

IN THE SUPREME COURT OF OHIO

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

Plaintiffs-Appellees,

vs.

UNITED TELEPHONE COMPANY  
OF OHIO, AND SPRINT NEXTEL  
CORPORATION

Defendants-Appellants

Case No.: 08-1822

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

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MEMORANDUM IN RESPONSE TO JURISDICTION OF APPELLEES STAMMCO  
LLC D/B/A THE POP SHOP, KENT STAMM AND CARRIE STAMM

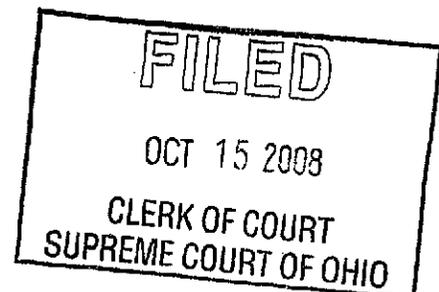
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Michael K. Farrell (0040941)  
[mfarrell@bakerlaw.com](mailto:mfarrell@bakerlaw.com)  
*Counsel of Record*  
Thomas D. Warren (0077541)  
Karl Fanter (0075686)  
Baker & Hostetler LLP  
1900 East Ninth Street, Suite 3200  
Cleveland, OH 44114-3485  
Telephone: (216) 861-7528  
Facsimile: (216) 696-0740

*Counsel for Appellants  
United Telephone Company of Ohio  
And Sprint Nextel Corporation*

Dennis E. Murray, Sr. (0008783)  
[dms@murrayandmurray.com](mailto:dms@murrayandmurray.com)  
*Counsel of Record*  
Donna J. Evans (0072306)  
[dae@murrayandmurray.com](mailto:dae@murrayandmurray.com)  
Murray & Murray Co., L.P.A.  
111 E. Shoreline Drive  
Sandusky, OH 44870  
Telephone: (419) 624-3000  
Facsimile: (419) 624-0707

*Counsel for Appellees Stammco, LLC  
d/b/a The Pop Shop, Kent Stamm, and  
Carrie Stamm*



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**THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This Court should not accept discretionary review. This cramming case is not one of public or great general interest. It certainly does not involve a substantial constitutional question. The issue is not novel or of broad application, and neither court below ruled on any constitutional question.

The entire basis of Appellants' argument is that: Sprint disagrees with the fact that class certification was ordered by the trial court and was unanimously affirmed by the Sixth District Court of Appeals. Similar cases with virtually identical allegations against providers of telephone service have been brought as class actions across the country. To Appellants' knowledge, no court has denied class certification, and other cases have been certified or settled as classes. See *McFerren v. AT&T Mobility LLC*, Case No. 2008CV151322 (Fulton Co. Superior Court, Georgia). Consumer based class certification is, appropriately, the norm in the United States and other parts of the world.

Appellants United Telephone Company of Ohio ("United Telephone") and Sprint Nextel Corporation (collectively "Sprint" or "Appellants") provided local telephone service to more than a million residents in Ohio. *Stammco v. United Telephone Co. of Ohio*, 2008-Ohio-3845 at ¶15. In addition to billing these customers for the telephone services provided by United Telephone, Sprint also has other contractual relationships with unrelated third parties pursuant to which Sprint contracts to place additional charges on its telephone customers' bills for items or services allegedly provided by these separate third party entities. *Stammco*, 2008-Ohio-3845 at ¶17. Sprint does so because its contracts with the third party crammers make money for Sprint. (Sprint's actual participation in this process is dissimilar to that of the Post Office that merely delivers mail as addressed.)

The Plaintiffs-appellees are Kent and Carrie Stamm and Stammco, LLC (Stammco). Stammco received phone bills from Sprint that included charges billed on behalf of third parties for items and services that were not authorized by Stammco nor were they received. The Sprint practice is recognized in the industry and is commonly referred to as “cramming”. *Stammco*, 2008-Ohio-3845 at ¶2. Stammco requested that this cramming practice of third-party billing be discontinued or blocked. However, Sprint did not and does not allow Stammco, or any Ohio customer, the ability to block these third-party charges from their Sprint bills. *Stammco*, 2008-Ohio-3845 at ¶18. Neither does Sprint require any authorization from its customers before cramming the third-party charges on their bills. *Id.* Sprint’s practice of causing unauthorized charges to be placed on telephone bills of Ohio customers is a breach of the implied duty of good faith and fair dealing, is negligent, and has resulted in the unjust enrichment of Sprint. *Stammco*, 2008-Ohio-3845 at ¶2.

To argue that this case is of public and great general interest, Sprint resorts to the familiar use of scare tactics. Sprint threatens that this case will somehow subject all businesses in Ohio to class action litigation on behalf of persons who have suffered no harm. Appellants suggest that credit card companies, and even the Post Office, as entities that deliver bills on behalf of others, would be affected by this class certification decision. Sprint’s contention is utter nonsense. Sprint’s argument ignores the unique facts that are present here. Appellant’s characterizations and predictions of the expansive scope and affect of the ruling in this case are simply wrong. This is a fairly simple, run-of-the-mill case challenging the legitimacy of the cramming practices of a provider of local telephone service to a large number of its subscribers in Ohio for items and services that have no relationship to the local phone service that it provides. “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.” *Stammco*, 2008-Ohio-3845 at ¶50. These are routine causes of action that are litigated as class actions on a regular basis, throughout Ohio and the United States.

Contrary to Appellants’ arguments, the class as certified does not constitute an improper “fail-safe” class that has no existence unless and until there is a positive decision in favor of the plaintiffs. Appellants unsuccessfully made this argument in the trial court and in the court of appeals. It has no merit. The Sixth District found the class definition to be unambiguous. *Stammco*, 2008-Ohio-3845 at ¶32. Class membership is not dependent upon a finding of liability on the part of Appellants. Rather it is clearly based upon the existing facts as to each class member “who were billed for charges on their local telephone bills by Sprint on behalf of third parties without their permission.” *Stammco*, 2008-Ohio-3845 at ¶4.

There is no substantial constitutional question involved in this case. Neither the trial court nor the Sixth District ruled on any constitutional question or cited to any constitutional provision.

## **STATEMENT OF THE CASE AND ADDITIONAL FACTS**

### **I. SPRINT’S THIRD-PARTY BILLING PROCESS.**

To facilitate the third-party billing process, Sprint enters into contracts with large billing clearinghouses or billing aggregators who, in turn, bill on behalf of a large number of other entities. Sprint actually purchases the accounts receivable from the third-party vendors through a process that it terms “Settlement by Acceptance”. Sprint then crams the third-party charges on the local telephone bills of its customers and Sprint collects the payments. Sprint charges the third-party clients a set amount for each transaction processed by Sprint.

The Court of Appeals found that “[i]t 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.” (Emphasis added) *Stammco*, 2008-Ohio-3845 at ¶18.

Sprint places, on average, more than 200,000 third-party charges on the bills of Ohio telephone customers, each month. Sprint faced widespread complaints from its customers who were crammed by Sprint, when the customers were sharp enough to discover the practice and had the stamina to go through the grueling process to complain. Challenges to Sprint of the “unauthorized” charges are “daunting, uneconomical, and ultimately frustrating to the average lay person.” *Stammco LLC v. United Telephone Co. of Ohio*, Case No. 05cv000150 at pg. 7, (CP Fulton Co., Sept. 28, 2007). (Hereinafter “Judgment Entry”).

Sprint was obligated to make more than 4,000 monthly credit adjustments to the telephone bills of class members who were able to detect cramming and to complain of the practice. This, despite Sprint’s contention of “scrutiny” as to third party billing. Because the adjustments were driven by actual recorded and accepted customer complaints, it was clear that Sprint’s cramming practices represented a significant, underreported problem for the class members. Many, if not most customers did not notice a small charge to their account. Or they could not take the time to inquire. Or they were caught up in the daunting and frustrating experience of dealing with Sprint’s system of giving them the runaround. Many customers simply paid the bill without taking steps to dispute the charges. The breadth of the problem is far beyond the Sprint adjustments.

The trial court recognized the serious problem of “cramming” and held: “(a) that Sprint is aware of the significance of the problem; (b) that Sprint has the technology to prevent cramming abuses; and (c) that Sprint has failed to give its Ohio customers the same minimal protections it has been able to provide, and does provide, to its customers in other States or jurisdictions.” Judgment Entry p. 3.

## **II. PLAINTIFFS’ EXPERIENCE WITH SPRINT’S THIRD-PARTY BILLING.**

Stammco received a Sprint telephone bill in October 2004 for service at its business, The Pop Shop. This bill included unauthorized charges of \$87.98 billed by OAN Services, Inc. which were in turn “billed on behalf of Bizopia.” Judgment Entry p. 5. This was a large line item and it caused a large enough increase in the telephone bill to induce Mr. Stamm to investigate. Upon review of the monthly phone bills for The Pop Shop, as well as the personal telephone bills, numerous other unauthorized and bogus charges were uncovered.

Mr. Stamm was not aware that Sprint was billing him on behalf of third parties. Sprint did not ask for approval before initiating any third-party billing. Until this initial large single charge was encountered, earlier third-party cramming billing items were so small that they had gone unnoticed. Mr. Stamm managed to get those initial charges reversed, but only after a great deal of difficulty. By cramming Stammco and class members’ bills with bogus charges, Sprint had cheated its customers. Sprint did not allow customers to block these charges. Therefore, many class members paid for absolutely nothing. As described by the trial court, “every customer of United Telephone Company of Ohio, similarly situated, must submit to the prospect of having these charges appear on his or her phone bill without the necessity of any authorization being required, and he or she is forced to endure Sprint’s protracted dispute

resolution process before any unauthorized charges may be take off his or her bill, assuming the customer were to even notice the charge in the first place.” Judgment Entry pp. 9-10.

### **III. THE CLASS CERTIFICATION DECISIONS IN THE COURTS BELOW.**

Sprint inaccurately states that the thrust of plaintiffs’ allegations are for negligence. This view of the case is far too narrow. The actual issues posed by Appellees in their Complaint are many. They include:

(a) Whether defendants owed a duty to their telephone customers to ensure the accuracy of billing on their accounts;

(b) Whether defendants took adequate measures to properly screen that those billing entities they allowed to place charges on Sprint customer s local telephone bills were reputable;

(c) Whether defendants took adequate measures to ensure that only charges authorized by Sprint customers were placed on the customers local telephone bills;

(d) Whether unauthorized charges were billed to Sprint customers on their local telephone bills on behalf of third parties;

(e) Whether defendants took appropriate measures to remove all unauthorized third party charges from the Sprint customers local telephone bills;

(f) Whether defendants collected any unauthorized charges from Sprint local telephone customers on behalf of third parties;

(g) Whether defendants collected any late payment fees or other charges from Sprint local telephone customers resulting from any unauthorized charges placed on the Sprint customers local telephone bills by third parties;

(h) Whether defendants provided Sprint customers with adequate options to control whether or not a third party s products and services are charged on their telephone bills.

First Amended Complaint at ¶ 38.

The trial court certified this case as a class action. That decision was affirmed by the Court of Appeals. The Sixth District recognized that “[t]his 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 refusing to permit telephone customers to block such third-party charges." *Stammco*, 2008-Ohio-3845 at ¶36.

## **ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW**

### **I. APPELLANTS' PROPOSITION OF LAW NO. 1**

**A class action cannot be maintained when only some of the putative class members have been injured.**

#### **Appellees' Response to Proposition of Law No. 1:**

Sprint seems to be arguing in this proposition that actual harm to these class members cannot be determined on a class-wide basis. Citing to *Hoang v. E\*Trade Group, Inc.* (8<sup>th</sup> Dist.), 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151, at ¶24 and other cases, Appellant states that it will be necessary to look at the individual situations of each class member to determine if Sprint's conduct caused some actionable harm. Sprint is confusing the exercise of initially identifying the class members (compiling a list of customers who were billed on behalf of third parties without their permission), with the court's obligation to decide if the fact of the billing is legally actionable.

At no time does Sprint explain why the class, as defined by the Court, would contain members who were not injured. The class members were duped into paying for something they never received or never authorized. If the trial court determines that Sprint breached the implied terms of its contracts, was unjustly enriched, or provided inaccurate bills to

customers through its negligence, Sprint must answer to the class in damages. The essence of Sprint's argument is that some customers approved and paid for some third-party charges. If so, the customers are not class members to the extent they approved the charge. Indeed, if a Sprint customer authorized the charge ----- by definition, there was no impermissible cramming.

Appellant alleges that "it is undisputed that United Telephone's billing practices do not themselves cause harm." Appellants' Memorandum in Support of Jurisdiction p. 8. It not only is disputed, but this is a determination yet to be made – one to be made once the trial court reaches the merits of the case. However, Appellants later concede, in contradiction, that "when a third party bills for something a customer did not approve [ ] a putative class member could be harmed." *Id.* Because Sprint placed these billing items on the local telephone bills of its customers and collected the charged amounts, Sprint facilitated the damages.

The Sixth Appellate District Court held that the trial court acted within its sound discretion when it concluded that these determinations of liability could properly be made by the trial court in the class action proceedings. It is important to keep in mind that although there are potentially more than a million local telephone subscribers, not all of them will be entitled to any recovery. Not all subscribers were billed for third-party charges. There are instances where third-party charges were authorized and hence were genuine. Making the factual and legal determinations as to whether charges appearing on class members' telephone bills are unauthorized is no more burdensome than making the determination of whether the charge was otherwise legitimate. Documentation is available from the third parties as to authorized charges. If a charge cannot be authenticated, perhaps the trial court would consider it to be unauthorized. Although time-consuming, the process of identifying class members, with today's technology, can be accomplished. As recently noted by District Court Chief Judge James G. Carr, that

“[w]hile digging out that information may be very costly and time-consuming, that is no reason for letting [the defendant] keep monies which, if plaintiffs prevail, it should never have gotten.” *Randleman v. Fidelity National Title Insurance Co.* (N.D. Ohio 2008), 251 F.R.D. 267, 280. In *Randleman*, Chief Judge Carr certified a class of homeowners who could have been eligible for, but who were not provided with, a discounted premium on title insurance when they refinanced their homes. Although it was observed that identifying the members of the *Randleman* class might be a laborious task, and would require “digging out” information in the possession of the title insurance company or the files of agents to determine discount eligibility, the court held that those facts should not deny certification. *Id.* at 277. Sprint has previously argued that identifying class members would be difficult. The Court of Appeals properly rejected this argument. *Stammco*, 2008-Ohio-3845 at ¶¶ 30-32. Sprint merely uses these pleadings as the opportunity to reargue the underlying facts.

There is no “potential for mischief” as Sprint claims, in maintaining this class. All class members have been billed for items and services without their permission. It would be a legal conclusion, not appropriate at this stage, to determine whether class members have suffered compensable harm. However, should the trial court hold that Sprint’s billing practices were negligent, constituted a breach of the duty of good faith and fair dealing, or resulted in unjust enrichment to Sprint, all class members suffered the same type of compensable harm. If the trial court rules otherwise, no class members are entitled to compensation. Appellants’ argument that “only some of the putative class members have been injured” is, frankly, nonsensical.

Alleging reasons that go to the merits of the controversy, Appellant argues that this class does not meet the predominance requirement of Civ.R. 23. However, a decision on

class certification should not address the merits of the controversy. *Eisen v. Carlise & Jacqueline* (1974), 417 U.S. 156, 178; *Ojalvo v. Board of Trustees of Ohio State University* (1984), 12 Ohio St.3d 230, 233. The only issue before the trial court and the only issue decided by the trial court was the propriety of class certification. *Id.*

The Sixth District set out the requirements for class certification and its standard-of-review and then proceeded to address Appellants' assignments of error pertaining to the adequacy of the class certification analysis made by the trial court. The appellate court found 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." *Stammco*, 2008-Ohio-3845 at ¶59. As to each assignment of error, the Sixth District properly concluded that the determination of the trial court was within the exercise of the trial court's sound discretion.

## **II. APPELLANTS' 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.**

### **Appellees' Response to Proposition of Law No. 2.**

How else would you define a damages class, if not to describe the group of individuals who have been allegedly harmed? Furthermore, in making this statement Sprint admits that there is a class of individuals who have actually been injured. The Sixth District Court of Appeals found that the class definition was "unambiguous" and complied with the requirements under *Warner v. Waste Management, Inc.*, (1988), 36 Ohio St. 3d 91, 521 N.E. 2d 1091 and *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St. 3d 67. *Stammco*, 2008-Ohio-3845 at ¶ 32.

The class is not defined by the merits of the claims. There is no need to determine the amount or the validity of the damages in order to locate those individuals who are class members. The class consists of Sprint customers, and only of those Sprint customers who were billed for an item or service that they did not request or authorize. This fact distinguishes this case from every case cited by Appellants, allegedly in support of their position. See *Bungard v. Ohio Dep't of Job & Family Servs.* (10<sup>th</sup> Dist.), 2006-Ohio-429 at ¶15 (defining class members as those who did **not receive** services in compliance with state and federal requirements); *Barber v. Meister Protection Serv.* (8<sup>th</sup> Dist.), 2003-Ohio-1520 at ¶36 (class members sought to be those who, due to the **deceptive or unconscionable practices** of defendants, purchased security services); *Petty v. Wal-Mart Stores, Inc.* (2<sup>nd</sup> Dist), 148 Ohio App.3d 348, 2002-Ohio-1211 at ¶13 (class of employees who were required or permitted to **illegally work** “off the clock”); and *Hall v. Jack Walker Pontiac Toyota, Inc.* (2<sup>nd</sup> Dist. 2000), 143 Ohio App.3d 678, 682-83 (all persons who entered into a consumer transaction with the defendant where the defendant’s **activities constituted those of a “credit services organization”** under the Credit Services Organization Act). To find the class members in every one of these cases cited above, the court would need to first make a legal determination on the merits of the case. In this case all that needs to be done is to compile a list of Sprint customers that have unauthorized charges on their bills. No legal decision is necessary.

The challenged order only certified the class. Civ.R.23(C)(2) directs notice to the class – with class members’ rights to opt out if they do not want to be part of the class. It is feasible to identify the class members and provide them with notice before a trial. Sprint’s concern about the due process rights of class members is unfounded.

Finally, Sprint's last point, asserting that this is a "fail-safe" class is based upon the same faulty reasoning that has been addressed above. A "fail-safe" class is defined by the merits of the case and exists only if the plaintiffs prevail. In a "fail-safe" class, the "proposed class definition is, in essence, framed as a legal conclusion." *Indiana State Employees Ass'n v. Indiana State Highway Comm'n.* (S.D. Ind. 1978), 78 F.R.D. 724, 725. The class, as defined here, is not a "fail-safe" class.

By definition, a "fail-safe" class can only exist after resolving the ultimate liability issue. With a "fail-safe" class, if the defendants prevail at trial, there never was a class to begin with and no proposed members of the unsuccessful class would be bound by the judgment. *Dafforn v. Rousseau Assocs., Inc.*, 1976-2 Trade Cases ¶ 61, at 219 (N.D. Ind. 1976). For example, certifying a class "of children entitled to a public education who have learning disabilities and who are not properly identified and/or who are not receiving special education" could create an improper "fail-safe" class. The class would exist only if it was determined that the public school system did not properly identify these children and/or provide them special education. *Adashunas v. Negley* (7<sup>th</sup> Cir. 1980), 626 F. 2d 600, 603-604. For the same reason, a class of homeowners who were charged "an artificially fixed and illegal brokerage fee" would be improper. If a jury determined that the defendants did not charge any illegal fees there are no class members. *Dafforn*, supra at \*1.

To determine whether a class definition improperly includes a merit determination ----- a court must ask, will the class still exist even if the defendant of the class action lawsuit wins at trial? This class will. The legal questions, pertaining to Appellant's **liability**, are unrelated to the fact that the class members were billed for unauthorized charges. Even if the trial court eventually concluded that Sprint had no liability, it would not create a situation where

no class existed, because all of the customer class members would be bound by that finding, unless they had opted out of the class.

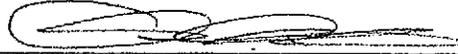
Sprint's real argument is that the Court of Appeals did not follow the established rules pertaining to class certification. But, in fact, it did (as did the trial court) ----- to the letter. Sprint's disagreement with the decisions below is not a basis for certification. *Williamson v. Rubich* (1961), 171 Ohio St. 253, 254. Legal scholars, versed in consumer class certification issues, reading the detailed findings of the Trial Court and the Court of Appeals most assuredly would conclude that both courts were exemplary in the manner by which they have conducted this litigation.

### CONCLUSION

Class members were billed for items and alleged services that they did not authorize. This was accomplished by a practice known as cramming. Although class members asked Sprint to stop the cramming practice, Sprint refused and the unauthorized billings continued. The Trial Court certified this case as a class action, the Sixth District Court of Appeals agreed. Appellants continue to dispute those decisions, raising the exact same arguments that they did in the courts below.

This is merely another case in which a defendant does not want to proceed under well-established rules for civil procedure. The only issue decided by the Trial Court, and the only issue passed on by the Court of Appeals, was whether class certification was proper. This case is not one of great public or general interest and does not involve a substantial constitutional question. Sprint's petition to accept the appeal should be denied.

Respectfully submitted,



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Dennis E. Murray, Sr., Esq. (0008783)

E-Mail Address: [dms@murrayandmurray.com](mailto:dms@murrayandmurray.com)

Donna J. Evans, Esq. (0072306)

E-Mail Address: [dae@murrayandmurray.com](mailto:dae@murrayandmurray.com)

MURRAY & MURRAY CO., L.P.A.

111 E. Shoreline Drive

Sandusky, Ohio 44870

Telephone: (419) 624-3000

Facsimile: (419) 624-0707

Counsel for Plaintiffs-Appellees

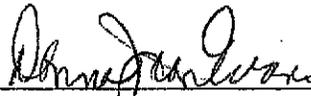
**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum In Response To Jurisdiction Of Appellees Stammco LLC D/B/A The Pop Shop, Kent Stamm And Carrie Stamm was forwarded by First-Class mail to the following:

Michael K. Farrell  
G. Karl Fanter  
BAKER & HOSTETLER, LLP  
1900 East Ninth Street, Suite 3200  
Cleveland, OH 44114-3485

Attorney for Appellants

on this 14<sup>th</sup> day of October, 2008.

  
\_\_\_\_\_  
Dennis E. Murray, Sr., Esq. (0008783)  
Donna J. Evans, Esq. (0072306)  
MURRAY & MURRAY CO., L.P.A.

Counsel for Plaintiffs-Appellees