

ORIGINAL

IN THE SUPREME COURT OF OHIO

STAMMCO LLC d/b/a THE POP SHOP, <i>et al.</i> ,	:	Case No.: 2012-0169
	:	
	:	
Plaintiffs-Appellees,	:	On Appeal From the
	:	Fulton County Court
v.	:	of Appeals, Sixth
	:	Appellate District,
UNITED TELEPHONE COMPANY OF OHIO AND SPRINT NEXTEL CORPORATION,	:	Case No. F-11-003
	:	
	:	
Defendants-Appellants.	:	

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

Michael K. Farrell (0040941)
Counsel Of Record
 John B. Lewis (0013156)
 Karl Fanter (0075686)
 BAKER & HOSTETLER LLP
 PNC Center
 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
 AUG 14 2012
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY OF ARGUMENT	1
STATEMENT OF FACTS	3
I. United Telephone Lets Third Parties Bill Customers Using United Telephone’s Bills	3
II. United Telephone’s Billing Services Are Not Inherently Harmful	5
III. Plaintiffs Allege That United Telephone Acted Negligently, And The Fact Of Damage Is A Critical Element Of All Plaintiffs’ Claims.....	6
IV. This Court And Then The Trial Court Rejected Class Certification Of Plaintiffs’ Cramming Claims.....	8
A. This Court Finds Class Certification Was Improper	10
B. On Remand, The Trial Court Properly Denies Certification.....	11
C. The Sixth District Again Becomes The Only Court In The Country To Sanction A Cramming Class Action.....	13
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW	14
I. Proposition of Law No. I: A Trial Court does not abuse its discretion by evaluating the merits of the plaintiffs’ claims when considering class certification	14
A. The Abuse of Discretion Standard And Standard of Review That Should Have Been Applied By The Appellate Court	14
B. Courts Have Long Misunderstood Eisen.....	16
C. Wal-Mart Makes Clear That A Trial Court’s Duty To Conduct Rigorous Analysis Will Often Require Evaluation Of Merits Issues - It Is Not An Abuse of Discretion To Do So.....	18
D. The Trial Court Did Not Abuse Its Discretion By Considering Merits Issues, Or In Any Other Way, When It Denied Certification.....	22
1. There Are Not Common Issues Of Law Or Fact.....	23
2. Individualized Issues Of Law And Fact Predominate.....	25
3. The Proposed Class Definition Is Flawed.....	29
4. The Class Is Unmanageable.....	31
5. Plaintiffs Lack Standing And Typicality.....	33
CONCLUSION	35
PROOF OF SERVICE.....	36

APPENDIX

1. Notice of Appeal, January 30, 2012..... A-1
2. Sixth Appellate District Decision and Judgment, December 16, 2011..... A-4
3. Fulton Cty. Court of Common Pleas Judgment Entry, December 22, 2010.....A-21
4. Ohio Supreme Court Decision and Judgment, March 24, 2010..... A-36

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Augustus v. Progressive Corp.</i> , 8th Dist. No. 81308, 2003-Ohio-296.....	23
<i>Bacon v. Honda of Am. Mfg.</i> , 205 F.R.D. 466 (S.D. Ohio 2001).....	34
<i>Bill Buck Chevrolet v. GTE Florida, Inc.</i> , 54 F.Supp.2d 1127 (M.D. Fla. 1999).....	25
<i>Blackie v. Barrack</i> , 524 F.2d 891 (9th Cir. 1975).....	17
<i>Brown v. SBC Communications, Inc. et al.</i> , S.D.Ill. No. 05-CV-777-JPG, 2009 WL 260770 (Feb. 4, 2009).....	9, 10, 27, 31
<i>Chambers v. St. Mary's Sch.</i> , 82 Ohio St.3d 563, 697 N.E.2d 198 (1998).....	7
<i>Comcast Corp. v. Behrend</i> , 80 U.S.L.W. 3707, 2012 WL 113090 (2012).....	3
<i>Coopers & Lybrand v. Livesay</i> , 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).....	18, 22
<i>Cope v. Metro. Life Ins. Co.</i> , 82 Ohio St.3d 426 696 N.E.2d 1001.....	17
<i>Cowit v. Cellco Partnership</i> , 181 Ohio App.3d 809, 2009-Ohio-1596, 911 N.E.2d 300 (1st Dist.).....	26
<i>Ed Schory & Sons, Inc. v. Soc. Nat'l Bank</i> , 75 Ohio St.3d 433, 662 N.E.2d 1074 (1996).....	7
<i>Eisen v. Carlisle & Jacquelin</i> , 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).....	passim
<i>Erica P. John Fund, Inc. v. Halliburton Co.</i> , 131 S.Ct. 856, 178 L.Ed.2d 622 (2011).....	26
<i>Gen. Tel. Co. of Southwest v. Falcon</i> , 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).....	18

<i>Hambleton v. R.G. Barry Corp.</i> , 12 Ohio St.3d 179, 465 N.E.2d 1298 (1984)	7
<i>Hamilton v. Ohio Sav. Bank</i> , 82 Ohio St.3d 67, 694 N.E.2d 442 (1998).....	15, 16, 18
<i>Hill v. Moneytree of Ohio Inc.</i> , 9th Dist. No. 08CA009410, 2009-Ohio-4614	17
<i>Hoang v. E*Trade Group, Inc.</i> , 151 Ohio App.3d 363, 2003-Ohio-3001, 784 N.E.2d 151 (8th Dist.).....	27
<i>Howland v. Purdue Pharma, L.P.</i> , 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d 141	14
<i>In re Am. Med. Sys., Inc.</i> , 75 F.3d 1069 (6th Cir. 1996).....	28
<i>In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation</i> , 691 F.2d 1335 (9th Cir. 1982).....	17
<i>In re G.T.B.</i> , 128 Ohio St.3d 502, 2011-Ohio-1789, 947 N.E.2d 166	16
<i>J.M. Woodhull, Inc. v. Addressograph-Multigraph Corp.</i> , 62 F.R.D. 58 (S.D. Ohio 1974).....	32
<i>Joyce v. Gen. Motors Corp.</i> , 49 Ohio St.3d 93, 551 N.E.2d 172 (1990)	16
<i>Koch v. Stanard</i> , 962 F.2d 605 (7th Cir. 1992)	17
<i>Lady Di's, Inc. v. Enhanced Servs. Billing, Inc.</i> , S.D.Ind. No. 1:09-CV-34-SED-DML, 2010 WL 4751659 (Nov. 16, 2010)	14, 25, 27
<i>Leach v. W. & S. Life Ins. Co.</i> , 51 N.E.2d 403 (9th Dist. 1941)	28
<i>Linn v. Roto-Rooter, Inc.</i> , 8th Dist. No. 82657, 2004-Ohio- 2559	28
<i>Lucio v. Safe Auto Ins. Co.</i> , 183 Ohio App.3d 849, 2009-Ohio-4816, 919 N.E.2d 260 (7th Dist.)	17
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).....	33

<i>Maestle v. Best Buy Company</i> , 197 Ohio App.3d 248, 2011-Ohio-5833, 967 N.E.2d 227 (8th Dist.)	30, 31
<i>Margulies v. Guardian Life Ins. Co. of Am.</i> (Apr. 5, 2007), 8th Dist. No. 88056, 2007-Ohio-1601	31
<i>Marks v. C.P. Chem. Co.</i> , 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987)	9, 15, 16
<i>Midland Pizza, LLC v. Southwestern Bell Tel. Co.</i> , 277 F.R.D. 637 (D.Kan.2011).....	13, 14, 27
<i>Nagel v. Huntington Natl. Bank</i> , 179 Ohio App.3d 126, 2008-Ohio-5741, 900 N.E.2d 1060 (8th Dist.).....	17
<i>Ojalvo v. Bd. of Trustees of Ohio State Univ.</i> , 12 Ohio St.3d 230, 466 N.E.2d 875 (1984)	passim
<i>Petty v. Wal-Mart Stores, Inc.</i> , 148 Ohio App.3d 348, 773 N.E.2d 576 (2d Dist. 2002).....	26
<i>Repede v. Nunes</i> , 8th Dist. Nos. 87277, 87469, 2006-Ohio-4117	28
<i>Schmidt v. Avco Corp.</i> , 15 Ohio St.3d 310, 473 N.E.2d 822 (1984).....	15, 16, 19, 26
<i>Scott v. Fairbanks Capital Corp.</i> , 284 F. Supp. 2d 880 (S.D. Ohio 2003)	28
<i>Setliff v. Morris Pontiac, Inc.</i> , 9th Dist. No. 08CA009364, 2009-Ohio-400	17
<i>Shelter Realty Corp. v. Allied Maintenance Corp.</i> , 574 F.2d 656 (2d Cir. 1978).....	17
<i>Simmons v. Am. Gen. Life & Acc. Ins. Co.</i> , 140 Ohio App.3d 503, 748 N.E.2d 122 (6th Dist. 2000)	33
<i>Simon v. E. Ky. Welfare Rights Org.</i> , 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)	33
<i>Spivey v. Adaptive Mktg. LLC</i> , 622 F.3d 816 (7th Cir. 2010)	29
<i>Stammco, LLC v. United Tel. Co.</i> , 6th Dist. No. F-11-003, 2011-Ohio-6503	passim

<i>Stammco, LLC v. United Tel. Co. of Ohio</i> , 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292 (“ <i>Stammco I.</i> ”).....	passim
<i>Stammco, LLC v. United Tel. Co. of Ohio</i> , 6th Dist. No. F-07-024, 2008-Ohio-3845	5, 8
<i>State ex rel. Davis v. Pub. Emps. Retirement Bd.</i> , 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444	15, 25, 26
<i>State ex rel. Ogan v. Teater</i> , 54 Ohio St.2d 235, 375 N.E.2d 1233 (1978)	20
<i>Stern v. AT&T Mobility Corp.</i> , C.D. Cal. No. 05-8842, 2008 WL 4382796 (Aug. 22, 2008), <i>reconsideration denied</i> , 2008 WL 4534048 (Oct. 6, 2008)	8, 31
<i>Stern v. Cingular Wireless Corp.</i> , C.D. Cal. No. 05-8842, 2009 WL 481657 (Feb. 23, 2009)	9, 27
<i>Terminal Supply Co. v. Farley</i> , 6th Dist. No. L-90-041, 1991 WL 1577	28
<i>Unger v. Amedisys Inc.</i> , 401 F.3d 316 (5th Cir. 2005)	23
<i>Vega v. T-Mobile USA, Inc.</i> , 11th Cir. No. 07-13864, 2009 WL 910411 (Apr. 7, 2009)	26
<i>Wal-Mart v. Dukes</i> , 131 S. Ct. 2541, 180 L.Ed.2d 374 (2011)	passim
<i>Warner v. Waste Mgt., Inc.</i> , 36 Ohio St.3d 91, 521 N.E.2d 1091 (1988)	20
<i>Wilson v. Brush Wellman, Inc.</i> , 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59	15, 28
<i>Woods v. Oak Hill Community Med. Ctr., Inc.</i> , 134 Ohio App.3d 261, 730 N.E.2d 1037 (4th Dist. 1999).....	33

RULES

Rule 23 of the Ohio Rules of Civil Procedure	passim
Rule 23(A) of the Ohio Rules of Civil Procedure.....	33
Rule 23(B) of the Ohio Rules of Civil Procedure.....	15
Rule 23(B)(2) of the Ohio Rules of Civil Procedure	8

Rule 23(B)(3) of the Ohio Rules of Civil Procedure passim
Rule 23(B)(3)(d) of the Ohio Rules of Civil Procedure 32

OTHER AUTHORITIES

Manual for Complex Litigation, Section 21.24 (4th Ed. 2005)..... 26

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has already concluded that the individual issues at the core of plaintiffs' claims preclude class certification. *Stammco, LLC v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292 (“*Stammco I.*”) On remand, the trial court reached the same result and denied certification. But the Sixth District reversed, finding that the trial court abused its discretion by considering merits issues in the course of ruling on class certification. *Stammco, LLC v. United Tel. Co.*, 6th Dist. No. F-11-003, 2011-Ohio-6503, ¶ 50. The Sixth District’s decision should be overruled because it is based on a reading of the law expressly rejected by the U.S. Supreme Court in *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 180 L.Ed.2d 374 (2011).

Plaintiffs allege what they call “cramming.” They claim that *some* third-party charges they received with their telephone bills were for services they did not want or use. The only harm plaintiffs allege is that they paid *some* of those charges. No matter how a class is defined, the questions at the heart of plaintiffs’ claims—whether they were charged, and paid, for a third-party service they did not want or use—can never be answered for all other United Telephone customers “in one stroke.”

Stammco I reversed certification of a class defined as those who received charges “without their permission” because its members were not readily identifiable. To identify class members, the trial court would have had to “determine individually whether and how each prospective class member had authorized third-party charges” and “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” on the question of authorization. *Stammco I* at ¶ 11. The Court also found that the phrase “their permission” used in the definition was ambiguous. *Id.* at ¶ 10. Because the failure to

meet these threshold Rule 23 requirements was fatal, the Court did not address the many other reasons a class could not be certified, including lack of commonality, manageability, or predominance of class wide issues and the fact that plaintiffs sought to certify an improper failsafe class. *Id.* at ¶ 13.

On remand, plaintiffs presented a “new” class definition that simply replaced the phrase “without their permission” with language meaning the same thing but that still did not allow efficient identification of class members. After taking extensive evidence, briefing and an oral hearing, the trial court found that plaintiffs “had not met their burden” under Rule 23 and denied certification. Despite *Stammco I* and the decisions of every other court in the country ruling on class certification in a cramming case, the Sixth District reversed.

Based on *Ojalvo v. Bd. of Trustees*, and its incorrect reading of *Eisen v. Carlisle*, the Sixth District held that the trial court abused its discretion by considering two merits issues: first, that plaintiffs sued United Telephone, not the third parties that initiated the charges they dispute, and second, that no statute or case law imposes on United Telephone a duty to re-verify third party charges that it delivers. *Stammco, LLC v. United Telephone Co.*, 6th Dist. No. F-11-003, 2011-Ohio-6503, at ¶ 50 (citing *Ojalvo v. Bd. of Trustees of Ohio State Univ.*, 12 Ohio St.3d 230, 233, 466 N.E.2d 875 (1984) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974))). The Sixth District did not find that either of the trial court’s statements was incorrect—but instead ruled it was error merely to consider such things.¹ *Id.*

¹ The Sixth District also disagreed with the trial court’s conclusion that the class definition created an improper failsafe class. United Telephone believes the trial court was correct on this point, but does not address that issue as it is outside of the Proposition of Law accepted for review.

Wal-Mart v. Dukes and its rapidly growing progeny now make clear that the trial court did not abuse its discretion by considering merits issues.² On the contrary, it is necessary to consider the merits when determining whether plaintiffs have met their burden under Rule 23. *Wal-Mart*, 131 S.Ct. at 2552, fn. 6. For this reason, the Sixth District's decision should be reversed, and the trial court's order denying class certification should be reinstated.

STATEMENT OF FACTS

I. **United Telephone Lets Third Parties Bill Customers Using United Telephone's Bills.**

Appellant United Telephone Company of Ohio ("United Telephone") allows certain third-party businesses to place charges on the monthly billing statements United Telephone sends to its customers.³ Third parties who bill this way need not create and operate their own billing infrastructure. Customers who choose to do business with these third parties receive consolidated billing rather than multiple bills. United Telephone is not involved in the transactions that can lead to the third-party charges that appear on its bills. Rather, those charges result from transactions between third-party businesses and end-user customers. (Davis Aff. ¶ 10, Supp. 112.)

² The U.S. Supreme Court recently granted certiorari in another case to decide whether "a court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." *Comcast Corp. v. Behrend*, 80 U.S.L.W. 3707, 2012 WL 113090 (2012).

³ Sprint Nextel Corporation is not a proper defendant, there is no personal jurisdiction over it, and no class of plaintiffs can properly be certified as to it. Sprint Nextel Corporation reserves these issues. Sprint Corporation, Sprint Nextel Corporation, Embarq Corporation, CenturyTel, Inc., and CenturyLink, Inc. do not provide local Telephone services in Ohio. (Eason Aff. ¶ 2-6, Supp. 17-18.)

More than 2,000 different businesses have used United Telephone's third-party billing service during the relevant time period. (Davis Aff. ¶ 16, Supp. 115.) Those businesses offer a variety of products, including long distance telephone service, pay-per-call services like weather or sports, website setup and hosting, on-line advertising, and music downloading. (*Id.* at ¶ 16, Supp. 115.)

Participating third-party businesses electronically transmit information about the charges associated with their transactions to one of several billing clearinghouses. The clearinghouses identify which of the charges were incurred by United Telephone customers. The clearinghouses then send information about those charges to United Telephone in the form of thousands of electronic "messages," each of which pertains to a specific charge. United Telephone processes the information and each charge is then placed onto the appropriate bill. When customers receive their monthly bills for local telephone services from United Telephone, those bills include any third-party charges that customer has incurred. (*Id.* at ¶ 10-13, Supp. 112-113.)

Third-party charges appear on a separate page of customers' bills and are conspicuously labeled as such. The name of the third-party initiating the charge, nature of service for which the charge was made, amount of the charge, and contact information for inquiries about the third-party charge are included. (Davis Aff. ¶ 4, Supp. 111; Stamm 61-65, Ex. 17, Supp. 25-27, 46.) Credits or adjustments given to customers in the event of an erroneous or disputed third-party charge are also processed by United Telephone and similarly appear on customer bills. (Stamm Exs. 21-32, 34, Supp. 57-101, 105-109.)

When United Telephone receives payments from customers and the payments include amounts for third-party charges, the amounts related to third-party charges are

delivered to the clearinghouses, less flat, per-message, fees for the billing and collection services provided by United Telephone. (McAtee 22-26, Supp. 121-122.)

Because of its limited role, United Telephone does not receive or maintain information that shows whether a specific third-party service was ordered or used by a customer, or whether any third-party charge was valid or authorized. (Davis Aff. ¶ 10, Supp. 112.) This is undisputed. Thus, if United Telephone is contacted by a customer or otherwise needs to determine how a specific third-party charge occurred, it must secure the information from the customer, the third party, and the clearinghouse. (David Aff. at ¶ 10, 12, Supp. 112-113.) This, too, is undisputed.

II. United Telephone's Billing Services Are Not Inherently Harmful.

Whether a particular charge from a third-party business is legitimate depends upon interactions between that third-party business and the customer, not on anything that United Telephone does. Indeed, the trial court acknowledged that certain third-party charges "are transparent, authorized and legitimate." *Stammco, LLC v. United Tel. Co. of Ohio*, 6th Dist. No. F-07-024, 2008-Ohio-3845, ¶ 20.

The facts relating to the plaintiffs' third-party charges are illustrative. Plaintiffs-appellees Kent and Carrie Stamm receive local telephone service from United Telephone at their home and business (Stammco, LLC, doing business as "The Pop Shop"). (Am. Compl. ¶ 2, Supp. 2; Stamm 24, 155-57, Supp. 20, 42; Eason Aff. ¶ 5-6, Supp. 18.)

Plaintiffs allege that they did not order some third-party items for which they were billed. Yet during discovery, they conceded that certain third-party charges they paid were legitimate. For instance, they were billed for long-distance service from MCI on their United Telephone bill, and admit that they purchased long-distance service from MCI and that the MCI charges are legitimate. (Stamm 134-36, Supp. 38.)

Plaintiffs complain that they never ordered website services from a business called Bizopia, but that is disputed. It is undisputed that Bizopia spoke to one of plaintiffs' employees, who it claims authorized the service order. It is also undisputed that the portion of that call verifying the order was recorded and that Bizopia twice faxed a written confirmation of the order to plaintiffs. Plaintiffs, however, deny that their employee had authority to order Bizopia's services, and dispute whether he actually did so during that telephone conversation. (Stamm 73-77, Supp. 28-29; Smith 13-15, Supp. 128-130.) United Telephone removed the Bizopia charges from plaintiffs' bill at their request, and plaintiffs did not pay them. (Stamm 133, Ex. 24, Supp. 37, 68.)

Except for complaints about long distance telephone calls plaintiffs claim they did not make or accept the charges for, they do not contest any additional charges from other businesses. Plaintiffs do not claim they were harmed by, or seek recovery for, receiving third-party charges for services and products they wanted or used. (Stamm 59, Supp. 25.)

III. Plaintiffs Allege That United Telephone Acted Negligently, And The Fact Of Damage Is A Critical Element Of All Plaintiffs' Claims.

Plaintiffs assert claims for negligence, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. They allege that United Telephone was negligent by not ensuring that specific third-party charges they got were valid, by insufficiently "screening" third-party service providers, and by delivering third-party charges without first obtaining written permission to do so. (Am. Compl. ¶ 53, 58-59, Supp. 12, 13; Stamm 57-58, Supp. 24-25.) Plaintiffs do not allege that United Telephone improperly charged them for any of its own services, that it violated any federal or state law or tariff, or that it engaged in fraud or a common misrepresentation.

Plaintiffs do not and cannot dispute that harm and causation, including the fact of damages, are elements of liability that they and every class member must prove for each of the claims they assert. *Chambers v. St. Mary's Sch.*, 82 Ohio St.3d 563, 565, 697 N.E.2d 198 (1998) (negligence); *Ed Schory & Sons, Inc. v. Soc. Nat'l Bank*, 75 Ohio St.3d 433, 433-444, 662 N.E.2d 1074 (1996) (breach of the contractual duty of good faith and fair dealing); *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984) (unjust enrichment).

The only harm plaintiffs allege is paying for services they claim they did not request or use, for which they seek money damages. (Am. Compl. ¶ 29-30, Supp. 7.) Plaintiffs also sought an injunction prohibiting United Telephone "in the future, from billing for products and services that were not authorized" by customers (Am. Compl. Prayer, Supp. 14), but they have since abandoned their request for a class on that claim.

And, although plaintiffs allege that they were harmed, it is undisputed that the overwhelming majority of third-party charges delivered with United Telephone's bills are legitimate. Third-party providers must pass a comprehensive prebilling approval process, and United Telephone reviews information about the third party including descriptions of the services it offers, scripts of any recorded sales materials, "live" sales scripts, advertising to be used, phrases to appear on bills, and documents relating to the third party's customer enrollment process and "enrollment verification methods." (Davis Aff. ¶ 2-6, Supp. 110-111.)

United Telephone also requires that each third party independently verify all sales and comply with all applicable state and federal laws and regulations, and prohibits submission of fraudulent, deceptive or unfair charges. (Davis Aff. ¶ 6-7, Supp. 111.) United Telephone has the right to terminate the services of either a clearinghouse

or a third party for violation of its billing rules. (Davis Dep. 51-57, Supp. 135-137; Davis Aff. ¶ 17, Supp. 116.) Further, if contacted about such charges, United Telephone can remove charges from customers' bills on its own, like it did with plaintiffs' Bizopia charges. (Davis Dep. 34-35, Supp. 132.)

These measures are acceptable to United Telephone and verify that its customers who do receive charges for third-party services have agreed to, and are properly receiving, those charges. (Supp. Davis Aff. ¶ 3, Supp. 117.) Consistent with the voluntary payment doctrine, United Telephone also considers a customer's receipt and payment, without objection, of third-party charges to be further acceptable verification that the customer agreed to those charges. (*Id.* at ¶ 4, Supp. 118.)

IV. This Court And Then The Trial Court Rejected Class Certification Of Plaintiffs' Cramming Claims.

In 2007, the trial court initially certified classes under Civil Rules 23(B)(2) and (3). In its 2008 decision, 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, at ¶ 66. Plaintiffs did not appeal that ruling. In its 2008 decision, the Sixth District also found that plaintiffs' claims "present a need for significant individualized determinations to present the claims of class members," but still held that the trial court did not abuse its discretion by certifying a Rule 23(B)(3) damages class. *Id.* at ¶ 52.

After the Sixth District's first decision, the first two in an unbroken line of cases denying class certification in cramming cases were decided. The impossibility of litigating "cramming" claims on a class basis was first recognized in *Stern v. AT&T Mobility Corp.*. As the district court held in *Stern*: there is no "plausible class-wide method to prove cramming" and the existence of individualized defenses also precluded

class certification. *Stern v. AT&T Mobility Corp.*, C.D. Cal. No. 05-8842, 2008 WL 4382796, *9 (Aug. 22, 2008), *reconsideration denied*, 2008 WL 4534048 (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. Cingular Wireless Corp.*, C.D. Cal. No. 05-8842, 2009 WL 481657, *8 (Feb. 23, 2009).⁴

On February 4, 2009, the District Court for the Southern District of Illinois denied certification in another cramming case for the same reasons. In *Brown v. SBC Communications, Inc.*, the plaintiff sued a local telephone provider, claiming that his telephone bill included charges for third-party services that he did not request. Like plaintiffs here, Brown sought to represent a class of all SBC customers who received unauthorized charges. Brown also tried to define his way around the individualized questions inherent in his claims by limiting the putative class to those who were “improperly billed.” The district court denied class certification because:

Plaintiff’s claims against Defendants hinge on the fact that Plaintiff did not authorize the services for which he was billed. If the services had been authorized, Defendants’ actions would not violate [the Illinois statute], nor would Defendants be unjustly enriched Accordingly, the proposed class is: “All persons or entities who were residents of Illinois and who were *improperly billed for cramming charges* 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.

S.D. Ill. No. 05-cv-777-JPG, 2009 WL 260770, *3 (Feb. 4, 2009). The judge reasoned further:

⁴ This Court has stated that decisions under Federal Rule 23 are an “appropriate aid” to courts making rulings under Ohio’s Rule 23. *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987).

[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.

Id. at *3.

A. This Court Finds Class Certification Was Improper.

United Telephone appealed the Sixth District's first decision. Based upon well-settled class action principles, this Court reversed, holding that the trial court abused its discretion by certifying a Rule 23(B)(3) class. *Stammco I*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, at ¶ 11, 14. The reversal was premised on two grounds: "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. More specifically, a class action could not be maintained, inter alia, because the class definition would require the trial court to: (1) "determine individually whether and how each prospective class member had authorized third-party charges on his or her phone bill," and (2) "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.* at ¶ 11.

Because these grounds alone were fatal, the 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.

B. On Remand, The Trial Court Properly Denies Certification.

On remand, plaintiffs sought certification of a new class using a new definition that still required multiple, individualized inquiries to identify class members. The new proposed class (like Plaintiff's old, reversed class) was defined by the core merits issue of their claims—whether customers “authorized” third-party services. That class was defined: (1) to **include** 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) to **exclude** “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.” *Stammco, LLC v. United Tel. Co.*, Fulton C.P. No. 05CV000150, at *1, 3 (December 22, 2010) (emphasis added).

After analyzing extensive briefing, oral argument and reviewing the voluminous record, the trial court denied certification in a fifteen-page opinion. *Id.* at *15.

With the *Stammco I* opinion in hand, the trial court found that the plaintiffs’ 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 effort. *Id.* at *10, 11. The trial court also found class certification was improper because “[t]he ‘merits’ of the individual’s claim”—whether the charges were authorized—“defines’ the proposed class.” *Id.* at *14.

Thus, the trial court recognized that just to identify class members, it would have to conduct mini-trials regarding whether plaintiffs (and all other class members) “had agreed to such charge.” *Id.* at *1, 15. This is because the steps taken by third-party

providers to verify that customers have agreed to a charge—which, in the case of Bizopia, included an audio recording and at least two faxed written confirmations—are “methods acceptable” to United Telephone to verify the charges. (Davis Supp. Aff. ¶ 3-4, Supp. 117-118.) To identify and exclude from the class those customers “who subscribed to and provided authorization for long distance services from a provider of toll services***” the trial court would then have to do another layer of individual inquiries into issues like “subscription,” “authorization,” and the various types of charges each customer received.⁵ Only the third parties, clearinghouses, and customers themselves, not United Telephone, have the evidence about the initiation of charges for third-party services.

In denying class certification, the trial court also found that: (1) the proposed class definition was “indeterminate,” (2) United Telephone does not have records regarding customers authorizing third-party goods and services), (3) plaintiffs must prove that United Telephone allowed customers to be billed without their authorization, (4) Ohio law requires plaintiffs to prove seven elements for a class to be certified, (5) a trial court may consider any evidence that bears on the issue of class certification, (6) United Telephone does not owe its customers a fiduciary duty, (7) United Telephone is not required “to have ‘authorization’ for third party service provider charges,” and (8) the proposed definition is an improper fail-safe class. *Id.* at *9-14.

“For all of the foregoing reasons,” the trial court concluded that: “Plaintiffs have not met their burden of establishing, by a preponderance of the evidence, that a ‘class

⁵ Indeed, a single customer could be both included and excluded from the class. For example, plaintiffs would be included in the class because they claim they received unauthorized charges, but also would be excluded because they admit they subscribed to and received charges for long distance services from MCI, a provider of toll services. (Davis Supp. Aff. ¶ 3-4, Supp. 117-118.)

certification,' is a proper one." *Stammco, LLC v. United Tel. Co. of Ohio*, Fulton C.P. No. 05CV000150, at *1, 15.

C. The Sixth District Again Becomes The Only Court In The Country To Sanction A Cramming Class Action.

Plaintiffs appealed the trial court's denial of class certification. On June 20, 2011, while that appeal was pending, the U.S. Supreme Court issued its landmark *Wal-Mart* decision. *Wal-Mart* expressly rejected *Ojalvo's* reading of *Eisen*, making clear that it is permissible—and often necessary—to consider merits issues when conducting the rigorous analysis required for class certification. *Wal-Mart* also held that it is not enough to show that common questions exist. Rather, a plaintiff seeking certification must prove that there are common answers to those questions. *Wal-Mart*, 131 S. Ct. 2541, 180 L.Ed.2d 374.

Also while plaintiffs' appeal was pending, two more courts rejected certification in cramming cases. First, the United States District Court for the District of Kansas denied certification because questions of authorization and payment were individualized issues. "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." *Midland Pizza, LLC v. Southwestern Bell Tel. Co.*, 277 F.R.D. 637, 642 (D.Kan.2011).

The U.S. District Court for the Southern District of Indiana also denied class certification of common law claims for the alleged cramming of third-party charges. "[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.” *Lady Di’s, Inc. v. Enhanced Servs. Billing, Inc.*, S.D.Ind. No. 1:09-CV-34-SED-DML, 2010 WL 4751659, *4 (Nov. 16, 2010) (citing *Brown v. SBC Communications., Inc. et al.*, S.D.Ill. No. 05-CV-777-JPG, 2009 WL 260770, *3 (Feb. 4, 2009)). Both *Midland Pizza* and *Lady Di’s, Inc.* were submitted to the court of appeals as supplemental authority.

Nonetheless, relying on *Ojalvo* and its now-rejected reading of *Eisen*, the Sixth District reversed, finding that the trial court abused its discretion because two of the reasons articulated for denying certification were “improper considerations of the merits.” *Stammco, LLC v. United Tel. Co.*, 6th Dist. No. F-11-003, 2011-Ohio-6503, at ¶ 50. United Telephone appealed, and this Court accepted jurisdiction on June 20, 2012.

As *Wal-Mart* makes clear, the decision of the Sixth District was incorrect and should be reversed, the trial court’s denial of class certification should be reinstated, and this case should be remanded for resolution of plaintiffs’ individual claims. *Howland v. Purdue Pharma, L.P.*, 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d 141.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

I. Proposition of Law No. I: A Trial Court does not abuse its discretion by evaluating the merits of the plaintiffs’ claims when considering class certification.

A. The Abuse of Discretion Standard And Standard of Review That Should Have Been Applied By The Appellate Court.

There are seven requirements that must be met before a class may be certified:

(1) an identifiable class and unambiguous class definition, (2) the named plaintiffs 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 or fact common to the class, (5) the claims or defenses of the representative parties must be typical of those of the class, (6) the named plaintiffs must fairly and adequately represent the interests of the class, and (7) one of the Rule 23(B) requirements—here, that questions of law or fact common to the class predominate over any individual issues—must be met. *Stammco I*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, at ¶ 6. If any one of these requirements is not met, certification must be denied.

Trial courts have “broad discretion” in determining whether to certify a class. Their decisions may be reversed only for abuse of that discretion. *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444, ¶18; *Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1984).

An abuse of discretion is “more than an error of law or judgment”; it is a decision that is “unreasonable, arbitrary, or unconscionable.” *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶ 30; *Marks v. C.P. Chem. Co. Inc.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987) (same); *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442 (1998) (rejecting argument that trial court’s certification decision should be reviewed *de novo*).

The proper inquiry by an appellate court reviewing a class certification ruling is not whether the trial court “erred,” but “whether the trial court’s decision was ‘so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of reason but instead passion or bias.’” *Wilson* at ¶ 12, quoting *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256-257, 662 N.E.2d 1 (1996).

“A finding of abuse of discretion, particularly if the trial court has refused to certify, should be made cautiously.” *Marks* at 201. That the “appellate judges might have decided differently” does not justify reversal of a trial court’s certification ruling. *Hamilton* at 71.

Where the record supports the trial court’s certification decision, the decision should not be disturbed. *See Schmidt*, 15 Ohio St.3d at 313, 473 N.E.2d 822; *see also Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990) (“reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof”) (citation omitted); *In re G.T.B.*, 128 Ohio St.3d 502, 2011-Ohio-1789, 947 N.E.2d 166, ¶ 7 (correct judgment may not be reversed “simply because it was based in whole or in part on an incorrect rationale.”) .

Here, the Sixth District did not find that the trial court’s denial of certification was “unreasonable, arbitrary, or unconscionable” or “grossly violative of fact or logic.” It found only that the trial court considered merits issues and, relying on *Ojalvo* and its erroneous reading of *Eisen*, ruled that this alone was an abuse of discretion. That was error.

B. Courts Have Long Misunderstood *Eisen*.

For decades, Ohio courts have misunderstood *Eisen v. Carlisle & Jacquelin* to prohibit any consideration of merits issues in ruling on class certification. Based on *Eisen*, this Court ruled in *Ojalvo* that the trial court “went too far” into the merits by considering whether the plaintiffs had shown that “a common issue of breach of [class members’] contracts probably exists,” and then denying certification because they had not. *Ojalvo*, 12 Ohio St. 3d at 233, 466 N.E.2d 875. Citing *Eisen*, the *Ojalvo* Court declared that class certification “does not go to the merits.” *Id.*

Since then, Ohio courts have repeatedly cited *Ojalvo*, *Eisen*, or both, as barring any consideration of merits issues at the class certification stage. See e.g., *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 436, 696 N.E.2d 1001, (merits questions cannot be considered at certification phase); *Hill v. Moneytree of Ohio Inc.*, 9th Dist. No. 08CA009410, 2009-Ohio-4614, ¶ 12 (“[c]onsideration of the merits . . . is inappropriate in determining class certification”); *Setliff v. Morris Pontiac, Inc.*, 9th Dist. No. 08CA009364, 2009-Ohio-400, ¶ 6 (“[w]hen a trial court considers a motion to certify a class, it accepts as true the allegations in the complaint”); *Lucio v. Safe Auto Ins. Co.*, 183 Ohio App.3d 849, 2009-Ohio-4816, 919 N.E.2d 260, 265, ¶ 15 (7th Dist.) (same); *Nagel v. Huntington Natl. Bank*, 179 Ohio App.3d 126, 131-32, 2008-Ohio-5741, 900 N.E.2d 1060, ¶ 10 (8th Dist.) (“[a]ny doubts a trial court may have as to whether the elements of [the] class certification have been met should be resolved in favor of upholding the class . . . ”, quoting *Rimedio v. SummaCare*, 172 Ohio App.3d 639, 2007-Ohio-3244, 876 N.E.2d 986, ¶ 12, quoting *Helman v. EPL Prolong, Inc.*, 7th Dist. No. 2001-CO-43, 2002-Ohio-5249, ¶ 20).

Ohio courts were not alone in misapplying *Eisen*. See, e.g., *Koch v. Stanard*, 962 F.2d 605, 607 (7th Cir. 1992); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation*, 691 F.2d 1335, 1342 (9th Cir. 1982); *Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 661 fn. 15 (2d Cir. 1978); *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975).

In *Wal-Mart*, the Supreme Court rejected once and for all *Ojalvo*'s reading of *Eisen* and with it the mistaken notion that merits issues have nothing to do with class certification. As the high court recognized, consideration of the merits—that is, consideration of what the law requires plaintiffs to prove on the causes of action they

have asserted, and whether those things can be proven for all class members in one stroke—is both appropriate and necessary. Indeed, it is impossible for courts to conduct the “rigorous analysis” required under Rule 23 without considering such issues. It is not, as the Sixth District held here, an abuse of discretion to do so.⁶

C. Wal-Mart Makes Clear That A Trial Court’s Duty To Conduct Rigorous Analysis Will Often Require Evaluation Of Merits Issues - It Is Not An Abuse of Discretion To Do So.

Long before *Wal-Mart*, the Supreme Court had recognized the need to consider merits issues and how they might be proven when deciding class certification:

Evaluation of many of the questions entering into 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.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), fn. 12. Four years later in *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), the Supreme Court reiterated that certification is proper only when “the trial court is satisfied, after a rigorous analysis” that all Rule 23 requirements are met and that analysis of those requirements “generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” *Id.* at 160-61, quoting *Coopers* at 469, quoting *Mercantile Natl. Bank v. Langdeau*, 371 U.S. 555, 558, 83 S.Ct. 520, 9 L.Ed.2d 523 (1963).⁷

⁶ Not only is *Ojalvo* incorrect in its reading of *Eisen*, its holding that the trial court “went too far” into the merits by considering whether there was proof of a “common breach” of all class members’ contracts is directly at odds with *Wal-Mart*. Indeed, the Supreme Court held that whether such common proof exists is exactly the right inquiry. *Wal-Mart*, 131 S.Ct. at 2552, fn. 6.

⁷ This Court adopted the rigorous analysis test in *Hamilton*, 82 Ohio St.3d at 70, 694 N.E.2d 442.

Requiring rigorous analysis, including consideration of merits issues where appropriate, protects both litigants and court resources because it ensures that only those cases that can fairly and efficiently be litigated on a class wide basis are certified. *Schmidt*, 15 Ohio St.3d at 313, 473 N.E.2d 822.

The logic of these Supreme Court decisions is plain—one cannot determine whether a case can fairly, efficiently or manageably be tried on behalf of a class without considering the merits. That is, courts must consider what claims have been alleged, what elements of proof and evidence those claims require, what defenses may be raised, and whether or not evidence relating to the claims of the named plaintiffs would be probative of the claims of any other alleged class members. Nonetheless, decisions like *Ojalvo*, and the Sixth District's here, continued the erroneous interpretation of *Eisen* and to prohibit any consideration of the merits in the class certification phase.

In *Wal-Mart*, the Supreme Court rejected the very interpretation of *Eisen* adopted by *Ojalvo*. The Supreme Court began its analysis by stating that class actions are “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Wal-Mart*, 141 S.Ct. at 2550. The Supreme Court also found that that exception is justified, and satisfies due process requirements, only if all of the Rule 23 requirements are strictly complied with. *Id.* at 2560.

The Supreme Court then made clear that “Rule 23 does not set forth a mere pleading standard.” A plaintiff seeking class certification “must affirmatively demonstrate his compliance with the Rule,” not just allege or promise such compliance in the future. *Id.* at 2551.

The Supreme Court's statement of plaintiffs' burden in *Wal-Mart* is consistent with this Court's decisions holding that those seeking certification bear the burden of

proving compliance with all of the Rule 23 requirements by a preponderance of the evidence. *State ex rel. Ogan v. Teater*, 54 Ohio St.2d 235, 247, 375 N.E.2d 1233 (1978); *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91, 94, 98 fn.9, 521 N.E.2d 1091 (1988). This was the standard properly applied by the trial court. *Stammco*, Fulton C.P. No. 05CV000150, at *15 (plaintiffs “have not met their burden of establishing, by a preponderance of the evidence” that class certification is proper).

In *Wal-Mart*, the Supreme Court also reiterated its earlier rulings that to conduct the rigorous analysis required under Rule 23 “it sometimes may be necessary for the court to probe behind the pleadings,” and that “[f]requently that ‘rigorous analysis’ 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 legal issues comprising the plaintiff’s cause of action.’” *Wal-Mart* at 2551-2552 (citing *Falcon*, 457 U.S. at 160, quoting *Coopers & Lybrand*, 437 U.S. at 469, fn. 12).

The *Wal-Mart* Court then specifically rejected the rationale upon which *Ojalvo* and the Sixth District’s decision here are based—that trial courts are somehow prohibited from considering 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.

Wal-Mart, 131 S.Ct. at 2552, fn. 6 (emphasis added).

The Supreme Court then closely examined the merits of the plaintiffs' gender discrimination claims. That is, the court examined what plaintiffs would have to prove to recover, to see if those claims could be proven for all class members "in one stroke." Noting that the crux of a discrimination claim is "the reason for a particular employment decision," the court then analyzed the statistical, sociological, and anecdotal evidence offered by plaintiffs in support of certification and concluded that none of it would prove a discriminatory reason behind each of the millions of employment decisions at issue. Thus, because there was no common answer to the common question posed by plaintiffs' claim, no class could be certified. *Id.* at 2552.

In *Stammco I*, this Court similarly considered merits evidence when it concluded that class members could not readily be identified. As it does now, plaintiffs' class definition then turned on the factual issue at the crux of their substantive claims—whether specific charges were authorized. In *Stammco I*, using the evidence about the disputed Bizopia charges as an example, this Court noted that to decide whether those charges were authorized (i.e., to determine the reason plaintiffs received them), the trial court would have to decide whether the employee who spoke to Bizopia "had authority" to incur the charges and "whether the employee actually" authorized them. *Stammco I*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, at ¶ 11. Because these are individual inquiries that would have to be done for each charge to each class member, the Court found it would be impossible to readily identify class members.

Although *Wal-Mart* was decided months before it ruled, the Sixth District continued to rely on *Ojalvo* and its misreading of *Eisen* in this case. Based on that, the Sixth District held that the trial court abused its discretion by making "improper incursions" or "forays" into merits issues. Specifically, the appeals court found that the

trial court abused its discretion by correctly noting: (i) that plaintiffs chose to sue United Telephone, rather than the third parties that initiated the charges that plaintiffs claim they did not incur, which entities the trial court termed the real “culprits,” and (ii) that plaintiffs had cited no statute or case law imposing a duty on United Telephone to re-verify third-party charges that it delivers. *Stammco, LLC*, 6th Dist. No. F-11-003, 2011-Ohio-6503, at ¶ 13.

Again, the Sixth District did not find any error in these statements. Rather, it found, based on *Ojalvo*, that the trial court abused its discretion just by considering those issues. *Wal-Mart* now makes clear that *Eisen* was misunderstood and *Ojalvo* incorrect. Accordingly, the Sixth District’s decision must be reversed.

D. The Trial Court Did Not Abuse Its Discretion By Considering Merits Issues, Or In Any Other Way, When It Denied Certification.

The trial court did not abuse its discretion by considering if or how plaintiffs could prove the merits of their claims on a class wide basis. Indeed, under *Wal-Mart* and the decisions of this Court, it would have been an abuse of discretion not to do so. This is because rigorous analysis is required and “the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” *Wal-Mart*, 131 S.Ct. at 2551-2552. Moreover, the “complex determinations required in Rule 23(b)(3) [damages] class actions entail even greater entanglement with the merits.” *Coopers & Lybrand*, 437 U.S. at 469 n. 12, quoting Wright and Cooper, *Federal Practice and Procedure*, Section 3911, at 485 (1976).

In *Wal-Mart*, the Supreme Court held that commonality—a requirement for certification under both federal and Ohio law—“necessarily overlaps” with the plaintiffs’ “merits contention” that Wal-Mart discriminated against the class. *Wal-Mart*, 131 S.Ct.

at 2552. Hence, “the crux” of the merits inquiry needed to resolve plaintiffs’ claims was “the reason for” the employment decisions made about them, and plaintiffs were trying to sue about the reasons for millions of employment decisions all at one time. *Id.* Thus, “[w]ithout some glue holding the alleged *reasons* for all those decisions together, the court found it impossible that “examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored.*” *Id.*

Rule 23 requires “a sophisticated and necessarily judgmental appraisal of the future course of litigation.” *Augustus v. Progressive Corp.*, 8th Dist. No. 81308, 2003-Ohio-296, ¶ 21. A trial court must understand the claims, defenses, relevant facts, and applicable substantive law “in order to make a meaningful determination of the certification issues.” *Unger v. Amedisys Inc.*, 401 F.3d 316, 321, (5th Cir. 2005), quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

Any merits issues identified by the trial court, including the two identified by the Sixth District, impact some or all of the Rule 23 requirements and were properly considered by the trial court. Indeed, those issues illustrate some of the many reasons why the trial court’s denial of certification was correct and was not an abuse of discretion.

1. There Are Not Common Issues Of Law Or Fact.

The “crux” of plaintiffs’ claims is that they paid for goods and services that they never ordered or used. But, as in *Wal-Mart*, there is no “glue” holding together the claims of all class members on this point. Plaintiffs seek to pursue claims about hundreds of thousands of charges, received by thousands of people and businesses, initiated by more than 2,000 different third parties, over more than 10 years. Plaintiffs, however, chose to sue United Telephone about these charges, and not the third parties

that initiated them. For this reason, there is no evidence (from United Telephone or otherwise) that will ever, in one stroke, produce a common answer to the question “Is there a valid reason for this charge?” for all of the charges to all class members.

As *Stammco I* states, this issue—which relates both to the merits and to class certification—is highly individualized. “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.” *Stammco I*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, at ¶ 11 (emphasis added). “[T]he court must determine individually whether and how each prospective class member had authorized third-party charges on his or her phone bill.” *Id.* With respect to plaintiffs’ Bizopia charges alone, “the court must determine whether Stammco’s employee had authority to authorize Bizopia’s charges and whether the employee actually did so.” *Id.* There could not, of course, be any common answers to these questions as to the charges from thousands of different third parties, each with different services and methods of interaction, that were received by thousands of different customers, over a multi-year period. Even as to a single third party, like Bizopia, evidence showing whether or not plaintiffs ordered Bizopia’s services would not prove whether anyone else did.

Thus, the trial court did not abuse its discretion by considering the merits-related fact that plaintiffs chose to sue United Telephone, the entity that delivers the charges, rather than the entities that initiated them. Nor did it abuse its discretion by noting that no statute or case law imposes a duty on United Telephone to re-verify such charges. *Stammco, LLC*, 6th Dist. No. F-11-003, 2011-Ohio-6503, at ¶ 13. These issues relate to the trial court’s examination of the term “authorization,” *Stammco*, Fulton C.P. No. 05CV000150, at *11, and the fact that the third parties’ verification procedures, in

addition to a customer's actual payment, both constitute authorization by "a method acceptable" to United Telephone. (Davis Supp. Aff. ¶3-4, Supp. 117-118.)

Moreover, because third parties initiate the charges, and not United Telephone, it is they who have the relevant evidence about their charges and customers' authorizations of them. This fact explains why the trial court cited *Bill Buck Chevrolet v. GTE Florida, Inc.*, 54 F.Supp.2d 1127 (M.D. Fla. 1999) for the unremarkable, accurate proposition that class members might have claims against the third parties. *Stammco*, Fulton C.P. No. 05CV000150, at *14.

A trial court's making correct statements of fact or law, in the course of reaching the same result as to certification as every other court in the country, does not violate Rule 23. Furthermore, any preliminary analysis involving the merits was just that—preliminary. Indeed, had it chosen to do so, the trial court could properly have dismissed plaintiffs' individual claims. *See Lady Di's, Inc.*, 2010 WL 4751659 (simultaneously granting summary judgment and denying class certification).

2. Individualized Issues Of Law And Fact Predominate.

No class can be certified unless common issues relating to plaintiffs' claims "predominate" over individual issues. "For common questions of law or fact to predominate, it is not sufficient that such questions merely exist; rather, they must present a significant aspect of the case. Further, the common questions must be capable of resolution for all members [of the class] in a single adjudication." *State ex rel. Davis v. Pub. Emps. Retirement Bd. et al*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2 444, ¶ 28, quoting *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 204, 509 N.E.2d 1249 (1987).

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. *Id.*; *Schmidt*, 15 Ohio St.3d at 313, 473 N.E.2d 822; *see also Vega v. T-Mobile USA, Inc.*, 11th Cir. No. 07-13864, 2009 WL 910411, *8, *12 (Apr. 7, 2009) (common issues do not predominate if plaintiffs still must present substantial individualized evidence or legal arguments to prove their claims; “Sorting out and proving the claims, if any, of these class members * * * would require substantial individualized evidence different from and in addition to that which [named plaintiff] would proffer to establish his own claim”); *Manual for Complex Litigation*, Section 21.24 (4th Ed. 2005) (common issue relevant to certification “only if it permits fair presentation of the claims and defenses and materially advances the disposition as a whole.”).

A court *must* examine the merits of the claims to determine if common questions predominate. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S.Ct. 856, 178 L.Ed.2d 622 (2011) (emphasis added); *Petty v. Wal-Mart Stores, Inc.*, 148 Ohio App.3d 348, 356, 773 N.E.2d 576 (2d Dist. 2002); *Cowit v. Cellco Partnership*, 181 Ohio App.3d 809, 2009-Ohio-1596, 911 N.E.2d 300, ¶ 47 (1st Dist.).

It is undisputed that harm (the fact of injury) and causation are elements of liability that every class member must prove. The only harm alleged by plaintiffs is that they paid for items “that they did not request or authorize.” (Stamm 59, Supp. at 28; Am. Cmplt. ¶ 44-45, 53, 59, Supp. at 11, 12, 13.)

Even the named plaintiffs admit that they got third-party charges (from MCI) that they concede were legitimate. Thus, the question of harm can only be resolved on a customer-by-customer, charge-by-charge basis, and requires evidence that only the third parties or customers, and not United Telephone, have.

Causation questions are also class-member specific. Proof that one United Telephone customer did, or did not, download a song would not show that he also made or received a long distance call, signed up to place an online advertisement, or even whether he downloaded other songs on other days. Specific proof as to one customer would show nothing at all about whether any other United Telephone customer requested or used any other third-party service.

Again, the impossibility of proving causation on a class wide basis relates directly to the fact that plaintiffs elected not to sue the third parties that actually interacted with putative class members and initiated any invalid charges, and that United Telephone has no duty to re-verify those charges. As this Court and the trial court both recognized, whether or not a charge is valid depends on interactions between customers and third parties to which United Telephone is not a party. While it may be a common fact that United Telephone delivered the charges, or provided local phone service, to class members, those things are of no significance to plaintiffs' claims. Indeed, those facts show nothing at all about whether any charge is valid.

This is why every court in the country—with the exception of the Sixth District—has denied class certification in cases like this one. *Midland Pizza*, 277 F.R.D. at 642; *Lady Di's, Inc.*, 2010 WL 4751659, at *4; *Brown*, 2009 WL 260770, at *3; *Stern*, 2009 WL 481657, at *8.

The federal cases rejecting so-called “cramming” class actions are consistent with Ohio law. Indeed, Courts applying Ohio law routinely deny class certification where—as here—actual harm, an unjust benefit from a class member to a defendant, and causation are necessary elements of claims and cannot be proven on a class-wide basis. See *Hoang v. E*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-3001, 784 N.E.2d 151,

¶ 19 (8th Dist.); *Linn v. Roto-Rooter, Inc.*, 8th Dist. No. 82657, 2004-Ohio- 2559, ¶ 14-16; *Terminal Supply Co. v. Farley*, 6th Dist. No. L-90-041, 1991 WL 1577, *6; *Repede v. Nunes*, 8th Dist. Nos. 87277, 87469, 2006-Ohio-4117, ¶ 19-20. Indeed, these issues relating to predominance and merits are intertwined with the very same individual issues that are present in the class definition and upon which *Stammco I* originally reversed certification.

Moreover, United Telephone's defenses to the claims of each class member are also inherently individualized and require inquiry into the specific facts of each class member's claim. See *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (defenses such as contributory negligence can turn on facts peculiar to each plaintiff's claim); *Wilson*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶ 28(same). Contributory negligence, superseding or intervening causation, waiver, laches, and the voluntary payment doctrine all require an individualized analysis of a member's claims.

The voluntary payment doctrine provides a good example of one such defense. Under Ohio's version of that rule, money paid voluntarily cannot be recovered merely because the person who made the payment was mistaken as to his obligation to pay. *Scott v. Fairbanks Capital Corp.*, 284 F. Supp. 2d 880, 894 (S.D. Ohio 2003), quoting *State ex rel. Dickman v. Defenbacher*, 151 Ohio St. 391, 395, 86 N.E.2d 5 (Ohio 1949). If the person making the payment did so with the full knowledge of the facts, he is not entitled to restitution. *Id.* "A payment made by a person who is free to make or to not make it, as he decides, is a voluntary payment." *Leach v. W. & S. Life Ins. Co.*, 51 N.E.2d 403, 404 (9th Dist. 1941).

Whether payments by particular class members bar their claims under the voluntary payment doctrine is an inherently individualized issue. For example, in

Spivey v. Adaptive, the plaintiff called a telemarketer to order a diet program and was offered a program that automatically billed his credit card on a recurring basis.

Although a recording of the call was made on which the caller agrees to that program, the plaintiff disputed that it was him speaking on the recording. *Spivey v. Adaptive Mktg. LLC*, 622 F.3d 816, 817-18 (7th Cir. 2010). The case was dismissed based on the voluntary payment doctrine. The court found that the plaintiff had not contested the charges despite the fact that they were itemized on his credit card bill and included a phone number for inquiries. *Id.* at 823. Due process entitles United Telephone to pursue this and other individualized defenses it has against class members' claims.

3. The Proposed Class Definition Is Flawed.

Based upon *Stammco I* and the above decisions, the trial court correctly determined 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. *Stammco*, Fulton C.P. No. 05CV000150, at *10, 11. That is why, as the trial court recognized, United Telephone’s records will never show which customers received charges they claim were not authorized, let alone show whether, in fact, any charge was not authorized.

The trial court was right. Plaintiffs’ new class definition is nothing more than a lengthier way of restating the same definition that *Stammco I* rejected. Instead of defining the class as customers who received third-party charges “without their permission,” plaintiffs now try to 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.*” *Stammco I*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, at ¶10; *Stammco, LLC v. United Tel. Co.*, 6th Dist. No. F-11-003, 2011-Ohio-6503, ¶ 12. The trial court recognized that this semantic change does not solve any of the problems identified by this Court. To the contrary, plaintiffs’ new definition is more ambiguous and its members even harder to identify.

For example, just to determine whether plaintiffs’ Bizopia charges are part of the class action, the trial court would have to conduct a mini-trial regarding whether plaintiffs “had agreed to such charge.” The steps taken by third-party providers to verify that customers have agreed to a charge—which, in the case of Bizopia, included an audio recording and at least two faxed written confirmations—are “methods acceptable” to United Telephone to verify the charge. (Davis Supp. Aff. ¶ 3, Supp. 117.)⁸

Under plaintiffs’ proposed class definition, a single customer could be both included and excluded from the class. For example, the named plaintiffs themselves would be *included* in the class because they claim they received unauthorized charges, but also would be *excluded* because they admit they subscribed to and received charges for long distance services from a provider of toll services. (Davis Supp. Aff. ¶ 3-4, Supp. 117-118.)

An Ohio appellate court recently found a similar class definition flawed for the same reasons. In *Maestle v. Best Buy Company*, 197 Ohio App.3d 248, 2011-Ohio-5833, 967 N.E.2d 227, ¶ 23 (8th Dist.), the court of appeals affirmed the denial of class

⁸ Further, the “exclusion” in plaintiffs’ new class definition would also require the trial court to somehow identify and exclude from the class those customers “who subscribed to and provided authorization for long distance services from a provider of toll services . . .” (Davis Supp. Aff. ¶ 3, Supp. 117.). Again, this exclusion would require exactly the same kind of individual inquiries into issues like “subscription,” “authorization,” and the types of charges each customer received, that this Court held were fatal to plaintiffs’ earlier class.

certification regarding claims that a bank improperly charged fees. The class definition improperly included all account holders that were charged interest or finance charges—even if those charges “were unrelated to the alleged improper account practices.” The class definition was improper because “the overly broad nature of appellant’s current class would require the lower court to conduct an individualized inquiry with respect to each individual’s account in order to determine whether that individual was in fact injured and, therefore a proper member of the class.” *Id.* at ¶ 26. And, a trial court must consider the merits to understand the impact of the class definition.

And, as the trial court here recognized, the third parties, not United Telephone, have the most relevant information regarding “consent” and “authorization” of charges. It is undisputed that without manually reviewing all of its customer bills, United Telephone cannot even identify by name which customers received third-party charges, or what third parties initiated those charges. (Davis Aff. ¶ 10, Supp. 112-113.) This alone is an unreasonable amount of effort. *Margulies v. Guardian Life Ins. Co. of Am.* (Apr. 5, 2007), 8th Dist. No. 88056, 2007-Ohio-1601, ¶ 18 (class definition failed “reasonable efforts” test where manual search of thousands of files was required to identify class members).

Like the classes in *Lady Di’s*, *Midland Pizza*, *Brown*, and *Stern*, the trial court correctly held—after analyzing how plaintiffs would try to prove the merits of their claims—that plaintiffs’ new proposed class suffers from the same fundamental flaw identified by this Court—namely, class members cannot be identified without individualized analysis and thousands of mini-trials.

4. The Class Is Unmanageable.

Under Rule 23(B)(3), a class action must be “manageable”—that is, a plaintiff must show how liability could manageably be proven for all class members in one adjudication. Civ.R. 23(B)(3), (3)(d); *J.M. Woodhull, Inc. v. Addressograph-Multigraph Corp.*, 62 F.R.D. 58, 60-61 (S.D. Ohio 1974). Plaintiffs’ claims present individualized factual and legal issues that could never be resolved for all class members in one adjudication. As *Stammco I* stated, the trial court “must determine whether Stammco’s employee had authority to authorize Bizopia’s charges and whether the employee actually did so,” and this will require evidence from the third parties themselves, none of whom are parties. *Stammco I*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, at ¶ 11.

It is impossible to identify potential class members and determine liability without thousands of individual inquiries into those who received specific charges, from which specific third-party entities, and whether each of them wanted or used the particular services for which they were charged. That alone makes this case unmanageable. As Mr. Stamm admitted, whether a third-party service was “actually ordered” cannot be determined even by reviewing all of the class members’ bills; to find this out one would “have to ask” each class member (and its employees or family members) about each charge. (Stamm Dep. 66-71, 128, 136-38, Supp. 27-28, 36, 38.) And, of course, one would have to ask the third party, too.

Even if class members could reasonably be identified, determining liability would still require proving that each class member received and paid a charge(s) for a service they did not want or use. To accomplish this, a trier of fact would have to: (i) review the class member’s bills for a more than six-year period and to identify all third-party

charges, (ii) identify the third party(ies) and service(s) reflected by those charge(s), (iii) identify which of those charges were claimed to be unauthorized; and then, as to those charges, determine (iv) whether, and which of, them were paid, and (v) whether adjustments were later issued as to any of them. Performing these actions for the named plaintiffs alone required depositions and manual review of bills, payment records, account notes and other materials. (Davis Aff. ¶ 10, 12-15, Supp. 112-115; McAtee Dep. 55-56, Supp. 126.) To do this for all class members in a single proceeding would be a practical impossibility.

5. Plaintiffs Lack Standing And Typicality.

The trial court also correctly denied certification because plaintiffs lack standing, are inadequate representatives, and their claims are not typical of the putative class. Rule 23(A); *Simmons v. Am. Gen. Life & Acc. Ins. Co.*, 140 Ohio App.3d 503, 507-508, 748 N.E.2d 122 (6th Dist. 2000). To have standing in a class action, a plaintiff must show: (1) a concrete and particularized “injury in fact,” (2) a causal connection between the injury and the defendant’s conduct, and (3) that it is likely that the injury will be remedied by the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Woods v. Oak Hill Community Med. Ctr., Inc.*, 134 Ohio App.3d 261, 268-269, 730 N.E.2d 1037 (4th Dist. 1999); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), fn.20.

By excluding customers who “subscribed to and provided authorization for long distance services from a provider of toll services,” plaintiffs are attempting to exclude charges like those they received from MCI and to limit their class to those who received “miscellaneous” charges such as those from Bizopia. None of the named plaintiffs, however, have standing to represent any class or subclass challenging such

“miscellaneous” charges. Plaintiffs Kent and Carrie Stamm have no standing to represent such a class because they did not receive any charges from Bizopia or any other “miscellaneous” charges. Plaintiff Stammco, LLC has no standing because it is undisputed that it never paid any portion of the Bizopia charges—the only miscellaneous charges it received. (Stamm Dep. 130, 174, Supp. 37, 45.) Thus, it cannot show any injury. For these same reasons, the Stammers could not adequately represent any class as to those charges.

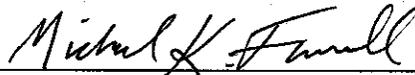
Moreover, the numerous individualized issues arising out of the claims of the named plaintiffs also show that their claims are not “typical” of the proposed class’s claims. *Bacon v. Honda of Am. Mfg.*, 205 F.R.D. 466, 479 (S.D. Ohio 2001) (no typicality when plaintiff winning his claim “would not necessarily have proved” anybody else’s claim), quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998).

Plaintiffs would no doubt like to preclude any consideration of the merits of their claims and whether those claims could be proven on behalf of a class. That is because these merit issues make clear that no class can properly be certified. *Wal-Mart* and the other cases cited in this brief show that inquiry into merits issues is not only necessary but required and impacts every one of the prerequisites for certification under Rule 23. These are precisely the reasons why it was not an abuse of discretion for the trial court to consider the issues here.

CONCLUSION

This Court should reverse the Sixth District's decision, reinstate the trial court's denial of class certification, and remand this case with instructions for the trial court to proceed with plaintiffs' individual claims.

Respectfully submitted,



Michael K. Farrell (0040941)
John B. Lewis (0013156)
Karl Fanter (0075686)
BAKER & HOSTETLER LLP
1900 East Ninth Street, Suite 3200
Cleveland, OH 44114-3485
Telephone: (216) 861-7528
Facsimile: (216) 696-0740

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

PROOF OF SERVICE

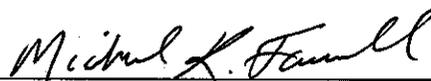
I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following counsel on this 14th day of August, 2012:

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

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

Linda S. Woggon
Counsel of Record
Vice President, Governmental Affairs
Ohio Chamber of Commerce
230 East Town Street
Columbus, Ohio 43215-0159

*Counsel for Amicus Curiae Ohio
Chamber of Commerce*



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

IN THE SUPREME COURT OF OHIO

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

Plaintiffs-Appellees,

v.

UNITED TELEPHONE COMPANY, OF OHIO AND SPRINT NEXTEL CORPORATION,

Defendants-Appellants.

Case No.

12-0169

On Appeal From the Fulton County Court of Appeals, Sixth Appellate District, Case No. 11FU000003

NOTICE OF APPEAL OF APPELLANTS UNITED TELEPHONE COMPANY OF OHIO AND SPRINT NEXTEL CORPORATION

Michael K. Farrell (0040941) Counsel Of Record John B. Lewis (0013156) Karl Fariter (0075686) BAKER & HOSTETLER LLP 1900 East Ninth Street, Suite 3200 Cleveland, OH 44114-3485 Telephone: (216) 621-0200 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, OH 44870 Telephone: (419) 624-3000 Facsimile: (419) 624-0707 dms@murrayandmurray.com

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

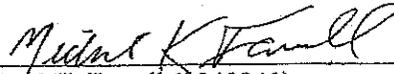
FILED JAN 30 2012 CLERK OF COURT SUPREME COURT OF OHIO

Appellants United Telephone Company of Ohio and Sprint Nextel Corporation ("United Telephone"), give notice of appeal to the Supreme Court of Ohio from the judgment of the Fulton County Clerk of Appeals, Sixth District, in Court of Appeals Case No. 11FU000003 that was journalized on December 16, 2011.

This case is of public and great general interest.

Date: January 30, 2012

Respectfully submitted,



Michael K. Farrell (0040941)

Counsel Of Record

John B. Lewis (0013156)

Karl Fanter (0075686)

BAKER & HOSTETLER LLP

PNC Center

1900 E. 9th Street, Suite 3200

Cleveland, OH 44114-3482

Telephone: (216) 621-0200

Facsimile: (216) 696-0740

E-mail: mfarrell@bakerlaw.com

*Counsel for Appellant 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*



*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.¹ 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

¹Appellee'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

12.

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), 2nd 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 (9th 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 capulize 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 (7th 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 (7th 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 (9th 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.

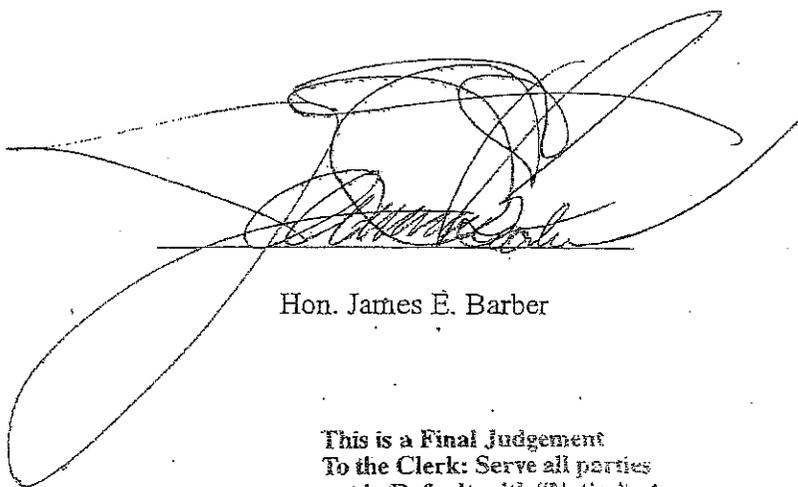
The Court is psychologically attuned to Plaintiff's plight, having personally experienced the

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.

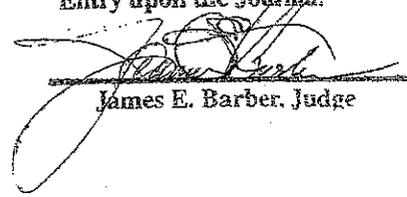
THIS IS A FINAL, APPEALABLE ORDER.



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

Copies Served 12/33/2010
Paul E. MacDonald, Clerk
By ew

the hearing that he “had documentation” that his “college credits had been assigned to [him] on January 26.” Insofar as the evidence could be considered conflicting on this point, “[w]e will not substitute our judgment for that of a board of elections if there is conflicting evidence on an issue.” *State ex rel. Wolfe v. Delaware Cty. Bd. of Elections* (2000), 88 Ohio St.3d 182, 185, 724 N.E.2d 771.

{¶ 41} Noble County is small; it has a population of just over 14,000. <http://www.epodunk.com/cgi-bin/genInfo.php?locIndex=17252>. It is probably safe to assume that every voting-age person in the county is aware of who is running for sheriff. I know it is safe to assume that collectively the voters of Noble County are competent to decide who should be their sheriff.

{¶ 42} Finally, this court has many times stated that it avoids construing statutes that lead to illogical or absurd results. *State ex rel. Haines v. Rhodes* (1958), 168 Ohio St. 165, 5 O.O.2d 467, 151 N.E.2d 716, paragraph two of the syllabus; *In re T.R.*, 120 Ohio St.3d 136, 2008-Ohio-5219, 896 N.E.2d 1003, ¶ 16. Hannum is currently the sheriff of Noble County. By the time the next elected sheriff takes office, Hannum will have been the sheriff for almost two years. But today this court concludes that the Noble County Board of Elections abused its discretion when it certified Hannum’s candidacy for sheriff. This court concludes that a man who has been sheriff since May 2009 is unqualified to be a candidate for sheriff. How is that not an absurd result?

{¶ 43} I conclude that Knowlton failed to establish that the board of elections abused its discretion or clearly disregarded applicable law in determining that Hannum had met the requirements of R.C. 311.01(B)(9). I would deny the writ of prohibition. Because the majority errone-

ously extends Wellington’s beef to Knowlton’s and thereby precludes the Noble County electorate from the opportunity to reelect their current sheriff, I dissent.



125 Ohio St.3d 91
2010-Ohio-1042

STAMMCO, L.L.C., d.b.a. The Pop Shop, et al., Appellees,

v.

UNITED TELEPHONE COMPANY OF OHIO, d.b.a. Sprint, et al., Appellants.

No. 2008-1822.

Supreme Court of Ohio.

Submitted Oct. 21, 2009.

Decided March 24, 2010.

Background: Customers brought action against providers of local and long distance telephone service, seeking money damages and declaratory and injunctive relief, and alleging the providers were liable to them and a class of telephone service customers under theories of liability sounding in negligence, breach of implied duty of good faith and fair dealing, and unjust enrichment, due to a practice of causing unauthorized third-party charges to be placed on customers’ telephone bills, which practice the customers referred to as “cramming.” The Court of Common Pleas, Fulton County, No. 05CV000150, certified the action as a class action. Providers appealed. The Court of Appeals, Mark L. Pietrykowski, P.J., affirmed. Providers sought review which was granted.

Holdings: The Supreme Court, Lanzinger, J., held that:

- (1) definition of "class" did not have readily identifiable members and was ambiguous, and
- (2) remand was required to redefine class. Reversed and remanded with instruction.
- Moyer, C.J., concurred in part, dissented in part, and filed opinion.

Murray & Murray Co., L.P.A., Dennis E. Murray Sr., and Donna J. Evans, Sandusky, for appellees.

Baker & Hostetler, L.L.P., Michael K. Farrell, Thomas D. Warren, Karl Fanter, and John B. Lewis, Cleveland, for appellants.

Aneel L. Chablani, Andrew D. Neuhauser, and Stanley A. Hirtle; Burdge Law Office Co., L.P.A., and Ronald L. Burdge, Dayton; and Stephen Gardner, urging affirmation for amici curiae Advocates for Basic Legal Equality, Inc., and National Association of Consumer Advocates.

Linda S. Woggon, urging reversal for amicus curiae Ohio Chamber of Commerce.

LANZINGER, J.

1. Parties ⇨35.41

Definition of class in class action must be precise enough to permit identification within a reasonable effort. Rules Civ. Proc., Rule 23.

2. Parties ⇨35.41, 35.71

Definition of class that included customers of local and long distance telephone service who were billed for charges on their local telephone bills by provider on behalf of third parties without their permission, which practice customers referred to as "cramming," did not have readily identifiable members and was ambiguous; definition was unclear whether customers' or third parties' permission was required, and how authorization was to be accomplished. Rules Civ.Proc., Rule 23.

3. Appeal and Error ⇨1178(1)

Remand was required to redefine class in customers' action against providers of local and long distance telephone service; parties did not have opportunity to present and argue merits of alternative class definitions in their appellate briefs, and trial judge who conducted class action and managed case had to be allowed to craft definition with parties. Rules Civ. Proc., Rule 23.

4. Parties ⇨35.41

Trial judge who conducts the class action and manages the case must be allowed to craft the definition with the parties. Rules Civ.Proc., Rule 23.

{¶ 1} We accepted this discretionary appeal to consider two propositions concerning the definition of a class for purposes of a class action under Civ.R. 23. Appellants, United Telephone Company of Ohio and Sprint Nextel Corporation, ask us to hold that the trial court's class certification is improper under Civ.R. 23 and that the case cannot be maintained as a class action. Because the class definition does not allow the class members to be readily identified, we reverse the court of appeals' judgment and remand the case to the trial court so that it may clarify the class definition.

Case Background

{¶ 2} In June 2005, appellees, Stammco, L.L.C., d.b.a. The Pop Shop ("Stammco"), and its owners, Kent and Carrie Stamm, filed a complaint on behalf of themselves and all others similarly situated against United Telephone Company of Ohio, d.b.a.

Sprint ("UTO"), and the Sprint Nextel Corporation ("Sprint"), who provided appellees with local and long-distance phone service. The complaint alleged that Stammco and other customers of UTO and Sprint had been damaged by appellants' negligent acts and billing practices. Specifically, appellees alleged that UTO and Sprint had engaged in the practice of "cramming," or causing unauthorized charges to be placed on their customers' telephone bills. Appellees highlighted one incident, in which charges from a third party, Bizopia, appeared on Stammco's phone bill. Although Bizopia claimed that it had secured from a Stammco employee authorization to charge fees on the bill, Stammco claimed that the employee had explicitly told Bizopia that he did not have the authority to authorize such charges.

{¶ 3} Pursuant to Civ.R. 23, appellees filed a motion for certification of the following class: "All individuals, businesses or other entities in the State of Ohio who are or who were within the past four years, subscribers to local telephone service from United Telephone Company of Ohio d.b.a. Sprint and who were billed for charges on their local telephone bills by Sprint on behalf of third parties without their permission. 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." The trial court granted the motion for class certification, named the Stamms and Stammco class representatives, and designated their counsel as counsel for the class.

{¶ 4} UTO and Sprint appealed the order certifying the class, asserting in part

that the trial court failed to carefully apply the requirements for class certification under Civ.R. 23 and that, as a matter of law, no class could ever properly be certified based upon appellees' claims. After applying the factors in Civ.R. 23(A) and the four factors in Civ.R. 23(B)(3), the court of appeals held that the trial court had not abused its discretion in sustaining the motion to certify the class.

{¶ 5} After initially declining jurisdiction, *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 120 Ohio St.3d 1488, 2009-Ohio-278, 900 N.E.2d 198, this court granted appellants' motion to reconsider and accepted discretionary jurisdiction over appellants' two propositions of law. *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 121 Ohio St.3d 1430, 2009-Ohio-1296, 903 N.E.2d 327. The first states, "A plaintiff cannot define the class to include only individuals who were actually harmed." The second states, "A class action cannot be maintained when only some class members have been injured."

Legal Analysis

{¶ 6} Civ.R. 23 sets forth the requirements for maintaining a class action. We have noted that there are seven requirements for a class action to be maintained under this rule: "(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 impracticable; (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 met." *Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67, 71, 694 N.E.2d 442, citing

Civ.R. 23(A) and (B) and *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, 521 N.E.2d 1091.

[1] {¶7} In the present case, the trial judge and court of appeals determined that the class was proper under Civ.R. 23(B)(3), which provides that a class action may be maintained when “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” However, we have held that “[a]n identifiable class must exist before certification is permissible. The definition of the class must be unambiguous.” *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91, 521 N.E.2d 1091, paragraph two of the syllabus. “[T]he requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for [9]the court to determine whether a particular individual is a member.” 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* (2d Ed.1986) 120–121, Section 1760. Thus, the class definition must be precise enough ‘to permit identification within a reasonable effort.’” *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d at 71–72, 694 N.E.2d 442, quoting *Warner v. Waste Mgt.*, 36 Ohio St.3d at 96, 521 N.E.2d 1091.

{¶8} In *Warner*, the plaintiffs filed a lawsuit in response to alleged activities in and around a dump site by the defendants, including Waste Management, Inc. The trial court certified a class consisting of people who “lived, worked, resided or owned real property within a five-mile radius of the Waste Management * * * site.” *Id.* at 93, 521 N.E.2d 1091. We held that a class defined to include all people who had ever worked within five miles of a specific

site did not permit identification of its members with a reasonable effort and that the trial court had abused its discretion in certifying a class whose members were not readily identifiable. *Id.* at 96, 521 N.E.2d 1091.

{¶9} On the other hand, in *Hamilton*, the trial court had denied plaintiffs’ motion seeking certification of a class and subclasses consisting of mortgagors on whose residential loans Ohio Savings Bank calculated interest according to a certain method. *Hamilton*, 82 Ohio St.3d at 69, 72, 694 N.E.2d 442. We held that an identifiable class existed because the trial court needed only to look at the actions or practices of Ohio Savings Bank to determine whether an individual was a member of the class or subclasses. *Id.* at 73, 694 N.E.2d 442. We rejected Ohio Savings Bank’s argument that the trial court would be required to conduct an individual inquiry into each prospective member’s knowledge or understanding of the method for calculating interest before ascertaining whether each person was a member of the proposed class. Because the bank was able to identify prospective class members with a reasonable effort, we concluded that there was an identifiable class. *Id.* at 72–73, 694 N.E.2d 442.

[2] {¶10} In the case now before us, 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. 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. Because the definition is ambiguous, we are unable to rule on appellants' objections to the class as currently defined.

{¶ 11} Furthermore, unlike in *Hamilton*, the trial court cannot readily identify prospective class members. In *Hamilton*, the court needed only to review the bank's records to determine whether a person was a member of the class. Here, however, the court must determine individually whether and how each prospective class member had authorized third-party charges on his or her phone bill. 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. 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 appellants' records. While it appears that the class is intended to consist only of customers who received unauthorized charges, the class definition prevents the class members from being identified without expending more than a reasonable effort. We conclude that a class action cannot be maintained under Civ.R. 23 using the class definition as stated and that the trial court abused its discretion in certifying the class as so defined.

{3, 4} {¶ 12} 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"). In *Marks*, we noted that "[e]ven if the appellate court does find an abuse of discretion, it should not proceed to formulate the class or issue itself." *Id.* We thus conclude that it is proper for the trial court to redefine the class on remand.

{¶ 13} Because we remand the case to the trial court to clarify and complete the class definition, we do not reach appellants' arguments 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.

Conclusion

{¶ 14} 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.

Judgment reversed and cause remanded.

LUNDBERG STRATTON,
O'CONNOR, and O'DONNELL, JJ.,
concur.

MOYER, C.J., and CUPP, J., concur in
part and dissent in part.

PFEIFER, J., dissents and would affirm
the judgment of the court of appeals.

MOYER, C.J., concurring in part and
dissenting in part.

Introduction

{¶ 15} I agree with the majority that the class definition in this case is ambiguous and that the matter should be remanded in order that the trial court may redefine the class. Therefore I concur in that portion of the majority opinion. But I do not completely agree with the analysis used by the majority in reaching that determination because the majority strays into issues of predominance and superiority. Therefore, I dissent from that portion of the majority opinion.

{¶ 16} In addition, I dissent from the majority opinion because I would address the appellants' propositions of law. When the trial court redefines the class on remand, the court and the parties would benefit from a ruling on the issues raised in the propositions of law. Judicial economy would be served by determining these issues now, rather than allowing the issues to lurk on remand and resurface in a new appeal.

{¶ 17} I would hold that the class in this case was ambiguously defined, but was not otherwise improper. The trial court did not abuse its discretion when it determined that classwide issues are predominant in this case.

Law and Analysis

The class definition is ambiguous

{¶ 18} To properly establish a class under Civ.R. 23(A), the definition must define

an identifiable group of persons in unambiguous terms. *Warner v. Waste Mgt. Inc.* (1988), 36 Ohio St.3d 91, 96, 521 N.E.2d 1091. "The test is whether the means is specified at the time of certification to determine whether a particular individual is a member of the class." *Hamilton v. Ohio Sav. Bank* [gr] (1998), 82 Ohio St.3d 67, 73, 694 N.E.2d 442, quoting *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 63, 556 N.E.2d 157.

{¶ 19} The class in this case is defined 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. Sprint 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."

{¶ 20} I agree that the class definition is ambiguous. The phrase "without their permission" is unclear. We cannot discern whether the customers/plaintiffs should have given permission to United Telephone Company of Ohio, d.b.a. Sprint, or to the third parties for the charges, and what form that permission should have taken. Thus, the definition fails to unambiguously specify the criteria by which to determine whether a particular person is a member of the class. I concur in that portion of the majority opinion. As an appellate court, we should refrain from endeavoring to define the class; that responsibility rests with the trial court.

Marks v. C.P. Chem. Co. (1987), 31 Ohio St.3d 200, 201, 31 OBR 398, 509 N.E.2d 1249. Therefore, I agree that the matter should be remanded to the trial court.

The determination of ambiguity under Civ.R. 23(A) should not be confused with the determination of the predominance of classwide issues and the superiority of a class action under Civ.R. 23(B)(3)

{¶ 21} In analyzing whether the class definition is ambiguous, the majority improperly includes issues relating to predominance and superiority under Civ.R. 23(B)(3). In particular, the majority explains that the class definition is ambiguous because, among other reasons, the trial court cannot “readily identify” class members. The majority states: “[T]he trial court cannot readily identify prospective class members. * * * Here, * * * the trial court must determine individually whether and how each prospective class member had authorized third-party charges on his or her phone bill. 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.”¹ Majority opinion at ¶ 11.

{¶ 22} We have held that a class must be identifiable with “reasonable effort” and that an amorphous class is not “readily identifiable.” *Warner v. Waste Mgt.*, 36 Ohio St.3d at 96, 521 N.E.2d 1091. For example, “[c]lasses such as ‘all people active in the peace movement,’ ‘all people who have been or may be harassed by the police’ and ‘all poor people,’ are too amorphous to permit identification within a rea-

sonable effort and thus may not be certified.” *Id.* The focus is on the definition itself—whether it is so abstract that it defies utilization.

{¶ 23} Yet according to the majority’s analysis of the issue, the trial court cannot “readily identify” class members if there are differing facts and legal issues among them.

{¶ 24} In *Hamilton*, we rejected a similar argument: “[E]ven when a class is appropriately defined by reference to defendant’s conduct, it is nevertheless indefinite if separate adjudications are likely required to finally determine the action.” *Hamilton*, 82 Ohio St.3d at 73, 694 N.E.2d 442. “The focus at this stage is on how the class is defined. ‘The test is whether the means is specified at the time of certification to determine whether a particular individual is a member of the class.’ *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 63, 556 N.E.2d 157, 165. The question as to whether there are differing factual and legal issues ‘do[es] not enter into the analysis until the court begins to consider the Civ.R. 23(B)(3) requirement of predominance and superiority.’ *Marks, supra*, 31 Ohio St.3d at 202, 31 OBR at 400, 509 N.E.2d at 1253.” *Hamilton* at 73, 694 N.E.2d 442. In *Planned Parenthood Assn. v. Project Jericho*, we explained that “[t]he fact that members may be added or dropped during the course of the action is not controlling. The test is whether the means is specified at the time of certification to determine whether a particular in-

1. This analysis closely mirrors the predominance analysis in *Brown v. SBC Communications, Inc.* (Feb. 4, 2009), S.D. Ill. No. 05-cv-777-JPG, 2009 WL 260770. When determining whether questions common to the class predominated over individual questions, the court in *Brown* found, “[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.” *Id.* at *3.

dividual is a member of the class.” 52 Ohio St.3d at 63, 556 N.E.2d 157.

{¶ 25} Thus, we have already rejected an analysis that blends Civ.R. 23(A) concepts, such as a readily identifiable class, with Civ.R. 23(B)(3) considerations, such as the predominance of individualized issues. Yet the majority’s decision today blurs the line by injecting issues relating to predominance and superiority under Civ.R. 23(B)(3) into the analysis of whether the class definition is readily identifiable under Civ.R. 23(A). This is no small point. The majority’s analysis will not help the trial court to define the class on remand, nor will it help clarify the law regarding class actions. Instead, courts may be caused to question whether our holding represents a new development in the law.

199{¶ 26} 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.

The trial court did not abuse its discretion when it found that classwide questions of law and fact predominate

{¶ 27} Appellants contend in their second proposition of law that the class was

improper under Civ.R. 23(B)(3) because of the predominance of issues affecting only individual members of the class.² Appellants argue that the class cannot be maintained, because the validity of third-party charges would have to be determined on an individualized, case-by-case basis. I would address this proposition of law and hold that the trial court did not abuse its discretion in determining that classwide questions predominate. The four federal court cases that appellants cite do not persuade me otherwise.

{¶ 28} Appellants’ second proposition of law asks us to apply the long-settled law controlling class certification.

{¶ 29} A trial court must “find[] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members” before it certifies a class under Civ.R. 23(B)(3).

{¶ 30} We have held that “[t]he mere existence of different facts associated with the various members of a proposed class is not by itself a bar to certification of that class. If it were, then a great majority of motions for class certification would be denied. Civ.R. 23(B)(3) gives leeway in this regard and permits class certification where there are facts common to the class members.” *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 10.

{¶ 31} This case presents the type of claims appropriate for class-action treatment because it includes common questions regarding significant aspects of the case which “arise from standardized forms or routinized procedures.” *Hamilton*, 82

2. Appellants also assert in their merit brief that the class action is not manageable and is not superior to other methods of resolving disputes. However, these issues were not

raised in the memorandum seeking jurisdiction or the motion for reconsideration and are therefore outside the scope of the propositions of law that we accepted for review.

Ohio St.3d at 84, 694 N.E.2d 442. As the court of appeals correctly¹¹⁰ observed, this case will require significant individualized determinations, but the majority of those determinations as well as classwide determinations can be made by examining appellants' computerized records.

{¶ 32} We have consistently held that a trial court has discretion in determining whether to certify a class under Civ.R. 23 and that that determination will not be overturned absent an abuse of discretion. "[A] trial judge is given broad discretion when deciding whether to certify a class action. * * * Moreover, 'absent a showing of abuse of discretion, a trial court's determination as to class certification will not be disturbed.' [*Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 312-313, 15 OBR 439, 473 N.E.2d 822.] An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable." *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 5.

{¶ 33} Appellants direct us to four decisions of federal courts, which they believe should guide the outcome of this case. I would hold that those cases are distinguishable and that, in any case, the trial court did not abuse its discretion when it determined that classwide issues were predominant in this case.

{¶ 34} In two of the cited cases, the entanglement of multiple causes of action and multiple statutes and a lack of standardized practices led the federal courts to hold that individualized issues predominated. *Sikes v. Teleline, Inc.* (C.A.11, 2002), 281 F.3d 1350; *Andrews v. AT & T* (C.A.11, 1996), 95 F.3d 1014.

{¶ 35} *Sikes* and *Andrews* are conceptually similar to *Schmidt v. Avco Corp.*, 15 Ohio St.3d at 314, 15 OBR 439, 473 N.E.2d

822, in which we held that "a class action would be inefficient and non-economical * * * because the claims raised involve noncommon issues that are either inextricably entangled with common issues or are too unwieldy to be handled adequately on a class action basis."

{¶ 36} We distinguished *Schmidt* from *Hamilton* by noting that the claims in *Schmidt* involved many "inextricably entangled" "noncommon issues." *Hamilton*, 82 Ohio St.3d at 83-84, 694 N.E.2d 442. In *Hamilton*, we explained that "class action treatment is appropriate where the claims arise from standardized forms or routinized procedures" despite the need for individualized proof on the issue of reliance. *Id.* at 84, 694 N.E.2d 442. *Sikes* and *Andrews* are distinguishable from this case because they involved a broader spectrum of claims and law and demanded an inquiry into the state of mind of each individual plaintiff. *Sikes* and *Andrews* do not aid in the disposition of this case.

{¶ 37} Appellants also direct us to *Stern v. Cingular Wireless Corp.* (Feb. 23, 2009), C.D.Cal. No. CV 05-8842, 2009 WL 481657, and *Brown v. SBC Communications, Inc.* (Feb. 4, 2009), S.D.Ill. No. 05-cv-777-JPG, 2009 WL 260770. While¹¹¹ those cases are admittedly similar to this case, appellants have failed to demonstrate that the trial court abused its discretion in certifying the class in this case.

{¶ 38} In *Stern*, the trial court refused to certify a class defined as cell-phone purchasers who claimed that certain services had been added to their plans without their permission. *Id.* at *2. The outcome in *Stern* was based on the plaintiffs' inability to offer any evidence that would establish on a classwide basis which services had been selected by the customer at the point of purchase and which had been provided. *Id.* at *7-8.

{¶ 39} Similarly, in *Brown*, the plaintiffs claimed that the defendant had placed un-

authorized monthly fees on their local phone bills. 2009 WL 260770 at *1. The court refused to certify the class, finding that “the 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.” *Id.* at *3.

{¶ 40} Unlike in *Sikes* and *Brown*, the trial court in this case determined that a class action was appropriate. Relying on *Ritt v. Billy Blanks Ents.*, 171 Ohio App.3d 204, 2007-Ohio-1695, 870 N.E.2d 212, the trial court found that individualized issues did not predominate and that the policies behind class actions supported allowing the class in this case. Although the unpublished district court cases *Stern* and *Brown* are somewhat similar to this case, that fact does not automatically mean that the trial court abused its discretion in certifying the class.

{¶ 41} Each class action is different and each trial court will decide issues of predominance based upon the facts present in the case before it. Thus, one court may appropriately certify a class, even if it resembles one that was not certified by another court under Civ.R. 23(B), when the circumstances, claims, issues, and evidence alter the analysis. Furthermore, the determination will be upheld absent an abuse of discretion, so a trial court may certify a diverse range of classes—even classes similar to those that have been rejected in the past—and that determina-

tion will not be reversed based upon a mere error of law or judgment. *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 5.

*The defined class is not
a “fail-safe class”*

{¶ 42} In their first proposition of law, appellants urge us to find that the class in this case is a “fail-safe class” and that it is therefore defectively defined.³ ¶ 192 “Fail-safe class” refers to a class definition that is improper because the members of the class cannot be known until a determination has been made as to the merits of the claim or the liability of the opposing party. *Adashunas v. Negley* (C.A.7, 1980), 626 F.2d 600, 603. Thus, a fail-safe class “put[s] the cart before the horse.” *Mims v. Stewart Title Guar. Co.* (N.D.Tex.2008), 254 F.R.D. 482, 486.

{¶ 43} We can resolve this issue by applying the holding in *Ojalvo v. Bd. of Trustees of Ohio State Univ.* (1984), 12 Ohio St.3d 230, 233, 12 OBR 313, 466 N.E.2d 875, that a court cannot reach the merits of a case at the class-certification stage. 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.” Appellants 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, appellants appear 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

3. Appellants’ first proposition of law is phrased: “A plaintiff cannot define the class to include only individuals who were actually harmed.” Appellants’ arguments under this proposition of law deal predominantly with the notion of a “fail-safe class.” The remain-

der of appellants’ arguments under the first proposition of law deal mainly with alleged errors of the findings that a trial court must make in certifying a class and are not germane to the resolution of the fail-safe-class issue that we accepted for review.

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.⁴

{¶44} In sum, determination of membership in the class in this case does not depend on a predetermination of the merits of the case or liability of the appellants.

Conclusion

{¶45} For the foregoing reasons, I concur in part and dissent in part.

CUPP, J., concurs in the foregoing opinion.



125 Ohio St.3d 103
2010-Ohio-1040

**OLENTANGY LOCAL SCHOOLS
BOARD OF EDUCATION,
Appellee,**

v.

DELAWARE COUNTY BOARD OF REVISION et al., Appellees; Knickerbocker Properties, Inc. XLII, Appellant.

No. 2009-0320.

Supreme Court of Ohio.

Submitted Feb. 24, 2010.

Decided March 24, 2010.

Background: Taxpayer appealed decision of Board of Tax Appeals (BTA), determin-

4. Furthermore, appellants contend that they are not liable for the third-party-billing practices even if a charge was unauthorized. In their notice of appeal, appellants state that "United Telephone's practice of passing third-party charges along to the customer is a neutral one. Most charges are unquestionably legitimate, and if one were proved ultimately to be unauthorized, it would be as a result of the conduct of a third party, not United Telephone." In appellants' merit brief, they ex-

ing taxation value of its residential rental property.

Holding: The Supreme Court held that evidence was price of sale of property was the property's taxation value.

Affirmed.

Pfeifer, J., filed an opinion concurring in part and dissenting in part, with which O'Connor and Lanzinger, JJ., joined.

1. Taxation ⇐2515

Evidence was sufficient to show that price of sale of residential rental property, occurring one year and two days prior to taxation date for property, was the property's taxation value; even though real estate appraiser and real estate agent testified that property had a high vacancy rate in year after sale, taxpayer's appraisal did not use "paired sales," which might have demonstrated a change in market conditions since time of sale, and appraisal report itself showed that similar properties had increased since time of sale. R.C. § 5713.03.

2. Taxation ⇐2699(8)

The Board of Tax Appeals (BTA) is responsible for determining factual issues and, if the record contains reliable and probative support for the BTA's determinations, the Supreme Court will affirm them on appeal.

plain that even if plaintiffs could prove that the third-party charges were unauthorized, liability would still not automatically attach: "Even class members who could prove [that they received and paid a third-party charge for a service that they did not request or use] would still have to prove that their payment of the charge was caused by United Telephone and not by their own conduct or the conduct of a third-party service provider."