

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Plaintiffs-Appellees,

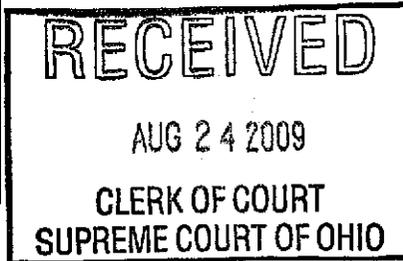
vs.

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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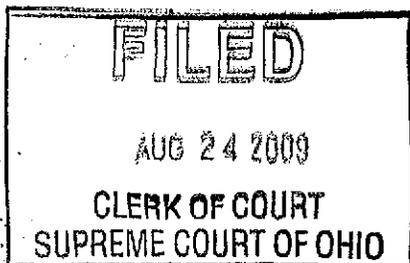


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I. PROCEDURAL BACKGROUND

Appellees, Plaintiffs below, sought the certification of a class of telephone subscribers defined as:

All individuals, businesses or other entities in the State of Ohio who are or who were within the past four years, subscribers to local 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.

Class certification was granted by the trial court pursuant to its Judgment Entry of September 28, 2007 and upheld on appeal by a unanimous decision of the Sixth District Court of Appeals on August 1, 2008.

Appellants filed a Notice of Appeal and a Memorandum in Support of Jurisdiction with this Court on September 15, 2008 listing two Propositions of Law. The jurisdictional memorandum challenged the description of the class certified as an improper “fail safe” class. The memorandum also challenged the Court of Appeals’ affirmation of the class certification under Civ.R. 23(B)(3)’s predominance requirement. This Court declined jurisdiction to hear the case by Entry on January 28, 2009, by a vote of 4-3.

Thereafter, Appellants filed a motion to reconsider that decision on February 9, 2009, solely on the contention that the class definition certified by the trial court and upheld by the Court of Appeals was a “fail safe” class. This Court then accepted jurisdiction in a Reconsideration Entry of March 25, 2009, by a vote of 4-3. Appellees, in a Motion to Dismiss, advised this Court that the class description was never challenged as a “fail safe” class by Appellants in the Court of Appeals, contending that Appellants had waived this argument. Appellees also noted that Appellants merit brief contained arguments regarding Civ.R. 23(B)(3)’s superiority requirement and the manageability of the class, issues that were never

argued, mentioned or alluded to in Appellants' jurisdictional briefing. Appellees sought in an alternative motion, to strike the arguments relating to these specific issues.

Nevertheless, this Court issued a ruling on August 4, 2009 denying Appellees' motion in total. Three Justices dissented and would have granted the motion to dismiss. A fourth Justice sought to have stricken pages 22-26 of Appellants' merit brief, correctly striking that portion of their brief which contains the arguments related to superiority and manageability of the class. In fact, therefore, only three Justices voted to deny Appellees' motion in its entirety.

This Court observes the "rule of four" derived from Section 2(A), Article IV of the Ohio Constitution which states: "A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment." From this provision, this Court has consistently applied the "rule of four," by which a minimum of four votes is needed for the Court to act. *Rocky River v. State Emp. Relations Bd.* (1989), 41 Ohio St.3d 602, 609. Based upon the votes of the members of this Court, however, it is apparent that the majority of the Court has agreed that the issues of superiority and manageability of the class (pages 22-26 of Appellants' Merit brief) are not properly before the Court. The only issues properly before the Court are those that have been allowed in by the majority – i.e. the question of the "fail-safe" class definition and Appellants' arguments pertaining to predominance. Appellees, nonetheless, will address the subjects of superiority and manageability in this Merit Brief because they must do so.

II. STATEMENT OF THE CASE

The issue of class certification has been thoroughly and extensively briefed. The court of appeals and the trial court made a detailed analysis of the facts, arguments and the law. The courts below gave thoughtful consideration to all of the relevant factors necessary to certify a class, and found that they were present in this case.

The class certified is not a “fail safe” class. The class definition contains no assumptions as to the merits of the class members’ claims and is not dependent upon finding that the defendants are liable. Members of the class will be bound by the final judgment, whether favorable to the class, or not.

To be a member of the class and to recover on their claims, all members of this class must have been billed by Sprint on their local telephone bill for an unauthorized charge that Sprint purchased from a third party. The class member must have paid the charge that was billed. It is undisputed that Sprint does not require authorization from its customers to allow this third-party billing. Furthermore, with the exception of certain toll charges, Sprint will not allow its customers to prevent or to “block” unauthorized third-party charges from being billed to them by Sprint. Sprint does not independently verify the validity of the accounts it purchases and for which it charges the class members. Contracts that Sprint has with the third-party vendors and/or billing clearinghouses, (companies that aggregate the bills of many vendors to submit to Sprint) would purport to shift the responsibility to these third parties to seek class member authorization for the item or service allegedly purchased. However, the customers/class members are not parties to these billing contracts between Sprint and third parties. This action, and the class, is appropriately defined by the affect of Sprint’s actions toward the class members.

III. STATEMENT OF ADDITIONAL FACTS

This case is about “cramming”. Cramming is a serious problem in the telecommunications industry. However, many, if not most, consumers are not aware that it is being done. “Cramming”, quite simply, is the practice of causing unauthorized charges to be placed on a customer’s telephone bill. It is a *very* lucrative business for those involved. Many states have enacted legislation to protect their consumers from this fraud and the Federal

Communications Commission has issued guidelines for local telephone providers to enhance consumers' ability to detect cramming. Attorneys General throughout the United States are taking on many of the entities involved, including the third-party billers, billing aggregators, and the telephone companies. In the real world, this type of practice is all part of a growing trend where large companies allow fraudulent businesses to use customer's accounts to steal millions of dollars. Many states have legislative provisions which mandate that customers have the right *to block* unwanted cramming *or* to require *prior approval* by the customer before a third party charge can be placed on the customer's telephone bill. Many states in which Sprint operates provide such logical protections to telephone customers. In those states, but not in Ohio, Sprint complies. No such legislation has been enacted in Ohio and so Sprint does not provide such logical protection to class members.

United Telephone Company of Ohio ("UTO"), under the name of Sprint (and now Embarq), provides local and long distance telephone service to more than a million consumers throughout Ohio. Billing activities for UTO and all of the local telephone companies that had formerly made up Sprint Local Telecommunications Division ("Sprint LTD") are processed centrally through a billing system managed by what is now known as Embarq Management Company ("Embarq"). (McAtee Dep. 13-14, 2nd Supp. at 158).¹ As a telephone service provider, Sprint is a public utility and has a duty to the public to provide accurate bills to its customers. Rest. Torts § 552(3).

The bills sent to Sprint's local telephone customers often include charges billed by Sprint that are initiated by unrelated third parties for items or services which have nothing to

¹ For convenience, the entities known as "Sprint Corporation", "Sprint LTD", "United Telephone Company of Ohio" and "Embarq Management Company" will be referred to collectively as "Sprint".

do with Sprint's provision of local or long distance communications. The charges of which the class complains appear on Sprint customers' bills without any permission or knowledge. They are charges which provide no benefit to the class. Sprint contracts with large billing clearinghouses or billing aggregators, who provide their "charges" to Sprint on behalf of a large number of other third parties. (Davis Dep. 20-22, 51, 2nd Supp. at 163-164, 167). Sprint charges fees for billing services for these clients which are set based upon the volume of the billing items and the collection history of the clients. It is important to note that Sprint maintains detailed computer records which show which of these third party "providers" are abusing Sprint's own customers. (Davis Dep. 14, 17-19, 29, 43-44, 2nd Supp. at 162-163, 165-166). In 2005, Sprint had agreements with eight different billing clearinghouses and delivered charges to end user telephone customers on behalf of at least 2,000 different third-party service providers. (Davis Affidavit ¶ 16, Supp. at 118).

Sprint boldly suggests that Sprint's role in this billing process is little more than that of a passive collector, placing a charge on the customer bills and sending it on to the third-party biller once the customer pays. This description disguises the fraud. In fact, Sprint actually purchases the accounts receivable from these third-party vendors, determining the payment amount through an accounting process that it terms "Settlement by Acceptance". (Davis Dep. 40, Supp. At 133). In the settlement process *Sprint* determines the dollar amount of the accounts that third party billers are submitting for *Sprint's* customers; calculates *Sprint's* billing and collection fees; reduces the net amount by any previously billed adjustments or bad debts on telephone customer accounts associated with that third-party vendor, and ultimately determines the payment amount *Sprint will send* to the third-party vendor *for settlement*. (McAtee Dep. 22-23, 26, Supp. At 125, 126). Sprint then bills these third-party charges with the local telephone

bills of its customers and collects the payments from its customers. Sprint uses its special relationship as a provider of local telephone service to “cram” the bills of its customers with unauthorized charges. The question to be decided by the trial court, at the *merits phase* of this case, is Sprint’s liability, if any, for billing practices that have harmed its customers. Sprint has clearly demonstrated to the trial court that it believes that it has *no* liability.

The third-party clients, of Sprint, pay a set service-implementation fee to Sprint; agree to a minimum revenue commitment; and are charged a set amount for *each* transaction processed by Sprint. (Davis Dep. 43-44, 2nd Supp. at 166). Transactions include the charges placed on an end user’s telephone bill as well as any billing adjustments made to that account. (Davis Dep. 45-46, Supp. at 134, McAtee Dep. 56, Supp. at 130). Sprint charges the third party provider an additional set amount of money per transaction as a bill-processing fee; another fee per transaction designated as “inquiry support”; and a flat rate fee for each individual bill sent to its local telephone customer which includes a charge initiated from that third party. (Davis Dep. 36-37, 46-47, Supp. at 132, 133; McAtee Dep. 28-33, Supp. at 126-128).

Sprint refers most of its own customer complaints, dealing with unauthorized third-party billing, *back* to the billing clearinghouse or to the third-party vendor because those parties did not previously agree to pay an *extra* amount to have Sprint handle complaints as to them. This process by which Sprint purports to handle the complaint is what Sprint calls “inquiry support”. The third party has the option to have Sprint handle all customer service calls, known as “full inquiry”, but most do not utilize that service. (Davis Dep. 36-38, 46-47, Supp. at 132-134). So, in reality, those local telephone customers who have questions about third-party charges on their Sprint telephone bills are directed by Sprint to the billing clearinghouse and then to the third-party vendor for “resolution”. When the Sprint customer is unable to get resolution,

the customer eventually ends up back with Sprint. A customer service representative at Sprint might authorize a credit on the customer's bill, although the actual outcome would depend upon what the customer expresses to the Sprint representative and upon which Sprint representative happens to take the call. (Gillespie Dep. 36-37, 2nd Supp. at 174-175). The call could be "escalated" to another representative with "more training" and "experience" if needed. (Gillespie Dep. 16-18, 2nd Supp. at 170-171, Hill Dep. 18-19, Supp. at 140). There is an actual adjustment code in the account representative handbook specifically for credit adjustments resulting from complaints of third party cramming.

When a third-party vendor authorizes a credit for the customer's Sprint telephone bill in response to a complaint, or if a Sprint representative decides to give the customer a credit for the charges, Sprint is paid, yet again for the mere inclusion of this additional line item, the credit for its customer, just as they were paid for the original charge on the bill. (Davis Dep. 57-58, Supp. at 137). This is in addition to all of the other set fees paid by the third party to Sprint for the various billing and collection services that Sprint provides. Sprint also charges each third-party vendor an additional fee for each "escalated" complaint received by Sprint regarding that client's billing. (Davis Dep. 70-71, 2nd Supp. at 168). The actual billing disputes, therefore, generate additional revenues for Sprint. The more the pain to the Sprint customer, the more the revenue for Sprint.

Mr. Stamm received a Sprint telephone bill for his company, Stammco, in October 2004 for service at Stammco's business, the Pop Shop. The bill included unauthorized charges of \$87.98, billed by OAN Services, Inc. which were in turn "billed on behalf of Bizopia." (Amend. Compl ¶ 15, Supp. at 4-5). This line item caused a large enough increase in the monthly telephone bill to induce Mr. Stamm to institute a thorough review of the entire bill.

(K. Stamm Dep. 66, Supp. at 30). Mr. Stamm discovered that he was being billed for web site building and monthly hosting, services which he had never authorized. (K. Stamm Dep. 73, Sup. at 31). In fact, Bizopia never actually provided any services to the Pop Shop, never asked for information about the business to enable it to set up the alleged web site, but continued to bill the Pop Shop through Sprint. (K. Stamm Dep. 74, Supp. at 32). Mr. Stamm discovered that the billing was part of a deceitful telemarketing scheme. Bizopia, after being informed of the deception, refused to issue a credit for the charges. (K. Stamm Dep. 82, Ex. 18, 19, 20, Supp. at 34, 52-59, 2nd Supp. at 179).

Until this time, Mr. Stamm had not been aware that Sprint was billing him on behalf of third parties. The possibility of this type of billing was never addressed with Mr. Stamm prior to beginning his telephone service. (K. Stamm Dep. 56-58, Supp. 27-28).

A concerned Mr. Stamm went back through past billing statements. Mr. Stamm discovered numerous other unauthorized charges on the Sprint telephone bills that had gone unnoticed because they were of much smaller amounts. Those charges were for such services as a never-received seven minute collect call to the Pop Shop's *fax number* from Pittsburgh, Pennsylvania billed by Integretel, Inc. on behalf of AccessOne Comm. (K. Stamm Dep. 125-127, Ex. 22, Supp. at 38-39, 63-67). They also included a nine minute collect call, allegedly from a pay phone in the Pittsburgh area, to Mr. Stamm's residence on a day during the week when no one was at home, which turned out to have originated from a line with a fax machine, billed by OAN Services, Inc. on behalf of Nationwide Connect, Inc. (K. Stamm Dep. pp. 139-142, Ex. 28, Supp. at 85-90, 2nd Supp. at 178). There was also another collect call from the Philadelphia area to the Pop Shop in the evening after the business was closed, billed by OAN Services, Inc. on

behalf of Nationwide Connect, Inc. (K. Stamm Dep. 146-147, Ex. 29, Supp. at 43, 91-95). All of these were bogus. All of them were worthless and all of them had been collected by Sprint.

At one time, Mr. Stamm had an agreement with MCI to provide long-distance telephone service and these charges were included on his Sprint telephone bill. (K. Stamm Dep. 135, Supp. at 41). Reputable long-distance service providers, such as MCI, which appear monthly on billing statements are not the problem. The problem is with the more than 2,000 smaller and less visible companies that Sprint allows to provide single line items on the customer's bill that are easily overlooked by the customer, as long as each single charge is small.

Regulatory bodies, such as the Federal Trade Commission, investigate and actively pursue some of these disreputable companies who profit from illegal cramming along with some local telephone providers. (See *Federal Trade Commission v. Nationwide Connections, et al.*, Case No. 06-80180-CIV-RYSDAMP/VITUNAC (S.D. Fla.), just recently settled in the District Court after over three years of litigation).² The Federal Trade Commission, through its investigatory process has identified specific third-party vendors that have generated bogus bills for long distance calls that were never made and for which the third party was unable "to provide adequate proof of the integrity of its billing transactions."³ Telemarketing, web-hosting, and billing scams, such as the one purported to be used by Bizopia, have also been

² Sprint now acknowledges that it terminated billing on behalf of the third-party providers involved in that FTC suit upon learning of the allegations raised by the FTC. (See Davis Aff. ¶17 – Supp. at 119). That litigation was brought to the attention of Sprint in April 2007 by Appellees/Stammco in their Motion for Class Certification, but not until after the FTC case had been pending since February 2006, and two years after Mr. Stamm had made his complaints to Sprint in 2004 and 2005 detailing his receipt of unauthorized billings. Documentation provided by Sprint shows that it has had billing and collections agreements with some of these companies for at least eight years previous. This recalcitrance on the part of Sprint points out the nature of Sprint's consumer relationship.

³ See *Federal Trade Commission v. Nationwide Connections, Inc., et al.*, Case No. 06-80180-CIV (S.D. Fla.), First Amended Complaint ¶ 30.

verified by the FTC. See *Federal Trade Commission v. U.S. Republic Communications, Inc., et al.*, Civil Action No. H-99-3657 (S.D. Tex) (describing a similar scheme run by a former corporate officer of U.S. Republic Communications, Inc. who went on to become the CEO of Bizopia).

Sprint has obviously cheated Appellees and the class members by “cramming” their bills with bogus charges it purchased from dishonest third parties. Sprint would not allow the plaintiffs and class members to simply block these bogus third-party charges. This manner of billing by Sprint caused class members to pay for nothing at all.

Sprint has long been aware of the cramming problem and the potential and actual abuse of these billing arrangements. Sprint places almost 200,000 third-party charges, or adjustments, on the bills of Ohio telephone customers *each month*. (McAtee Dep. 47-53, Supp. at 129, 2nd Supp. at 159-160). Of these line items billed, several thousand are monthly credit adjustments made to Ohio customers’ telephone bills. Because these adjustments are driven by customer complaints, it was clear to Sprint that they represent a significant problem for its telephone customers. Furthermore, not all customers who inquire about the authenticity of a specific charge were given a billing adjustment. Many simply paid the bill. (K. Stamm Dep. 98-99, 2nd Supp. at 177). Some customers do not notice a small charge to their account or take the time to inquire about it. (K. Stamm Dep. 101, 2nd Supp. at 177). The breadth of the problem is far beyond the numbers reported by Sprint as adjustments. In its extent and boldness, it is breathtaking.

* * * * *

Sprint gives telephone customers in other states the opportunity to “block” such third-party vendor charges. (Gillespie Dep. 25, 30-31, 2nd Supp. at 172-173). In one, non-Ohio,

state Sprint representatives are allowed to proactively offer a block when a customer inquires about a charge. In other non-Ohio states, where the third-party block is available, the representative may only reactively offer the block when a customer calls and somehow indicates that he wants to be able to stop the unauthorized charges. (Gillespie Dep. 26-29, 2nd Supp. at 172-173). Sprint will not provide the option to block third-party charges for any customers who happen to live in Ohio. (Gillespie Dep. 38-39, Supp. at 123). Every Ohio customer of Sprint must surrender to the prospect of having these unauthorized bogus charges appear on their phone bills without any authorization required, and are forced to go through Sprint's protracted dispute resolution process to have the unauthorized charges taken off their bills. *If* the customer even notices the charge in the first place.

IV. LAW AND ARGUMENT

STANDARD OF REVIEW FOR CLASS CERTIFICATION DECISIONS

A decision by a trial court to certify a class "will not be disturbed absent a showing of an abuse of discretion." *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St.3d 67, 70, quoting *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, 31 OBR 398, 509 N.E.2d 1249, at the syllabus; *Baughman v. State Farm Mut. Auto Ins. Co.* (2000), 88 Ohio St.3d 480, 483. A trial court possesses broad discretion in determining whether a class action may be maintained. That determination will not be disturbed absent a showing that the discretion was abused. *Baughman*, 88 Ohio St.3d at 483. The trial court's decision regarding the certification of a class should not be reversed on appeal because the appellate judges would have decided the issue differently had the initial determination been in their hands. *Hamilton*, 82 Ohio St.3d at 70-71.

As this Court recognized in *Hamilton*:

[A]ppellate courts overwhelmingly, if not universally, give trial courts broad discretion in deciding whether to certify a class. See, generally, 5 Moore's Federal Practice (3 Ed.1997) 23-25 to 23-27, Section 23.04. Moreover, the appropriateness of applying the abuse-of-discretion standard in reviewing class action determinations is grounded not in credibility assessment, but in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket. *Marks, supra*, 31 Ohio St.3d at 201, 31 OBR at 399, 509 N.D.2d at 1252; *In re NLO, Inc.* (C.A.6 1993), 5 F.3d 154, 157.

Hamilton, 82 Ohio St.3d at 70.

Proposition of Law No. 1: A Class Definition That Describes It's Members As Those Who Have Suffered The Same Kind Of Harm Is Properly Defined.

A. The Class As Certified Is Not A Fail-Safe Class, Therefore Sprint's Argument Has No Merit

When asking this Court to accept this case for review, Sprint made the outrageous statement that "permitting the panel's decision below to stand will make the Sixth District the only state or federal court to allow fail-safe classes." Sprint's argument that this class, as defined, is a fail-safe class must be rejected. To clearly comprehend the flaw in Sprint's argument, there must first be a solid understanding of the concept of a fail-safe class.

1. What Is A Fail-Safe Class?

The first case found to describe a fail-safe class is *Dafforn v. Rousseau Associates, Inc.* (N.D. Ind. July 27, 1976), Civil No. F 75-74, 1976 U.S. Dist. LEXUS 13910, 1976 WL 1358, 1976-2 Trade Cases P 61, 219. That case involved antitrust claims asserted on behalf of a class defined as "all sellers of previously occupied single-family dwellings located within Allen County, Indiana, who sold said dwellings, and . . . pay[ed] an artificially fixed and illegal brokerage fee." The court properly took issue with the term "illegal brokerage fee", holding that membership in the class could not be determined until it was determined whether the contested fees were illegal. The court correctly reasoned that if it was found that the

contested fees were not illegal, the class as defined would not include anyone. The notion, adopted by *Dafforn*, was that the class would “disappear” by a final disposition on the merits of the underlying cause of action, if liability was decided adversely.

The case law that has since evolved discusses such “fail safe” classes by tying the fail safe concept to the requirement that a class must be identifiable when certified, i.e. a court must be able to determine from the description of the class whether a particular individual is a member. “An identifiable class exists if its members can be ascertained by reference to objective criteria. The order defining the class should avoid subjective standards (e.g., a plaintiff’s state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against). Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION, Fourth, § 21.222, Definition of Class (2004).

A fail-safe class has certain attributes which are universally recognized. By definition, a fail-safe class is not objective and membership in the class cannot be determined until a final determination of liability. See *Newton v. Southern Wood Piedmont Co.* (S.D. Ga. 1995), 163 F.R.D. 625, 632, *aff’d*, (11th Cir. 1996) 95 F.3d 59; *Gomez v. Illinois State Bd. of Educ.* (N.D. Ill. 1987), 117 F.R.D. 394, 397; *Joseph v. General Motors Corp.* (D. Colo. 1986), 109 F.R.D. 635, 639. A fail-safe class is defined by criteria that are subjective and first require an analysis of the *merits* of the case, or the underlying liability. See *Simer v. Rios* (7th Cir. 1981), 661 F.2d 655, 669 (affirming denial of class certification because identifying class members based on each individual’s state of mind would be a “Sisyphean task”, [a task that would be unending or hopelessly repetitive]). A fail safe class definition is framed as a legal conclusion and therefore the trial court has no way of ascertaining whether a given person is a member of the class until a determination of ultimate liability as to the defendant is made. See *Adashunas v.*

Negley (7th Cir. 1980), 626 F.2d 600, 604 (holding trial court properly denied certification of class of children with improperly identified learning disabilities who are not receiving special education); *Dunn v. Midwest Buslines, Inc.* (E.D. Ark. 1982), 94 F.R.D. 170, 172 (denying certification of class of “those who have actually been discriminated against” because the class has no limits until conclusion of trial on the merits); *Hagen v. City of Winnemucca* (D. Nev. 1985), 108 F.R.D. 61, 63 (finding certification inappropriate for class defined to consist of all persons whose constitutional rights had been violated by city’s prostitution policies); *Indiana State Employees Ass’n, Inc. v. Indiana State Highway Comm’n* (S.D. Ind. 1978), 78 F.R.D. 724, 725 (denying certification of class of injured persons because definition was framed as a legal conclusion).

A fail-safe class inevitably creates one-sided results. Proposed class members are bound only by a judgment favorable to plaintiffs, but not by an adverse judgment. A finding of no liability for the defendant logically means that the class does not, in fact, exist. Therefore, the adverse decision on the merits binds only the class representative. See *Dafforn*, 1976-2 Trade Cases 61 at 219 (holding that because class would consist of only those homeowners who paid illegal fees, a jury determination that defendants did not charge illegal fees would mean there was no class). Fail safe classes are not permitted because they present a means of risk-free litigation for the potential members of the class. *Intratex Gas Co. v. Beeson* (Tex.S.C. 2000), 22 S.W. 398, 405.

2. How Has Ohio Traditionally Looked At Fail-Safe Classes?

Ohio courts have not explicitly discussed class certification using the term “fail safe”. In fact, only one recent decision by the Sixth District⁴ contains the actual words “fail safe”. However, in most instances, including this case, reviewing courts analyze these “fail safe” attributes as part of the rigorous analysis demanded by Civ.R. 23. Ohio courts look carefully at the manner in which the class is defined to make sure that the class definition is unambiguous and framed in a way that allows the class members to be identified with reasonable effort based only upon the definition. *Stammco LLC v. United Telephone Co. of Ohio*, 2008-Ohio-3845 at ¶¶29-31.

To maintain a class action under Civ.R. 23, there must first be an identifiable class with an unambiguous definition. *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91. “The focus at this stage is on how the class is defined.” *Hamilton*, 82 Ohio St.3d at 74. “[I]dentifiability requires clarity in the class description.” *Brandow v. Washington Mutual Bank* (C.A.8), 2008-Ohio-1714 at ¶ 17. The description of the class must be “sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.” *Id.*, at 71-72; *Simmons v. American General Life and Accident Insurance Co.* (C.A.6 2000), 140 Ohio App.3d 503, 508, citing 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* (2 Ed. 1986) 120-121, Section 1760.

This Court has spoken to the issue of deference to lower courts’ well-reasoned opinions on numerous occasions. *Stare decisis* directs that future rulings be able to be made in a predictable manner. This Court should stand by the precedents established in its prior decisions.

⁴ In *Miller v. Volkswagen of America, Inc.*, 2008-Ohio-4736 at ¶¶ 27-29 the Appellate Court rejected the defendant’s contention that the class certified was a fail-safe class after concluding that the class was identifiable with reasonable effort and would still exist even if the defendant was not found liable.

“Civ. R. 23 does not require a class certification to identify specific individuals who are members so long as the certification provides a means to identify such persons”. *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St. 3d 56, 63, citing 7A Wright & Miller, *Federal Practice Procedure* (1973) 115, 118 Section 1760; see also *Warner*, 36 Ohio St. 3d at 96, 521 N.E. 2d at 1096.

“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.” *Hamilton*, 82 Ohio St.3d at 73, quoting *Planned Parenthood*, 52 Ohio St.3d at 63 (emphasis added). However, it is not necessary that the class certification order identify the exact means by which class membership will be ascertained.” *Radatz v. Fed. Natl. Mtge. Assn.* (CA.8), 176 Ohio App. 3d 319, 326, 2008-Ohio-1937.

A class may be maintained despite difficulties in identifying and locating specific class members. Whether or not *each* individual class member can be found, has no bearing on whether membership in the class of a specific individual can be established by the Court by means of the class description. It may be necessary to use multiple sources of information to find some class members and to provide “the best notice practicable under the circumstances” to all others. See Civ. R. 23(c)(2) and *Reed Estate v. Hadley* (CA.4), 2007-Ohio-5462 at ¶¶ 38-42 (noting that identification of some class members may be accomplished by using the defendant’s business records supplemented with other information found in records of the probate court). “[W]hile identification of the class members may take some time and effort ***, the task is not unduly difficult.” *Id.* at ¶ 41. The question is simply whether the class definition is adequate to make these identifications without a separate finding of the merits of the case.

At the class certification stage, issues going to the merits of the action may not be determined. *Ojalvo v. Bd. of Trustees of Ohio State Univ.* (1984), 12 Ohio St.3d 230, 233, 12 OBR 313, 466 N.E.2d 875, citation omitted. However, a class is not ambiguous merely because individualized factual determinations will be needed to determine whether each potential claimant meets the class criteria. *Warner*, 36 Ohio St.3d at 96. The trial court should look to the actions or practices of the defendant in order to define the class. *Hamilton*, 82 Ohio St.3d at 73.

A class definition is improperly ambiguous if the court would have to examine the facts and determine an ultimate issue of the claim asserted to ascertain if each individual is a member of the class. In order to determine membership in a class that is defined as those who are “legally injured” it would require an impermissible analysis of the merits of the legal claims of potential members. *Bungard v. Ohio Dept. of Job & Family Services* (C.A. 10), 2006-Ohio-429 at ¶ 15 (refusing to certify a class of individuals “who did not received services in compliance with all state and federal support requirements.”).

In upholding a trial court’s refusal to certify a class of “all 174,000 past and present Ohio Wal-Mart employees” in a case alleging wage and hour violations for missed breaks and working “off the clock”, the Second District Court of Appeals recognized that this class definition was overly broad. *Petty v. Wal-Mart Stores, Inc.* (C.A. 2 2002), 148 Ohio App. 348, 354, 773 N.E.2d 576. “[T]his class is impermissible because it has been expanded beyond a rational relationship to the plaintiff’s theory of recovery.” *Id.*

As defined, the persons who were exposed to the conduct would be a subset of the class rather than the class. If this type of class were permitted, plaintiffs would be able to define a class as broadly as possible in the hope of netting a certain percentage of injured members. This practice would render the class action vehicle unduly cumbersome, and ultimately ineffective. Without a definition of the class *related to the plaintiff’s theory of recovery*, the trial court would have to conduct individualized inquiry with

respect to each individual's exposure to the alleged conduct of Wal-Mart in order to determine whether that individual was the subject of tortious conduct by Wal-Mart, which would obviate the purpose of class actions. (Emphasis added.)

Petty, 148 Ohio App. at 354.

However, in a strikingly similar Wal-Mart case in the state of Washington, a court of appeals upheld certification of a similar class defined as “[a]ll current and former hourly paid employees of Wal-Mart Stores, Inc. (including Wal-Mart Stores, Supercenters and Sam’s Clubs, but excluding distribution centers) in the state of Washington who worked off the clock without compensation and/or worked through any part of a rest or meal break from September 10, 1997 through the date judgment is entered in this action and who have not held a salaried management position with Wal-Mart at any time during that period.” *Barnett v. Wal-Mart Stores, Inc.* (Wash.App.Div. 1 2006), 133 Wash.App. 1036, 2006 WL 1846531 at * 2. Of particular note is the Washington court’s analysis. In distinguishing the *Petty* Wal-Mart case, *Barnett* held that the Washington definition is permissible because it does not depend on a resolution of the liability issue that these employees were working without *statutorily required* compensation. *Barnett* correctly observed that liability did not turn on the factual determination that any employees worked off the clock or did not get proper breaks. Liability turned on whether Wal-Mart knowingly permitted or required work without compensation. “Simply crafting the class definition in terms of the plaintiffs’ claims did not make the definition merits based. *Id.* at * 4.

Also of note in *Barnett*, is the Washington court’s rejection of Wal-Mart’s argument that this definition improperly creates a “fail safe” class. “Here, Wal-Mart can prevail by refuting the allegations of improper employment practices that resulted in wage and hour law violations, because liability turns on Wal-Mart’s knowledge and actions, rather than the fact that an employee worked off the clock or missed meal and rest breaks. The latter outcome would

not create a situation where no class existed because employees who allegedly worked off the clock would be bound by a finding that Wal-Mart neither required nor permitted such work, unless they opted out of the class. *Barnett* at * 4-5.

A class definition that creates an identifiable class will, as a practical matter, be based upon objective criteria. In order for the class members to be determined at the time of certification, the definition may not be framed as a legal conclusion or one that is based upon the merits of the case. This is consistent with the rationale against certifying what other courts describe as a fail-safe class.

3. What Have The Federal Courts And Other States Said About Fail-Safe Classes?

In interpreting and applying Civ.R. 23, the Ohio Supreme Court has held that, because the Ohio rule is virtually identical with Fed.R.Civ.P. 23, “federal authority is an appropriate aid to interpretation of the Ohio rule.” *Marks v. C.P. Chemical Co.* (1987), 31 Ohio St.3d 200, 201, 509 N.E.2d 1249.

Federal courts agree that “fail safe” classes consisting of members who cannot be identified, unless the defendant is found liable after trial, are improper. Recent decisions from district courts across the country effectively illustrate this concept. The inclusion of a liability component in the class definition prevents the plaintiff from establishing that a class is “precise,” “objective,” and “presently ascertainable.” *Brazil v. Dell, Inc.* (N.D.Cal. 2008), 585 F.Supp.2d 1158, 1167, citing *O’Connor v. Boeing North American, Inc.* (C.D.Cal. 2000), 197 F.R.D. 404, 416. Thus, a class defined as those individuals who made purchases based on a defendant’s *false advertising* cannot be ascertained until after the court reaches a legal determination that the defendant had falsely advertised. *Id.* However, a class of homeowners who refinanced an existing mortgage and were charged a premium for a new lender title insurance policy and did

not receive a refinance credit is not defined in a circular or “fail safe” manner. *Mims v. Stewart Title Guaranty Co.* (N.D.Tex., Dec. 11, 2008), 254 F.R.D. 482, 486. The *Mims* court instructed:

The Plaintiffs proposed class is not defined in a fail safe, liability-based manner. 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. In this case, the Plaintiffs’ class definition does not involve any elements of liability, but is instead exclusively based on objective criteria: whether a person sought to refinance or replace an existing mortgage within 7 years, whether or not they were charged a premium by [the defendant], and whether or not they received a refinance credit.

Id. Certifying a parallel Ohio class of borrowers who refinanced the mortgage on their homes, Chief Judge Carr stated that the final decision on the merits of the claims asserted will be based on a judicial interpretation of the language of the schedule of insurance rates. “However I finally interpret this language, my ruling will apply to all members of the proposed class.” *Randleman v. Fidelity National Title Insurance Co.* (N.D. Ohio 2008), 251 F.R.D. 267-279.

A detailed analysis of a challenged class definition was made by the District Court in *Allen v. Holiday Universal* (E.D. Penn. 2008), 249 F.R.D. 166. The *Allen* court’s findings are very instructive, as they parallel the challenges made by Sprint in this action. The Plaintiffs in *Allen* sought certification of a class of “all persons who, on or after December 7, 1998, entered into a contract for health club services with health clubs * * * that required the payment of a membership fee in excess of \$100.00.” The defendant health clubs asserted that the class definition was defective because it was overly broad and a “fail safe” class. *Id.* at 170-71. The defendants contended that the definition was overly broad because it included: (1) health club members who were not damaged because some health club members may have accepted the benefits of their contracts, and (2) current members who might not wish to void their contracts. *Id.* at 171. Recognizing that many courts have held that a class definition is

overly broad where the class encompassed persons who had not suffered any injury⁵, the *Allen* court correctly observed that, nevertheless all persons included in this class definition suffered an injury. *Id.* at 171-72. If the initiation fees charged were in violation of the law, “then all persons who paid those fees have been injured, regardless of whether they personally view the fees as excessive or wish to void their contracts.” *Id.* at 172. The health clubs’ additional argument that the class definition is overly broad because liability could depend upon the application of an affirmative defense of ratification, which, in turn, would depend upon the circumstances and actions of each individual member, was also rejected by the court. The “ratification argument does not preclude class certification because ratification is relevant to *damages*, not liability.” *Id.* at 172 (emphasis in original). The *Allen* court held that this is not a fail-safe class that addresses the central issue of liability to be decided in the case. “Thus, the rule against one-way intervention – where a class is bound only by a favorable judgment – is not violated.” *Id.* at 175.

A federal bankruptcy court in Texas recently certified a class of individuals who were charged unauthorized fees. *Wilborn v. Wells Fargo Bank, N.A.* (S.D.Tex., March 24, 2009), 404 B.R. 841. The class definition approved by the Court consists of:

All individuals who filed for bankruptcy under Chapter 13 in the Southern District of Texas between November 16, 2002 through November 16, 2007 who owed Wells Fargo, as servicer or holder, on a mortgage debt secured by real property, and upon whom Wells Fargo either charged, or both charged and collected, professional fees and costs during the pendency of each of their respective bankruptcy cases which were never disclosed to this

⁵ See *Owen v. Regency Bluecross Blueshield* (D.Utah 2005), 388 F.Supp.2d 1318, 1334 (“[T]he proposed definition of the class is overbroad because many of the proposed class members have suffered no damages.”); *Zapka v. Coca-Cola Co.* (N.D.Ill., Oct. 27, 2000), 2000 WL 1644539 at *3 (holding class definition improper where it included individuals who were not harmed); *Canady v. Allstate Ins. Co.* (W.D.Mo., June 19, 1997), 1997 WL 33384270 (“Because the court cannot accept plaintiffs’ blanket contention that every member of the proposed broad class has allegedly suffered harm as a result of the defendants’ wrongdoing, the court must find that the class definition is overbroad.”).

Court, the debtor, or other parties-in-interest nor approved by this Court by written order entered on the docket in their respective bankruptcy cases.

Id. at 858. Wells Fargo asserted that the plaintiffs had proposed a “fail safe” class definition, addressing the central issue of liability to be decided in the case, which would preclude the possibility of an adverse judgment against class members (the class members either win or are not in the class). *Id.* at 860. The court concluded that the definition does not include a legal conclusion regarding Wells Fargo’s ultimate liability, by stating:

If either definition had included a phrase asserting that Wells Fargo charged or assessed the fees and costs *in violation of Bankruptcy Rule 2016 and Section 506*, then that would have made the definition a fail-safe definition. This is so because adding the phrase “in violation of Bankruptcy Rule 2016 and Section 506” precludes the Court from making a judgment adverse to the Plaintiffs – i.e. a legal conclusion about Wells Fargo’s ultimate liability would have already been made within the definition before the class action is ever tried. Here, neither the Plaintiffs’ proposed class definition nor the current class definition as modified by this Court include language regarding Wells Fargo’s ultimate liability; therefore, the Court concludes that the class definition is not a fail-safe definition.

Id.

These recent federal cases described above, clearly illustrate the concept of liability-based, or merits-based, class definitions that are the essential element of a fail-safe class.

Discussions of the fail-safe class concept can be found in several other state court decisions, as well. Looking to federal case law for guidance, the Colorado Court of Appeals adopted verbatim the description of a “fail safe” class as one where the “proposed class definition is in essence framed as a legal conclusion.” *LaBrenz v. American Family Mutual Insurance Co.* (Col. 2007), 181 P.3d 328, 335, quoting *Indiana State Employees Ass’n v. Indiana State Highway Comm’n* (S.D.Ind. 1978), 78 F.R.D. 724, 725. The class sought to be certified in *LaBrenz* included insureds whose medical services were paid by the defendant under a specific

Explanation Code and health care providers whose medical bills were reduced under that same billing code. The Court held that the fail-safe concept was inapplicable because the definition used neutral terms. Therefore, the Court found that the proposed class definition was not framed as a legal conclusion. The proposed class definition did not require a decision on the merits before membership in the class could be ascertained. These class members need only show that their medical services were paid under the stated Explanation Code.

In one of the frequently cited cases discussing fail safe class definitions, the Supreme Court of Texas analyzes the “fail safe” concept in depth in *Intratex Gas Co. v. Beeson* (Tex 2000), 22 S.W.3d 398. Focusing on the problem of risk-free litigation, precluding proposed class members from being bound by a judgment in favor of a defendant, the Supreme Court of Texas found a fail safe class in those producers of natural gas “whose natural gas was taken by the defendant in quantities less than their ratable proportions” as defined by Texas law. The Court based its decision on the fact that because membership in the class turned on the ultimate issue before the court – whether the defendant illegally took gas nonratably from the class members -- it was necessary to determine liability before identifying the class. *Id.* at 405. Until the court determined whether or not Intratex violated the law, class membership could not be decided. *Id.* This is not the case here, because class membership is based upon the Sprint customer’s receipt and payment of a third-party charge placed on their local telephone bill that was not authorized by the member. Each class member can be determined before the Court rules on any potential liability of Sprint.

Reiterating the importance of proposed class members being bound by a judgment in a fail-safe analysis, the Supreme Court of Texas noted that a class action “was never intended to be an exception to res judicata.” *Citizens Insurance Co. of America v. Daccach* (Tex. 2007),

217 S.W.3d 430, 438. A fail-safe class “is defined as members who succeed on the ultimate liability question.” *Id.* at 459. Even if a class member may elect to decline the remedy in the event of a favorable judgment, a class is not invalid as a traditional “fail safe” class if the class member would still be bound by the judgment. *Id.*

Relying heavily on the Texas *Intratex* case, the Missouri Court of Appeals also upheld certification of two classes of purchasers of Dodge Durangos within specified periods of time whose electric window regulators failed and who did not receive a Bosch motor window regulator as a warranty repair. *Dale v. DaimlerChrysler Corp.* (MO 2006), 204 S.W.3D 151, 161. The Defendant argued that this definition was merits-based because the trial court had made a tentative merits decision that the installation of a Bosch motor power window regulator was the only proper fix. *Id.* at 179. Quoting at length from *Intratex*, the *Dale* Court asked the proper question: “will the class still exist even if the defendant of the class action lawsuit wins at trial?” *Id.* at 179-80. “Here, it is obvious to us that even if it is determined at trial that [DaimlerChrysler] was not liable for its failure to install Bosch motor power window regulators, there would still exist two classes of individuals”. *Id.* at 180.

All of the federal cases and all of the state cases that discuss the concept of a fail-safe class definition agree completely on the attributes of such a class and the characteristics that identify it. There are no disputes about the rationale for prohibiting such fail safe definitions and the policy reasons are clearly defined and logical. Courts in all of the jurisdictions that have discussed this concept accept and cite to the language found in each other’s decisions without question. There should not be any confusion about what constitutes a fail-safe class definition. Ohio should not ignore its prior decisions and the findings of the courts below to stray from the settled jurisprudence already developed in the federal and state courts around this country.

B. Important Reasons Why this Class, as Defined, Is Not A Fail-Safe Class.

On September 28, 2007, the trial court granted Plaintiffs' motion for class certification and certified a class of telephone subscribers "who were billed for charges on their local telephone bills by [Appellant] on behalf of third parties without their permission." *Stammco*, 2008-Ohio-3845 at ¶4. This certification decision was upheld by the Sixth District Court of Appeals in a unanimous decision on August 1, 2008. Initially, it must be noted that Sprint did not raise the issue of the alleged improper class description in its Assignments of Error and the issues presented for review in the Sixth District Court of Appeals. It was not argued in the trial court. This argument, although improperly raised now, has no merit. The class is clearly not a fail-safe class and Sprint's assertion to the contrary is false.

1. The Class Is Not Defined In Terms of Liability.

The class is defined in definite terms that will allow the Court to determine if a particular individual is a member. To be a member of the class an individual, business or other entity must: (1) have subscribed to local telephone service from United Telephone Company of Ohio, d.b.a. Sprint, within the past four years; (2) have been billed for charges on their local telephone bills by Sprint on behalf of third parties; and (3) those charges must have been billed without the telephone subscribers' permission. Whether Sprint's billing practice allows for recovery of damages has yet to be decided. Sprint has consistently and with great vigor and voluminous filings argued that it has *no liability* to the class members, even when they meet these three criteria. In its Notice of Appeal filed with this Court, Sprint continues to describe its third-party billing practices as "neutral", with any blame and any liability for the collection of the unauthorized charges, shifted instead to third parties.

A class definition is not imprecise merely because many questions may need to be answered to determine if a person is, indeed, a member of the class. Any difficulty there may be in identifying the class is not a consideration when determining if an identifiable class exists. The definition in this case contains no merits-based language. The language used does not require a resolution of any disputed factual issue. The class definition is precise enough to permit identification of the members, and does not imply any liability on the part of Sprint for these actions.

2. The Class Will Exist Even if Sprint Prevails on the Merits.

To determine whether a class definition includes a merit determination, a court must decide whether the class would still exist if the defendant prevails at trial. This class most certainly will. Should the court, after hearing the testimony and reviewing the evidence, determine that Sprint has no liability based upon its third-party billing practices, there will still be an identifiable class of telephone subscribers who have been billed by Sprint on behalf of third parties and who have not given permission for this type of billing. The existence of the class has no relationship to the ultimate liability determination. Determining the members of the class does not rest upon a determination of the merits of the cause.

Furthermore, this class will be bound by any future judgment of the courts below, favorable or not. If the courts later find for or against Sprint, this litigation will end. Either Sprint is liable for the damages to the identified class members, or the class members take nothing because they will be barred by res judicata from pursuing any further action. There will be finality in the litigation for these parties.

3. A Decision On the Merits is Not Necessary to Determine Class Membership.

The Court need not answer the ultimate liability question to identify and provide notice to class members. The class members can be identified at the time of certification, based upon objective criteria that have no relationship to the merits of this case. There is no subjective element to the class definition. The class definition is based upon the manner in which Sprint acted toward this ascertainable group of persons, without any need to find that Sprint's actions created any liability for damages to class members. All class members were exposed to the same conduct of Sprint. But, no legal issue needs to be decided to see who is in the class.

Proposition Of Law No. II: A Class Must Be Defined As Those Who Have Been Harmed And To Whom A Defendant May Be Potentially Liable.

Sprint, surprisingly, contends that it is improper to define a class as those who have actually been harmed. To the contrary, a class, where possible, "should be defined upon the basis of the manner in which the defendant acted toward an ascertainable group of persons." *Hamilton*, 82 Ohio St.3d at 73 (citations omitted). "The Rule 23(B)(3) action is the so-called 'damage' action." *Id.* at 79, quoting *Warner*, 36 Ohio St.3d at 95-96. The class action device is appropriate in cases where "it saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *General Tel. Co. of the SW v. Falcon* (1982), 457 U.S. 147, 155, 102 S.Ct. 2364, 72 L.Ed.2d 740. This economy of resources can only be possible when a class is defined as those to

whom a defendant *may be* potentially liable. A class definition that includes those who cannot allege damages will be impermissively overly broad.⁶

There must be a nexus between the action complained of and the legal injury alleged. Including individuals whose claims do not meet this nexus requirement in the class and who are, therefore, not entitled to relief would defeat class certification and present obvious standing challenges. See *Amchem Products, Inc. v. Windsor* (1997), 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (observing the particular dangers of overbroad class definitions in a different context); *Oshanna v. Coca-Cola Bottling Co.* (N.D. Ill. 2005), 225 F.R.D. 575, 580 (denying certification where “class definition is overly inclusive and encompasses millions of potential members without any identifiable basis for standing.”). A class definition consistent with this nexus requirement satisfies this concern.

A class definition that describes its members as those who have suffered the same kind of harm is sufficiently well defined. *Nehmer v. United States Veterans’ Administration* (N.D. Cal. 1987), 118 F.R.D. 113, 124-25. Impermissible ambiguity is not created simply because each class member is not specifically identified at the time of certification. It can easily be determined that the criteria for class membership is met and “the class members here are readily identifiable, since they will identify themselves by filing claims for benefits.” *Id.* at 125.

⁶ See *Noble v. 93 Univ. Place Corp.* (S.D.N.Y. 2004), 224 F.R.D. 330, 341-42 (noting that “certification is routinely granted where the proposed class definition relies in part on the consideration of defendants’ alleged liability.”); *Vincaino v. United States Dist. Court* (9th Cir. Wash. 1999), 173 F.3d 713, 722 (rejecting the notion that defining a class of employees by their common claim to have been injured by their employer’s unlawful actions is “circular” and requires a finding on the merits to identify class members.); *Forbush v. J.C. Penney Co.* (5th Cir. 1993) 994 F.2d 1101, 1105 (holding that to not permit a class to be defined in terms of the legal claims brought “would preclude certification of just about any class of persons alleging injury from a particular action.”)

The present class definition is precise and appropriate. It does not include those persons who could not allege they were harmed. It is not based upon the merits of the action. Sprint's attempt to find fault with the definition must be disregarded.

A. Common Issues Predominate Over Individual Issues In this Action.

There are many common questions of law and fact in this case. "For common questions of law or fact to predominate, it is not sufficient that such questions merely exist; rather, they must present a significant aspect of the case. Furthermore, they must be capable of resolution for all members in a single adjudication." *Marks v. C.P. Chem. Co.* (1987), 31 Ohio St.3d 200, 204. "Moore's Federal Practice at 23-45 sets forth a number of standards that the courts have used to determine predominance: the substantive elements of class members' claims require the same proof for each class member; the proposed class is bound together by a mutual interest in resolving common questions more than it is divided by individual interests; the resolution of an issue common to the class would significantly advance the litigation; one or more common issues constitute significant parts of each class member's individual cases; the common questions are central to all of the members' claims; and the same theory of liability is asserted by or against class members, and all defendants raise the same basic defenses." *Westgate Ford Truck Sales, Inc. v. Ford Motor Co.* (8th Dist.), 2007-Ohio-4013 at ¶ 80.

Simply because a trial court may not be able to gather evidence from a single source to identify the class members and proceed with the litigation does not make a class action unduly burdensome or prevent common issues from predominating over individualized issues. *Radatz*, 176 Ohio App. 3d at 327.

1. Causation and Harm Can Be Determined On a Class-Wide Basis.

Each class member was billed by Sprint for an item or service that was not authorized or received. These charges were placed by Sprint on its customer's local telephone bills. Sprint accepted the billing records and purchased the account receivables from numerous third parties, under agreements that provided Sprint with an added source of income, yet gave inadequate protection to Sprint's telephone customers. The alleged harm resulted when each class member paid unauthorized charges.

Sprint confuses the exercise of determining which telephone subscribers will be members of the defined class, with determination of liability of the defendant upon the merits of the causes of action. Although it may take some effort to identify the class members, once identified, they have all suffered the same harm to which common questions of law and fact apply.⁷ Sprint is a party to detailed billing and collection services agreements with the third parties who create and/or aggregate the records for the charges that end up on Sprint customer's bills. Those billing and collection agreements appropriately require that the third party providers of presubscribed long distance services *register* the customer's authorization with Sprint through a letter of agency, or the customer must contact Sprint directly. Sprint, however, makes no like requirement for the other third party services for which it bills, and it offers its customers no similar protection. Instead, Sprint shifts the responsibility to the third party providers, who agree to cooperate with Sprint in providing responses regarding customer complaints, including class

⁷ Sprint repeatedly attempts to divert our attention from this basic fact by pointing out that some charges which were authorized, such as the long distance service Plaintiffs received from MCI, did not cause class members any harm. Plaintiffs repeat: authorized charges appearing on the telephone bills are not "crammed" and, therefore, are not the subject of this litigation. The questions remain – Did Sprint engage in negligent billing practices? Do Sprint's billing practices constitute a breach of its contractual duty of good faith and fair dealing to its customers? Has Sprint been unjustly enriched?

members. The named plaintiffs will easily be able to identify class members by utilizing Sprint's own computer records and the third-parties computer records as a resource. The trial court can then move on to a trial on the merits and determine liability for or against the entire class.

The manner in which the Sprint entities purchase, place and collect the unauthorized charges on the bills of customers as part of the telephone billing process; the extent of Appellants' knowledge of the "cramming" problem through complaints received and requests from customers for removal of the charges from their bills; and Appellants' actions in response; the availability or not of a third-party billing block when the customer wishes to stop this billing practice – these are all common elements of Sprint's potential *liability* that will *predominate* the inquiry in this action, *after* the determination of class maintainability .

Liability based upon the causes of action pled will be established for all class members by establishing liability on the claims as pled by the named plaintiffs. The fact of damage can be established on a class-wide basis, even though the calculation of actual damages will vary from class member to class member. "[T]he fact of damage question is distinct from the issue of actual damages. Fact of damage pertains to the existence of injury, as a predicate to liability; actual damages involve the quantum of injury, and relate to the appropriate measure of individual relief." *Hoang v. E*Trade Group, Inc.* (8th Dist 2003), 151 Ohio App.3d 363 at 369, quoting *Martino v. McDonald's Sys., Inc.* (N.D. Ill. 1980), 86 F.R.D. 145, 147.

This litigation is not about deciding the validity of each and every third party charge billed to a Sprint customer. Rather, the focus after class certification is on whether Sprint has liability to its customers when it billed for a third-party charge that was not authorized. This is a very important distinction.

Sprint points to *Brown v. SBC Communications, Inc.* (S.D. Ill., Feb. 4, 2009), Case No. 05-cv-777-JPG, 2009 WL 260770, as an example of a “cramming” case that was not certified as a class action by a district court.⁸ First of all, it must be pointed out that the class that the court refused to certify was, on its face, impermissibly defined through a “fail safe” definition. The class was to include all persons “who were improperly billed for cramming charges” by five listed defendants. *Id.* at *2. But more importantly, *Brown* is a decision made at the trial court level, where the court, in its discretion, felt that the plaintiff could not adequately explain how it could effectively determine whether each individual class member actually authorized the charge for which he or she was billed. *Id.* at *4. The trial court, in this case, had no such reservations. If *stare decisis* means anything, this Court must accept the trial court’s decision that *it* has the ability to manage.

In contrast, here the trial court below considering the class certification issues, understood the challenge and determined that the court was up to it. Simply because one task may require elements of individual analysis and may be more time-consuming than another does not make the task impossible. “A court should not ‘determine predominance by comparing the time that the common issues can be anticipated to consume in the litigation to the time that individual issues will require. Otherwise, only the most complex common questions could predominate since such issues tend to require more time to litigate than less complex issues.’”

⁸ Also inapposite is Appellants’ citation to *Andrews v. AT & T* (11th Cir. 1996), 95 F.3d 1014. The predominant issue in that case was whether the appellants were involved in the operation of hundreds of different illegal gambling schemes that used 900 numbers to facilitate caller participation as well as other users of 900 numbers who offered credit cards or information about credit availability through illegal means of solicitation. The focus of the court in that case was upon the task of establishing the legality of each and every scheme that used 900 numbers for solicitation. The sheer number and variations of such schemes, alleged to defraud the public, and the need to show reliance on the misrepresentations made by each class member rendered those cases clearly unsuitable for class treatment. (Other than the fact that the case deals with a telephone company it bears no resemblance to this action.)

Hamilton, 82 Ohio St. 3d at 85, quoting 5 Moore's Federal Practice (3 Ed. 1997) 23-207 to 23-208, Section 23.46[1].

Sprint attempts to shift the factual inquiry away from identifying the class members to instead scrutinizing the relationships and communications between the class members and the third parties, *if* there ever were any, in the first place. By doing so, Sprint attempts to create an artificial sense of factual disparity that does not, in fact, even exist. Class claims will focus only on those actions of Sprint which are common to the class. See *Collins v. International Dairy Queen* (M.D. Ga. 1999), 186 F.R.D. 689 (refusing to decertify a class, despite the need of class members to prove individual economic losses, when the focus would be on the defendants' conduct). Here, class members each stand in the same relationship with Sprint, and each has suffered the same harm through Sprint's erroneous billings, and they have conferred the same benefits on Sprint when unauthorized charges or credits for third parties appeared on their Sprint phone bills. It is a very simple computer generated inquiry which is not only quite simple, but it is routine and the trial court has certified this class with *no reservations*.

This common element of harm for each class member distinguishes this class from the class in *Hoang*, which consisted of Ohio residents with online trading accounts at times when the service was interrupted. In that instance, not every class member would have been injured by an inability to process a stock trade when the computer system shut down. *Hoang*, 151 Ohio App.3d at 369. Our facts are also very different from the class sought to be certified in *Linn*, for Roto-Rooter customers charged an identical "miscellaneous supplies charge" without regard to the cost of any miscellaneous supplies used for that customer. The *Linn* court found that it was possible some class members were harmed by paying too much, while others may have actually received miscellaneous supplies exceeding the amount charged. *Linn v. Roto-*

Rooter, Inc. (8th Dist.), 2004-Ohio-2559 at ¶23. See also *Faralli v. Hair Today, Gone Tomorrow* (N.D. Ohio), No. 1:06 CV 504, 2007 WL 120664 at * 7 (recognizing that a court cannot certify a class that includes individuals who have no claim).

In another “cramming” case, the Sixth Circuit Court of Appeals affirmed a district court’s order granting class certification under federal law for a class of CenturyTel telephone customers who alleged that they were victims of “cramming” and were misled into “paying for services they did not authorize or receive”. *Beattie v. CenturyTel, Inc.* (6th Cir. 2007), 511 F.3d 554, 558. The cramming alleged in that complaint was a charge for WireWatch, a wire maintenance program that CenturyTel offered and for which customers could enroll in via oral communications with a customer service representative. *Id.* In appealing the class certification, CenturyTel made the same arguments as Sprint, regarding predominance, arguing that the “fact of injury is *not* a common issue among class members.” *Id.* at 564 (emphasis in original). CenturyTel further argued that “only those customers who can establish that they did not want or request the WireWatch service can establish CenturyTel’s liability . . .” *Id.* at 566. The Sixth Circuit disposed of the argument by finding that the plaintiffs had raised common allegations of improper billing practice which would allow the district court to determine liability for the class as a whole. The Sixth Circuit stated: “True, each class member will have to show that she did not enroll in WireWatch, but that is relevant, as the district court concluded, to the issue of damages and not liability.” *Id.*

In this case, every unauthorized charge that was paid by a class member resulted in out-of-pocket damages to that class member. Every third-party item included on the bill of a class member, including a credit reversing an earlier charge, resulted in a benefit to Sprint. The larger questions of law, whether or not the billing of unauthorized third party charges gives rise

to liability on the part of Sprint under the legal theories presented by the class, will be resolved for every member of the class without the need to look at the individual facts for each class member.

2. Predominance of Common Issues.

The Court of Appeals correctly concluded, as did the trial court, that the common issues in this case predominate over the individual issues affecting specific telephone subscribers. The Sixth District stated:

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.

Stammco LLC, 2008-Ohio-3845 at ¶ 51. These common issues identified by the Court of Appeals will advance the litigation for all class members by establishing the liability of Sprint under the various alternative causes of action asserted by Appellees. Sprint's contention that the common issues will be of no significance to "proving whether a particular charge was valid" is an attempt at misdirection. Proving whether any one specific charge was valid or not is not the essential part of this litigation. Instead, class members seek to prove that Sprint: 1) breached its contractual duty of good faith and fair dealing, as part of the class subscription agreements, when it billed them for unauthorized charges; 2) was unjustly enriched by payments made by its local class member telephone customers for unauthorized items and services billed by Sprint; and 3)

caused harm to local, class member, telephone customers who paid unauthorized charges that were billed to them by Sprint as a result of the negligent manner in which Sprint conducted its third-party billing practices.

“Common questions need only predominate; they need not be dispositive of the litigation.” *In re Foundry Resins Antitrust Litigation* (S.D. Ohio 2007), 242 F.R.D. 393, 409. However, “it is not sufficient that common questions merely exist; rather, the common questions must represent a significant aspect of the case and they must be resolved for all members of the class in a single adjudication.” *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 313, 15 OBR 439, 473 N.E.2d 822. Moreover, “[i]n determining whether common questions of law and fact predominate, the focus of the inquiry is directed toward the issue of liability.” *Forman v. Data Transfer, Inc.* (E.D. Penn. 1995), 164 F.R.D. 400, 404, citing *Bogosian v. Gulf Oil Corp.* (3rd Cir. 1977), 561 F.2d 434, 456.

“Frequently, numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of wrongful conduct.” *Pyles v. Johnson* (4th Dist. 2001), 143 Ohio App.3d 720, 737, quoting *Vasquez v. Superior Court of San Joaquin Cty.* (1971), 4 Cal.3d 800, 808.

The focus of this case is, as it should be, on **Sprint’s** activities that produce the bills containing the “crammed” charges to its telephone subscribers. These common questions of law and fact are central to the case and will predominate over any individual issues. They will

be resolved with finality for all class members in this adjudication. The Court of Appeals finding of predominance should be upheld.

B. This Class Is Manageable.

The manageability issues raised by Appellants, pertaining to the necessity of particularized fact finding were noted and considered by the Court of Appeals and the Trial Court. The Trial Court granted Appellees' motion for class certification and the appellate court concurred. "Ultimately, we find that the opinion of a highly experienced and respected trial judge regarding the manageability of proposed class action is the best estimation available to us of the administrative and legal impediments to maintaining the action" *Grant v. Becton Dickinson & Co.* (10th Dist), 2003-Ohio-2826 at ¶66.

Sprint's concerns about manageability are merely another smokescreen and a re-hashing of the same issues addressed elsewhere in their brief. For the most part, the factual inquiry described by Sprint is a part of the mechanics of the class member identification process. Locating those Sprint customers who have bogus third-party charges on their bills that have not been reversed is a clerical and ministerial process. When called upon, the telephone subscribers will be able to identify the charges that they know were unauthorized. Inquiry of the third-party billing entities that initiated those charges can easily be made. Many of the specific billing entities are already identified in Sprint's computer records as being problematic. Those that routinely provided Sprint with phony billing items that Sprint included on class member bills can be immediately identified. A review of the cramming complaints received by Sprint customer service operators and the origination of those charges that have been reversed with the reason code of "cramming" will easily uncover the patterns of bogus billings. The process will not be convoluted nor impossible as Sprint contends. As soon as class certification is concluded, we

will move on to the issue of liability. Once that is concluded, the mechanical process of providing a remedy to class members who have been damaged will be efficiently handled with ease.

The liability issues can be addressed on a class-wide basis. Sprint will not be called upon to defend the validity of every charge, just the validity of its billing practices.

C. This Class Action Is Superior to Other Alternatives.

Appellants' assertion that there are multiple procedures superior to a class action is, to put it mildly, preposterous. The suggestion that a telephone customer file an individual action or take a \$2.00 claim to small claims court is, obviously, ridiculous. Even though Mr. Stamm was so upset, when he discovered these bogus charges, that he decided he must pursue such claims, this does not mean that every one of the thousands of other Sprint customers could be equally diligent. The view taken by the trial court is the more realistic one – that the amount of the individual charges are so small that class members would be reluctant to put forth excessive effort. Thousands of small, individual claims would also bog down the court system. The efficiency and economy of a class-wide resolution is far superior.

Requiring its customers to report their billing disputes to the bogus third-party “provider”, or the billing clearinghouse, or *ultimately* to Sprint for any type of resolution is only effective if, before those stages, the customer recognizes the charge as an unauthorized item on their bill. As Appellees have shown, many of these items go unnoticed and are never questioned. Those facts are precisely the reason why Sprint's billing scheme works to the advantage of Sprint and its third-party billers. Unless the customers were made aware of the fact that these false charges were being placed on their Sprint telephone bills and that they needed to look for them, report them, and go through the lengthy process of unending calls for relief, there can be

no relief for the vast, vast majority of class members. Furthermore, if Sprint is so eager to issue full adjustments for virtually all disadvantaged class members, why don't they simply aid the process in the context of this action, by making the customers aware of the problem, so that they can seek adjustments? Or why did they/do they not permit Ohio customers to have the same blocking protection offered by Sprint in other states?

This class action is also superior to asking customers to take their complaints about third-party charges to governmental agencies. Appellees do not suggest that complaints should *not be made* to agencies such as the Public Utilities Commission, the Attorney General, and/or the Federal Trade Commission. They should do so. Yet when Mr. Stamm took this route he nevertheless obtained no relief. The lack of an acceptable remedy from the governmental agencies was the reason why Mr. Stamm initiated this class action. (Stamm Depo. pp 92-96 Supp. at 36-37). And, again, only those Sprint customers who are aware that they are the victims of "cramming" will be able to complain to anyone.

The limitations of these suggested alternatives prove that a class action is truly superior.

APPROPRIATE ACTION BY THIS COURT

The case law is clear and the aspects of this case which Sprint attempts to dispute are covered by well-settled law. There is no further reason for this Court to further review the decisions of the courts below.

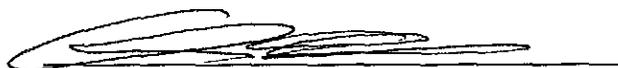
If this case did not proceed as a class action, Sprint would retain the benefits that it reaped, to the detriment of its vulnerable customers. These customers would have no other recourse. On the other hand, should class certification be upheld, Sprint will lose nothing more than what it should not have taken in the first place, further limited by the time period encompassed by the applicable statute of limitations.

Upon a finding that the class is properly defined and not a fail-safe class, as a matter of law, the case should be returned to the trial court. The trial court can then continue with the determination of liability on behalf of the class certified.

In the alternative, should this Court ultimately disagree with the trial court and the Court of Appeals that this class is properly certified, the appropriate result would be to remand the case to the trial court to redefine the class in accordance with this Court's opinion. "[A]ny claimed defect in a proposed class definition is not grounds to deny class certification. If there is a problem with the proposed class, the class can be redefined by the court." *Baughman*, 88 Ohio St.3d at 484.

In fact, this Court should dismiss this case, now, as having been improvidently allowed in for review. *Stare decisis* would allow for no other conclusion. This is a routine commercial consumer class action. The Courts below have done precisely what they were required to do by Rule and by this Court's decisions. Both of the decisions from below are precise, correct and exhibit a true dedication to following established precedent.

Respectfully submitted,



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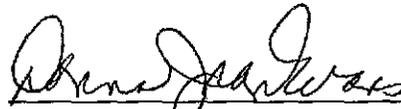
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