

ORIGINAL

IN THE SUPREME COURT OF OHIO

STAMMCO LLC d/b/a THE POP SHOP, et al.	:	Case No. 2008-1822
	:	
	:	
Plaintiffs-Appellees,	:	On Appeal From the
	:	Fulton County Court
	:	of Appeals, Sixth
	:	Appellate District,
UNITED TELEPHONE COMPANY, OF OHIO AND SPRINT NEXTEL CORPORATION,	:	Case No. 07-024
	:	
	:	
Defendants-Appellants.	:	

---

REPLY BRIEF OF APPELLANTS UNITED TELEPHONE COMPANY OF OHIO AND SPRINT NEXTEL CORPORATION

---

Michael K. Farrell (0040941)  
*Counsel Of Record*  
 Thomas D. Warren (0077541)  
 Karl Fanter (0075686)  
 John B. Lewis (0013156)  
 BAKER & HOSTETLER LLP  
 1900 East Ninth Street, Suite 3200  
 Cleveland, OH 44114-3485  
 Telephone: (216) 861-7528  
 Facsimile: (216) 696-0740  
 mfarrell@bakerlaw.com

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

Dennis E. Murray, Sr. (0008783)  
*Counsel of Record*  
 Donna J. Evans (0072306)  
 Murray & Murray Co., L.P.A.  
 111 E. Shoreline Drive  
 Sandusky, Ohio 44870  
 Telephone: (419) 624-3000  
 Facsimile: (419) 624-0707  
  
*Counsel for Appellees Stammco, LLC  
 d/b/a The Pop Shop, Kent Stamm, and  
 Carrie Stamm*

FILED  
 SEP 14 2009  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

## TABLE OF CONTENTS

INTRODUCTION.....	1
I. The appellees concede that fail-safe classes are improper.....	2
II. This is a fail-safe class.....	3
III. The class is also improper because individualized issues predominate. ....	7
CONCLUSION .....	11
PROOF OF SERVICE.....	12

## TABLE OF AUTHORITIES

### Cases

<i>Allen v. Holiday Universal</i> (E.D. Pa. 2008), 249 F.R.D. 166 .....	4
<i>Alix v. Wal-Mart Stores, Inc.</i> (N.Y. Supr. Ct. 2007), 838 N.Y.S.2d 885 .....	5
<i>Barber v. Meister Protection Serv.</i> (March 27, 2003), 8th Dist. 81553, 2003-Ohio-1520.....	5
<i>Barnett v. Wal-Mart Stores, Inc.</i> (July 3, 2006), Wash. App. Div. 1 No. 55491-3-I, 2006 WL 1846531 .....	4
<i>Beattie v. CenturyTel, Inc.</i> (6th Cir. 2007), 511 F.3d 554 .....	6
<i>Brown v. SBC Communications, Inc.</i> (Feb. 4, 2009), S.D. Ill. No. 05-cv-777-JPG, 2009 WL 260770 .....	6, 7
<i>Faralli v. Hair Today, Gone Tomorrow</i> (Jan. 10, 2007), N.D. Ohio, No. 1:06CV504, 2007 WL 120664 .....	5
<i>Hoang v. E*Trade Group, Inc.</i> (8th Dist.), 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151.....	5
<i>Linn v. Roto-Rooter, Inc.</i> (May 20, 2004), 8th Dist., No. 82657, 2004-Ohio-2559.....	5
<i>Marks v. C.P. Chem. Co.</i> (1987), 31 Ohio St.3d 200, 509 N.E.2d 1249 .....	9
<i>Repede v. Nunes</i> (Aug. 11, 2006), 8th Dist. Nos. 87277 & 87469, 2006-Ohio-4117.....	5
<i>Stammco, LLC v. United Tel. Co. of Ohio</i> (Aug. 1, 2008), 6th Dist. F-07-024, 2008-Ohio-3845.....	1, 3
<i>State ex rel. Davis v. Pub. Employees Ret. Bd.</i> , 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E. 444 .....	9
<i>Stern v. AT&amp;T</i> (Aug. 22, 2008), C.D. Calif. No. 05-8842, 2008 WL 4382796, reconsideration den'd, (Oct. 6, 2008), 2008 WL 4534048, motion for new evidence den'd, (Feb. 23, 2009), 2009 WL 481657.....	6, 7

### Rules

Rule 23 of the Ohio Rules of Civil Procedure .....	1, 2, 3, 10
--	-------------

## INTRODUCTION

In their merits brief, the plaintiffs-appellees, Stammco, LLC and Kent and Carrie Stamm, concede that fail-safe classes are improper. The Court should rule consistently with this agreed-upon proposition, as have other courts throughout the land. Thus, the central issue in this appeal is: Is the putative class a fail-safe class? In other words, does the class definition improperly define the class by the merits, so that class membership cannot be determined until after individualized findings of liability?

The answer to this question is a resounding “yes.” The appellees have conceded at various points in this appeal that many if not most of United Telephone’s customers were not harmed by third-party billing. Billing a customer through a third party is not inherently harmful – for example, it causes no harm if a customer has ordered the goods or services that were billed. As the trial court held, many third-party charges “are transparent, authorized, and legitimate.” *Stammco, LLC v. United Tel. Co. of Ohio* (Aug. 1, 2008), 6th Dist. F-07-024, 2008-Ohio-3845, at ¶20. It is only if goods or services are *not* ordered, but are billed and inadvertently paid for, that harm could arise.

Because not all United Telephone customers have been harmed by the alleged conduct, the appellees conceded in opposing jurisdiction that their class consisted only of that subset of United Telephone customers who billed for products and services that they did not order – i.e., customers who were allegedly harmed by United Telephone’s billing practices. This is a quintessential fail-safe class, which cannot be certified because individualized determinations of liability are needed to determine class membership. Accordingly, this Court should hold, as have all other courts that have been presented with similar allegations, that such a class cannot be maintained.

Faced with this problem, the appellees retreat to the position that their class – ambiguously defined as all United Telephone customers who were billed for third-party charges “without permission” – includes everyone billed for third-party charges, regardless of whether the customer was actually harmed by paying for something they did not order. But this retreat is to no avail, because the appellees themselves concede that a class is improper if it includes members who were not harmed. Such a class also fails under Rule 23(B)(3) because the individualized determinations of causation and harm – necessary elements of their common-law causes of action – predominate over any allegedly common issues.

**I. The appellees concede that fail-safe classes are improper.**

The appellees concede that fail-safe classes are improper. (Appellees Br. at 12-24.) Among the reasons offered by the appellees are:

- A fail-safe class is improper because “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.” (Id. at 17.)
- A fail-safe class runs afoul of Rule 23’s requirement that the class definition be unambiguous. (Id.)
- The contours of a fail-safe class cannot be determined until there has been a finding of liability. This precludes the possibility of an adverse judgment against class members, as either the class members win or they were never in the class in the first place. (Id. at 13-14.) Accordingly, a class is improper if, in the appellees’ words, the class definition is “framed as legal conclusion or one that is based upon the merits of the case,” or if the

“inclusion of a liability component” exists in the class definition. (Id. at 19.)

United Telephone agrees. For these reasons and those set forth in United Telephone’s opening brief, fail-safe classes are improper. This Court should hold, as every other state and federal court considering the matter has previously held, that such classes cannot be certified under Rule 23.

## **II. This is a fail-safe class.**

The named plaintiffs admit that causation and harm are elements of liability for each of their causes of action. See, Appellees Br. to Sixth Dist. at 17 (“each of the class members’ claims requires proof of actual injury caused by [United Telephone] before liability can be established. \* \* \*”). They also admit that they were not harmed, and no one was unjustly enriched, when they received and paid charges for third-party services that they did request and use. (Stamm 59, Supp. at 28; Am. Cmplt. ¶44-45, 53, 59, Supp. at 11, 12, 13.) Indeed, as the trial court held, many third-party charges “are transparent, authorized, and legitimate.” *Stammco, LLC*, 2008-Ohio-3845, at ¶20.

Given that only certain United Telephone customers were allegedly harmed by the third-party billing practices, the appellees conceded in their opposition to jurisdiction that their class – ambiguously defined as United Telephone customers billed for third-party charges “without permission” – consisted only of those United Telephone customers who were billed for products and services that they did not order. (Appellees Memo. in Opp. to Juris. at 7, 8, 11.) They repeat that fact again in their merits brief: “authorized charges appearing on the telephone bills are not ‘crammed’ and, therefore, are not the subject of this litigation.” (Appellees Br. at 30 fn. 7.)

This is a classic example of a fail-safe class. The class is defined as only that subset of United Telephone’s customers harmed by its billing practices. In other words, the class is defined in terms of liability. As a result, if a particular class member’s charges were determined to be authorized and valid, i.e., United Telephone prevails on the merits, the customer would not be a member of the class.<sup>1</sup> There is no cause of action for customers who request, authorize, receive, pay for, and are happy with, the services they receive from third parties.

This class is also an improper fail-safe class because determining whether any particular third-party charge was improper would be a herculean task requiring thousands of mini-trials. These mini-trials would have to include several parties – various clearinghouses and third-party service providers – that are not named in this action. Indeed, whether a particular charge from a third-party business is legitimate depends upon interactions between that business and the customer, not on anything United Telephone does. The question of causing harm must necessarily be resolved at the putative class-member level.

The appellees now contend that theirs is not a fail-safe class. Rather, they now argue, the phrase “without permission” in the class definition means everyone billed for third-party charges, regardless of whether the customer was actually harmed by paying for something they did not order. In essence, they claim that all United Telephone

---

<sup>1</sup> The cases cited by the appellees where a class was determined not to be fail-safe are distinguishable from the present action in at least two crucial respects – the class definitions did not include a liability component and liability could be determined on a class-wide basis. See, e.g., *Barnett v. Wal-Mart Stores, Inc.* (July 3, 2006), Wash. App. Div. 1 No. 55491-3-1, 2006 WL 1846531, at \*3-4 (Appellees Br. at 18-19); *Allen v. Holiday Universal* (E.D. Pa. 2008), 249 F.R.D. 166, 171-172, 175, 191 (Appellees Br. at 20-21). And *Barnett* was recently criticized as “an anomalous case whose holding is at

customers who received third-party charges without having authorized that *method* of billing are members of the class. (Appellees Br. at 25-27.)

But the appellees cannot escape the fail-safe problem by defining their class in this fashion, because the class would then improperly include people who have no injury and therefore no claim. The appellees concede, and the trial court found, that third-party billing is not inherently harmful.<sup>2</sup> And as the appellees admit in their merits brief, “a class definition is overly broad where the class encompassed persons who had not suffered any injury. \* \* \* ” (Id. at 20-21.)

Indeed, Ohio and federal courts uniformly hold that a class may not be certified where, as here, the fact of causation and actual harm, and therefore liability, are individualized issues.<sup>3</sup> The appellees attempt to distinguish some of these cases, arguing that in this case there is a “common element of harm for each class member.” (Id. at 33.) But the appellees have not, and cannot, identify just what the harm is to

---

odds with its own reasoning.” *Alix v. Wal-Mart Stores, Inc.* (N.Y. Supr. Ct. 2007), 838 N.Y.S.2d 885, 893.

<sup>2</sup> The appellees also contend that third-party charges are hidden on United Telephone’s bills. But all third-party charges appear on a separate page of the bills with the following language: “Sprint provides billing on behalf of [clearinghouse]. *There is no connection between Sprint and [clearinghouse]. Please review all charges appearing in this section.* Any questions regarding these charges should be referred to the number provided for billing inquiries.” (Stamm Dep. Ex. 21, Supp. at 61-62 (emphasis added).) Thus, these charges are not hidden.

<sup>3</sup> See, e.g., *Repede v. Nunes* (Aug. 11, 2006), 8th Dist. Nos. 87277 & 87469, 2006-Ohio-4117, at ¶17 (class certification improper where “individual analysis of each plaintiff’s financial situation” was needed to establish harm); *Hoang v. E\*Trade Group, Inc.* (8th Dist.), 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151, at ¶24 (class certification improper where existence of harm, and therefore liability, could not be proven without examining facts about each class member); *Linn v. Roto-Rooter, Inc.* (May 20, 2004), 8th Dist., No. 82657, 2004-Ohio-2559, at ¶16, 18, 19, 23 (same); *Barber v. Meister Protection Serv.* (March 27, 2003), 8th Dist. No. 81553, 2003-Ohio-1520, at ¶34, 36-37 (same); *Faralli v. Hair Today, Gone Tomorrow* (Jan. 10, 2007), N.D. Ohio No.

customers who received bills for third-party charges without the customer's permission, but who actually ordered the items for which they were billed.<sup>4</sup> Even the named plaintiffs concede they do not seek recovery for third-party services that they ordered and paid for. (See, e.g., Stamm 59, Supp. at 28.)

The cases cited by the appellees involve a class-wide harm, fraud, or statutory violation. For example, the plaintiffs rely on *Beattie v. CenturyTel, Inc.* (6th Cir. 2007), 511 F.3d 554 (Appellees Br. at 34). In *Beattie*, despite other individualized issues, the Sixth Circuit affirmed class certification because on the issue of liability, the same alleged statutory violation was found to be common to all class members, and to predominate.<sup>5</sup> Here, however, the plaintiffs' various common-law theories are not susceptible of common proof on liability. Each plaintiff must prove individual causation and actual harm to establish liability. The supposedly predominate question of liability that led to class certification in *Beattie* is not present in this case.

Given the absence of class-wide harm, the only two opinions cited by the parties that actually involve other attempted class actions on the subject of third-party billing by a local telephone services provider rejected class certification. See *Brown v. SBC Communications, Inc.* (Feb. 4, 2009), S.D. Ill. No. 05-cv-777-JPG, 2009 WL 260770,

---

1:06CV504, 2007 WL 120664, at \*6 (same); see, also, cases cited at United Tel. Br. at 8-9, 9 fn. 2, 13-14, 18-20.

<sup>4</sup> Even the appellees' alternative construction of "with permission" in the class definition is improperly fail-safe, because whether particular customers "permitted" third-party billing would itself be an individualized liability issue requiring an analysis of the communications between third parties and the customers. The record is undisputed that many United Telephone customers who use third-party services choose to receive charges for those services on their local telephone bills or know of the procedure and have no objection. (Davis Aff. at ¶14, Supp. at 117.)

<sup>5</sup> *Beattie* was an interlocutory appeal, and the case is ongoing. United Telephone does not concede that class certification was appropriate in *Beattie*.

and *Stern v. AT&T* (Aug. 22, 2008), C.D. Calif. No. 05-8842, 2008 WL 4382796, reconsideration den'd, (Oct. 6, 2008), 2008 WL 4534048, motion for new evidence den'd, (Feb. 23, 2009), 2009 WL 481657. As the court stated in *Stern*, “[t]he simple fact is that one cannot determine what services were crammed without taking the deposition of each class member to determine what services were authorized.” *Id.* at \*21.

The appellees ignore *Stern*. And their only response to *Brown* is that the case is distinguishable because “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.” (Appellees Br. at 32.) But that is no distinction, because that statement is as true here as it was in *Brown*.

For these reasons, the Court should rule, consistently with *Brown* and *Stern*, that this fail-safe class should not have been certified.

### **III. The class is also improper because individualized issues predominate.**

Even if certain classes could proceed in the absence of class-wide harm, this is not such a case, for individualized issues predominate over the allegedly common ones. Proof in such a case is not only customer-specific, it is purchase-specific. Proof that one United Telephone customer did, or did not, download a song would not show that the individual made or received a long distance call, signed up to place an online advertisement, or downloaded other songs on other days. And proof as to one customer’s understanding or belief would show nothing at all about whether any other United Telephone customer requested or used any other third-party service.

The appellees claim that “[w]hen called upon, the telephone subscribers will be able to identify the charges that they know were unauthorized” and that determining liability is a simple “clerical and ministerial process.” (Appellees Br. at 37.)

However, the appellees' own allegations belie this claim, and underscore the impossibility of resolving these disputes on a class-wide basis. For example, one charge on appellee Stammco's phone bill was from a company called Bizopia. The appellees maintain that the Bizopia charges are invalid. (Id. at 8.) But that issue is, in fact, hotly disputed. It was revealed during discovery that Bizopia spoke to Frank Smith, one of Stammco's employees, and recorded the portion of the call verifying the order for its services – and even faxed a written confirmation of the order to Stammco. (Stamm 73-78, Supp. at 31-33; Smith 13-15, Supp. at 154-156.) When Mr. Stamm called Bizopia to inquire about the charge, Bizopia played the recorded verification for him over the telephone, and faxed another copy of written confirmation to Mr. Stamm, which he then discarded. (Stamm 74-75, 86-87, Ex. 19, Supp. at 32, 35, 59.) Mr. Stamm then spoke to Frank Smith, who remembered the call and answering questions, but was unable to recall many details. (Stamm 76-77, Supp. at 32; Smith 13-15, Supp. at 154-156.) This is why Bizopia, despite Mr. Stamm's threats to sue Bizopia or report it to the Ohio Attorney General, the FCC, or the FBI, refused to reverse its initial charges. (Stamm 92-94, Exs. 18, 19, Supp. at 36-37, 52-59.)

This one charge on one customer's bill required multiple depositions, discovery requests, a manual review of bills, payment records, and account notes. (Davis Aff. at ¶10, 12-15, Supp. at 115, 116-117; McAtee 55-56, Supp. at 130.) And the issue is still in dispute. Contrary to the appellees' theory, due process does not allow liability to be proven merely by a plaintiff's claim that they received an invalid charge. Rather, a jury will have to evaluate the credibility of the Bizopia representative, Ken Stamm, and Frank Smith, and determine whether Smith had actual or apparent authority to bind the appellees. And even if a jury determined that the Bizopia charges were not authorized –

facts unique to this particular charge for this particular plaintiff – that verdict would not address any other charge on the bills of the named plaintiffs or any other United Telephone customer. Were that not enough, there are some 2,000 third parties that bill through United Telephone, each of which has different products and services, marketing methods, and sales scripts. (Davis Aff. at ¶16, Supp. at 118.)

As Mr. Stamm admitted, whether a third-party service was “actually ordered” cannot be determined by reviewing the face of each class member’s bills. Rather, a court would “have to ask” each class member (and its employees or family members) about each charge, and then obtain evidence from the third parties at issue. (Stamm 66-71, 128, 136-138, Supp. at 30-31, 39, 41-42.) Performing this analysis for every class member would be a practical impossibility. The appellees also claim, without any factual support in the record, that United Telephone has “detailed records” identifying which of the 2,000 third-party service providers have billed United Telephone customers for items never ordered. Yet the only evidence from the record is that United Telephone has no such records. (Davis Aff. at ¶10-13, Supp. at 115-117.)

Moreover, “[f]or 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 [of the class] in a single adjudication.” *State ex rel. Davis v. Pub. Employees Ret. Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E. 444, at ¶28, quoting *Marks v. C.P. Chem. Co.* (1987), 31 Ohio St.3d 200, 204, 509 N.E.2d 1249. Common issues do not predominate unless the same facts claimed to establish liability in favor of the named plaintiffs also prove liability in favor of all class members. See *Davis*, 2006-Ohio-5339, at ¶28; see, also, cases cited at United Tel. Br. at 16-17.

In its opening brief, United Telephone explained why the purported common issues identified by the trial court do not establish liability for any of the appellees' claims, and are in fact irrelevant. (United Tel. Br. at 20-22.) In response, the appellees fail to address how the purportedly common questions identified by the lower court will materially advance the resolution of their claims. Rather, the appellees contend that "[p]roving whether any one specific charge was valid or not is not the essential part of this litigation." (Appellees Br. at 35.) They are wrong. Because there are no class-wide allegations of fraud or harm, or a statutory violation, the only way to determine liability is to examine the individual claims of every putative class member. Thus, the class also fails the predominance test under Rule 23(B)(3) and should not have been certified for this reason as well.<sup>6</sup>

---

<sup>6</sup> The appellees maintain that, based upon the Court's ruling on their motion to dismiss, this Court should strike the portion of United Telephone's merits brief (pages 22-26) addressing manageability and superiority under Civil Rule 23(B). (Appellees Br. at 2.) Without conceding the point, in the interest of narrowing the issues before this Court, United Telephone does not address manageability and superiority here.

## CONCLUSION

For the reasons above and in United Telephone's merits brief, the Court should hold fail-safe classes to be improper under Ohio law, reverse the decision below, and enter an order denying class certification.

Respectfully submitted,

 (by Ben Gaul, telephone authorization)

Michael K. Farrell (0040941)

*Counsel Of Record*

Thomas D. Warren (0077541)

Karl Fanter (0075686)

John B. Lewis (0013156)

BAKER & HOSTETLER LLP

1900 East Ninth Street, Suite 3200

Cleveland, OH 44114-3485

Telephone: (216) 861-7528

Facsimile: (216) 696-0740

mfarrell@bakerlaw.com

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

## PROOF OF SERVICE

I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following counsel on September 14, 2009:

Dennis E. Murray, Sr.  
*Counsel of Record*  
Donna J. Evans  
Murray & Murray Co., L.P.A.  
111 E. Shoreline Drive  
Sandusky, Ohio 44870  
Telephone: (419) 624-3000  
Facsimile: (419) 624-0707

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

Aneel L. Chablani  
*Counsel of Record*  
Andrew D. Neuhauser  
Stanley A. Hirtle  
Advocates of Basic Legal Equality, Inc.  
525 Jefferson Avenue Suite 300  
Toledo, Ohio 43604-1094

*Counsel for Amicus Curiae Advocates  
for Basic Legal Equality*

Linda S. Woggon  
*Counsel of Record*  
Vice President, Governmental Affairs  
Ohio Chamber of Commerce  
230 East Town Street  
Columbus, Ohio 43215-0159  
Telephone: (614) 228-4201

*Counsel for Amicus Curiae Ohio  
Chamber of Commerce*

Ronald L. Burdge  
*Counsel of Record*  
Burdge Law Office Co. LPA  
2299 Miamisburg Centerville Road  
Dayton, Ohio 45459

*Counsel for National Association of  
Consumer Advocates*

Michael Farrell (by Ben Good telephone authorization)  
*Counsel for Appellants United Telephone  
Company of Ohio and Sprint Nextel  
Corporation*