

IN THE SUPREME COURT OF OHIO

STAMMCO LLC d/b/a THE POP
SHOP, *et al*,

Plaintiffs-Appellees,

v.

UNITED TELEPHONE COMPANY,
OF OHIO AND SPRINT NEXTEL
CORPORATION,

Defendants-Appellants.

08-1822

On Appeal From the
Fulton County Court
of Appeals, Sixth
Appellate District,
Case No. 07-024

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS UNITED TELEPHONE COMPANY OF OHIO
AND SPRINT NEXTEL CORPORATION**

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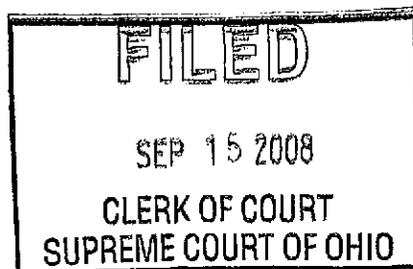


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**THIS CASE IS OF
PUBLIC AND GREAT GENERAL INTEREST AND INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

For the first time, an Ohio court has approved a class action challenging an allegedly negligent business practice even though the court recognized that the practice does not result in harm to every class member. If this decision stands, any Ohio business accused of a negligent practice will be potentially subject to a class action on behalf of every customer – including those who are unharmed and have no claim. Other courts have uniformly rejected class actions in the absence of class-wide harm. This Court should do so as well.

Appellant United Telephone Company of Ohio (“United Telephone”), a local telephone provider, allows other businesses to bill their customers with United Telephone’s statements. United Telephone’s role is to include these third-party charges as part of the phone bill, as opposed to having the Post Office deliver a separate bill for these charges from the third party to the customer. United Telephone is not involved in the underlying transactions that lead to the third-party charges.

The plaintiffs-appellees Kent and Carrie Stamm and Stammco, LLC, which operated a store call The Pop Shop owned by the Stamms (collectively, “the plaintiffs”), receive local phone service from United Telephone at their home and business. They brought a putative class action claiming that United Telephone negligently allowed some unauthorized charges from third parties to show up on their phone bills. Notably, however, the plaintiffs concede that some of the third-party charges on their phone bills were legitimate. The plaintiffs do not allege that United Telephone violated any federal or state law or tariff or that United Telephone engaged in fraud or a common misrepresentation.

United Telephone's practice of passing third-party charges along to the customer is a neutral one. Most charges are unquestionably legitimate, and if one were proved ultimately to be unauthorized, it would be as a result of the conduct of a third party, not United Telephone. Ignoring this crucial fact, the Sixth District allowed this class action to proceed. If this decision is allowed to stand, credit card companies, as the aggregator and biller of numerous third-party charges, or even the Post Office that delivers bills on behalf of others, could be next. And the decision has serious implications for all businesses in Ohio who could now be subject to class action litigation on behalf of persons who have suffered no harm.

In the alternative, the plaintiffs interpret the class as consisting only of individuals who actually received illegitimate charges on their phone bills. With the exception of this case, however, lower courts in Ohio have consistently rejected a party's attempt to define its way around the requirement of class-wide harm. Furthermore, such a class would violate due process and constitute an improper "fail-safe" class, which other courts have refused to certify. The Court should hear this case for these reasons as well.

STATEMENT OF THE CASE AND FACTS

I. The Plaintiffs Approved Third-Party Charges On Their Phone Bill.

The plaintiffs receive local phone service from United Telephone.¹ The plaintiffs concede that they approved certain third-party charges on their bills. They were billed for long-distance service from MCI on their United Telephone bill, and they admit that they purchased long-distance service from MCI. The plaintiffs do not seek recovery for those charges or any other “authorized” charges.

The plaintiffs disputed certain charges, each of which was resolved without them paying a dime. They first disputed an \$87.98 charge on The Pop Shop’s October 2004 phone bill from a company called Bizopia for website setup and a monthly hosting fee. In fact, Bizopia had a recorded verification of the order from one of The Pop Shop’s employees and faxed written confirmation of the order to The Pop Shop. Despite Bizopia’s proof of purchase, United Telephone removed that particular charge from his bill because of Mr. Stamm’s complaint. The plaintiffs also argued that they had not made four long distance calls reflected on their home and business phone bills. Mr. Stamm contacted United Telephone about these charges, the charges he identified were immediately removed from the bills, and the plaintiffs never paid them.

¹ From January 2000 until May 2006, United Telephone was a wholly owned subsidiary of Sprint Corporation, which later became Sprint Nextel Corporation, and did business under the trade name “Sprint.” Since May 2006, United Telephone has been a wholly owned subsidiary of Embarq Corporation, has done business under the trade name “Embarq,” and there has been no ownership or control of United Telephone by Sprint Nextel Corporation. At no time did Sprint Corporation, Sprint Nextel Corporation or Embarq Corporation provide, or bill for, local telephone services in Ohio. As it has maintained throughout this case, Sprint Nextel Corporation is not a proper defendant herein, there was no personal jurisdiction over it in the court below, and no class of plaintiffs can properly be certified as to it. Sprint Nextel Corporation reserves and does not waive these issues and appellants jointly submit this memorandum solely in the interest of brevity.

II. United Telephone's Safeguards Against Unauthorized Third-Party Charges.

The plaintiffs do not allege that United Telephone engaged in fraud, or was paid fees from a percentage of the illegitimate third-party charges showing up with its bills. Indeed, the fees paid by third parties to United Telephone are not based on a percentage of, or in any way tied to, the dollar amount of the third-party charges delivered or collected.

Rather, the thrust of plaintiffs' allegations are for negligence. But in fact, United Telephone goes to great lengths to prevent improper third-party charges from showing up on its phone bills. United Telephone has agreements with companies that aggregate bills of third parties and provide them to United Telephone for placement on phone bills. To prevent "cramming" – the deliberate addition of unauthorized charges to a customer's account – businesses that want to bill for their services on United Telephone's bills must undergo a comprehensive approval process. United Telephone reviews extensive information about the third party including descriptions of the services it offers, scripts of any recorded sales materials, "live" sales scripts, advertising to be used, phrases to appear on bills, and documents relating to the third party's customer enrollment process and "enrollment verification methods." Only after this process will United Telephone decide whether to deliver charges for a third party. Each third party must also comply with billing guidelines that require sales to be independently verified, require that charges comply with all applicable state and federal laws and regulations, and prohibit submission of fraudulent, deceptive or unfair charges. United Telephone has the right to terminate the agreements for violations of

these and other billing guidelines. United Telephone also has the absolute right to remove the charges from a customer's bill.

III. The Court Of Appeals Affirmed The Trial Court's Class Certification.

The plaintiffs have asserted claims for negligence, the breach of the implied contractual covenant of good faith and fair dealing, and unjust enrichment. The plaintiffs claim that United Telephone negligently screened third-party service providers, failed to ensure that all third-party charges on its phone bills were legitimate, and did not to obtain prior customer approval to deliver bills for the services of third parties.

On September 28, 2007, the trial court granted the plaintiffs' motion for class certification pursuant to Civil Rules 23(B)(2) and (3). The court certified a class of United Telephone subscribers "who were billed for charges on their local phone bills by [United Telephone] on behalf of third parties without their permission." *Stammco, LLC v. United Telephone Co. of Ohio*, 6th Dist. No. F-07-024, 2008-Ohio-3845, at ¶4, attached as Exhibit A. On October 25, 2007, United Telephone timely appealed. On August 1, 2008, the court of appeals affirmed the trial court's judgment regarding the Rule 23(B)(3) class.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition Of Law No. I: A class action cannot be maintained when only some of the putative class members have been injured.

To certify a class under Civil Rule 23(B)(3), common issues of fact and law must predominate over individual issues. This Court has held that only common issues that are "significant" to plaintiff's causes of action are relevant to predominance analysis. "[I]t is not sufficient that common questions merely exist; rather they must present a

significant aspect of the case. Furthermore, they must be capable of resolution for all members [of the class] in a single adjudication.” *State ex rel. Davis v. Pub. Emp. Ret. Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444, at ¶28 (quoting *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, 201, 509 N.E.2d 1249). See, also, 1 McLaughlin on Class Actions (3d ed. 2006) § 5:23 (whether a issue predominates “can only be determined after considering what value the resolution of the class-wide issue will have in each class member’s underlying cause of action,” which in turn “requires an understanding of the elements of the claims and defenses to be litigated”) (internal quotation omitted).

With the exception of this case, lower courts have uniformly interpreted this Court’s holdings to mean that unless causation and actual harm can be determined on a class-wide basis, a class cannot be certified. See *Hoang v. E*Trade Group, Inc.* (8th Dist.), 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151, at ¶24 (“Implicit in Rule 23’s requirements is a showing that those persons sought to be included in the class have all suffered some harm to which common questions of law or fact apply.”); *Linn v. Roto-Rooter, Inc.*, 8th Dist. No. 82657, 2004-Ohio-2559, at ¶16, 18, 19, 23 (a “case-by-case analysis of each service call” was required because there no evidence that “all class members have suffered some harm” (emphasis in original)); *Repede v. Nunes* (8th Dist.), 2006-Ohio-4117, at ¶17 (“Even though Repede and some of the other 4,000 plaintiffs may have suffered damage as a result of their dealings with JK Harris, others may not have suffered any damage at all. It would be extremely difficult to distinguish between which plaintiffs have been injured and which have not without an individual analysis of each plaintiff’s financial situation.”); *Cicero v. U.S. Four, Inc.*, 10th Dist. No. 07AP-310, 2007-Ohio-6600, at ¶41 (“Where the issue of whether the defendant’s alleged

injurious conduct is actionable (that is, the issue of liability) as to any given class member depends not only on the defendant's common course of conduct, but on evidence pertaining to differing situations of individual class members, common issues will not be deemed predominant over individual issues in the case.”).

Federal courts, which provide “an appropriate aid to interpretation of” Ohio class action jurisprudence, see *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5874, 817 N.E.2d 59, at ¶17 (quotation omitted), are in agreement. See, e.g., *Faralli v. Hair Today, Gone Tomorrow* (Jan. 10, 2007), N.D. Ohio No. 1:06CV504, 2007 WL 120664, at *6 (denying certification where proposed class included “members who have not suffered harm at the hands of the defendant” (quotation omitted)); *Oshana v. The Coca-Cola Co.* (C.A. 7, 2006), 472 F.3d 506, 513-14 (denying certification due to individualized issues as to causation and actual damages); *Blades v. Monsanto Co.* (C.A.8, 2005), 400 F.3d 562, 571 (“damages to all class members must be shown to justify the class action”); *Sikes v. Teleline, Inc.* (C.A. 11, 2002), 281 F.3d 1350, 1366 (“We cannot condone the use of a presumption as a ‘shortcut’ in resolving issues of injury and damages where such elements are provable by the plaintiffs and are required for recovery.”); *Schwartz v. Dana Corp./Parish Div.* (E.D. Pa. 2000), 196 F.R.D. 275, 282 (denying certification “because each member must prove liability and damages, [and thus] individual issues will predominate over common issues”); cf. *Collins v. Anthem Health Plans, Inc.* (Conn. 2005), 275 Conn. 309, 338-39, 880 A.2d 106 (rejecting plaintiffs’ attempt to “gloss over the injury and causation issues” by “arguing that the mere existence of the financial incentive program caused each class member to suffer harm”; relying on Federal Rule 23 authority).

Cases involving class-wide fraud are consistent with the requirement of class-wide harm, because class-wide fraud is deemed to cause injury to each member of the class. See, e.g., *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 430, 432-33, 1998-Ohio-405, 696 N.E.2d 1001 (fraudulent omission in written insurance policy); *Ritt v. Billy Blanks Ent.* (8th Dist.), 171 Ohio App.3d 204, 2007-Ohio-1695, 870 N.E.2d 212 (common fraudulent misrepresentation).

Here, in contrast, it is undisputed that United Telephone's billing practices do not themselves cause harm. United Telephone simply passes charges from third parties along to their customers. It is only when a third party bills for something a customer did not approve that a putative class member could be harmed. The plaintiffs concede, and the trial court and court of appeals acknowledge, that the plaintiffs and other class members approved and paid for some of the third-party charges on their phone bills. "Some of these third party billings are transparent, authorized and legitimate." Trial Court JE at 3; see, also, *Stammco, LLC*, 2008-Ohio-3845, at ¶20 (same); Appellee Br. to Sixth District at 19 ("[N]ot every third-party charge * * * is unauthorized").

The court of appeals concluded that common questions existed, including (1) the manner in which United Telephone "purchases, places, and collects unauthorized charges on telephone bills," (2) United Telephone's alleged knowledge of customers' cramming complaints, (3) United Telephone's actions in response, and (4) the "availability of a third-party billing block." *Stammco, LLC*, 2008-Ohio-3845, at ¶50; see also *id.* at ¶36. But these allegations (which United Telephone disputes are common

issues) do not bear upon whether, in any particular circumstance, a putative class member has actually been harmed.²

This Court should adopt the reasoning of the Ohio lower courts and federal courts that have considered the issue. If, as here, a class includes individuals who have not been actually harmed – a required element of each of the plaintiffs’ claims – common issues cannot predominate. Here, for example, the class litigation would require individualized proof that a class member received and paid for an unauthorized charge from a third party, and that the charge was not later adjusted. Indeed, the impossibility of proving authorization, causation, or payment for all charges to all class members in a single adjudication is compounded by the fact that those charges cover a wide range of services offered by more than 2000 different businesses. And even if a class member could actually prove harm, the class members would still have to demonstrate that United Telephone, as opposed to the third-party business or the class member himself, proximately caused such harm.³

The potential for mischief should class actions like this one be allowed to proceed is self-evident. Even if a plaintiff had no evidence that a business engaged in class-wide fraud, he could still maintain a class action on the grounds that the business had a practice that allegedly resulted in harm to some, but not all, of its customers. That, of

² The court of appeals repeatedly stressed the existence of a computerized database, *Stammco, LLC*, 2008-Ohio-3845, at ¶30, 58-59, to address the “significant individualized determinations” that the court conceded exist, *id.* at ¶52, but the undisputed evidence is that the only way to determine if a third-party charge was paid or, if an adjustment was later given, is to manually review each customers’ billing records. And even in that circumstance, the individualized question of whether the charge was illegitimate would still be unresolved.

³ Similarly, defenses to the claims of class members, including contributory negligence, estoppel, waiver, and laches, also present individualized issues.

course, could be said as to almost every business practice, opening the floodgates to unmanageable class actions.

Proposition Of Law No. II: A plaintiff cannot avoid the obligation to prove class-wide harm by defining the class to include only those class members who were actually harmed.

Alternatively, the plaintiffs interpret their class as including only those customers who actually received improper charges. As they represented to the Sixth District, “Although not every third-party charge on a Sprint customer’s bill is unauthorized, only those customers with unauthorized charges are class members.” (Appellee Br. to Sixth District, at 19.) Neither the plaintiffs nor the courts below articulated any method for identifying these people.

But interpreting the class as consisting only of people who actually received improper charges does not solve the problem. A plaintiff cannot circumvent the lack of predominance caused by the admitted absence of class-wide harm simply by defining his class as that subset of class members who were actually harmed. Except in this case, lower courts have held that a party may not define a class by the merits of the claim to avoid individualized issues. See, e.g., *Bungard v. Ohio Dep’t of Job & Family Servs.*, 10th Dist. 5AP-43, 2006-Ohio-429, at ¶15 (class defined as those who were legally injured by defendant’s action was impermissible because “examination of the merits” of individual members’ claims would be required); *Barber v. Meister Protection Serv.* (8th Dist.), 2003-Ohio-1520, ¶34, 36-37 (reversing certification because class definition involved individualized examination of merits of claim for each class member regarding causation and damages); *Petty v. Wal-Mart Stores, Inc.* (2d Dist.), 148 Ohio App.3d 348, 2002-Ohio-1211, 773 N.E.2d 576, at ¶15 (class definition improper because individualized inquiries into the facts of each potential class member’s case to determine

membership was required); *Hall v. Jack Walker Pontiac Toyota, Inc.* (2d Dist. 2000), 143 Ohio App.3d 678, 683, 758 N.E.2d 1151 (class definition was “circular and ambiguous” because class membership could not be determined “until the facts of the individual claim are examined”).

Federal courts concur that a party cannot define a class by the merits of a claim to avoid individualized issues. See *Brazil v. Dell, Inc.* (July 7, 2008), N.D. Cal. No. C-07-01700, 2008 WL 2693629, at *7 (refusing to certify class defined by the primary issue in the action because the members of the class could not “be identified unless [the defendant] is found liable after trial”); *Edwards v. McCormick* (S.D. Ohio 2000), 196 F.R.D. 487, 493 (class definition improper “[i]f a court must come to numerous conclusions regarding class membership or adjudicate the underlying issues on behalf of each class member); *Forman v. Data Transfer, Inc.* (E.D.Pa. 1995), 164 F.R.D. 400, 403-404 (class definition improperly subsumed legal and factual issues at heart of case); *Crosby v. Social Sec. Admin. of United States* (C.A.1, 1986), 796 F.2d 576, 580 (class definition improper because “class members impossible to identify prior to individualized fact-finding and litigation”); *Van West v. Midland Nat. Life Ins. Co.* (D.R.I. 2001), 199 F.R.D. 448, 451 (class is improper when it “is defined simply as consisting of all persons who may have been injured by some generically described wrongful conduct allegedly engaged in by a defendant.”); *In re Copper Antitrust Litig.* (W.D. Wis. 2000), 196 F.R.D. 348, 353 (class definition “must not depend on subjective criteria or the merits of the case or require extensive factual inquiry to” decide who is in class); see, also, *Livingston v. U.S. Bank, N.A.* (Colo. App. 2002), 58 P.3d 1088, 1090 (class definition improperly “subsumed the very legal and factual issue” at heart of case).

The Court should adopt this reasoning and preclude the plaintiffs from defining their class in this fashion. Failing to do so would eviscerate the federal and state jurisprudence prohibiting class actions in the absence of class-wide harm.

A class defined by the merits is also improper because notice must be provided to class members before trial so that they have an opportunity to opt out. See 5 Moore's Fed. Prac. (3d ed. 2008), §23.21 [3][d], 23-48-23-49. If class membership cannot be determined until after trial, pre-trial notice is impossible. This presents obvious due process concerns.

Finally, the proposed class definition is improper because it constitutes what is known as a "fail-safe" class. Should the plaintiffs be allowed to proceed with this type of class, and if they lose at trial, they would, by definition, not be members of the class. Their counsel would no doubt argue that the judgment had no res judicata effect on other class lawsuits on the exact same grounds, allowing them to file additional class actions on identical grounds until one of the class members wins at trial.

Courts outside of Ohio have uniformly rejected "fail-safe" classes because the defendant "would be bound only by a judgment favorable to plaintiffs but not by an adverse judgment." *Adashunas v. Negley* (7th Cir. 1980), 626 F.2d 600, 604 (denying certification of such a "fail-safe" class); see, also, *Brazil*, 2008 WL 2693629, at *7; *Genenbacher v. Centurytel Fiber Co. II, LLC* (C.D. Ill. 2007), 244 F.R.D. 485, 488 (denying certification to "fail safe" class because "the class definition precludes the possibility of an adverse judgment against class members; the class members either win or are not in the class"); *Adashunas*, 626 F.2d at 604 (same); *Dunn v. Midwest Buslines, Inc.* (E.D. Ark. 1980), 94 F.R.D. 170, 172 (refusing to certify proposed class of "those who had been actually discriminated against" because a finding of no

discrimination on the part of the defendants would mean the class was improperly certified); *Dafforn v. Rousseau Assocs., Inc.* (N.D. Ind. July 27, 1976), N.D. Ind. F-75-74, 1976 WL 1358, at *1 (denying certification to fail-safe class defined as all persons who paid illegally fixed brokerage fees); *IntraTex Gas Co. v. Beeson* (Tex. 2000), 22 S.W.3d 398, 404-405 (barring certification of a fail-safe class).

This Court should adopt the reasoning of these courts and not allow the first “fail-safe” class to be certified in Ohio.

CONCLUSION

The Court should review and reverse the decision below.

Date: September 15, 2008

Respectfully submitted,

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I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following counsel on this 15th day of September 2008:

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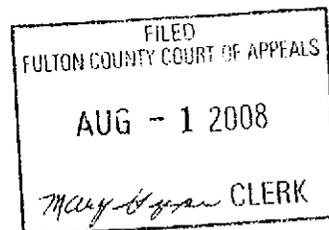
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EXHIBIT A

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

Stammco, LLC, et al.

Court of Appeals No. F-07-024

Appellees

Trial Court No. 05CV000150

v.

United Telephone Co. of Ohio, et al.

DECISION AND JUDGMENT

Appellants

Decided: **AUG 0 1 2008**

* * * * *

Dennis E. Murray, Sr. and Donna J. Evans, for appellees.

Michael K. Farrell and G. Karl Fanter, for appellants.

* * * * *

PIETRYKOWSKI, P.J.

{¶ 1} This is an appeal of a September 28, 2007 judgment of the Fulton County Court of Common Pleas certifying this action as a class action. The action is brought by appellees Kent and Carrie Stamm ("the Stammers"), who reside in Archbold, Fulton County, Ohio, and by Stammco, LLC d.b.a. The Pop Shop ("Pop Shop"), an Ohio limited

liability company that operates a business located in Archbold. Appellants, United Telephone Company of Ohio, d.b.a. Sprint ("UTO") and Sprint Corporation ("Sprint") provide appellees with local and long distance telephone service.

{¶ 2} Appellees assert that appellants are liable to them and a class of telephone service customers under theories of liability sounding in negligence, breach of the implied duty of good faith and fair dealing, and unjust enrichment due to a practice of causing unauthorized charges to be placed on their telephone bills. Appellees refer to the billing practice as "cramming." In addition to monetary damages, appellees seek declaratory and equitable relief to prevent future billings for products and services that were not authorized by class members and to return sums allegedly obtained by defendants as a result of the billing practice.

{¶ 3} The trial court granted appellees' motion to certify a plaintiff class of telephone subscribers consisting of:

{¶ 4} "All individuals, businesses or other entities in the State of Ohio who are or who were within the past four years, subscribers to telephone service from United Telephone Company of Ohio d.b.a. Sprint and who were billed for charges on their local telephone bills by Sprint on behalf of third parties without their permission. Excluded from this class are defendants, their affiliates (including parents, subsidiaries, predecessors, successors, and any other entity or its affiliate which has a controlling interest), their current, former, and future employees, officers, directors, partners,

members, indemnities, agents, attorneys and employees and their assigns and successors."

{¶ 5} Appellants appeal the class certification to this court. They assert three assignments of error on appeal:

{¶ 6} "Assignment of Error No. 1

{¶ 7} "The trial court erred and abused its discretion by failing to carefully apply the requirements for class certification under Civil Rule 23, by failing to conduct rigorous analysis into whether all of those requirements were or could be met in this case, and by failing to make findings that or how any of those requirements had been met here.

{¶ 8} "Assignment of Error No. 2

{¶ 9} "The trial court erred and abused its discretion by granting plaintiffs' motion for class certification.

{¶ 10} "Assignment of Error No. 3

{¶ 11} "The trial court erred and abused its discretion because, as a matter of law, no class could ever properly be certified based upon the claims of the named plaintiffs here."

{¶ 12} A decision to certify an action as a class action is not a decision on the merits of a claim. "In determining whether to certify a class, the trial court must not consider the merits of the case except as necessary to determine whether the Civ.R. 23 requirements have been met. *Ojalvo v. Bd. of Trustees of Ohio State Univ.* (1984), 12 Ohio St.3d 230, 233." *Williams v. Countrywide Home Loans, Inc.*, 6th Dist. No. L-01-

1473, 2002-Ohio-5499, ¶ 24. Seven requirements under Civ.R. 23 are to be met to certify an action as a class action:

{¶ 13} "Seven prerequisites must be met before a court may certify a case as a classaction pursuant to Civ.R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impractical; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be satisfied. *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, 96-98, 521 N.E.2d 1091." *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, ¶ 6.

{¶ 14} The standard of review on appeal of decisions on whether to certify an action as a class action is the abuse of discretion standard. *Marks v. C.P. Chemical Co., Inc.* (1987), 31 Ohio St.3d 200, syllabus; *In re Consol. Mtge. Satisfaction Cases*, ¶ 5. An abuse of discretion connotes a judgment that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 15} The trial court found that appellees "did and still do provide local and long distance telephone service to more than one million customers throughout Ohio, including Plaintiffs." Judgment Entry of September 28, 2007. The court also detailed factual findings on billing practices:

{¶ 16} "Billing activities for UTO, and for all of the other local telephone companies that are part of the Sprint network, are processed centrally through a system managed by what is now known as Embarq Management Company. The process of billing for the services provided by these local telephone companies is the same for all subsidiaries of Sprint. This process was and is managed solely through a system of computerized procedures, and they have not changed during the relevant time period.

{¶ 17} "In addition to billing its own customers for the telephone services provided directly by Sprint subsidiaries, including UTO, Sprint has also entered into contracts with a number of other unrelated third parties, for the purpose of providing billing services for sundry items and services rendered by and on behalf of these other contracting third parties, and it bills its own customers on behalf of these unrelated third party entities, per contract. The procedure for the billing of these items and services, on behalf of these unrelated third parties entities, has also remained the same over the requisite time period."

{¶ 18} It is undisputed that appellants do not require any written authorization from its Ohio customers before they place third-party charges on their customers' local telephone bills and that Sprint has the ability to block such charges. It is also undisputed that appellants have refused to permit Ohio customers, including the Stamms, from blocking third-party charges from being placed against their accounts.

{¶ 19} The trial court also summarized the contentions of appellees:

{¶ 20} "Plaintiffs claim that a number of these third party entities, hiding behind tiers of billing agents, electronic billing systems, and billing telephone companies, have become successful in collecting large sums of monies from Defendants' customers, by having or causing unauthorized, misleading, and deceptive charges to be placed on Defendants' customers telephone bills. These unrelated charges are billed and collected by the local telephone company from its own customers, for items or services allegedly provided by these unrelated companies and businesses. Some of these third party billings are transparent, authorized, and legitimate. Some are not. To the extent such services are bogus, or unauthorized, Plaintiffs claim they constitute a fraud upon themselves, the public, and upon the proposed 'Class.'" Id.

{¶ 21} The trial court provided in its opinion a detailed review of appellants' billing procedures and the difficulties encountered by customers who challenge unauthorized third-party charges on their bills. "The manner in which * * * Sprint representatives handle the customers' complaint or request for information is standardized, and the manner in which the call is 'escalated' to other representatives, with more training and experience, when more sophisticated assistance is needed in handling the call to attempt resolution, is uniform. This multi-tiered system is often electronic, and it soon becomes daunting, uneconomical, and ultimately frustrating to the average lay person." Id.

{¶ 22} As to the named appellees, the record discloses that the Stamms own and operate a small business named Stammco, LLC d.b.a The Pop Shop. The Stamms

discovered numerous unauthorized charges on their monthly phone bills. Upon complaint, ultimately some charges were resolved and credits issued to their accounts. The evidence also disclosed that there was at least one unresolved third-party charge, discovered during appellant Kent Stamm's deposition in this case, that had been paid, was claimed to be unauthorized, and for which repayment has not been made by appellants.

{¶ 23} In *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St.3d 67, the Ohio Supreme Court directed that trial courts, in deciding motions to certify class actions, are "required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied. Id. at 70. Under *Hamilton*, [w]hile there is no explicit requirement in Civ.R. 23 that the trial court make formal findings to support its decision on a motion for class certification, there are compelling policy reasons for doing so." Id.

{¶ 24} Appellants assert under Assignment of Error No. 1, that the judgment certifying this action as a class action should be vacated as the review of class certification issues by the trial court was insufficiently rigorous under *Hamilton*. Additionally, appellants assert that the trial court failed to address a series of issues raised by appellants against class certification and failed to make findings of fact on how the Civ.R. 23 prerequisites were met. Appellants contend that the reversal is required under *Hamilton* and under the decision of this court in *Miller v. Volkswagen of America, Inc.* (Apr. 7, 2006), 6th Dist. No. E-05-005.

{¶ 25} In *Miller v. Volkswagen of America, Inc.*, this court reversed a trial court judgment that, "without explanation," and, in a seven word order, certified an action as a class action. We reversed and remanded the case for further proceedings on the class certification issue. The *Miller v. Volkswagen of America, Inc.* decision does not stand for the broad proposition that an appellate court must find an abuse of discretion whenever a trial court's judgment on class certification lacks findings of fact on each of the seven prerequisites for class certification or where the review of class action issues by the trial court is not deemed sufficiently rigorous.

{¶ 26} In *Ward v. Nationsbank Mtge. Corp.*, 6th Dist. No. E-05-040, 2006-Ohio-2766, this court recognized that "[t]rial courts are permitted to issue class certification decisions without * * * making the requisite findings of fact." *Id.*, at ¶ 35. There nevertheless must be "sufficient factual evidence in the record to have permitted a meaningful class certification determination by a preponderance of the evidence." *Id.*, at ¶ 37. Other appellate districts have also recognized that a trial court's failure to follow preferred procedures under *Hamilton* to specify facts and reasons for conclusions under Civ.R. 23 as to whether class certification is appropriate does not, by itself, require an appellate court to reverse a judgment on class certification. *Brandow v. Washington Mutual Bank*, 8th Dist. No. 88816, 2008-Ohio-1714, ¶ 8; *Pyles v. Johnson*, 143 Ohio App.3d 720, 731, 2001-Ohio-2478.

{¶ 27} Here the trial court issued a lengthy and detailed opinion reviewing relevant facts, particularly the nature of standardized procedures for billings and for response to

customer complaints as to unauthorized third-party charges. Appellees are correct that the trial court failed to provide specific findings of fact as to the seven prerequisites for class certification and its reasons for granting class certification. However, the record contains sufficient evidentiary material upon which to determine whether class certification was appropriate. Accordingly, we find that appellants' Assignment of Error No. 1 is not well-taken.

{¶ 28} Under Assignment of Error No. 2, appellants assert that the trial court abused its discretion by granting appellees' motion for class certification. We consider each class certification requirement in turn.

{¶ 29} Under *Warner v. Waste Management, Inc.*, "Rule 23 requires, albeit implicitly, that an identifiable class must exist before certification is permissible. The definition of the class must be unambiguous." *Warner v. Waste Management, Inc.*, at 96. The definition must permit identification of class members with "reasonable effort." *Id.*

{¶ 30} Appellants contend that identification of class members of the certified class will require individualized review of customer bills or employment of computer programming to identify UTO customers who received third-party charges over a six year period. Appellants do not claim that identification of customers who were billed for third-party charges and paid them could not be accomplished through a computer analysis of Sprint's billing data.

{¶ 31} "The focus at this stage is on how the class is defined. 'The test is whether the means is specified at the time of certification to determine whether a particular

individual is a member of the class.' *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 63, 556 N.E.2d 157, 165. The question as to whether there are differing factual and legal issues 'do[es] not enter into the analysis until the court begins to consider the Civ.R. 23(B)(3) requirement of predominance and superiority.' *Marks, supra*, 31 Ohio St.3d at 202, 31 OBR at 400, 509 N.E.2d at 1253." *Hamilton v. Ohio Savings. Bank*, at 73.

{¶ 32} The class definition here is unambiguous and complies with the requirements under *Warner* and *Hamilton*. Whether the necessary screening of billing records to identify class members creates predominance or superiority issues that preclude class certification will be considered under the Civ.R. 23(B)(3) analysis of predominance and superiority class requirements.

{¶ 33} On appeal appellants have not disputed that appellees are members of the class. They have not disputed that the class is so numerous that joinder of all class members is impractical.

{¶ 34} The commonality requirement to class certification requires that "there are questions of law or fact common to the class." Civ.R. 23(A)(2). "Courts generally have given a permissive application to the commonality requirement in Civ.R. 23(A)(2). See *Marks v. C.P. Chemical Co.* (1987), 31 Ohio St.3d 200, 31 OBR 398, 509 N.E.2d 1249. This prerequisite has been construed to require a "common nucleus of operative facts." *Marks, supra* at 202, 31 OBR at 400, 509 N.E.2d at 1253." *Warner v. Waste Management*, at 97.

{¶ 35} In *Warner*, the Supreme Court of Ohio agreed that "if there is a common fact question relating to negligence, or the existence of a contract or its breach, or a practice of discrimination, or misrepresentation, or conspiracy, or pollution, or the existence of a particular course of conduct, the Rule is satisfied." *Id.*, quoting Miller, *An Overview of Federal Class Actions: Past, Present and Future* (2 Ed. 1977), at 24 with approval.

{¶ 36} This action concerns a course of conduct applicable to the class involving standardized billing practices of appellants. These practices concern the unauthorized charging of customer accounts with third-party charges and standardized procedures in which appellants respond to customer complaints to such billings. The course of conduct applicable to the class includes a standardized policy of not requiring written authorizations from Ohio telephone customers before placing third-party charges against a customer's account and refusal to permit telephone customers to block such third-party charges. The trial court found that the billing complaint procedure is "multi-tiered," "often electronic," and "daunting, uneconomical, and ultimately frustrating to the average lay person." The record supports a finding that the commonality requirement of Civ.R. 23(A)(2) is met in this case.

{¶ 37} On appeal, appellants have not disputed that the claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class. Nor have they disputed that the representative parties will fairly and adequately represent the interests of the class.

{¶ 38} This leaves the requirement that the action meet the requirements of Civ.R. 23(B)(1), 23(B)(2), or 23(B)(3). Appellees sought certification of the class under both Civ.R. 23(B)(2) and 23(B)(3).

{¶ 39} Civ.R. 23(B)(3) provides:

{¶ 40} "An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

{¶ 41} "* * *

{¶ 42} "(3) the court finds that the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action." (Emphasis added.)

{¶ 43} Appellants contend that neither the predominance or superiority requirements of Civ.R. 23(B)(3) have been met and that proceeding on a class basis to adjudicate claims of third-party cramming of telephone bills will be unmanageable.

{¶ 43} "It is now well established that 'a claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.' *Lockwood Motors, Inc. v. Gen. Motors Corp.* (D. Minn. 1995), 162 F.R.D. 569, 580." *Cope v. Metro. Life Ins. Co.* (1998), 82 Ohio St.3d 426, 430.

{¶ 44} In *Cope v. Metro. Life Ins. Co.*, the Ohio Supreme Court reversed a decision denying class action status to an action against Metropolitan Life Insurance Company and Metropolitan Life Insurance and Annuity Company to challenge methods used to procure sales of life insurance. The complaint alleged a "wide spread scheme to obtain higher commissions and extra charges" by classifying sales of additional life insurance to existing policyholders as new policies when such sales were to be treated as replacement policies. *Id.*, at 427. The difference in classification was significant in view of MetLife's practice to waive or reduce different policy charges for replacement policies. *Id.*

{¶ 45} The court identified cases involving "involving similar form documents or the use of standardized procedures and practices" as presenting opportunities for "common proof" of claims on a class basis. *Id.*, at 430-431. The court reaffirmed its reasoning in *Hamilton v. Ohio Savings Bank* that "* * * [C]lass action treatment is appropriate where claims arise from standardized forms or routinized procedures,

of that class. If it were, then a great majority of motions for class certification would be denied. Civ.R. 23(B)(3) gives leeway in this regard and permits class certification whether there are facts common to the class members." *Id.*, at 468.

{¶ 50} Whether liability in damages is asserted in negligence, for breach of an implied duty of good faith and fair dealing, or unjust enrichment, the standardized practices of appellants present opportunities for class wide proof of necessary elements to establish liability. The claims of all class members arise out of common billing practices of appellants. We agree with appellees that relevant class wide evidence will include evidence regarding the manner in which Sprint purchases, places, and collects unauthorized charges on telephone bills, the extent of Sprint's knowledge of the cramming problem through customer complaints against unauthorized third-party charges on customer accounts, Sprint's actions in response, and the availability of a third-party billing block when a customer seeks to prevent such billing.

{¶ 51} This case does present a need for significant individualized determinations to present the claims of class members. However, appellants' billing system is computer based and appellants' database records will be available to provide detailed factual data both as to individual and class wide issues through computer analysis of the database. Under such circumstances it is reasonable to conclude that questions of law and fact common to the class predominate over questions affecting only individual members. Consideration of Civ.R.23(B)(3) listed factors, *infra*, also supports this conclusion.

{¶ 52} Appellants also dispute that proceeding as a class action is a superior method to adjudicate the dispute over unauthorized third-party charges to telephone accounts. Appellants claim there are multiple procedures superior to class action that are available to challenge third-party charges. Appellants refer to their own internal procedures to question charges to accounts dealing either directly with the third parties that asserted the charge or with UTO to secure full adjustment to the account. Appellants argue that class members could seek assistance with state and federal consumer agencies or litigate their claims in small claims courts.

{¶ 53} This case, however, presents thousands of individual claims for small amounts. This is the type of claim for which the class action procedure is well suited. The Ohio Supreme Court, in *Hamilton v. Ohio Savings Bank*, acknowledged the role of class actions in presenting such claims:

{¶ 54} "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Hamilton v. Ohio Savings Bank*, at 80 quoting *Amchem Products, Inc. v. Windsor* (1997), 521 U.S. 591, 617 and *Mace v. Van Ru Credit Corp.* (C.A. 7 1997), 109 F.3d 338, 344.

{¶ 55} Civ.R. 23(B)(3) lists four factors for consideration to assist in determining whether the requirements of preponderance and superiority have been met. Civ.R.

23(B)(3) supra; *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 314. We address the factors in turn.

{¶ 56} Appellants have not contended that there is evidence that class members have an interest in individually controlling separate actions on their claims. In view of the limited value of individual claims, such an interest is unlikely. There is no other pending litigation against appellees asserting claims of Ohio telephone service customers arising from cramming of third-party charges on their bills. The parties have not argued any advantage to concentrating the claims in a single forum other than advantages gained through use of the class action device itself. The final factor concerns "the difficulties likely to be encountered in the management of a class action." Civ.R. 23(B)(3). Appellants have argued strongly both in the trial court and on appeal that this action is unmanageable as a class action. The manageability issues raised by appellants are based upon the scope of individualized determinations required to adjudicated all claims.

{¶ 57} The Supreme Court of Ohio has recognized that "the trial court is in the best position to consider the feasibility and gathering and analyzing class-wide evidence." *In re Consolidated Mortgage Satisfaction Cases*, at ¶ 12. The trial court exercised its discretion to certify this case as a class action.

{¶ 58} This case presents an effective tool for use in addressing both class wide and individualized factual determinations—appellants' computerized billing database. In our view, the trial court is capable of managing this action as a class action in large part

due to the availability of computer database billing records and the ability to employ computer analysis of those records.

{¶ 59} We find that there exists substantial competent probative evidence in the record demonstrating that both the prerequisites of Civ.R. 23(A) and Civ.R. 23(B)(3) have been met for the trial court to order this action to proceed as a class action. The nature of the dispute and central role played by computerized billing records support a conclusion that class issues predominate over issues concerning only individual claims. The size of the class and limited value of individual claims strongly support a conclusion that the class action is the superior method available for a fair and efficient adjudication of the controversy. Accordingly, we find that the trial court did not abuse its discretion in sustaining the motion to certify under Civ.R. 23(B)(3).

{¶ 60} Appellees argue that this action also meets the requirements to proceed as a class action on the additional ground of Civ.R. 23(B)(2). Civ.R. 23(B)(2) provides:

{¶ 61} "An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

{¶ 62} "* * *

{¶ 63} "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;"

{¶ 64} In *Warner v. Waste Management, Inc.*, the Ohio Supreme Court recognized that "Civ.R. 23(B)(2) has, as its primary application, a suit seeking injunctive relief."

Warner v. Waste Management, Inc., at 95. "This rule entails two requirements: (1) the action must seek primarily injunctive relief, and (2) the class must be cohesive." *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, at ¶ 13. Class certification under Civ.R. 23(B)(2) is unavailable where injunctive relief is "merely incidental" to a primary claim for monetary damages. *Id.*, at ¶ 17; accord, *Hamilton v. Ohio Savings Bank*, at 86-87; *Marks v. C.P. Chemical Co., Inc.*, at 203-204; *In re Rogers Litigation*, 6th Dist. No. S-02-042, 2003-Ohio-5976, at ¶¶ 42-43.

{¶ 66} Appellees seek both monetary damages and injunctive relief in the amended complaint. However, the action for monetary damages has been the primary focus of the case. Accordingly, class certification under Civ.R. 23(B)(2) is unavailable for appellants' claims.

{¶ 67} In view of our determination that the trial court did not abuse its discretion in certifying this action as a class action under Civ.R. 23(B)(3), we find appellants' Assignment of Error No. 2 not well-taken.

{¶ 68} Under Assignment of Error No. 3, appellants argue that "no class could ever properly be certified based upon the claims of the named plaintiffs here." Based upon our ruling under Assignment of Error No. 2, we find Assignment of Error No. 3 is not well-taken.

{¶ 69} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Fulton County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to

App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Fulton County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

Mark L. Pietrykowski, P.J.

William J. Skow, J.
CONCUR.

Peter M. Handwork

JUDGE
Mark L. Pietrykowski

JUDGE
William J. Skow

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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