IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

STEPHEN GRIDER and BEVERLY L., GRIDER, INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED,	)	
Plaintiffs/Appellees,	)	
v.	)	No. 102693
COMPAQ COMPUTER CORPORATION,	)	District Court No. CJ-2003-969
Defendants/Appellants.	)	

BRIEF OF THE OKLAHOMA STATE CHAMBER OF COMMERCE AND INDUSTRY, INC., THE GREATER OKLAHOMA CITY CHAMBER, THE METROPOLITAN TULSA CHAMBER OF COMMERCE, INC., AND THE CENTER FOR INDIVIDUAL FREEDOM AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT/APPELLANT'S BRIEF IN CHIEF

Appeal from the District Court of Cleveland County, State of Oklahoma
Case No. CJ-2003-969
The Honorable Tom A. Lucas, District Judge
National Class Action Asserting Contract Theories
Based on Claims of Computer Defects

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I. INTRODUCTION

The mission of The Oklahoma State Chamber of Commerce and Industry, Inc. ("The State Chamber") is to make Oklahoma "The State of Choice for Business." See The State Chamber, Mission, available at http://www.okstatechamber.com/about_us.php. Now entering its 80th year The State Chamber has always been active in promoting and ensuring the development of a sound foundation for Oklahoma's economy. Id.

The mission of the Greater Oklahoma City Chamber (the "OKC Chamber") is to be the "voice of Business and the visionary organization in Oklahoma City." See The Greater Oklahoma City Chamber, Mission, available at http://www.okcchamber.com/page.asp?atomid=1152. As Oklahoma's largest business organization, the OKC Chamber carries out its mission by working to create a business climate that attracts new businesses to Oklahoma City and enhances growth and expansion opportunities to existing businesses. Id.

The Metropolitan Tulsa Chamber of Commerce, Inc. (the "Tulsa Metro Chamber") is "the principal business-driven leadership organization improving the quality of community life in the Tulsa Metro and surrounding area through the development of regional economic prosperity." See The Tulsa Metro Chamber, Mission, available at http://ww3.tulsachamber.com/general.asp?id=51. Clearly, the collective goal of The State Chamber, the OKC Chamber and the Tulsa Metro Chamber (collectively, "The Chambers") is to foster the improvement of the business environment in the state of Oklahoma.

The mission of the Center for Individual Freedom ("The Center"), founded in 1998, is to protect and defend individual freedoms and individual rights. See The Center for Individual Freedom, Mission, available at http://www.cfif.org/htdocs/about_cfif/index.htm (last visited December 15, 2005). The legal climate of a state affects not only the ability of a state to attract and retain businesses, but also affects the quality of life of individuals in that state. See, e.g., SoonerPoll.com, Oklahomans Show Considerable Support for Lawsuit Reform and Road Funding, New Survey Finds, 1 (In a survey of 502 statewide voters in 2005, 66% said they believe the number of lawsuits filed against businesses, doctors and hospitals in Oklahoma increases the prices Oklahoma's middle class families have to pay for products, services, and medical care.). The Center, in fulfilling its mission to protect and defend individual freedoms and rights, has an interest in bringing this information to the attention of the judiciary.

The law is an essential part of the foundation for any economy and is a factor that businesses consider in making a number of business decisions. See, e.g., Oklahoma 21st Century, Inc., State Policy & Economic Development in Oklahoma: 2002, 43, 60-61 (2002) (discussing a study by the Oklahoma Department of Commerce that recognized the impact of Oklahoma's regulatory environment on its ability to attract and assist in the expansion of businesses; discussing the effect of laws providing economic incentives and imposing various types of taxes on Oklahoma's economic growth); SoonerPoll.com, Oklahomans Show Considerable Support for Lawsuit Reform and Road Funding, New Survey Finds, 2 ("A good majority of Oklahoman's also believe that without lawsuit reforms, Oklahoma will have a harder time…attracting businesses and jobs to the state."). The Chambers and the Center (collectively the "Amici Parties") therefore have a strong interest in the development

of rational standards of liability that enhance, and do not harm, Oklahoma's economy and its individual citizens. In addition, the fact that The Chambers' members have been named as defendants in class action lawsuits gives them a unique interest in further educating the Court about the issues presented in Defendants/Appellants' Brief in Chief.

Oklahoma's current position with regard to class action lawsuits is likely to have an adverse affect on its economy. The following quotation from a report on economic development illustrates this.

> Within its region and compared to some other states in the nation, Oklahoma has been less aggressive in changing its liability system to reduce liability costs. In particular, Oklahoma has not taken action regarding…class action issues…[I]f other states are more aggressive in reducing liability costs, one can expect an adverse effect on Oklahoma economic development. In addition to the higher cost this imposes on business, it imposes defferentially high cost on small business. To the extent that small business is an important engine of growth, the effect could be to reduce the dynamism of the state's economy. An adverse economic effect will surely occur if the state becomes so undesirable to potential plaintiffs that they require significantly higher wages to remain in the state.

Oklahoma 21st Century, Inc., State Policy and Economic Development in Oklahoma: 2005, 83, Ronald L. Moomaw, Changes in Liability Systems and Economic Development: The Oklahoma Context (2005), available at http://www.okstatechamber.com/file_upload/2005Oklahoma21stCentury.pdf (last visited December 16, 2005).

Armed with this knowledge and the issues discussed further in this brief, the Amici Parties maintain that this case presents this Court with an opportunity to clarify, narrow, or make an exception to its holding in Ysbrand v. DaimlerChrysler Corp., 2003 OK 17, 81 P.3d 618. In so doing, the Court will concurrently help Oklahoma to keep pace with its sister states in creating a fairer class action legal environment, thereby protecting Oklahoma's economy.

As etched on the walls and cornices of several courthouses in this State, the safety of the State is the highest law, *Salus populi suprema lex* (attributed to Justinian I). The Court's potential decision to affirm the District Court's nationwide class certification order is likely to have devastating effects on Oklahoma's economy. The Amici Parties request, therefore, that the Court consider the points raised in this *amici curiae* brief and reverse the District Court of Cleveland County's September 23, 2005 Order Granting Class Certification With Findings of Fact and Conclusions of Law.

II. ARGUMENT AND AUTHORITIES

A. CERTIFICATION OF A NATIONWIDE CLASS, THROUGH APPLICATION OF THE LAW OF THE MANUFACTURER'S PRINCIPAL PLACE OF BUSINESS, IS NOT WARRANTED AND COULD HAVE A DEVASTATING EFFECT ON OKLAHOMA'S ECONOMY.

In its September 23, 2005 Order Granting Class Certification With Findings of Fact and Conclusions of Law in this case, the trial court ruled that the law of the principal place of business of the manufacturer applies to claims for breach of warranty under the Uniform Commercial Code. Based upon that ruling, the court was able to conclude that there were common issues of Texas substantive law applicable to all such claims. The trial court then certified a class of plaintiffs domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia who could assert the claims asserted by the named plaintiffs. In reaching its certification decision, the trial court substantially relied on this Court's 2003 decision in the afore-mentioned Ysbrand case. Had the trial court concluded that the laws of the many states in which plaintiffs purchased their computers applied, it would not have been able to grant class certification.

Through its opinion in Ysbrand, this Court may have unwittingly begun the process of establishing Oklahoma as a haven for nationwide class action lawsuits. This is shown by the fact that, after being denied nationwide class certification in Texas in Compaq Computer Corp. v. LaPray, 135 S.W.3d 657 (Tex. 2004), the same proposed class of plaintiffs had their nationwide class certified by the trial court here. The court below ruled that Texas law would apply, despite the refusal of Texas to apply its own law to all members of a proposed nationwide class. If it affirms, this Court's decision to permit nationwide class certification under the facts of this case is likely to act as a magnet, with one pole attracting a flood of nationwide class action lawsuits to the courts of Oklahoma, and the other pole repelling businesses that do not wish to subject themselves to the jurisdiction of Oklahoma courts. The net effect of this Court's decision could be an enormous drain on the already burdened Oklahoma economy. For example, judicial resources of the State are likely to be severely taxed by a flood of nationwide class actions with very little connection to Oklahoma. Further, the State's revenue could suffer as businesses choose not to initiate contact with, or limit their contact with, Oklahoma to avoid being subject to the jurisdiction of a state that permits this particular type of nationwide class actions to be brought against them. It is precisely these effects that have surely played a part in preventing other states from interpreting their choice-of-law rules in the manner endorsed by this Court in Ysbrand, and the trial court in this case. These burdens that Oklahoma will bear if the trial court is affirmed, coupled with the fact that they will be imposed in direct contravention of Texas' interpretation of its own law, are directly contrary to the goals of the Amici Parties.

As recognized by the Seventh Circuit as recently as May 2002, "[t]he . . . conclusion that one state's law would apply to claims by consumers throughout the country – not just those in [Oklahoma], but also those in California, New Jersey, and Mississippi – is a novelty . . . ." In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1016 (7th Cir. 2002). This very same language is quoted by the Texas Supreme Court in LaPray, 135 S.W.3d at 681. Arguments in favor of such a result have "not carried the day with state judges"; instead, states have refused to apply a "uniform place-of-the-defendant's-headquarters rule" to products-liability cases. In re Bridgestone, 288 F.3d at 1016.

Other courts have also held that liability for alleged defects in nationally-marketed products cannot be determined by reference to only one state's law. Applying the choice-of-law regimes of many different jurisdictions, these courts have concluded that such cases must *implicate the law of each and every jurisdiction in which the challenged product was sold*. See, e.g., Spence v. Glock, Ges.m.b.H., 227 F.3d 308, 312-314 (5th Cir. 2000); In re Am. Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996); Castano v. Am. Tobacco Co., 84 F.3d 734, 741-743, 749-750 (5th Cir. 1996); Georgine v. Amchem Prods., Inc., 83 F.3d 610, 627 (3d Cir. 1996), aff'd sub nom. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Walsh v. Ford Motor Co., 807 F.2d 1000, 1017 (D.C. Cir. 1986); In re Ford Motor Co. Ignition Switch Prods. Liab. Litig., 194 F.R.D. 484, 487-490 (D.N.J. 2000) ("Ignition Switch"); Sweet v. Pfizer d/b/a Pharmacia and Upjohn, 2005 WL 3074602, *11-12 (C.D. Cal. Nov. 15, 2005); Bostick v. St. Jude Medical, Inc., 2004 WL 3313614, *12 (W.D. Tenn. Aug. 17, 2004); State Ex Rel. American Family Mut. Ins. Co. v. Clark, 106 S.W.3d 483, 486-7 (Mo. 2003); Lyon v. Caterpillar, Inc., 194 F.R.D. 206, 211-217 (E.D. Pa. 2000); Clay v. Am. Tobacco Co., 188 F.R.D. 483, 497-98 (S.D. Ill. 1999); Dhamer v. Bristol-Myers Squibb Co.,

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In fact, many federal courts have gone out of their way to expressly reject arguments that the law of the defendant's principal place of business should be applied. See, e.g., Spence, 227 F.3d at 314-15 (rejecting notion that the law of the state "where the product was manufactured and where it was placed in the stream of commerce" should control warranty claims in nationwide product defect class action); In re Pharmaceutical Industry Average Wholesale Price Litigation, 230 F.R.D. 61, 83 (D. Mass. 2005); Lyon, 194 F.R.D. at 215-18 (in nationwide product defect class action, holding that applicable state law may not be limited to the law of the defendant's principal place of business); Clay, 188 F.R.D. at 497-498 (rejecting proposed application of law of defendant's principal place of business in nationwide product defect class action); Chin, 182 F.R.D. at 456-457 (refusing, in nationwide product defect class action, to apply law of manufacturer defendant's home state to all claims, noting that each class member's home state "has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws" and that "[t]hese interests arise by virtue of each state being the place where Plaintiffs reside, or the place where Plaintiffs bought and used their allegedly defective vehicles or the place where Plaintiffs' alleged damages occurred"); Bronco II, 177 F.R.D. at 370-371 (rejecting plaintiffs' proposal to apply

Michigan law to warranty claims of 650,000 putative class members because that jurisdiction was defendants' principal place of business and the alleged location of key vehicle design decisions); In re Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417, 422-3 (E.D. La. 1997) ("The center of the parties' relationship lies in each of the 51 jurisdictions where plaintiffs own Masonite product; thus the analysis favors application of some law other than that of Masonite's primary place of business"); Feinstein, 535 F. Supp. at 605-606 ("Plaintiffs do not persuade me that Ohio [as Firestone's principal place of business] satisfies that requirement [of having the most substantial interest] in a case involving a tire which was, say, manufactured in Pennsylvania, purchased in Massachusetts, and had its defects manifest themselves in New Jersey.").

Accordingly, the vast majority of federal courts has refused to certify nationwide class actions in state-law products liability cases, (see, e.g., Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 674-675 (7th Cir. 2001) (Judge Easterbrook vacating certification of nationwide product defect class while observing 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."); Castano, 84 F.3d at 747, 749-750; In re Am. Med. Sys., 75 F.3d at 1085-1086; In re Rhone Poulenc Rorer, 51 F.3d 1293, 1299-1303 (7th Cir. 1995)) and in many other types of cases. See, e.g., Kirkpatrick v. J C. Bradford & Co., 827 F.2d 718, 725 (11th Cir. 1987); In re Prempro, 230 F.R.D. 555, 573-4 (E.D. Ark. 2005); In re Paxil Litigation, 212 F.R.D. 539, 551 (C.D. Cal. 2003); Schwartz v. Upper Deck Co., 183 F.R.D. 672, 679-680 (S.D. Cal. 1999); In re Jackson Nat'l Life Ins. Co. Premium Litig., 183 F.R.D. 217, 223-25 (W.D. Mich. 1998); Marascalco v. Int'l Computerized Orthokeratology Soc'y, Inc., 181 F.R.D. 331, 339-40 (N.D. Miss. 1998); Mack v. GMAC,

169 F.R.D. 671, 677-79 (M.D. Ala. 1996); Coe v. Nat'l Safety Assocs., Inc., 137 F.R.D. 252, 254 (N.D. Ill. 1991). The trial court in this case has, therefore, departed radically from the national consensus.

Furthermore, the trial court's decision here has the effect of allowing class certification of "no injury" product defect claims. The Amici Parties do not support such a position. In fact, one of The State Chamber's stated goals for 2006 is to vie for legislation requiring injury in fact and actual loss of money or property for recovery in consumer lawsuits. See The State Chamber, 2006 Legislative Agenda (2006), 32, available at http://www.okstatechamber.com/news_publications.php?action=pub&story_id=355. In this case, Plaintiffs/Appellees allege that the floppy disk controllers ("FDCs"), which control the delivery of data to and from floppy disk drives, in their computers are potentially defective, but they present no evidence of having suffered lost or corrupted data as a result of the alleged defect. See Compaq Computer Corporation's Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification, at 24-5. Most jurisdictions that have considered the viability of "no injury" economic-loss-only tort and contract claims have refused to recognize them, holding that purchasers of an allegedly defective product do not have a cognizable claim if the defect has not manifested itself in the product they own. See Rainer v. Union Carbide Corp., 402 F.3d 608, 618-19 (6th Cir. 2005); Briehl v. Gen. Motors Corp., 172 F.3d 623, 626-29 (8th Cir. 1999); Angus v. Shiley, Inc., 989 F.2d 142, 147-48 (3d Cir. 1993); Willett v. Baxter Int'l, Inc., 929 F.2d 1094, 1098-1100 (5th Cir. 1991); Martin v. Home Depot U.S.A., Inc., 369 F.Supp.2d 887, 890-1 (W.D. Tex. 2005); Heindel v. Pfizer, Inc., 381 F.Supp.2d 364, 385-6 (D.N.J. 2004); Williams v. Purdue Pharma. Co., 297 F.Supp.2d 171, 178 (D.D.C. 2003); In re Gen. Motors Type III Door Latch Litig., No. 98 C

5836, MDL 1266, 2001 WL 103434, *4-*5 (N.D. Ill. Jan. 31, 2001) ("the great weight of authority from other jurisdictions suggests that a defect must manifest itself in plaintiff's vehicle before plaintiff can recover"); In re Air Bag Prods. Liab. Litig., 7 F. Supp. 2d 792, 803-806 (E.D. La. 1998); Lee v. Gen. Motors Corp., 950 F. Supp. 170, 172-74 (S.D. Miss. 1996); Martin v. Ford Motor Co., 914 F. Supp. 1449, 1455-56 & n.9 (S.D. Tex. 1996); Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 602 (S.D.N.Y. 1982) ("[t]ire owners whose tires performed to their entire satisfaction cannot demonstrate, as a matter of law, the 'fact of damage' necessary to state a claim"); Wallis v. Ford Motor Co., 2005 WL 1120218 (Ark. May 12, 2005); Everett v. TK-Taito, LLC, 2005 WL 2897573, *7 (Tex. App. Ft. Worth Nov. 3, 2005); Tietsworth v. Harley-Davidson, Inc., 677 N.W.2d 233, 240-3 (Wis. 2004); Yu v. IBM Corp., 732 N.E.2d 1173, 1177-78 (Ill. App. Ct. 2000); Ford Motor Co. v. Rice, 726 So. 2d 626, 627, 628-29 (Ala. 1998); Capital Holding Corp v. Bailey, 873 S.W.2d 187, 192 (Ky. 1994).

The following discussion in Frank v. DaimlerChrysler Corp., 292 A.2d 118, 123-27 (N.Y. App. Div. 2002); articulates the public-policy rationale underlying these courts' decisions:

> [Under Plaintiff's no-injury theory], as soon as it can be demonstrated, or alleged, that a better design exists, a suit can be brought to force the manufacturer to upgrade the product or pay an amount to every purchaser equal to the alteration cost. Such "no-injury" . . . actions would undoubtedly have a profound effect on the marketplace, as they would increase the cost of manufacturing, and therefore the price of everyday goods to compensate those consumers who claim to have a better design, or a fear certain products might fail.

292 A.2d at 126-27. The authority on this topic makes it apparent that if the trial court's Order is to be affirmed, it must be so affirmed on a theory that has been rejected by the majority of jurisdictions in the country.

Class action litigation tends to be filed in jurisdictions that are most hospitable to such actions. See generally Thomas M. Woods, Note, Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform, 75 N.Y.U. L. Rev. 507, 515 (May 2000), WL 75 NYULR 507; see also 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, 157, 164 (Winter 2002), WL 25 HVJLPP 143 (survey showed that "a large number of [class actions] were brought by small groups of plaintiffs' counsel who have developed expertise in bringing massive actions against large corporations in a select number of state courts."); Class Action Litigation – A Federalist Society Survey, I Class Action Watch 1, 3 (Jan. 1999); Rand Institute for Civil Justice, Class Action Dilemmas: Pursuing Public Good for Private Gain, Executive Summary, 7 (1999).

This type of forum shopping has been practiced for a long time. "What is new is the extent to which certain courts and jurisdictions have become powerful magnets for litigation." American Tort Reform Association, "Bringing Justice to Judicial Hellholes 2002," 4 (2002). "Consequently, defendants are sometimes brought into courtrooms in areas of the country that have little or no connection to the case being tried. This is not only unfair to defendants, it is also unfair to the individuals who live in these jurisdictions. When local courts are unduly burdened with cases from elsewhere, the local residents may have their own cases subjected to substantial delay." Id. Among other things, some of the problems in these jurisdictions which have become class action magnets include rules not being applied fairly and the certification of classes that do not meet the statutory requirements. Id. For problems just like these, Oklahoma was recently placed on the American Tort Reform Association's list of "dishonorable mentions." See American Tort Reform Association,

"Judicial Hellholes 2004," 33 (2004), available at http://www.americanjustice partnership.com (last visited December 20, 2005). The American Tort Reform Association noted that "business leaders consider Oklahoma at a crossroads because of frivolous lawsuits and abuse of the legal system and a possible future class action capitol of the United States." Id. at 37.

Certification under circumstances in which most other courts would not certify a class signals Oklahoma's willingness to become a favored destination for plaintiffs seeking a forum for nationwide class actions, and in particular, "no injury" class actions. This phenomenon has occurred in other states with jurisprudence that is unusually favorable to class certification. In Madison County, Illinois, for example, the rate of per capita state-court class actions in 1999 was approximately eight times higher than the rate for those filed in federal court. Beisner & Miller, supra, at 162 (citing L.R. Meacham, Judicial Business of the United States Courts: 2000 Report of the Director, 402-408 (2001)). Nearly all of the cases filed in Madison County courts involved national issues and out-of-state defendants, and approximately 75% of them were filed by only two firms that are affiliated with each other. Id.; see also Editorial, Mayhem in Madison County, Wall St. J., Dec. 6, 2002, 2002 WL-WSJ 103128087.

As illustrated by the events in Madison County, there will be nothing local about most of the nationwide class actions that are likely to flow into Oklahoma if the trial court is affirmed here. This type of litigation, having only the remotest connection to Oklahoma, will likely be brought primarily by out-of-state lawyers against major, out-of-state corporations and for the substantial benefit of out-of-state class members. It will impose huge administrative burdens on the courts of this State with little benefit to its citizens. As

previously noted, not only will administrative burdens abound, but they will likely be joined by a steady trend toward improper application of the class certification standards outlined in Rule 23 of the Federal Rules of Civil Procedure, and its state equivalents.

Due to the already over-burdened judiciary budget in this State, it can be difficult even now in many counties to obtain timely hearing or trial dates due to dockets clogged with too many cases and not enough judicial officers. This problem could be exponentially exacerbated if this Court allows Oklahoma to become a magnet for class action litigation. Certainly, any alleged "superiority or manageability" which might be gained from class certification would be fleeting and illusory as court dockets in this State slow to a crawl. There is no reason why Oklahomans should be the ones to suffer this fate when other states are not willing to subject their courts and citizens to the same onslaught.

The perceived reasonableness of a state's legal framework is a factor that business decisionmakers consider when determining where to market products, locate facilities and bring jobs. See Harris Interactive, Study No. 14966, U.S. Chamber of Commerce State Liability Systems Ranking Study (Jan. 11, 2002), Litigation Fairness Campaign, 8, at http://www.instituteforlegalreform.org/resources/012202.pdf (last visited Dec. 18, 2005). In fact, the perception of fairness of a state's civil justice system has been linked to its economic growth. See Todd G. Buchholz & Robert W. Hahn, Does a State's Legal Framework Affect Its Economy?, Litigation Fairness Campaign, 2, available at http://www.institute forlegalreform.org/resources/111302.pdf (last visited Dec.18, 2005) ("Using econometric analysis, we conclude that the impact of a state's legal system on economic growth is statistically significant").

State officials have recognized the adverse economic effect excessive class action litigation can bring to a state. For example, former Governor of Michigan, John Engler, stated at a news conference in January, 2005: "As a governor, I saw firsthand how an out-of-control, unpredictable legal climate can negatively impact the economic vitality of just about every segment of state commerce, hurting job creation and the well being of families. The average American family of four pays a 'litigation tax' of more than $3,300 a year—in higher prices for the products they buy, insurance rates and health care costs." See Center for Individual Freedom article, "Nation's Largest Industry Trade Group Joins Fight for Legal Reform in the States", 1, available at http://www.cfif.org/htdocs/legislative_issues/federal_issues/hot_issues_in_congress/legal_reform/legal-reform-pero-interview.htm (last visited December 15, 2005). Dan Pero, former chief of staff to Governor Engler and current President of American Justice Partnership, expanded on the governor's sentiments as follows:

> When you take that number of $3,400 or $3,200 or $3,800 and you think about that, it is a year's tuition at a community college. Imagine what a family can do with that money if it was in their pocket and not tacked on to other goods and services. That is money that could be re-invested back into the economy and it is money that could be reinvested by business in research and development. It could be used to pay additional workers or create more jobs or pay higher salaries.
>
> When that money is not available it begins to put a lid on and stymie economic development, and that's when you hear businesses say that they need some certainty. And we simply cannot afford to be setting aside the kind of money that we are, almost to practice defensive medicine so to speak. It inhibits entrepreneurs and inventors perhaps from wanting to engage in a particular product or enter into the marketplace for fear of lawsuits.

See Center for Individual Freedom interview, "Dan Pero, President of the American Justice Partnership, Discusses Legal Reform", 4, available at http://www.cfif.org/htdocs/

legislative_issues/federal_issues/hot_issues_in_congress/legal_reform/nam-legal-reform-release.htm (last visited December 15, 2005).

The certification of a class dramatically increases the stakes of litigation. Recent verdicts awarding astronomical damages (most of which are consumed by plaintiffs' attorney fees) have created an almost irresistible pressure to settle class action litigation, even where the claims are meritless. See, e.g., Max Boot, Federalist Society: Conference: Civil Justice and the Litigation Process: Do the Merits and the Search for Truth Matter Anymore? Day One: Panel One: Class Action Litigation: Introduction, 41 N.Y. L. Sch. L. Rev. 337, 338 (1997), WL 41 NYLSLR 337 (stating that "certifying a class often puts a gun to defendants' heads and forces them to settle cases that are largely meritless"); see also David Minvielle, Comment, Use of the Hearsay Objection in Class Certification Hearings to Promote Preliminary Evaluation on the Merits of the Case, 45 Loy. L. Rev. 585, 597 (Fall 1999), WL 45 LYLR 585 (noting that "[c]ommentators almost universally agree that '… class certification of mass torts forces settlements'").

Furthermore, the costs of defending against claims prior to certification or settlement can be disastrous to businesses, especially those in their early years of development. Allowing permissive certification of nationwide class actions could have a stifling effect on economic growth in Oklahoma. At the time of the decision in Ysbrand, The State Chamber predicted it would have the effect of opening the door to nationwide class actions in Oklahoma. The trial court's decision below here shows that the State Chamber's prediction is coming true. If, as the Amici Parties predict, Oklahoma's courts are flooded with nationwide class actions, businesses will surely do all they can to avoid being haled into Oklahoma courts where their fate with regard to an alleged product defect will be determined

in an all or nothing gamble with a single, Oklahoma jury. Many businesses may avoid establishing themselves in Oklahoma. They will be likely to avoid incorporating or opening offices here for fear that they will be found to be purposefully availing themselves of the privilege of doing business in Oklahoma. See, e.g., Hanson v. Denckla, 357 U.S. 235 (1958) (finding purposeful availment to be necessary to the constitutional exercise of jurisdiction by a state over a foreign corporation). Businesses would be justified in doing all within their power to minimize their contacts with Oklahoma to a level just below that which would give courts of this State general personal jurisdiction over them. See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) (holding that the business defendants' contacts with the state in which they were sued were not sufficient to permit the constitutional exercise of general personal jurisdiction over them); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (same).

In his May 2, 2003 article entitled, "Our Oklahoma", Oklahoma Governor Brad Henry stated that "our state is exceedingly business-friendly." See Brad Henry, "Our Oklahoma", 1, available at http://www.gov.ok.gov/display_article.php?article_id=182&article_type=0&print=true (last visited December 15, 2005). In fact, Governor Henry mentioned that consultants informed him "unequivocally that Oklahoma is one of the five most pro-business states in the U.S." Id. Factors contributing to this include extremely low property taxes, a productive workforce, and the 4th lowest business costs in the nation. Id at 1-2. If Oklahoma becomes a magnet for class action lawsuits its great innate potential to be a magnet for business will be thwarted. If the trial court's decision below stands, the efforts over the past several years by the Governor, the Legislature, county commissioners, city councils, chambers of commerce, development authorities and other groups to create this

business-friendly environment in the state could be for naught. In any event, it will certainly harm Oklahoma's chances of being the state of choice for business. Further, the reluctance of companies to do business in this State will undoubtedly damage Oklahoma's already fragile economy.

The Amici Parties do not believe that the trial court, when it issued its Order, intended for Oklahoma to become a sanctuary for nationwide class action lawsuits, nor intended to provide a disincentive for businesses to become a part of Oklahoma's business community, nor intended to increase the costs of products and services to Oklahoma's individual citizens. Nevertheless, these are likely the practical effects of the trial court's decision if it is affirmed here. Consequently, The Amici Parties respectfully ask that the Court consider these effects on Oklahoma's economy and its individual citizens and reverse the trial court's Order Granting Class Certification With Findings of Fact and Conclusions of Law.

B. APPLICATION OF CHOICE OF LAW RULES IN A MANNER UNIQUE TO CLASS ACTIONS OFFENDS DUE PROCESS.

The Amici Parties maintain that, as it stands, the trial court's application of choice of law principles, which depends upon the character of this lawsuit as a class action, is violative of due process. "The Due Process Clause limits the extent to which one state's law can be applied to claims that arise in many states." LaPray, 135 S.W.3d at 688. A proper choice of law analysis would have disregarded the class action nature of this suit. Regardless of whether or not claims are asserted by residents of multiple jurisdictions in a class action, due process requires that a trial court "apply an individualized choice of law analysis to each plaintiff's claims." Georgine, 83 F.3d at 627 (citing Phillips Petroleum v. Shutts, 472 U.S. 797, 823 (1985)), aff'd sub nom., Amchem Prods., 521 U.S. 591; accord Ignition Switch, 174

F.R.D. at 348 ("While it might be desirable, for the sake of efficiency, to settle upon one state…and apply its law in lieu of the 49 jurisdictions, due process requires individual consideration of the choice of law issues raised by each class member's case before certification.").

If due process is ignored, individual freedoms and individual rights will be gravely threatened. Such a disposition exemplifies the same type of lawsuit abuse mentioned earlier, which costs the individual taxpayer in the form of higher prices for goods and services.

C. DEFERENCE SHOULD BE GIVEN TO THE SUPREME COURT OF TEXAS' RECENT DECISION IN COMPAQ COMPUTER CORPORATION V. LAPRAY.

The trial court's decision to apply Texas substantive law to the claims of the entire nationwide class in Oklahoma is most troubling in that it shows an utter lack of deference to the Texas Supreme Court's recent decision in Compaq Computer Corp. v. LaPray, 135 S.W.3d 657 (Tex. 2004), which involved the exact same claims for the same proposed class represented by five of the same Texas law firms, against the same Defendant involved in this case, and in which the Texas Supreme Court found that Texas law did not apply to the claims of all class members. The trial court should have respectfully deferred to the Texas Supreme Court in that court's interpretation of its state's laws.

If this Court affirms the trial court's Order, it will do so in direct contravention of the view which Texas takes of its own law; *i.e.,* that it should not apply to nationwide class actions such as this suit against Compaq Computer Corp. "Judicial comity is the principle in accordance with which the courts of one state or jurisdiction give effect to the laws and judicial decisions of another, not as a matter of obligation but out of deference and respect." 16 AmJur 2d *Conflict of Laws* §16 (1998). Under the doctrine of comity, "Texas will

recognize laws and judicial decisions of other states, expecting that those states will extend Texas the same consideration." K.D.F. v. Rex, 878 S.W.2d 589, 593-4 (Tex. 1994). "Because comity is grounded in cooperation and mutuality, Texas does not extend comity to another state so long as that state declines to extend comity to Texas or other states under the same or similar circumstances." Id. at 594. Even outside the concept of comity, it could easily be said that the Texas Supreme Court is in a better position to accurately decide how to apply its own law than is any court in Oklahoma, especially since choice of law decisions are normally made with such state-specific public policy concerns in mind. The Amici Parties urge this Court to consider extending Texas comity in this case, not only if it wishes to receive the same treatment from Texas courts in the future, but also because not doing so exposes a fundamental flaw in the Ysbrand decision. By extending comity to the Texas Supreme Court's view of its own state's law, this Court can mend that flaw by, at the least, narrowing or limiting the application of Ysbrand when applying the law of *another* state in a proposed class action.

Subsequent to this Court's decision in Ysbrand, only one reported Oklahoma opinion (and no reported opinions from other jurisdictions) has cited it. That citation does not help the plaintiffs' posture in this case. In Melot v. Oklahoma Farm Bureau Mut. Ins. Co., 87 P.3d 644, 649 (Okla.Civ.App. Div.4 2003), the court cited Ysbrand only in relation to a discussion of the common issues of *fact* aspect of class action analysis, which is not a central issue in this case. Thus, by narrowing the application of Ysbrand so that it does not lead to the application of *another* state's law in a nationwide class action (especially when that other state has specifically found that its own law does not apply), the Court would not upset the rule of any other case.

However, even Ysbrand, as it currently stands, supports the notion that Oklahoma courts should pay deference to the Supreme Court of Texas' opinion in LaPray. Ysbrand expressly recognizes that one of the factors relevant to any choice of law decision under section 6(c) of the Restatement (Second) of Conflicts is "the relevant policies of other interested states and relative interests of those states in the determination of the particular issue." Ysbrand, 2003 OK 17, ¶ 13, 618 P.3d at 625. In light of LaPray, Texas' policy against having its law applied in this particular case could not be clearer. The principles outlined in the comity doctrine and RSTM (2d) of Conflicts § 6(c) are not only fitting and proper, but, if applied to the present case, would likely lead to Oklahoma becoming more of a magnet for business and less of a magnet for class actions.

III. CONCLUSION

The Amici Parties respectfully submit that this Court consider the potentially devastating effects on both Oklahoma's economic prosperity and the rights of its individual citizens that could be caused by the decision to affirm the District Court's order certifying a nationwide class action. Together with the Defendants/Appellants, Amici Parties pray for reversal of the District Court's Order certifying a nationwide class.

Respectfully Submitted,

_____

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