerce depends upon uniform expectations. States need the authority to regulate local markets, and companies need to be able to predict with reasonable certainty which law will govern their conduct in a particular state. If, with respect to a particular industry, Congress determines that nationwide standards are necessary, then it may choose to take action. Otherwise, if national regulation is not deemed necessary by the federal government, then principles of federalism and state sovereignty require that each state have the ability to achieve and preserve local uniformity through the application of its own laws to activity within its own borders. This system cannot tolerate the imposition of one state's view of appropriate legal and regulatory standards onto activities within the jurisdiction of other co-equal sovereign states through the device of a nationwide class action. The fact

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[10] In addition, under the district court's approach, consumers from the same state who own the same model vehicle could have their tort claims governed by conflicting standards if their respective vehicles happened to be assembled in different states.

that the district court's *pro forma* choice-of-law analysis leaves this possibility wide open is one more reason to reverse its certification order.

IV. THE TRIAL COURT'S DECISION THREATENS TO TURN OKLAHOMA INTO THE NEXT HAVEN FOR NATIONAL CLASS ACTION FILINGS.

Class action litigation has exploded over the last fifteen years. According to one study, from 1994 to 1997, U.S. companies experienced a growth rate in the number of putative class actions filed against them ranging from 300% to 1000%. 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at ix-x (May 1, 1997) *available at* http://www.uscourts.gov/rules/WorkingPapers-Vol1.pdf; *see also* Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 184 (2001) (RAND analysts concluded that class action lawsuits likely surged during the 1990s, with about half of class action litigation activity taking place in state court).

Yet the dramatic growth in class litigation should not be misread as a sign that the rights of more individuals are being vindicated. The modern class action is often a lawyer-initiated, lawyer-directed affair designed to generate a substantial fee award. To that end, prospective class counsel regularly scan news reports for possible bases for class litigation, seek out individuals to serve as named plaintiffs, and then shop for friendly courts in which to file suit. They then obtain class certification — often, as here, without showing that litigation on a class-wide basis is consistent with the constitutional rights of the defendant and absent class members — and then use the threat of a huge verdict to force a settlement that provides a large fee for class counsel.

The most effective way for a class action lawyer to ensure a lucrative settlement is to allege and certify a nationwide class, thus maximizing the coercive value of the certification

order. *See* pages 14-16, *supra*. As the federal courts have recognized, however, nationwide class actions raising claims under state law generally may not be certified consistent with the requirements of Rule 23, due process, and federalism because of complexity resulting from the need to apply the varying laws of the 50 states. *See, e.g.*, *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995).

Seeking a more hospitable forum, many class action lawyers have shifted their attention to state court. John H. Beisner & Jessica Davidson Miller, CLASS ACTION MAGNET COURTS: THE ALLURE INTENSIFIES 3 (Manhattan Inst. July 2002) (www.manhattan-institute.org/html/cjr_5.pdf); *see also* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 575 (1996) (certification of nationwide classes by state courts "has been increasing in recent years"); *The Interstate Class Action Jurisdiction Act of 1999: Hearing Before the House Judiciary Comm.*, 106th Cong. (July 21, 1999) (statement of former acting Solicitor General Walter E. Dellinger) *available at* http://www.house.gov/judiciary/dell0721.htm; *cf.* Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 386 (1998) ("It is no secret that class actions—formerly the province of federal diversity jurisdiction—are being brought increasingly in the state courts"); *Class Action Litigation: A Federalist Society Survey*, *available at* http://www.fed-soc.org/Publications/classactionwatch/volume1issue1.htm (between 1988 and 1998, state-court class actions were up by 1042%, compared with 338% in federal court).

Moreover, class action attorneys are not using just any state court in their effort to circumvent the constitutional limitations on class actions. With increasing frequency, they are filing their cases in state courts that have acquired a reputation for acquiescing in requests for nationwide certification and running roughshod over the constitutional rights of defendants and absent class members.

For example, after a few class-friendly decisions in Alabama, class action lawyers from across the country flocked to that state to file class actions. During 1995-1997, courts in six thinly populated Alabama counties certified 43 class actions, at least 28 of which were brought on behalf of nationwide classes. STATESIDE ASSOCIATES, CLASS ACTION LAWSUITS IN STATE COURTS: A CASE STUDY IN ALABAMA (Feb. 26, 1998) (attached to statement of Dr. John B. Hendricks, on behalf of Small Business Council of the U.S. Chamber of Commerce, before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee (Mar. 5, 1998)). The Alabama Supreme Court finally intervened, making clear that, under that State's procedural rules, trial courts were required to perform a rigorous analysis of factual issues, choice-of-law issues, and other requirements for class certification. As a result, class action filings in Alabama have slowed dramatically. See Eddie Curran, *Welcome to Greene County, America's Class Action Capital*, MOBILE REGISTER, Dec. 26, 1999, at 1B.

But the intervention of the Alabama Supreme Court only caused class action lawyers to take their show on the road to such class-action/mass-joinder havens as Mississippi, West Virginia, Washington, New Mexico, and southern Illinois. To date, few state appellate courts have interceded to ensure that class action litigation within their jurisdictions is conducted in a manner consistent with the Constitution.

Indeed, appellate courts in Illinois have affirmed the certification of multistate class actions based upon the conclusion that Illinois law governs all claims against an Illinois corporation, regardless of where those claims arose. *See, e.g.*, *Clark v. TAP Pharm. Prods., Inc.*, 798 N.E.2d 123, 129 (Ill. App. Ct. 2003) (upholding application of Illinois law to transactions outside Illinois that involved non-Illinois class members and medical care providers, based solely on fact that defendant's corporate headquarters is in Illinois); *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1254-55 (Ill. App. Ct. 2001) (in case involving auto insurance claims, applying law of defendant's domicile to claims arising elsewhere), *appeal allowed*, 786 N.E.2d 180 (Ill. 2002) (table). The class action bar is well aware of this trend and has responded accordingly. Madison County, Illinois is now ranked third nationwide in class action filings each year behind the far more populous counties containing Los Angeles and Chicago. John H. Beisner & Jessica Davidson Miller, *They're making a Federal Case Out of It . . . In State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 159 (2001). Approximately 81% of the putative class actions filed in Madison County between February 1998 and March 2001 sought to certify nationwide classes. *Id.* at 169; see also Tom McCann, *Class Actions: The Battle Heats Up*, CHICAGO LAW., Mar. 2004, at 8, 9 (106 class actions were filed in Madison County in 2003, as compared with 11 filings in 1999); Mark Ballard, *Mississippi Becomes a Mecca for Tort Suits*, NAT'L L.J., Apr. 30, 2001, at A1 (describing similar phenomenon for mass-joinder suits in Mississippi).

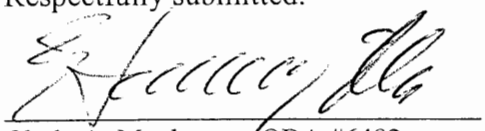
The district court's willingness to certify a national class after only superficial scrutiny of the choice-of-law problems inherent in such a decision will not go unnoticed. History has shown that when state courts become lax in applying and enforcing the traditional limitations on class certification, the plaintiffs' bar responds by flocking to that

forum. If this Court does not now restore the long-standing and well-reasoned boundaries that circumscribe the proper domain of class actions, the floodgates may well be opened in Oklahoma.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the brief of the appellants, the Amici respectfully requests that this Court reverse the district court's order certifying this class. In the alternative, Amici respectfully request that this Court remand to the district court for a full explanation of how it intends to resolve the choice-of-law issues raised by certification of a nationwide class.

Respectfully submitted.



Clyde A. Muchmore, OBA #6482
Harvey D. Ellis, Jr., OBA #2694
CROWE & DUNLEVY
20 N. Broadway Ave., Suite 1800
Oklahoma City, OK 73102-8273
(405) 235-7734
(405) 272-5211 (Fax)

Attorneys For Amici Curiae

Erika Z. Jones
Adam C. Sloane
Carl J. Summers
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Robin S. Conrad
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

John T. Whatley
ALLIANCE OF AUTOMOBILE
MANUFACTURERS, INC.
1401 Eye Street, N.W.
Washington, D.C. 20005
(202) 326-5500

Of Counsel

CERTIFICATE OF SERVICE

The undersigned certifies that on the 22nd day of September, 2004, a copy of the foregoing document was mailed, postage prepaid, to the following:

A. Erin Dwyer
Figari & Davenport, LLC
3400 Bank of America Plaza
901 Main Street, LB 125
Dallas, TX 75202

Mary Quinn-Cooper
Kathy R. Neal
Andrew L. Richardson
Eldridge Cooper Steichen & Leach, PLLC
P.O. Box 3566
Tulsa, OK 74101-3566

W.G. "Gil" Steidley
Steidley & Neal
4500 S. Garnett, Suite 800
Tulsa, OK 74146

Counsel for Defendant/Appellant

Mary D. Winter
Edward D. Robertson, Jr.
Bartimus, Frickleton, Robertson & Obetz, PC
200 Madison Street, Suite 1000
Jefferson City, MO 65101

Mr. Harry Huge
Harry Huge Law Firm, LLP
401 Ninth Street, NW, Suite 450
Washington, DC 20004

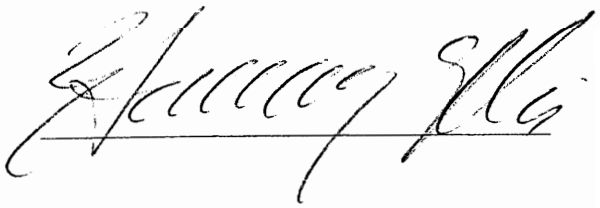
Sean Burrage
Taylor Burrage Foster Mallett & Downs
400 W. Fourth Street
P.O. Box 309
Claremore, OK 74108

Michael Burrage
Burrage Law Firm
P.O. Box 1727
115 North Washington
Durant, OK 74702

Henry A. Meyer, III
John B. Norman
Norman & Edem
Renaissance Centre East
127 Northwest 10th Street
Oklahoma City, OK 73103

Steve Garner
Jeff Bauer
Strong & Associates, PC
901 East Battlefield
Springfield, MO 65807

Counsel for Plaintiffs/Appellees



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