

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.

: Case No.: 2008-1822
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: On Appeal From the
: Fulton County Court
: of Appeals, Sixth
: Appellate District,
: Case No. 07-024
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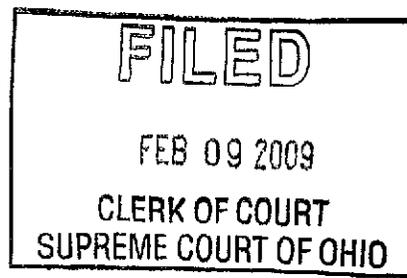
MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION
OF AMICUS CURIAE OHIO CHAMBER OF COMMERCE

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Pursuant to Supreme Court Practice Rule XI, Section 2(B), amicus curiae the Ohio Chamber of Commerce (the “Chamber”) respectfully submits this memorandum in support of appellants United Telephone Company of Ohio and Sprint Nextel Corporation’s (collectively, “United Telephone”) motion to reconsider this Court’s decision not to accept this discretionary appeal.¹

Permitting the panel’s decision below to stand will make Ohio the only state or federal court system in the country to allow “fail-safe” classes. This will have an extremely negative impact on the Chamber’s members. The plaintiffs-appellees Kent and Carrie Stamm, and Stammco, LLC (collectively, “the plaintiffs”) do not dispute that such classes have been rejected everywhere else, and allowing them in Ohio will put this state at a competitive disadvantage. Any business with multiple numbers of similar transactions will be subject to class actions on the grounds that any of its business practices had allegedly resulted in harm to some, but not all, of its customers.

The Chamber is aware that this Court’s authority to reconsider should only be used 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). The plaintiffs, however, admitted in their memorandum in opposition to jurisdiction that their purported class is, in fact, a “fail-safe” class, and misstated relevant facts and applicable law, which may have impacted the Court’s decision to decline jurisdiction. Moreover, additional cases have been issued in support of United Telephone’s position since its

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.

appeal was filed. None of these issues could have been addressed in United Telephone's or the Chamber's earlier memoranda.

I. The Chamber has an important interest in this litigation.

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.

II. Many United Telephone customers authorized third-party services, and the plaintiffs try to avoid this fact by defining a "fail-safe" class.

The panel below is the first and only time that 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. The plaintiffs receive local phone service from United Telephone at their home and business. United Telephone 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. It is undisputed that United Telephone's billing practices do not themselves cause harm – it is a neutral practice. Most charges are unquestionably legitimate, and if one were proved ultimately to be unauthorized, it would be as a result of the conduct of one of thousands of third parties, not United Telephone.

The plaintiffs 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 that some of the third-party charges on their phone bills, such as those from MCI, were legitimate, and the plaintiffs do not seek recovery for those charges. Whether the other charges were in fact authorized is a vigorously disputed issue, and the available evidence suggests that the plaintiffs authorized many of the charges about which they currently complain. Moreover, the plaintiffs also admit that many of United Telephone's other customers authorize and receive legitimate third-party services, and thus have not been caused any harm. Memo. in Opp. to Juris. at 8 (“There are instances where third-party charges were authorized and hence were genuine.”).

The plaintiffs do not dispute that Ohio and federal courts have uniformly held a class cannot properly be certified unless causation and actual harm can be determined on a class-wide basis. To try and avoid this issue, the plaintiffs conceded in their memorandum in opposition that their purported class only consists of customers who have actually received improper, unauthorized charges, as opposed to all customers who received third-party charges generally:

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.

* * * *

The class members were duped into paying for something they never received or never authorized.

* * * *

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 7, 8, 11; see, also, Appellee Br. to Sixth District, at 19 (“Although not every third-party charge on a Sprint customer’s bill is unauthorized, only those customers with unauthorized charges are class members.”). This class definition assumes wrongdoing, i.e., that only customers who received unauthorized charges are class members, and it is impossible to identify class members without thousands of mini-trials regarding the merits of the action.

III. With the exception of the decision below, “fail-safe” classes have been uniformly rejected by every court in the United States.

The plaintiffs, however, cannot circumvent the lack of predominance caused by the admitted absence of class-wide harm simply by defining their class as that subset of class members who were actually harmed. With the exception of the panel below, courts hold that a party may not define a class by the merits of the action to avoid individualized issues.

Membership in such a class cannot be determined until after liability determinations are made. This is known as a “fail-safe” class. For example, the plaintiffs concede that “a class of homeowners who were charged an artificially fixed and illegal brokerage fee would be improper” because the class is defined by its merits. Memo. in Opp. at 12 (internal quotations omitted). Likewise, the plaintiffs’ class definition here – which only includes customers who received unauthorized, improper charges – is a classic example of a “fail-safe” class. Moreover,

since the notice of appeal in this action was filed, additional decisions have been issued that are critical of such “fail-safe” classes that are defined by merits of the claims at issue.²

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. This allegation could be made about almost every business practice. 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. 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. This decision also 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.

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. Moreover, businesses would be liable for the improper or fraudulent practices

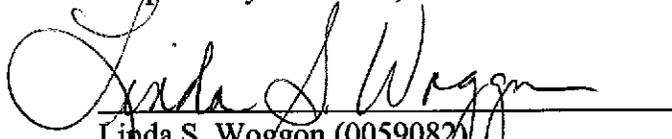
² See, e.g., *Velasquez v. HSBC Finance Corp.* (Jan. 16, 2009), N.D. Calif. No. 08-4592, 2009 WL 112919 (fail-safe classes are improper because they are improperly defined by the merits of their legal claims, and are therefore unascertainable prior to a finding of liability in the plaintiff’s favor); *Merritt v. Wellpoint* (Jan. 16, 2009), E.D. Virg. No. 3:08-CV-272, 2009 WL 122756 (same); *Mims v. Stewart Title Guaranty Co.* (Dec. 11, 2008), N.D. Tex. No. 3:07-CV-1078-N, 2008 WL 5516486, at *4 (“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.”).

of other businesses of which they have no knowledge. The impact of permitting class actions such as this is massive.

CONCLUSION

This case involves matters of public and great general interest, and involves substantial constitutional questions. For the reasons set forth above and in its initial briefing, the Chamber respectfully requests that the Court reconsider its January 28, 2009 announcement declining jurisdiction, and accept this appeal for review.

Respectfully submitted,



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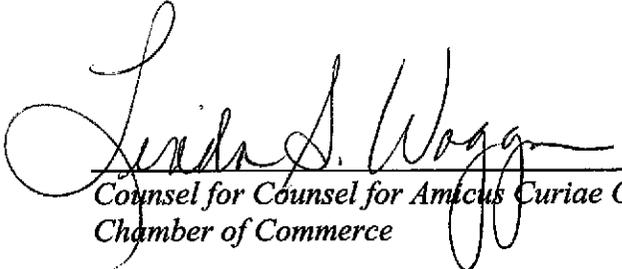
I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following
counsel on this February 9, 2009:

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