IN THE SUPREME COURT OF OHIO

STAMMCO LLC d/b/a THE POP SHOP, *et al*,	:	08-1822
Plaintiffs-Appellees,	:	On Appeal From the Fulton County Court of Appeals, Sixth Appellate District, Case No. 07-024
v.	:	
UNITED TELEPHONE COMPANY, OF OHIO AND SPRINT NEXTEL CORPORATION,	:	
Defendants-Appellants.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE OHIO CHAMBER OF COMMERCE

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

Amicus curiae the Ohio Chamber of Commerce (the "Chamber"), founded in 1893, is a trade association of businesses and professional organizations. It is Ohio's largest and most diverse statewide business advocacy organization. The Chamber's members range from small owner-operators to large multi-national corporations. The Chamber represents all types of business sectors, including manufacturing, insurance, finance, retail, transportation, and health care.

The Chamber, which includes the Ohio Small Business Council, promotes and protects the interests of its 4,000 business members, including building a more favorable business climate conducive to expansion and growth. The Chamber is dedicated to creating a strong pro-jobs environment in Ohio. As an independent and informed contact point for government and business leaders, the Chamber is a respected participant in public policy discussions. The Chamber formulates policy positions on diverse issues, including public finance, small businesses, health care, environmental regulation, education funding, taxation, workers compensation, and campaign finance. The Chamber also participates in legislative and administrative proceedings.

Permitting Ohio courts to certify class actions challenging allegedly negligent business practices even though there is no allegation that the practice is fraudulent or harms every class member will have an extraordinarily negative effect on the business climate in Ohio. Any Ohio business accused of a negligent practice will be subject to a class action on behalf of every customer – including those who are unharmed. Other courts, however, have uniformly rejected class actions in the absence of class-wide harm.

Appellant United Telephone Company of Ohio is a local telephone provider that allows other businesses to bill their customers on United Telephone's bills. United Telephone's role is to include these third-party charges as part of the phone bill. United Telephone is not involved in the underlying transactions that lead to the third-party charges. The plaintiffs, who are customers of United Telephone, brought a putative class action claiming that United Telephone negligently allowed some unauthorized charges from third parties to show up on their phone bills. The plaintiffs concede, however, that some of the third-party charges 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 neutral. There are indisputably proper charges, and if a charge were proved ultimately to be unauthorized, it would be as a result of the conduct of a third party, not United Telephone. Nonetheless, the Sixth District allowed this class action to proceed. If this decision is allowed to stand, credit-card companies – whose business is to aggregate and bill third-party charges – will undoubtedly be next, as will countless other businesses alleged to have acted negligently, even if only with respect to one customer.

The decision has serious implications for all businesses in Ohio who may now be subject to class action litigation on behalf of persons who have suffered no harm. This decision violates the due process rights of defendants to have plaintiffs prove each element of their claims – including causation and harm – and to present individualized defenses.

The Sixth District's decision is especially troubling in light of the fact that United Telephone resolved through its customer-service procedures virtually all of the named plaintiffs' disputed claims in a manner favorable to the plaintiffs. United Telephone requires third parties

to have procedures for resolving disputed charges, and for customers dissatisfied with a third party's resolution of a dispute, it is United Telephone's policy to issue full charge adjustments on a "no fault" basis in almost every case. These procedures are effective, informal, fast, place no burden of proof on customers, and make litigation wholly unwarranted. Customers may also take their issues regarding a third party's services or charges to the Public Utilities Commission of Ohio, the Attorney General, or the Federal Trade Commission, who will pursue these parties when appropriate.

This Court should accept jurisdiction so that businesses both large and small will be protected from this unwarranted expansion of class action jurisprudence. Otherwise, Ohio citizens will suffer from the increased cost of doing business in Ohio – from lost jobs, should companies leave Ohio to avoid the extraordinary risk of liability for such neutral business practices, to the increased costs of the goods and services of the businesses remaining in Ohio – with no benefit.

STATEMENT OF THE CASE AND FACTS

The Chamber adopts the Statement of the Case and Facts in the Memorandum in Support of Jurisdiction of Appellants United Telephone Company of Ohio and Sprint Nextel Corporation.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

The Chamber also adopts the Argument in Support of Propositions of Law in the Memorandum in Support of Jurisdiction of Appellants United Telephone Company of Ohio and Sprint Nextel Corporation.

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

Common issues of fact and law must predominate over individual issues for a class to be certified under Rule 23(B)(3). Only common issues that are "significant" to a plaintiff's causes

of action are relevant to the 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).

Lower courts have 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.[1] 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, have also so held.[2]

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 is 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. This Court should adopt the reasoning of the Ohio lower courts and federal courts

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[1] See *Hoang v. E*Trade Group, Inc.* (8th Dist. 2003), 151 Ohio App.3d 363, 370, 784 N.E.2d 151; *Linn v. Roto-Rooter, Inc.*, 8th Dist. No. 82657, 2004-Ohio-2559, at ¶16, 18, 19, 23; *Repede v. Nunes* (8th Dist.), 2006-Ohio-4117, at ¶17; *Cicero v. U.S. Four, Inc.*, 10th Dist. No. 07AP-310, 2007-Ohio-6600, at ¶41.

[2] See, e.g., *Faralli v. Hair Today, Gone Tomorrow* (Jan. 10, 2007), N.D. Ohio No. 1:06CV504, 2007 WL 120664, at *6; *Oshana v. The Coca-Cola Co.* (C.A. 7, 2006), 472 F.3d 506, 513-14; *Blades v. Monsanto Co.* (C.A.8, 2005), 400 F.3d 562, 571; *Sikes v. Teleline, Inc.* (C.A. 11, 2002), 281 F.3d 1350, 1366; *Schwartz v. Dana Corp./Parish Div.* (E.D. Pa. 2000), 196 F.R.D. 275, 282; cf. *Collins v. Anthem Health Plans, Inc.* (Conn. 2005), 275 Conn. 309, 338-39, 880 A.2d 106.

that have considered the issue. If a class includes individuals who have not been actually harmed – an element of each of the plaintiffs' claims – common issues cannot predominate.

This Court should also seek review because the lower courts did not "carefully apply" Rule 23's requirements and "conduct a rigorous analysis" into whether those requirements are met. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 1998-Ohio-365, 694 N.E.2d 442. The purpose of this Court's "rigorous analysis" test is to protect businesses and other defendants from improperly certified classes and to protect their due process rights. This is why such an analysis must include consideration of the arguments made by the party opposing certification and consideration of similar cases. *Howland v. Purdue Pharma, L.P.*, 104 Ohio St.3d 584, 587-88, 2004-Ohio-6552, 821 N.E.2d 141, at ¶21-26 (reversing and entering order denying certification where trial court failed to "analyze or even mention" arguments made by defendant and ignored decisions in similar cases).

In the courts below, United Telephone (1) argued that each class member must show they suffered actual harm as an essential element of all of the claims asserted, a point of law that plaintiffs have never disputed; (2) established that it is undisputed that some members of the class received no invalid charges and thus suffered no harmed from United Telephone's delivery of third-party charges; and (3) cited the numerous cases from Ohio and elsewhere holding that, in such situations, class certification is improper. Inexplicably, neither the trial court nor the Sixth District mentioned these arguments or considered the relevant case law.

The impact of permitting class actions such as this is massive. 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 course, could be said as to almost every business practice. Moreover,

businesses would be liable for the improper or fraudulent practices of other businesses of which they have no knowledge. This Court should review the merits of this action.

<u>Proposition Of Law No. II</u>: 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 argue that their class only includes 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.)

But that 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, both lower courts and federal courts have held that a party may not define a class by the merits of the claim to avoid individualized issues.[3] Permitting the plaintiffs to define their class this way eviscerates the federal and state jurisprudence prohibiting class actions in the absence of class-wide harm.

As a practical matter, the class definition is inappropriate because neither the plaintiffs nor the courts below identified any method for identifying these people. And this class definition is also 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,

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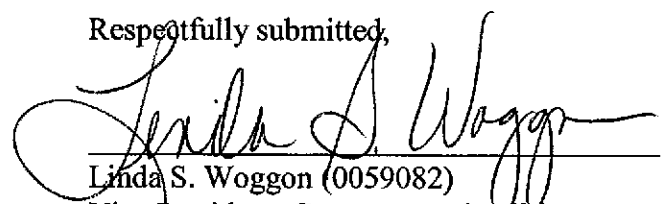
[3] See, e.g., *Bungard v. Ohio Dep't of Job & Family Servs.*, 10th Dist. 5AP-43, 2006-Ohio-429, at ¶15; *Barber v. Meister Protection Serv.* (8th Dist.), 2003-Ohio-1520, ¶34, 36-37; *Petty v. Wal-Mart Stores, Inc.* (2d Dist.), 148 Ohio App.3d 348, 2002-Ohio-1211, 773 N.E.2d 576, at ¶15; *Hall v. Jack Walker Pontiac Toyota, Inc.* (2d Dist. 2000), 143 Ohio App.3d 678, 683, 758 N.E.2d 1151; *Brazil v. Dell, Inc.* (July 7, 2008), N.D. Cal. No. C-07-01700, 2008 WL 2693629, at *7; *Edwards v. McCormick* (S.D. Ohio 2000), 196 F.R.D. 487, 493; *Forman v. Data Transfer, Inc.* (E.D.Pa. 1995), 174 F.R.D. 400, 403-404; *Crosby v. Social Sec. Admin. of United States* (C.A.1, 1986), 796 F.2d 576, 580; *Van West v. Midland Nat. Life Ins. Co.* (D.R.I. 2001), 199 F.R.D. 448, 451.

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 plaintiffs' counsel to file additional class actions on the exact same 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."[4]

CONCLUSION

This case involves matters of public and great general interest, and involves substantial constitutional questions. This Court should review and reverse the decision below.

Respectfully submitted,



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[4] *Adashunas v. Negley* (7th Cir. 1980), 626 F.2d 600, 604; 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; *Adashunas*, 626 F.2d at 604; *Dunn v. Midwest Buslines, Inc.* (E.D. Ark. 1980), 94 F.R.D. 170, 172; *Dafforn v. Rousseau Assocs., Inc.* (N.D. Ind. July 27, 1976), N.D. Ind. F-75-74, 1976 WL 1358, at *1; *IntraTex Gas Co. v. Beeson* (Tex. 2000), 22 S.W.3d 398, 404-405.

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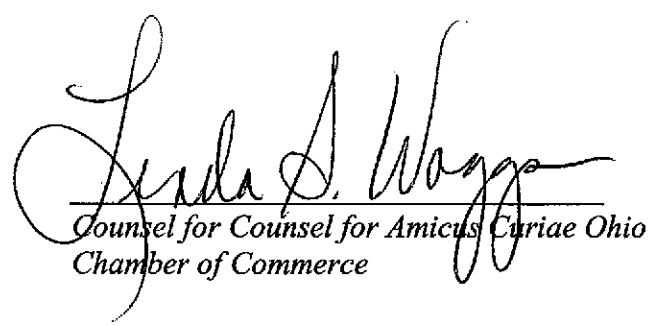

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