

IN THE SUPREME COURT OF OHIO

STAMMCO LLC d/b/a THE POP SHOP, et al.,	:	Case No. 12-0169
	:	
	:	
Plaintiffs-Appellees,	:	On Appeal From the
	:	Fulton County Court
	:	of Appeals, Sixth
v.	:	Appellate District,
	:	Case No. 11FU000003
UNITED TELEPHONE COMPANY, OF OHIO AND SPRINT NEXTEL CORPORATION,	:	
	:	
	:	
Defendants-Appellants.	:	

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANTS UNITED TELEPHONE COMPANY OF OHIO  
AND SPRINT NEXTEL CORPORATION**

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Michael K. Farrell (0040941)  
*Counsel Of Record*  
 John B. Lewis (0013156)  
 Karl Fanter (0075686)  
 BAKER & HOSTETLER LLP  
 PNC Center  
 1900 E. 9<sup>th</sup> Street, Suite 3200  
 Cleveland, OH 44114-3482  
 Telephone: (216) 621-0200  
 Facsimile: (216) 696-0740  
 E-mail: 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, OH 44870  
 Telephone: (419) 624-3000  
 Facsimile: (419) 624-0707  
 E-mail: dms@murrayandmurray.com

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

**FILED**  
 JAN 30 2012  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

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## THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

On remand after this Court reversed class certification, *Stammco, LLC v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, the trial court correctly denied class certification based on a proposed class definition virtually identical to, and plagued with the same problems as, the one struck down by this Court in March 2010. The Sixth District Court of Appeals reversed, erroneously finding that the trial court had abused its discretion.

To do this, the Sixth District relied on *Ojalvo v. Bd. Of Trustees of Ohio State Univ.*, 12 Ohio St.3d 230, 466 N.E.2d 875 (1984)—and its incorrect reading of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974)—to hold that any consideration of merits issues in deciding class certification is error. But the U.S. Supreme Court's recent decision in *Wal-Mart v. Dukes*, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) now makes it clear that *Ojalvo* was wrongly decided. The court of appeals also misconstrued the law regarding “fail-safe” classes and disregarded one of the two separate reasons for this Court's 2010 decision—addressing the ambiguity of the class definition, but ignoring the fact that class members are not identifiable. Further, the court of appeals did not consider unanimous federal precedent denying class certification in identical cases and violated the well-settled rule that it cannot reverse a trial court's correct judgment merely because it disagrees with the trial court's reasoning.

The court of appeals' reliance on *Ojalvo* is an error often repeated by Ohio courts, and is at odds with other Ohio decisions that correctly acknowledge the propriety of considering merits issues at the class certification stage. This Court should overrule *Ojalvo* on this point. This Court should also hold—as a matter of first impression—that Ohio law does not permit fail-safe classes, and also make clear that its decisions must be followed by lower courts and that proper denials of class certification may not be reversed because an appellate court disagrees with some of the trial court's reasoning.

In the wake of *Dukes*, other state supreme courts have clarified their class certification requirements.<sup>1</sup> This Court should do the same. Ohio courts and litigants require guidance on the questions of law raised herein. This is especially so as to when and how merits issues may be considered in ruling on class certification. Absent such guidance, lower courts will continue to struggle with these issues as they have since *Ojalvo*, reaching inconsistent conclusions and failing to provide uniform justice.

### STATEMENT OF THE CASE AND FACTS

#### I. Plaintiffs Approved Third-Party Charges On Their Phone Bill.

Appellant United Telephone Company of Ohio (“United Telephone”), a local telephone provider, allows other businesses to bill their customers for products or services via its monthly statements. United Telephone’s role is to deliver these third-party charges within customers’ phone bills, rather than the charges being separately mailed or delivered by the third party to the customer. United Telephone does not provide the services or products at issue.

Plaintiffs-appellees Kent and Carrie Stamm and Stammco, LLC (owner and operators of a store called The Pop Shop) (collectively, “plaintiffs”), receive local phone service from United Telephone at their home and business.<sup>2</sup> They brought a putative class action claiming that United Telephone negligently allowed some unauthorized charges from third parties to appear on their phone bills. Plaintiffs do not allege that United Telephone, in billing those charges,

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<sup>1</sup> See e.g., *Jackson v. Unocal Corp.*, 262 P.3d 874, 884, fn. 12 (Col. 2011); *Price v. Martin*, No. 2011-C-0853, 2011 WL 6034519 at \*3 (La. Dec. 6. 2011).

<sup>2</sup> United Telephone is a former subsidiary of Sprint Corporation. Sprint never provided, or billed for, local telephone services in Ohio. Sprint is not a proper defendant, and there is no personal jurisdiction over it. Sprint does not waive these issues, and submits this memorandum solely in the interest of brevity.

initiated the charges, violated any law or tariff, or engaged in fraud or a common misrepresentation.

Notably, plaintiffs admit that some of the third-party charges on their phone bills were legitimate and that they approved and paid some of them, such as charges for long-distance service from MCI. Plaintiffs do not seek recovery for those third-party charges or any other “authorized” charges for services they wanted or used.

Plaintiffs did dispute charges for services they claimed they did not want or use, each of which was resolved without them paying the third-party charge. They first disputed an \$87.98 charge on The Pop Shop’s October 2004 bill from a company called Bizopia for website setup and a monthly hosting fee. Bizopia had a recorded verification of a Pop Shop employee ordering its services, and faxed written confirmation of that order to plaintiffs. Despite Bizopia’s proof of purchase, United Telephone removed that particular charge from the bill when plaintiffs complained. Plaintiffs also argued that they had not made four long distance calls reflected on their home and business phone bills. Mr. Stamm contacted United Telephone about these charges, the charges he identified were removed from the bills, and plaintiffs never paid them.

**II. After Remand, The Trial Court Correctly Denied Class Certification, But The Court Of Appeals Reversed.**

Plaintiffs have asserted claims for negligence, breach of the implied contractual covenant of good faith and fair dealing, and unjust enrichment. The only harm plaintiffs allege is if they, or any putative class member, paid a charge for a third-party service they did not want or use.

The trial court initially certified classes under Civil Rules 23(B)(2) and (3), but the Sixth District reversed certification of the Rule 23(B)(2) injunctive class. *Stammco, LLC v. United Tel. Co.*, 6th Dist. No. F-07-024, 2008-Ohio-3845, 2008 Ohio App. LEXIS 3243. (Appx. 1). In that decision, the Sixth District stated that plaintiff’s claims “present a need for significant

individualized determinations to present the claims of class members,” but still held that the trial court had not abused its discretion by certifying a Rule 23(B)(3) damages class. *Id.* at ¶ 51.

United Telephone appealed, and this Court reversed, holding that the trial court abused its discretion by certifying a Rule 23(B)(3) class. *Stammco*, 125 Ohio St.3d 91, 926 N.E.2d 292, ¶ 11, 14. This Court reversed for two distinct reasons: “the class certified by the trial court does not have readily identifiable members and fails to meet the first requirement of Civ. R. 23—that its definition be unambiguous.” *Id.* at ¶ 10. Because these two issues were alone fatal to class certification, this Court explicitly did not address the other reasons why class certification was inappropriate, including: (1) that individualized issues in plaintiffs’ claims predominate over common issues, (2) any class definition that is based on “permission” or “authorization” of third-party charges creates a “fail-safe” class, and (3) such a class with disproportionately individualized issues would be unmanageable. *Id.* at ¶ 5, 13.

On remand, plaintiffs sought certification of a new class using a new definition that still required multiple, individualized inquiries to identify class members. After extensive briefing, including new authority uniformly rejecting class certification in third-party “cramming” cases, and hearing lengthy oral argument, the trial court denied class certification in a fifteen-page opinion. Judge Barber found that: “[T]his Court must reluctantly find that the Plaintiffs have not met their burden of establishing, by a preponderance of the evidence, that a ‘class certification,’ is a proper one.” *Stammco, LLC v. United Telephone Co.*, Fulton C.P. No. 05CV000150 at \*15 (December 22, 2010). (Appx. 18)

Plaintiffs appealed that ruling. Citing *Ojalvo*, the Sixth District reversed, finding that the trial court abused its discretion because “two of the three reasons the trial court articulated for denying the class are improper considerations of the merits and the third reason is inapplicable as

a matter of law.” *Stammco, LLC v. United Telephone Co.*, 6th Dist. No. F-11-003, 2011-Ohio-6503, 2011 Ohio App. LEXIS 5346, ¶ 50. (Appx. 1.) This timely appeal follows.

### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

#### **Proposition Of Law No. I: *Wal-Mart v. Dukes* Rejects *Ojalvo*'s Incorrect Reading of *Eisen*: A Trial Court Does Not Abuse Its Discretion By Evaluating The Merits Of The Plaintiffs' Claims When Denying Class Certification.**

For decades Ohio courts have misconstrued *Eisen v. Carlisle & Jacquelin*, and wrongly held that it prohibits courts from considering merits issues when ruling on class certification. In *Ojalvo v. Bd. Of Trustees of Ohio State Univ.*, this Court cited *Eisen* to hold that such consideration of merits issues was “contrary to the applicable law” because “[c]lass certification does *not* go to the merits of the action.” 12 Ohio St.3d 230, ¶ 3 (emphasis in original). Ohio courts cite *Ojalvo* to foreclose any consideration of the merits in ruling on class certification and to hold that facts alleged in a complaint must be accepted as true when ruling on certification.<sup>3</sup> Both are incorrect. The Sixth District was incorrect in relying on *Ojalvo* to reject, as an abuse of discretion, any consideration of the merits at the class certification stage.

In its recent landmark *Dukes* decision, the Supreme Court expressly rejected *Ojalvo*'s reading of *Eisen*. First, the Court reiterated its prior holdings that it is often necessary to consider merits issues in ruling on class certification: The “rigorous analysis [under Rule 23] will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. [T]he class determination generally involves considerations that are enmeshed in the factual and

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<sup>3</sup> See e.g., *Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 1998-Ohio-405, 696 N.E.2d 1001, ¶ 26; *Lowe v. Refining & Marketing Co.*, 73 Ohio App.3d 563, 567, 597 N.E.2d 1189 (1992); *Begala v. PNC Bank, N.A.*, 1st Dist. No. C-990033, 1999 Ohio App. LEXIS 6331 at \* 15; *Setliff v. Morris Pontiac, Inc.*, 9th Dist. No. 08CA009364, 2009-Ohio-400, 2009 Ohio App. LEXIS 354, ¶ 6; *Nagel v. Huntington Nat'l Bank*, 179 Ohio App.3d 126, 2008-Ohio-5741, 900 N.E.2d 1060 (8th Dist.) ¶10; *Begala v. PNC Bank, N.A.*, 1st Dist. No. C-990033, 1999 Ohio App. LEXIS 6331.

legal issues comprising the plaintiff's cause of action." *Dukes*, 131 S.Ct. at 2551-2552; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n. 12, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1977)

("determination of class action questions is intimately involved with the merits of the claims.

\*\*\* The more complex determinations required in Rule 23(b)(3) [damages] class actions entail even greater entanglement with the merits").<sup>4</sup>

The Court then specifically rejected the view that *Eisen* precludes consideration of merits issues at the class certification stage:

A statement in one of our prior cases, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) is sometimes mistakenly cited to the contrary: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." \* \* \* **To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.**

*Dukes*, 131 S.Ct. at 2552, fn. 6 (emphasis added).

Ignoring this contrary authority, the Sixth District relied on *Ojalvo* and its now-rejected reading of *Eisen* to hold that the trial court abused its discretion by making two "improper incursions" or "forays" into merits issues when the trial court correctly noted that: (i) because United Telephone's delivery of third-party charges has no effect on whether a charge is valid or not, the real "culprits," if any, are third parties initiating invalid charges, and (ii) no statute or case law imposes a duty on United Telephone to re-verify the charges that it delivers. *Stammco, LLC*, 6th Dist. No. F-11-003, 2011-Ohio-6503, ¶ 13.

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<sup>4</sup> See *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (court's rigorous analysis of Rule 23 issues may inevitably involve review of the merits). This Court adopted *Falcon*'s rigorous analysis test in *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442 (1998).

The court of appeals did not disagree with these statements, nor did it find that the trial court considered these issues for any purpose other than ruling on class certification, which was the only issue before the court. Indeed, the trial court's decision begins with the statement that "Plaintiffs now seek to prosecute their action, along with others similarly situated, as a 'class'" and ends with "Plaintiffs have not met their burden of establishing, by a preponderance of the evidence, that a 'class certification,' is a proper one." *Stammco, LLC*, Fulton C.P. No. 05CV000150 at \*1, 15.

Rather, the court of appeals found that these statements touched upon merits issues and, based on *Ojalvo*, that merely considering such issues was, standing alone, an abuse of discretion by the trial court. But as *Dukes* makes clear, *Ojalvo* is wrong. This Court should accept jurisdiction and hold that it is not error to consider overlapping merits issues when ruling on class certification. Indeed, a consideration of merits issues is often required.

**Proposition Of Law No. II: The Trial Court Did Not Abuse Its Discretion By Refusing To Certify A Fail-Safe Class Improperly Defined By The Merits.**

On remand, the trial court held that the "biggest impediment" to certification was that the new proposed class definition was an improper fail-safe class. *Stammco, LLC*, Fulton C.P. No. 05CV000150 at \*12. (This Court declined to reach the issue when it reversed class certification. *Stammco, LLC*, 2010-Ohio-1042, at ¶ 13-14.) The trial court explained that membership in the class, as defined, "turns on the ability to bring a successful claim on the merits" (*Stammco, LLC*, Fulton C.P. No. 05CV000150 at \*13), and that consequently class members "would be bound only by a judgment favorable to Plaintiffs, but not by an adverse judgment." *Id.* In other words, if United Telephone did not do anything wrong, then there are no members of the class, and thus no one whose claims would be precluded by a judgment in United Telephone's favor. So,

because “the ‘merits’ of the individual’s claim ‘defines’ the proposed class,” the trial court correctly held that the proposed class was an improper fail-safe class. *Id.*

The trial court’s “fail-safe” conclusion was in line with dozens of cases. Nonetheless, the Sixth District held the trial court’s analysis of the facts and the law was “more than a mistake of judgment or an error in law,” but, rather, was “unreasonable, arbitrary or unconscionable,” because even if a jury determined that a customer’s charge was authorized, he would still be a class member. *Stammco, LLC*, 6th Dist. No. F-11-003, 2011-Ohio-6503, ¶ 28, 46.

Not so. The new proposed class (just like the old, now-reversed class) was defined by the core merits of the underlying claims—namely, whether customers “authorized” third-party services. The class: (1) included customers “who were billed for third party charges as to which [United Telephone] had *no prior authorization* from the customer in writing or by a method acceptable to [United Telephone] sufficient for United Telephone to verify that the customer *had agreed to such charge*,” but (2) excluded “those customers who subscribed to and *provided authorization* for long distance services from a provider of toll services that were billed on the customers’ local telephone bills.” Plaintiffs’ merits-based definition improperly “put[s] the cart before the horse.”<sup>5</sup> *Mims v. Stewart Title Guar. Co.*, 254 F.R.D. 482, 486 (N.D.Tex. 2008).

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<sup>5</sup> The Sixth District also relied on Justice Moyer’s concurring and dissenting opinion stating that just because a customer did not authorize a charge would not necessarily mean that United Telephone is liable. *Stammco, LLC*, 2011-Ohio-6503, at ¶ 45. That is true, because plaintiffs would still need to prove other elements and United Telephone would have affirmative defenses. But that misses the point. The definition here is a classic fail-safe class because *if the charges were authorized, then the customer would not be a class member because United Telephone could not be liable*, and that customer would not be bound by that adverse judgment because he would not be in the class. And in any event, it is also still improper to define a class by merits-related issues.

While this Court has never explicitly held that fail-safe classes are improper, courts considering the issue—except for the Sixth District here—have uniformly rejected them.<sup>6</sup> And numerous courts—except for the Sixth District here—have also uniformly held that a class may not be defined so that an element of liability becomes a condition for inclusion in the class, thus requiring resolution of a disputed liability element to determine who is in the class.<sup>7</sup> As this Court recognized when it reversed class certification, *Stammco, LLC*, 2010-Ohio-1042, at ¶ 1, 10, 11, 14, plaintiffs cannot define a class by the merits of a claim to avoid individualized issues. This Court should hold that fail-safe classes—including classes defined by core liability issues—are improper, and affirm the trial court’s denial of class certification on that basis.

**Proposition Of Law No. III: The Sixth District Improperly Rejected This Court’s Determination That The Proposed Class Definition Did Not Permit Class Members To Be Identified With Reasonable Effort.**

In reversing certification, this Court found that the class certified failed to meet the requirement that the definition be unambiguous AND failed the separate requirement that the

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<sup>6</sup> *Randleman v. Fidelity Natl. Title Ins.*, 646 F.3d 347, 349 (6th Cir. 2011); *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980); *Jones-Turner v. Yellow Enterprise Systems, LLC*, W.D.Ky. No. 3:07CV-218-S, 2011 U.S. Dist. LEXIS 118564 at \*3 (Oct. 13, 2011); *Schilling v. Kenton Cty.*, E.D.Ky., No. 10-143-DLB, 2011 WL 293759, at \*5-6 (Jan. 27, 2011); *Boucher v. First American Title Ins. Co.*, W.D. Wash. No. C10-199RAJ, 2011 WL 1655598, at \*5 (May 2, 2011); *Genenbacher v. Centurytel Fiber Co. II, LLC*, 244 F.R.D. 485, 488 (C.D. Ill. 2007); *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 992 n.1 (S.D. Ind. 2007); *IntraTex Gas Co. v. Beeson*, 22 S.W.3d 398, 404-405 (Tex. 2000); 1 McLaughlin on Class Actions § 4:2 (8th ed.); 5 Moore’s Fed. Prac. ¶23.21[3][c], 23-47 (3d ed. 2010).

<sup>7</sup> *Cicero v. U.S. Four, Inc.*, 10th Dist. No. 7AP-310, 2007-Ohio-6600, 2007 WL 4305720, ¶ 28; *Bungard v. Ohio Dept. of Job & Family Services*, 10th Dist. No. 5-AP-43, 2006-Ohio-429, 2006 WL 242550, ¶ 15; *Brazil v. Dell, Inc.*, N.D. Calif. No. C-07-01700, 2008 WL 2693629, at \*7 (July 7, 2008); *Edwards v. McCormick*, 196 F.R.D. 487, 493 (S.D. Ohio 2000); *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403-404 (E.D.Pa. 1995); *Crosby v. Social Sec. Admin. of United States*, 796 F.2d 576, 580 (1st Cir. 1986); *Van West v. Midland Nat. Life Ins. Co.*, 199 F.R.D. 448, 451 (D.R.I. 2001); *In re Copper Antitrust Litig.*, 196 F.R.D. 348, 353 (W.D. Wis. 2000); *Livingston v. U.S. Bank, N.A.*, 58 P.3d 1088, 1090 (Colo. App. 2002); cf. 1 McLaughlin on Class Actions § 4:2 (8th ed.) (“A class is not ascertainable where membership in the class depends on each individual’s state of mind.”).

definition “permit its members to be identified with reasonable effort.” *Stammco, LLC*, 2010-Ohio-1042, at ¶ 1, 10, 11, 14. This Court did not, as the Sixth District stated, merely note a concern that “it might be difficult” to identify class members. *Stammco, LLC*, 6th Dist. No. F-11-003, 2011-Ohio-6503, ¶ 37.

This Court’s binding, majority opinion held that to determine whether a person was a class member, “the court must determine individually whether and how each prospective class member had authorized third-party charges on his or her phone bill.” *Stammco, LLC*, 2010-Ohio-1042 at ¶ 11. Moreover, for each class member, the “trial court must examine testimony by the person claiming to be a member of the class and what most likely will be conflicting testimony by Sprint or the third party.” *Id.* This Court even identified some individualized issues that would need to be resolved just to decide which specific charges the named plaintiffs authorized: “For example, the court must determine whether Stammco’s employee had authority to authorize Bizopia’s charges and whether the employee actually did so. Unlike the class in *Hamilton*, the class here cannot be ascertained merely by looking at [United Telephone’s] records.” *Id.*

Consistent with this Court’s decision, upon remand, the trial court examined if the new proposed definition—virtually identical to the old, rejected definition—permitted class members to be identified with reasonable effort. The trial court stated that the new class definition failed “to address the Supreme Court’s concern for ‘consent’ and ‘authorization,’” and that the records of United Telephone did not permit class members to be identified with a reasonable amount of effort. Thus, the class could not be certified. *Stammco*, Fulton C.P. No. 05CV000150 at \*10, 11.

The Sixth District, however, held that the trial court’s analysis was an abuse of discretion because the new definition “satisfied the concerns of [this Court] with respect to ambiguity,”

without ever addressing identifiability. *Stammco, LLC*, 2011-Ohio-6503, at ¶ 41. But a class definition must both be unambiguous AND allow members to be identified with reasonable effort. *Stammco, LLC*, 2010-Ohio-1042, at ¶ 6-7. The Sixth District erred because it ignored this Court's: (1) requirement that the class definition must also permit identification with reasonable effort, and (2) specific determination in this case that questions regarding authorization of a charge were individualized and prevented class members from being identified with reasonable effort. The Sixth District did not address how class members could be identified, or the trial court's application of this Court's analysis to the new proposed definition.

The Sixth District also stated without explanation that “[t]he amended definition deletes any reference to customers who received unauthorized charges.” *Stammco, LLC*, 2011-Ohio-6053, at ¶ 39. But that is incorrect. The new definition is just a longer way of restating the old, improper definition and still hinges on the individualized issues of “authorization” and “agreement” to specific charges. Instead of defining the class as “customers who ‘were billed for charges . . . on behalf of third parties without their permission,’” the plaintiffs now define it as including customers who were “billed for third-party charges as to which Sprint had no prior *authorization* from the customer in writing or by a *method acceptable* to Sprint sufficient for Sprint to verify that the customer *had agreed to such charge*.” As the trial court held, this semantic change does not resolve the problems identified by this Court.

For example, to determine whether Stammco's Bizopia charges are part of the class, the trial court would—as this Court already determined—have to conduct a mini-trial regarding whether the Stamms “had agreed to such charge.” This is because the steps taken by third-party providers to verify that customers have agreed to a charge—in the case of Bizopia, an audio

recording and at least two written confirmations—are “methods acceptable” to United Telephone to verify that customers have agreed to the charge.

A lower court “has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.” *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, ¶ 1, quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, syl., 462 N.E.2d 410 (1984); *see also Jones v. Harmon*, 122 Ohio St. 420, syl., 172 N.E.2d 151 (1930) (“it is the duty of the trial court to follow the ruling of this court, and not to do so is reversible error”). Under the law-of-the-case doctrine, “the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.” *Nolan*, 11 Ohio St.3d at 3, 462 N.E.2d 410.

If on remand, “a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court’s determination of the applicable law.” *Id.* Here, the trial court did just that, and the Sixth District nonetheless reversed. Accordingly, this Court should affirm the trial court’s denial of class certification.

**Proposition Of Law No. IV: An Ohio Appellate Court Must Consider Decisions In “Nearly Identical Federal Proceedings” When Determining Whether A Trial Court Abused Its Discretion By Denying Class Certification.**

This Court has made clear that it is error not to consider federal decisions in “nearly identical” cases. “Since the Ohio rule is identical to Fed. R. Civ. P. 23, federal authority is an appropriate aid to interpretation of the Ohio rule.” *Marks v. C.P. Chemical Co.*, 31 Ohio St.3d 200, 201 509 N.E. 1249 (1987); *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶17 (same).

An appellate court that “ignores nearly identical federal proceedings” when addressing class certification “does not merely misconstrue the letter and spirit of the law, it ignores them,”

and commits reversible error. *Howland v. Purdue Pharma, L.P.*, 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d. 141, ¶ 26 (reversing court of appeals' judgment upholding class certification where court of appeals ignored reasoning of federal decisions denying class certification in "almost identical" cases); see *Maas v. Penn-Central Corp.*, 11th Dist. No. 2006-T-0067, 2007-Ohio-2055, 2007 WL 1241336 (acknowledging requirement that courts consider relevant federal precedent cited by defendant).

Although presented with them, the court of appeals ignored several federal court decisions in virtually identical "cramming" cases. Each made clear that the trial court was correct in denying class certification. In the most recent of these, *Midland Pizza, LLC v. Southwestern Bell Tel. Co.*, certification was denied because:

Despite plaintiff's attempts to characterize it otherwise, the injury at issue here is individualized: whether each class member was billed for, and paid for, unauthorized charges on his or her telephone bill. \*\*\* Defendant is correct that no common proof is possible to demonstrate injury for all class members, because to determine whether or not a charge was authorized will require individualized proof.

D. Kansas No. 10-2219-CM-GLR (Nov. 18, 2011). Certification was likewise denied in *Lady Di's, Inc. v. Enhanced Servs. Billing, Inc.*, a suit asserting common-law claims for alleged "cramming" of third-party charges. Quoting from *Brown v. SBC Communications*, yet another "cramming" case in which class certification was denied, the court held:

[T]he Court will need to make individual determinations as to whether each proposed class member authorized the charges for which he was billed by defendants. The result will be multiple mini-trials, each requiring individual proofs. Consequently, there will be no judicial economy realized from certifying this action as a class action.

S.D. Ind. 1:09-CV-34-SED-DML, 2010 WL 4751659, at \*4 (Nov. 16, 2010) (quoting *Brown*, S.D. Ill. No. 05-cv-777-JPG, 2009 WL 260770, at \*3 (Feb. 4, 2009)). *Brown* is directly on point. *Brown* sued his local telephone company, claiming he was charged for third-party

services he did not order or use. Like plaintiffs, he sought certification of a class of all SBC customers who received such charges and tried to avoid the individualized issues inherent in his claims by defining the class as those who were “improperly billed.” The *Brown* court stated:

Plaintiff's claims against Defendants hinge on the fact that Plaintiff did not authorize the services for which he was billed. . . . Therefore, a consumer charged for a legitimately authorized service is not a member of the proposed class. Defendants contend that the question of whether each potential class member authorized the services for which he or she was billed requires individualized inquiries that render this case inappropriate for class certification. The Court agrees.

*Brown*, at \*3.

The impossibility of litigating “cramming” claims on a class basis was also recognized in *Stern v. AT&T*. In denying certification, the district court held that there was no “plausible class-wide method to prove cramming” and the existence of individualized defenses also precluded class certification. *Stern v. AT&T*, C.D. Calif. No. 05-8842, 2008 WL 4382796, (Aug. 22, 2008), reconsideration den'd, 2008 WL 4534048, at \*9, (Oct. 6, 2008). As that court later stated: “The 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.” *Stern v. AT&T*, C.D. Calif. No. 05-8842, 2009 WL 481657, at \*21 (Feb. 23, 2009).

Despite the fact that these cases are all nearly identical to this one, and despite the absence of any Ohio decision in such a case, the court of appeals did not consider any of them. As *Marks*, *Wilson*, and *Howland* make clear, that was reversible error.

**Proposition Of Law No. V: Where A Trial Court Properly Denies Class Certification, But The Court of Appeals Disagrees With Its Reasoning, The Decision Must Be Affirmed.**

This Court has “consistently held that a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof.” *Joyce v. General Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990) (citation omitted); *State v.*

*Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, 918 N.E.2d 497, ¶ 7. Stated differently, a correct judgment may not be reversed “simply because it was based in whole or in part on an incorrect rationale.” *In re G.T.B.*, 128 Ohio St.3d 502, 2011-Ohio-1789, 947 N.E.2d 166, ¶ 7.

Whether the court of appeals agreed with the trial court’s explanations of its reasons, the above authority makes clear that the trial court reached the right result. Plaintiffs’ claims cannot be litigated without deciding the core, individualized question of whether they were charged, and paid for, a service they did not want or use. If not, plaintiffs have suffered no harm and have no claim under any of their causes of action. As the Supreme Court held in *Dukes*, Rule 23 requires more than asking common *questions*, it requires that the evidence about the named plaintiffs can provide common *answers* to those questions, for all class members, “in one stroke.” Evidence about these plaintiffs will never show whether any other United Telephone customer was charged or paid for some other third-party service or product they did not order.

### CONCLUSION

The Court should review and reverse the decision below.

Respectfully submitted,



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Michael K. Farrell (0040941)  
John B. Lewis (0013156)  
Karl Fanter (0075686)  
BAKER & HOSTETLER LLP  
PNC Center  
1900 E. 9<sup>th</sup> Street, Suite 3200  
Cleveland, OH 44114-3482  
Telephone: (216) 621-0200  
Facsimile: (216) 696-0740

*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 this 30th day of January 2012:

Dennis E. Murray, Sr.  
Donna J. Evans  
Murray & Murray Co., L.P.A.  
111 E. Shoreline Drive  
Sandusky, OH 44870

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



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

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
FULTON COUNTY

Stammco, LLC, d.b.a. The Pop Shop, et al.

Court of Appeals No. F-11-003

Appellants

Trial Court No. 05CV000150

v.

United Telephone Company of Ohio,  
d.b.a. United Telephone Co., et al.

**DECISION AND JUDGMENT**

Appellee

Decided: December 16, 2011

\* \* \* \* \*

Dennis E. Murray, Sr. and Donna Jean A. Evans, for appellants.

Michael K. Farrell, Karl Fanter, John B. Lewis and Ruth E. Hartman,  
for appellees.

SINGER, J.

{¶ 1} Appellants appeal the order of the Fulton County Court of Common Pleas denying class certification following remand from the Supreme Court of Ohio. For the reasons that follow, we reverse.

1.

{¶ 2} The facts of this matter have been more fully explained in the previous consideration of this court, *Stammco, L.L.C. v. United Tel. of Ohio*, 6th Dist. No. F-07-024, 2008-Ohio-3845, and that of the Supreme Court of Ohio, *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042. In 2005, appellants, Stammco, L.L.C., dba The Pop Shop, and its owners, Kent and Carrie Stamm, sued their local telephone company, appellee, United Telephone Company of Ohio, alleging that they and others similarly situated had been damaged by appellee's negligent billing practices which facilitated a practice known as "cramming." *Stammco*, 1042-Ohio-1042, ¶ 2.

{¶ 3} "Cramming" is the practice of placing unauthorized charges on a customer's telephone bill. *Id.* "Crammers" take advantage of the aggregation of third party tolls or services that may be billed to end users by the user's local telephone company. The present case provides an example. At the time preceding this suit, appellee was a wholly owned subsidiary of Sprint Corporation.<sup>1</sup> Sprint entered into a number of contracts with other entities to include on its local telephone billings amounts due from third parties. Sprint purchased these receivables and was compensated for each transaction associated with a given receivable.

{¶ 4} In 2004, appellant Kent Stamm noticed an unauthorized \$87.98 charge by OAN Services, Inc. for "Bizopia" on his local telephone bill for The Pop Shop. Stamm

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<sup>1</sup>Appellee's ownership has since been through a number of incarnations. Sprint became Sprint-Nextel, then Embarq Corporation, which merged with CenturyTel, Inc. d.b.a. CenturyLink. Even though, according to appellants, since 2006 United Telephone of Ohio has had no corporate affiliation with Sprint, for simplicity, we shall refer to its corporate structure as it existed when this suit was instituted.

called Sprint where a representative told him to call OAN, where he was told to call Bizopia. After numerous telephone calls, emails, a substantial amount of time and a \$10 late payment fee, Stamm successfully persuaded Sprint to remove the charge. Stamm also asked that third party charges to his bill be blocked, but was advised that this service was not available to appellee's customers in Ohio. During this dispute, Kent Stamm also discovered numerous other unauthorized third party charges on both his home and business telephone statements, some of which he had paid in error.

{¶ 5} Appellants sued, asserting that appellee had a duty to provide accurate statements to its customers and to insure that the amounts collected in payment of those bills were indeed for products and services authorized and received by appellee's more than one million Ohio customers. Appellants asked for class certification and sought to enjoin appellee from billing further unauthorized charges and for compensatory damages from the prior practice.

{¶ 6} The trial court certified the class and named appellants class representatives. The trial court approved the class as being:

{¶ 7} "All individuals, businesses or other entities in the State of Ohio who are or who were within the past four years, subscribers to 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. Excluded from this class are defendants, their affiliates (including parents, subsidiaries, predecessors, successors, and any other entity or its affiliate which has a controlling

interest), their current, former, and future employees, officers, directors, partners, members, indemnities, agents, attorneys and employees and their assigns and successors." *Stammco*, 2008-Ohio-3845, ¶ 4.

{¶ 8} Appellee appealed the class certification to this court and we affirmed. *Id.* at ¶ 65. Appellee pursued a discretionary appeal to the Supreme Court of Ohio, which eventually accepted the case. *Stammco L.L.C. v. United Tel. Co. of Ohio*, 121 Ohio St.3d 1430, 2009-Ohio-1296. On review, the Ohio Supreme Court found the class definition that was certified to be ambiguous. According to the court:

{¶ 9} "The class definition includes customers who 'were billed for charges on their local telephone bills by Sprint on behalf of third parties without their permission.' This definition does not specify whether the customers were expected to give Sprint or the third parties authorization for billing, or whether the third parties were expected to obtain authorization from the customers for charges on the bill. In addition, in the phrase 'their permission' in the class definition, it is unclear who the word 'their' refers to. While one might assume that the word 'their' refers to customers, it could be read to refer to either customers or third parties. Nor is it clear how authorization was to be accomplished—that is, whether written, verbal, or any other form of permission was necessary to authorize billing, and to whom it should be given, whether directly to Sprint or to the third party."

{¶ 10} *Stammco*, 2010-Ohio-1042, ¶ 10. The court sent the case back to the trial court, "\* \* \* to redefine the class on remand." *Id.* at ¶ 12.

{¶ 11} On remand, appellants moved to amend their class definition to comply with the Supreme Court's mandate. The revised definition was:

{¶ 12} "All individuals, businesses or other entities in the State of Ohio who are or who were within the period four years prior to the initiation of this lawsuit, subscribers to local telephone service from United Telephone Company of Ohio d.b.a. Sprint and/or any successor company providing the same service, and who were billed for third party charges as to which Sprint had no prior authorization from the customer in writing or by a method acceptable to Sprint sufficient for Sprint to verify that the customer had agreed to such charge. Excluded from the class are those customers who subscribed to and provided authorization for long distance services from a provider of toll services that were billed on the customers' local telephone bills. Also excluded from this class are defendants, their affiliates (including parents, subsidiaries, predecessors, successors, former and future employees, officers, directors, partners, members, indemnities, agents, attorneys and employees and their assigns and successors)."

{¶ 13} The trial court, although sympathetic to appellants' frustration, on remand refused to certify the amended class. The court found that (1) the class definition submitted was a prohibited "fail-safe" class, (2) appellants brought their action against a local carrier, "rather than the culprit 'third party provider'" and (3) the suit proposes to impose a duty on appellee not required by "current legislation and case law." It is from the judgment denying certification of a class that appellants now bring this appeal. Appellants set forth six assignments of error:

5.

{¶ 14} "First Assignment of Error: The trial court erred, on remand, by issuing the December 22, 2010 judgment entry decertifying the class and thereby failing to follow the mandate of the Supreme Court.

{¶ 15} "Second Assignment of Error: The trial court erred in its December 22, 2010 judgment entry, by re-examining and overruling the previous determination after having correctly concluded that the case was properly certified as a class action.

{¶ 16} "Third Assignment of Error: The December 22, 2010 judgment entry of the trial court, reversing its prior ruling on class certification, was based upon an impermissible evaluation of the merits of the underlying causes of action.

{¶ 17} "Fourth Assignment of Error: The December 22, 2010 determination of the trial court that a class action is not feasible was based on a misconception and an inaccurate comprehension of the class definition.

{¶ 18} "Fifth Assignment of Error: The trial court erred in its December 22, 2010 judgment entry when it entered a final judgment, dismissing plaintiffs' complaint in its entirety.

{¶ 19} "Sixth Assignment of Error: The trial court's dismissal of the entire case when deciding the sufficiency of the class definition under Rule 23 upon remand, did not address the prayer for injunctive relief or the claims for individual damages."

#### I. Action on Remand

{¶ 20} In their first assignment of error, appellants insist that the trial court exceeded the instructions of the Ohio Supreme Court on remand. The only issue on

which the Ohio Supreme Court actually ruled was the sufficiency of the class definition, which that court found impermissibly ambiguous. *Stammco*, 2010-Ohio-1042, ¶ 11. The court stated:

{¶ 21} "We hold that the class certified by the trial court as presently defined does not permit its members to be identified with a reasonable effort. We therefore reverse the judgment and remand the cause to the trial court so that it may clarify the class definition in a manner consistent with this opinion." *Id.* at ¶ 14.

{¶ 22} Appellants argue that the only matter to be resolved on remand was the language of the class definition. Any other issues, including whether the class was legally sufficient pursuant to Civ.R. 23, were raised and affirmed by this court on appeal. Since that affirmance was not disturbed by the Ohio Supreme Court, those legal conclusions become the law of the case for subsequent trial and appellate proceedings, according to appellants.

{¶ 23} Appellee responds that reversal of the class definition nullifies the entire trial court judgment and puts the case in the position it would have been in had there never been a judgment. On remand, the case then resumes at that point where the first error was committed. That point, appellee insists, is prior to class certification. Since this leaves no existing class to decertify or any class definition to amend, the trial court is obligated to begin anew in the class certification process, appellee insists.

{¶ 24} Alternatively, appellee argues, even if we conclude that the class certification stands, a trial court in a class action has a continuing obligation to assure that

the class remains viable in light of subsequent developments. If the changed posture of the case no longer satisfies the requirements of Civ.R. 23, the trial court has not only the ability, but the obligation to decertify the class.

{¶ 25} As we stated in our original consideration of this matter:

{¶ 26} "A decision to certify an action as a class action is not a decision on the merits of a claim. In determining whether to certify a class, the trial court must not consider the merits of the case except as necessary to determine whether the Civ.R. 23 requirements have been met. *Ojalvo v. Bd. of Trustees of Ohio State Univ.* (1984), 12 Ohio St.3d 230, 233; *Williams v. Countrywide Home Loans, Inc.*, 6th Dist. No. L-01-1473, 2002-Ohio-5499, ¶ 24. \* \* \* *Stammco*, 2008-Ohio-3835, ¶ 12

{¶ 27} "Seven prerequisites must be met before a court may certify a case as a class action pursuant to Civ.R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impractical; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be satisfied. *Warner v. Waste Mgmt., Inc.* (1988), 36 Ohio St.3d 91, 96-98." *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, ¶ 6.

{¶ 28} A decision on whether to certify a class action is to be affirmed on review absent an abuse of discretion. *Marks v. C.P. Chemical Co., Inc.* (1987), 31 Ohio St.3d 200, syllabus; *In re Consol. Mtge. Satisfaction Cases*, ¶ 5. An "abuse of discretion" is more than a mistake of judgment or an error in law, the term connotes a judgment that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 29} Initially, the trial court certified the class and we affirmed, finding that the requirements of Civ.R. 23(A) and (B)(3) were satisfied. *Stammco*, 2008-Ohio-3845, ¶ 60. Although the Ohio Supreme Court first declined to hear a further appeal, *Stammco L.L.C. v. United Tel. Co. of Ohio*, 120 Ohio St.3d 1448, 2009-Ohio-278, on reconsideration, the court accepted jurisdiction on two propositions of law: "A plaintiff cannot define the class to include only individuals who were actually harmed[,]" and "A class action cannot be maintained when only some class members have been injured." *Stammco*, 126 Ohio St.3d 91, 2010-Ohio-1042, ¶ 5.

{¶ 30} Under these propositions, appellee argued, "\* \* \* that the class is a fail-safe class, that individualized issues predominate the class, that the class is unmanageable, and that a class action is not suitable for the issues present in this case." *Id.* at ¶ 13. Nevertheless, on its conclusion that the class definition was ambiguous, the court expressly declined to assess these arguments, remanding the matter to the trial court to redefine the class. *Id.* Interestingly, the late Chief Justice Moyer dissented on the ground the court should have reached appellee's propositions of law. *Id.* at ¶ 16, Moyer, C.J.,

concurring in part and dissenting in part. The Chief Justice then proceeded to do so, concluding, "\* \* \* the class in this case was ambiguously defined, but was not otherwise improper." *Id.* at ¶ 17.

{¶ 31} "The law of the case is a longstanding doctrine in Ohio jurisprudence. "The doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, ¶ 14, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. "[T]he rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Nolan* at 3, citing *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32. "Thus, \* \* \* following remand [when] a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law." *Id.*

{¶ 32} In this matter, the trial court initially certified the class and this court affirmed that certification. *Stammco*, 2008-Ohio-3845, ¶ 69. On further review, the Ohio Supreme Court found that a class action could not be maintained using the ambiguous class definition that had been accepted. *Stammco*, 2010-Ohio-1042, ¶ 11. The court then stated:

{¶ 33} "Rather than attempt to redefine the class ourselves, we remand the case to the trial court to do so, for two reasons. First, the parties did not have the opportunity to

present and argue the merits of alternative class definitions in their briefs before us. Second, the trial judge who conducts the class action and manages the case must be allowed to craft the definition with the parties. See *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, 201, 31 OBR 398, 509 N.E.2d 1249 ('A trial court which routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in litigation of class actions. It is at the trial level that decisions as to class definition and the scope of questions to be treated as class issues should be made')." *Id.* at ¶ 12. This was the mandate of the court. The court expressly did not reach appellee's other arguments. *Id.* at ¶ 13.

{¶ 34} Although the Ohio Supreme Court did not reach most of the matters discussed in this court's decision, it nonetheless reversed that decision. *Id.* at ¶ 14. The effect of that reversal is a vacation of our judgment so that the only decision of a reviewing court remaining is that of the Ohio Supreme Court. That decision was that one of the Civ.R. 23 prerequisite elements for class certification, an unambiguous class definition, had not been established. At a minimum, on remand, the trial court must approve a class definition that satisfies the dictates of the remanding decision before a class may be certified.

{¶ 35} What to make of the court's decision not to address the substantive issues raised is not clear. The court neither accepted nor rejected the analysis of this court nor the one offered by the chief justice. It would appear, however, that neither analysis is binding on the trial court. Thus, while we would consider it the better practice to revisit

class certification only to the extent that the new language in the class definition warrants, we do not believe that the doctrine of law of the case demands it. Accordingly, appellants' first assignment of error is not well-taken.

## II. Reevaluation of Class Certification

{¶ 36} In their second, third and fourth assignments of error, appellants maintain that the trial court improperly reversed itself in determining that the modified class definition created a "fail-safe" class, that it impermissibly evaluated the merits of the claim and the trial court misconceived the nature of the suit when considering feasibility.

{¶ 37} As a preliminary matter, we look to the "amended" class definition put forth by appellants on remand to see if the concerns voiced by the Ohio Supreme Court were adequately addressed. The court found ambiguity in the definition because (1) it did not specify to whom customers were expected to give permission for charges on the bill, (2) it was not clear whether the "their" in "without their permission" at the end of the first sentence referred to customers or third parties, and (3) it failed to specify by what manner and to whom permission should be given. *Stammco*, 2010-Ohio-1042, ¶ 10. The court also stated concerns that it might be difficult to identify customers who received unauthorized charges, "\* \* \* without expending more than a reasonable effort." *Id.* at ¶ 11.

{¶ 38} To address these concerns, appellants amended the language of the class definition so that included were defined customers "\* \* \* who were billed for third party charges as to which Sprint had no prior authorization from the customer in writing or by a

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method acceptable to Sprint sufficient for Sprint to verify that the customer agreed to the charge." Appellants also added a class exclusion for customer subscribed long distance toll services.

{¶ 39} The addition of the toll subscription exclusion only serves to limit the class more and does not seem to add any ambiguity. The amended class now defines to whom permission is to be granted: appellee, whose permission was required: the customer, and the manner the permission was to be granted: in writing or an alternative method by which appellee could verify agreement. The amended definition deletes any reference to customers who receive unauthorized charges. In our view, the amended language satisfies the specific concerns of the court in its mandate for remand. Moreover, the amended definition comports the Chief Justice Moyer's analysis in his concurrence:

{¶ 40} "In this case, class definition provided means to determine the class, which would have sufficed, were it not for the ambiguity. In order to determine class membership, the trial court would need to determine whether a putative class member (1) received a bill from United Telephone, (2) was assessed for third-party charges on that bill, (3) did not give appropriate authorization for the placement of those charges on that bill, and (4) is not among the exempted entities. The ambiguity lies in the phrase 'without their permission'; the trial court lacks a method to determine the form and manner that the permission should have taken. But once that method is clarified, the trial court will possess sufficient means for determining class membership from the class definition." *Id.* at ¶ 26.

{¶ 41} Having concluded that the proposed amended class definition satisfied the concerns of the Ohio Supreme Court with respect to ambiguity, we turn now to the reasons offered by the trial court to nonetheless deny class certification.

#### A. Fail-Safe

{¶ 42} The trial court found that the class definition offered created an improper fail-safe class.

{¶ 43} "A fail safe class is created when a court is required to hold 'mini-hearings' on the merits of each individual claim in order to determine the members of the class. *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 177. In order to decide whether a proposed class includes merit determinations, a trial court must decide whether that class 'rests upon a paramount liability question.' *Dale v. Daimler Chrysler Corp.* (2006), 204 S.W.3d 151, 179, citing *Intratex Gas Co. v. Beeson* (Tex. 2000), 22 S.W.3d 398, 404. In such a case, the class would only be bound by a judgment that is favorable to the class but not a judgment favorable to the defendant. *Id.*; *Dafforn v. Rousseau v. Russell Associates, Inc.* (N.D.Ind.1996), 1976-2 Trade Cases P61, 219. Therefore, to determine whether a class definition includes a merit determination, a court must decide whether the class would still exist if the defendant in the class action prevails at trial. *Dale v. Daimler Chrysler Corp.*, 204 S.W.3d at 179-180, citing *Intratex Gas Co. v. Beeson*, 22 S.W.3d at 405." *Miller v. Volkswagen of Am., Inc.*, 6th Dist. No. E-08-047, 2008-Ohio-4736, ¶ 28.

{¶ 44} Chief Justice Moyer would have rejected an assertion that the defined class was a "fail-safe" even as it was previously worded. He explained:

{¶ 45} " \* \* \* Here, the class definition contains the phrase 'individuals \* \* \* who were \* \* \* billed for charges on their local telephone bills \* \* \* on behalf of third parties without their permission.' [United] contend that this phrase prohibits class certification because class membership cannot be determined until a finding on the issue of liability has been made. In so contending, [United] appear[s] to concede that the lack of permission equates automatically with liability, but this is not the case. Defining the class in this way does not require a determination on the issue of liability or the merits of the underlying causes, because finding a class of customers who were assessed charges that they had not authorized does not require a determination that appellants are liable to the customers." *Stammco*, 2010-Ohio-1042, ¶ 43, Moyer, C.J. concurring and dissenting. (Footnote omitted.)

{¶ 46} Assuming that appellee was not found liable in the present case, the class would still exist because the determination of the class members does not rest on a determination of the merits. The class would still exist for: (1) customers of United Telephone of Ohio who, during the relevant period, (2) were billed for third party charges, (3) without prior authorization, (4) in writing or by an acceptable alternative. This is not a fail-safe class.

#### B. Misconception of Class

{¶ 47} Appellants complain that, in the decision under review, the trial court lost its way, resulting in rationale for denying class certification that reflects little of the proper posture of the case. Appellants suggest that the trial court has somehow

concluded that appellee is some sort of neutral pass-through entity taken advantage of by crammers, who are the real "culprit." From this erroneous assumption, appellants maintain, the court concluded that they have sued the wrong party. It is the crammers who should be the real target. Moreover, appellants assert, the trial court's conclusion that appellee, by "current legislation and case law," has no duty to appellants to police the charges it places on appellants' bills was an improper excursion in to the merits of the case.

{¶ 48} When enmeshed in the sometimes deliberate complexity of litigation, it is frequently difficult to sort out the immediate task at hand. Where this case is now is in the class certification phase. "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 178, quoting *Miller v. Mackey Internal.*, (CA 5, 1971), 452 F.2d 424, 427. "Class action certification does *not* go to the merits of the action." *Ojalvo v. Bd. of Trustees, Ohio St. Univ.*, *supra*, at 233. (Emphasis in original.)

{¶ 49} The trial court does not articulate how its forays into misplaced blame or questionable duty relate to its determination that the requirements of Civ.R. 23, which it once had determined were satisfied, which this court concluded were satisfied, and which the two justices of the Ohio Supreme Court who addressed the issue concluded were satisfied, are now found wanting. In our view, both rationales are improper incursions into the merits of the case.

{¶ 50} Since two of the three reasons the trial court articulated for denying the class are improper considerations of the merits and the third reason is inapplicable as a matter of law, we must conclude that the trial court abused its discretion in denying class certification. See *Ojalvo*, supra, syllabus. Appellants' second, third, fourth, and sixth assignments of error are found well-taken. The remaining assignment of error is moot.

{¶ 51} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

\_\_\_\_\_  
JUDGE

Arlene Singer, J.

\_\_\_\_\_  
JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

JOURNALIZED 12-23-10  
VOL 83 PG 1036

FILED  
FULTON COUNTY  
COMMON PLEAS COURT  
2010 DEC 22 A 10:46  
PAUL E. MACDONALD  
CLERK

**IN THE COURT OF COMMON PLEAS OF FULTON COUNTY, OHIO**

Stammco, LLC, d.b.a., The Pop Shop, et al, \*

Plaintiff, \*

-vs- \*

Fulton Co. Case No. 05CV000150

United Telephone Company of Ohio, \*

**JUDGMENT ENTRY**

d.b.a., United Telephone Co., et al, \*

Defendant. \*

\* \* \* \* \*

**Case Background**

Plaintiffs have brought their suit against their local and long distance telephone service provider, UTC, seeking relief from the imposition of third-party unauthorized charges, a practice known as “cramming.” Plaintiffs now seek to prosecute their action, along with others similarly situated, as a “class,” and they are seeking authorization to pursue this collective action against the Defendant, and its affiliated companies. The initial step in seeking this type of relief is to formulate a proper definition of the “class” to be certified, a proffer of which the Plaintiffs had submitted in their initial pleadings. In its initial Judgment Entry this Court did certify the Plaintiffs proposed class definition, as follows:

“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. United Telephone who were billed for charges on their local telephone bills by United Telephone on behalf of third parties without their permission. Excluded from this class are Defendants, their affiliates (including parents, subsidiaries, predecessors, successors, and any other entity or its affiliate which has a controlling interest), their current, former, and future employees, officers, directors, partners, members, indemnities, agents, attorneys and employees and their assigns and successors.” (See Stammco, LLC v. United Telephone Co. Of Ohio, 125 Ohio St. 3d 91, 2010-Ohio-1042, 926 N.E. 2d 292, at Paragraph 19.)

The Court of Appeals affirmed this certification. Subsequently the Supreme Court of Ohio reversed the Court of Appeals, and it remanded the issue of, “a more proper definition,” back to this Court, for clarification and further ruling.

This case boils down to a determination of four facts: (1) Whether the Defendant Company, United Telephone/United Telephone/Embarq, received monies from its customers, as part of its standard billing procedures and service, not only for itself, but also for and on behalf of certain “third party companies” with which it had a contractual relationship; (2) Whether its customers believed that the vast majority of the Defendant’s charges, appearing on their bills, arose from services provided by one entity, or by a number of entities, which appeared to be so interlinked and mutually responsible to themselves, so as to appear as one entity; (3) Whether such customers, to the extent they had become knowledgeable, were of a reasonable belief that they have been defrauded, and charged for services not provided, and/or not contracted for; and (4) Whether those customers who believe they were defrauded, and continue to be defrauded, can seek redress and relief from the

Courts, as a "Class."

The Court will initially address the "Error" assigned by the Supreme Court. The ultimate conclusions to be drawn by the Parties, from the Supreme Court's pronouncement on class definition error, differ greatly, in that the Plaintiffs aver the errors are "procedural," being mechanical and grammatical, while the Defendant contends them to be "substantive," and thus dispositive. The Court will attempt to reexamine anew the class definition resubmitted by Plaintiffs, the alternate arguments raised by the litigants, and the pertinent statutory and case law.

Plaintiffs have proposed the revised definition of the proposed class to be as follows:

**"All individuals, businesses or other entities in the State of Ohio who are or who were within the period four years prior to the initiation of this lawsuit to the present, subscribers to local telephone service from United Telephone Company of Ohio d.b.a. Sprint and/or any successor company providing that same service, and who were billed for third party charges as to which sprint had no prior authorization from the customer in writing or by a method acceptable to Sprint sufficient for Sprint to verify that the customer had agreed to such charge. Excluded from the class are those customers who subscribed to and provided authorization for long distance services from a provider of toll services that were billed on the customers' local telephone bills. Also excluded from this class are defendants, their affiliates (including parents, subsidiaries, predecessors, successors, former and future employees, officers, directors, partners, members, indemnities, agents, attorneys and employees and their assigns and successors."**

Unfortunately for Plaintiffs this Court must come to the following conclusions:

(1) That the "class definition," as submitted by the Plaintiffs is a prohibited "fail-safe class;"

(2) That the Plaintiff's action has been brought against the "local exchange carrier," rather than the culprit "third party provider;" and

(3) The action proposes to impose a "duty" upon the Defendant Carrier, that is not required of them, according to the status of current legislation and case law.

Plaintiffs have alleged they are the victims of a significant wrong. Unfortunately this wrong is insignificant on a personal level, but it is extremely significant and gross in nature on a community-wide level. It would appear that realistically this wrong can only be addressed, pressed, and redressed on a "class action" basis, or through remedial legislation. That being said, the overriding issue is whether the Courts (as opposed to the Legislature) will be allowed to address this clearly demonstrated wrong, in a viable and real way, or whether, in the converse, the current law and practice will be allowed to continue as is, thereby perpetrating the wrong complained of.

It is Black-Letter Law that in contracts, "The contract should be construed most strictly against the scrivener . . . This principle of law applies where there is an ambiguity of uncertainty." Wagner v. Menke, (June 19, 1935), 2<sup>nd</sup> Dist. No. 486, 1935 WL 1925, at Paragraph 7. Here, the Defendant Corporation is the recipient of certain moneys paid to it by its customers. But not all of that money is for services rendered. Some of that money is collected for "third party providers," who are also, ostensibly, contracted with that same customer. It retains a small portion of those moneys as a "fee" for its services to those "third party providers." For that money, it lists and collects the "charges" of those third party providers, on a combined bill, that their mutual customers receive in the mail. Ideally, this would be considered a "Customer," and a "Third Party Provider" convenience. The customer would only have to receive one bill, and there would only have to be one payment. Consequently the third party service providers would incur less overhead, and there would be a much

improved probability of those providers being able to recoup the small fees charged, for those services, since Defendant Sprint/Embarq/Century Telephone, the Local Exchange Carrier, (LEC) incorporates those fees within the aggregated bill sent to the customer.

The problem comes about when that "small fee" is not authorized, or is erroneous in some respect. Combating a small erroneous charge is an almost impossible task for the average customer. If the customer refuses to pay for a certain third party service, even if he did not contract for it, or authorize it, then the entire telephone service could or would be disconnected, or discontinued, or the charges could or would be rolled over "ad infinitum." The customers know this. As currently structured, even if a customer is convinced that a charge is fraudulent, or incorrect, and he or she wishes to contest that portion of his/her bill, then the burden is still upon him/her to prove this. This assumes that he or she is given a real opportunity to do so. In reality that task of garnering "proof" may be difficult to do if he/she is effectively shuffled around, to and from numerous overseas call centers, whose customer service representatives vaguely understand English, or the caller is shifted to a number of levels of prerecorded messages that tend to be interminable, and interspersed with long stretches of "elevator music." The enormous time, energy, and patience expended quickly eclipses any satisfaction to be derived from an eventual recoupment of a few dollars or cents.

Further, if a customer cannot prove the fraudulent or inaccurate nature of the charges to the Defendant's, and the third party service provider's satisfaction, then the charges will merely be rolled over onto the customer's next month's bill. If the telephone company insists that the customer must resolve any issue involving an alleged mistaken charge from the third party provider, with that provider, before it can remove that charge from the bill, then the customer is left with the prospect of dealing with a company that may or may not be predisposed to assist him/her, because they are

the ones who placed the incorrect or fraudulent charges on the bill in the first place. Added to this commercial conundrum is the fact that if the customer chooses to move to another third party provider, any unresolved charges from the first one will remain prominent and viable until paid, and they could easily end up in a bad debt collection debacle.

This practice the Court is considering has a name. It is common known as “cramming.” ‘Cramming’ is the practice of placing unauthorized, misleading, and/or deceptive charges on an otherwise authorized telephone bill. The entities that engage in this fraudulent practice appear to rely largely on the fact that telephone bills are often confusing, or left unread, in order to mislead consumers into paying, “for services that they did not authorize or receive.” (See FCC publication, *Unauthorized, Misleading, or Deceptive Charges Placed on Your Telephone Bill – Cramming* August 13, 2002). There have been legislative attempts to address this matter. The law is very clear regarding plain language and telephone bills:

“Charges contained on telephone bills must be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered. The description must be sufficiently clear in presentation and specific enough in connect to that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged. 64.2401 Truth-in-Billing Requirements, 47 C.F.R., 64.2401.”

The “truth in billing” rules were adopted in large part to deter unscrupulous practices, such as “cramming,” placing unauthorized or deceptive charges on consumer’s local telephone bills. These charges may be for any services the consumer did not request, such as ring tones, music,

horoscopes, or email accounts. Consumers often do not notice or understand these charges when they appear on the telephone bills, and they may simply pay them without realizing that they are for services the consumer did not request or authorize, or they may simply pay them to avoid further aggravation and greater expenditures. (See *Franchising 2010*, 993 *PLI/Pat* 645, 647 (2010).

Local exchange carriers or "LECs" dominated the telephone service market after the AT&T breakup starting in 1982. See *United State v. American Tel. & Telegraph Co.*, 552 F.Supp. 131, 227 (D.D.C. 1982); 47 C.F.R. Sec. 702, et. seq. When the Federal Communications Commission began detariffing LEC's services, and their party service providers entered the market, the billing and collection from the third party providers sometimes morphed, whereby the exploitation of unsophisticates, predicated upon this nefarious billing procedure, began. The FCC's detariffing of the LEC's billing and collection services gave rise to a peculiar form of commerce, founded upon third party exploitation by use of this uncommon payment method, for things other than telephone usage. (See *In re Matter of Detariffing billing & Collection*, 102 F.C.C. 2d 1150 (1986). *Fed. Trade Commission* No. 310CV0022, 2010 WL 2849424.)

#### Common Law and Equity

At common law, a person who accepts a service, and subsequently pays for it, has, in effect, ratified the contract, and fully performed the obligations adhering to it. If, however, a person is induced to pay a charge, by adhesion, fraud, or deceit, for a service he/she did not contract for, or did not get, then that person is not bound by that contract. One cannot assent to a fraudulent contract. Therefore, by laws and common sense, anyone who is injured in a fraudulent transaction, whether he or she is unknowingly or knowingly injured, is within his or her right to have that injury made known, and to pursue a claim in a Court of Law and Equity.

United Telephone indicates it has vetted third-party billing providers, and even the sales scripts used by these providers. It claims they have occasionally decertified providers for inappropriate conduct. Further, United Telephone asserts it incorporated the requirement that third-party providers produce independent authorization from customers before it would pass all and any charges that were to be included on the customers aggregated bill. United Telephone receives a fee for handling the service charges and aggregating those charges onto one combined bill. The customers were alleged to be, and in the scheme of things, were designated to be the "third party beneficiaries" of the agreements by and between United Telephone and any third party service providers.

Plaintiffs assert that United Telephone, as the final "gatekeeper" of the bill, has an obligation to ensure that all the customer's charges were in deed "valid." Defendant disagrees with that. Defendant claims that Plaintiffs are attempting to stamp Defendant as an "insurer," which Defendant asserts is beyond law, fact, or reason.

Plaintiffs assert that where the Defendant is the only local exchange company available to the customer, it is unavoidable that if the customer wants to have a "land line," he or she can not deal with anyone other than United telephone. Plaintiffs further assert that if United Telephone, as part of its "regulations and practice," collected tariffs and received payments from the providers, and submitted that practice as part of the record to be submitted to the FCC, then as the principal telecommunications company in the area, it has a concomitant duty to ensure that any service provider passing on charges for aggregation be required to follow appropriate business and governmental guidelines. This would be particularly true where it has outlined the practice in the format of written agreements, and vetted the providers with this purpose in mind. Further, by acting

as the initial point of contact between third-party providers and the customer, it has blurred the lines of the relationship, as perceived by the consumer of their services. United Telephone has indicated it has been able to resolve some customer complaints made against third-party providers. However, in the customers mind, this lends further credence to Plaintiffs' assertion that this establishes proof of a relationship of "implied authority," if not "agency." All these points merit serious consideration, and they do marshal substantial evidence in support of a ruling that would favor a finding in favor of class certification.

#### Legal Analysis of Statutory and Case Law

Justice Cupp appeared to have an appreciation of the issues in this case, when he stated in his concomitant Concurrence and Partial Dissent, "I would address this proposition of law and hold that the Trial Court did not abuse its discretion in determining that class wide questions predominate." Stammco, LLC v. United Tel. Co. Of Ohio, 125 Ohio-St. 3d 91, 2010-Ohio-1042, 926 N.E. 2d 292, at Paragraph 27.

While this was a minority endorsement that class wide questions predominate, the majority did not concur regarding this matter, and therefore this Court must reconsider the underlying law.

The first Error found by the Court concerns aspects of a readily identifiable class of members, which appears to be founded upon the fundamental second Error, where this Court accepted the Plaintiffs' broadly construed aspects of "authorization," i.e., "their permission." This Court does agree with the Supreme Court, that without specifically defining from whom authorization was required, and to whom it must be given, then the relative litigant's position must remain declared as "indeterminate."

Simply put the "their" of "their permission," refers to customers who received bills from

United Telephone, where the bills contain third-party charges, and they were/are either fraudulent charges for services not received, or charges arising from deceptive business practices, and United Telephone is not able to produce a satisfactory record indicating that these charges were ever "authorized" by the customer. If the class is defined in these terms, than by default the Plaintiffs must prove, in a "telephone cramming case," that United Telephone allowed unauthorized charges to be placed on the customer's bill, and no credible record of "authorization" for the charges exists.

Ohio Courts have identified seven requirements that must be satisfied before an action may be maintained as a "class action" under Civil Rule 23:

- 1) An identifiable class must exist, and the definition of the class must be on ambiguous;
- 2) The named representatives must be members of the class;
- 3) The class must be so numerous that joinder of all members is impracticable;
- 4) There must be questions of law and/or fact common to the class;
- 5) The claims or defenses of representative parties must be typical of the claims or defenses of the class;
- 6) The representative parties must fairly and adequately protect the interests of the class; and
- 7) One of the three Civil Rule 23 (B) requirements must be met.

"The failure to meet any one of these prerequisites will defeat a request for class certification." Schmidt v. Avco Corp (1984), 15 Ohio St. 3d 310, 313, 15 OBR 439, 473 N.E.2d 822. "In determining whether the seven class certification requirements have been met, a trial court is not to consider the merits of the claims." Ojalvo v. Bd of Trustees of Ohio State Univ. (1984),

12 Ohio St.3d 230, 233, 12 OBR 313, 466 N.E. 2d 875. "However, a trial court may consider any evidence before it at that stage of the proceedings which bears on the issue of class certification." Senter v. General Motors Corp. (C.A.6, 1976), 532 F.2d 511, 523. (Also Hansen v. Landaker (Dec. 7, 2000), Franklin App. No. 99AP-1117, 2000 Ohio App. LEXIS 5680 at Paragraph 6, 2000 WL 1803936 at Paragraph 8).

Here Plaintiffs have proffered a new definition that attempts to address the Supreme Court's concern for "consent" and "authorization." The case of Global Crossing Telecomms, Inc. V. Metrophones Telecomms, Inc. (2007), 550 US 45, 49, appears to address this matter by giving the customer/consumer rights advocate a right to redress injuries suffered from the "carrier's charges." The "class" definition submitted by Plaintiffs here assumes that all charges appearing on the telephone bill are the "carrier's," or that their injuries arise as a direct result of the "carrier's" practices or regulation. But Defendant asserts the charges are not "theirs," but the Third Party Providers. To cite from another Opinion, "Section 203(a) of the Communications Act requires all common carriers to file with the FCC schedules, also known as tariffs, setting forth its charges and showing the classifications, practices, and regulations affecting such charges. 47 U.S.C. Section 203(a)." Splitrock Props., Inc. v. Qwest Commc'ns Corp. (D.S.D. Aug. 28, 2009), No. Civ. 08-4172, 2009 WL 2827901, at Paragraph 2.

Plaintiffs have not asserted a claim that the proposed class definition should include matters regarding the practices and regulatory relationship existing by and between United Telephone and its third party service providers. A Discovery Motion, prior to the filing of the Class Certification Motion, might have been in order to first establish whether United Telephone had filed a schedule with the FCC. The Motion might have established the mode of practices and regulations regarding

the “third party service charges,” and the tariffs United Telephone aggregates. However, this is not the appropriate juncture to consider that matter.

Defendant carrier asserts that it is only a “conduit,” and a “bill aggregator,” and that the questioned charges arise from third party service providers, to which they are beholden. The Federal Courts have had extensive experience regarding “telephone carrier - customer fiduciary relationship” issues. “The mere fact that in the course of their business relationships the parties reposed trust and confidence in each other does not impose any corresponding fiduciary duty.” (See City Solutions, Inc. v. Clear Channel Commc’ns, Inc., 201 F.Supp. 2d 1048, 1050 (N.D.Cal. 2002) Customers, therefore are not owed any “fiduciary duty” from the telephone company. (See McDonnell Douglas Corp v. General Tel. Co. Of Cal., 594 F 2d 720, 725 (9<sup>th</sup> Cir. 1979)). Finally, at least one Federal Court has said that, “A telephone company is not in a fiduciary relationship with its customers.” Simpson v. U.S. West Commc’ns, Inc., 957 F.Supp. 201, 206 (D.Or. 1997). Plaintiffs have asked this Court to certify a class where the injury arises from, **“third party charges as to which United Telephone had no prior authorization from the customer in writing or by a method acceptable to United Telephone sufficient for United Telephone to verify that the customer had agreed to such charge.”** Simply put, the case law does not specifically require United Telephone to have an “authorization” for third party service provider charges, nor does it impose any “fiduciary relationship,” such that it would owe its customers a duty under that rubric.

#### Fail Safe Class

Lastly we come to the biggest impediment to Plaintiffs’ cause of action. Defendant argues that the amended class definition submitted by the Plaintiffs constitutes a “fail-safe” class. Plaintiffs claim their cause is not a “fail-safe” classification case. A review of the Final Arguments presented

to the Ohio Supreme Court in this case indicate that this was an issue that was considered by the Justices to be of paramount importance, and even determinative.

“Fail-safe” issues relate back to an Enactment passed by Congress some six years ago, designated as the “Class Action Fairness Act,” which was purportedly passed to give broad protection to large corporations who were being peppered with numerous “peccadillo” suits, that were allegedly causing an unreasonable sap of the economic strengths of these behemoths. The Washington Legal Foundation has authored and published an excellent article on the subject in its “Legal Backgrounder,” Vol. 24, at page number 38, where the concept is briefly discussed, and explained in comprehensive terms.

To capsulize the matter, a class definition is considered to be impermissible, as a “fail-safe” class, or as a “one-way intervention” class, where and because the definition based class membership turns on the ability to bring a successful claim on the merits. Courts have generally held that such a definition is inconsistent with requirements of Civil Rule 23(c)(3), which provides in part that a judgment, adverse to the class, would bind all class members, and thus there would not exist any generalized evidence which could prove or disprove an element, “on a simultaneous, class-wide basis.” (See Amati v. City of Woodstock, 176 F.3d 952 (7<sup>th</sup> Cir. 1999), and Cope v. Metropolitan Life (1998), 82 O.St. 3d 426). These holdings indicate a class definition must not result in a “fail-safe” class which, “would be bound only by a judgment favorable to Plaintiffs, but not by an adverse judgment.” Adashunas v. Negley, 626 F.2d 600, 604 (7<sup>th</sup> Cir. 1980), citing Dafforn v. Rousseau Associates, Inc., 1976 WL 1358, Paragraph 1 (N.D.Ind. 1976); La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 467 (9<sup>th</sup> Cir. 1973). Hence, in class action litigations, Plaintiffs are now required to present a posture that walks a very tight line, on a continuum between a predominance of the

individualized issues, and the ability to define a class, without reaching the cases's underlying merits, and whose membership reaches the alleged facts and injuries. Apparently Congress has made a policy decision to appropriate and/or pre-empt this area of economic stimulus, even though it has not expressly stated as much in formal, legal format.

Plaintiffs here predicate their proposed amended class definition upon United Telephone's lack of records. The problem that develops is that if an individual Plaintiff is able to join that class, and the Trier of Fact were to find that United Telephone did not keep a record of that individual's "authorization," or have an acceptable record of it, and the Trier of Fact were to further determine that United Telephone had no duty, and it is not liable for failure to keep those records, then the individual Plaintiff could subsequently sue United Telephone, claiming the charges were "fraudulent." This would appear to be a "fail-safe." The "merits" of the individual's claim "defines" the proposed class. Thus the proposed class definition is unacceptable by virtue of the legislation that "outlaws" it.

The "fail-safe" dilemma appears to be a creature of Legislative policy, and it is insurmountable in Plaintiff's case. To cite the Jurist in the case of Bill Buck Chevrolet v. GTE, "This is not to say that telephone or credit card customers who have been wrongfully billed or charged due to a *third party's fraud* (emphasis added) are without remedy. If a service provider knowingly causes a telephone customer to be billed for services that the customer did not request, the customer may have a cause of action against that service provider, possibly including a RICO claim." (See Bill Buck Chevrolet, Inc. V. GTE Fla., Inc. (M.D. Fla. 1999), 54 F.Supp. 1127, 1134.) The Court here would proffer that to be "wishful thinking" extraordinary.

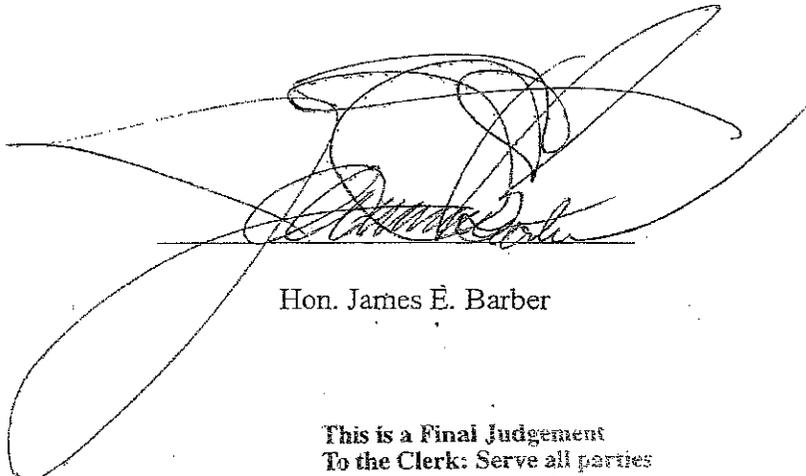
The Court is psychologically attuned to Plaintiff's plight, having personally experienced the

attempt to obtain a redress through an escalate of telephone calls routed through call centers in India and Pakistan, without a lot of satisfaction. Nevertheless it appears that there is a precedent for this type of situation, which has been long recognized and encapsulated by the Latin phrase: "Damnum absque injuria." Unfortunately this Court does not have the wherewithal, nor the authority to address Plaintiffs' situation. A higher Court than this one will have to address the issue, with some decorum, common sense, and finality.

For all of the foregoing reasons, this Court must reluctantly find that the Plaintiffs have not met their burden of establishing, by a preponderance of the evidence, that a "class certification," is a proper one. Therefore, Plaintiff's Amended Motion for Class Certification, is hereby found not to be sustained, and it is hereby denied and dismissed, without prejudice.

IT IS SO ORDERED.

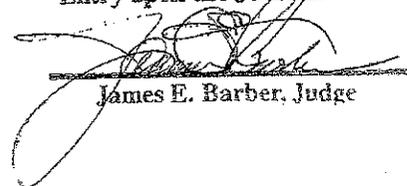
THIS IS A FINAL, APPEALABLE ORDER.



Hon. James E. Barber

cc: Dennis Murray, Sr., Esq.  
Donna Evans, Esq.  
Michael Farrell, Esq.  
Karl Fanter, Esq.

**This is a Final Judgement  
To the Clerk: Serve all parties  
not in Default with "Notice" of  
this Judgement, and "Date of its  
Entry upon the Journal."**



James E. Barber, Judge