

Pursuant to Supreme Court Practice Rule XI, Section 2(A)(1), appellants United Telephone Company of Ohio and Sprint Nextel Corporation (“United Telephone”) respectfully move this Court for reconsideration of its order declining jurisdiction to hear this discretionary appeal.¹ Three Justices would have accepted jurisdiction on the question of whether a plaintiff can certify what is known as a “fail-safe” class – one that circumvents the obligation to prove class-wide harm by defining the class by the merits of the action to include only those class members who were actually harmed.² United Telephone respectfully requests that the Court reconsider its decision and accept jurisdiction. Permitting the panel’s decision below to stand will make the Sixth District the only state or federal court to allow fail-safe classes. The appellate court’s decision, if left to stand, could have a profoundly negative effect on Ohio businesses, and fundamentally alter the certification and administration of class actions in Ohio. It also would significantly change Civil Rule 23’s notice and opt-out provisions.

United Telephone is mindful that motions for reconsideration should not simply reargue the case. See S.Ct.Prac.R. XI(2)(A). Rather, the authority to reconsider should be to “correct decisions which, upon reflection, are deemed to have been made in error.” *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, at ¶5 (internal quotations omitted). This Court should reconsider its decision for two central reasons. First, appellees Kent and Carrie Stamm and Stammco, LLC

¹ The two propositions of law submitted by United Telephone were: (1) a class action cannot be maintained when only some of the putative class members have been injured, and (2) 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.

² Justices Lundberg Stratton and O’Connor dissented, and Justice O’Donnell would have accepted the appeal on the second proposition of law. See *January 28, 2009 Case Announcements*, 2009-Ohio-278, at 10-11.

conceded in their memorandum in opposition to jurisdiction that their proposed class is, in fact, a fail-safe class – something that no court, either federal or state, has ever sanctioned. Second, court decisions published after United Telephone filed its memorandum in support of jurisdiction set forth, in unequivocal terms, the impropriety and unworkability of fail-safe classes.

I. The Stamms Concede That Their Class Is A Fail-Safe Class.

The gravamen of the appellees' claims is that United Telephone delivered third-party charges with its telephone bills, and that in *some* cases, those third-party charges were not authorized. Indeed, the appellees admitted below that certain third-party charges on their *own* phone bills were authorized. As such, while the appellees speak in sweeping terms about “cramming” phone bills with unauthorized charges (allegations that United Telephone disputes), the fact remains that at the end of the day, the appellees claim that only *certain* United Telephone customers who received third-party billing were actually harmed. See Memo. in Opp. to Juris. at 8 (“There are instances where third-party charges were authorized and hence were genuine.”); see, also, Trial Court JE at 3 (“Some of these third party billings are transparent, authorized and legitimate); *Stammco, LLC*, 2008-Ohio-3845, at ¶20 (same); Appellee Br. to Sixth District at 19 (“[N]ot every third-party charge * * * is unauthorized”). But Ohio courts

have uniformly held that unless causation and actual harm can be determined on a class-wide basis, a class cannot be certified.³ Federal courts agree.⁴

Faced with this case law, the appellees make a critical concession in their memorandum in opposition upon which they had previously wavered: that their class includes *only those* United Telephone customers who actually received unauthorized charges on their bills. As the appellees state: “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.” Memo. in Opp. to Juris. at 7 (emphasis added). And again: “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.*” Memo. in Opp. to Juris. at 11 (emphasis added).

II. Fail-safe classes have been rejected by every court in the United States.

This is just the type of fail-safe class that federal and Ohio courts have uniformly rejected – until the panel’s decision below. A party cannot circumvent the requirement of class-wide harm by defining the class as the subset of class members who were

³ See, e.g., *Hoang v. E*Trade Group, Inc.* (8th Dist.), 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151, at ¶24; *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.

⁴ 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.

actually harmed.⁵ To do so is to define a class on the merits of an action, such that class membership cannot be determined until after liability determinations are made.

Courts have uniformly held that these fail-safe classes are improper.⁶ As one court recently stated: “The problem with such a ‘fail safe’ definition is that it requires the court to determine the ultimate issue of liability with regard to each potential class member at the outset, thus putting the cart before the horse.” *Mims v. Stewart Title Guaranty Co.* (Dec. 11, 2008), N.D. Tex. No. 3:07-CV-1078-N, 2008 WL 5516486, at *4.

Since United Telephone filed its notice of appeal, other additional cases have been published that are critical of fail-safe classes. See, e.g., *Velasquez v. HSBC Finance Corp.* (Jan. 16, 2009), N.D. Calif. No. 08-4592, 2009 WL 112919 (fail-safe classes are improper because they are improperly defined by the merits of their legal claims, and are therefore unascertainable prior to a finding of liability in the plaintiff’s favor); *Merritt v. Wellpoint* (Jan. 16, 2009), E.D. Virg. No. 3:08-CV-272, 2009 WL 122756 (same); *Mims*, 2008 WL 5516486, at *4. These inverted classes are not permitted because thousands of mini-trials on the merits of each individual action are necessary to

⁵ 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.

⁶ See, e.g., *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.

determine who is a member of the class.⁷ The appellees cannot simply define away the inherently individualized issues in this action.⁸

Fail-safe classes also destroy the essential symmetry of Civil Rule 23 because the defendant “would be bound only by a judgment favorable to plaintiffs but not by an adverse judgment.” *Adashunas*, 626 F.2d at 604. In other words, if the appellees are allowed to proceed with this class but they lose at trial, they would, by definition, not be class members; their counsel would thus contend that the judgment had no res judicata effect on other class lawsuits on the same grounds, allowing them to file additional class actions until one of the class members wins at trial.

The fail-safe class definition also presents due-process concerns because notice prior to a liability determination must be provided to class members pursuant to Civil Rule 23(C) before trial so they have an opportunity to opt out. See 5 Moore’s Fed. Prac. (3d ed. 2008), §23.21 [3][d], 23-48-23-49. Because the class is defined by the merits of action, such notice prior to a trial on the merits would be impossible.

The potential for mischief should class actions like this one be allowed to proceed is self-evident. If this decision stands, every Ohio business could have almost any class

⁷ The appellees contend that so-called “cramming” class actions have been certified by other courts. Memo. in Opp. to Jurisdiction at 1. But to United Telephone’s knowledge, the only other court to actually rule on a “cramming” class action rejected it. *Stern v. AT&T* (August 22, 2008) C.D. Calif. No. 05-8842, 2008 WL 4382796, reconsideration den’d, (Oct. 6, 2008), 2008 WL 4534048. The only case the appellees cite is a purported *settlement class*, which has no bearing on the matter. Memo. in Opp. to Jurisdiction at 1.

⁸ For example, it is impossible to prove authorization, causation, or payment for all charges to all class members in a single adjudication, especially when 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.

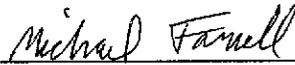
action certified against it simply by having a plaintiff circularly define his putative class based on the merits of his claim. Even if a plaintiff had no evidence that a business engaged in class-wide fraud, he could still maintain a class action on the grounds that the business had a practice that allegedly resulted in harm to some, but not all, of its customers. That, of course, could be said as to almost every business practice, opening the floodgates to unmanageable class actions.

CONCLUSION

For the reasons set forth above and in their memorandum in support of jurisdiction, appellants respectfully request that the Court reconsider its January 28, 2009 announcement declining jurisdiction, and accept this appeal for review.

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Respectfully submitted,



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