No. 10-0275

In the
Supreme Court of Ohio

EDWARD B. WEST,
on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

vs.

CARFAX, INC. AND POLK CARFAX, INC.
Defendants-Appellants,

CENTER FOR AUTO SAFETY, ET AL.
Class Members-Objectors-Appellees.

On Appeal from the Court of Appeals of Ohio, Eleventh Appellate District,
Trumbull County, Case No. 2008 T 0045

MEMORANDUM OPPOSING JURISDICTION OF APPELLEES CENTER FOR AUTO SAFETY, *ET AL.*

HUGH E. MCCAY (Bar. No. 0023017)
Counsel of Record
TRACEY L. TURNBULL
PORTER WRIGHT MORRIS & ARTHUR LLP
925 Euclid Avenue, Suite 1700
Cleveland, OH 44115
Tel. (216) 443-9000
Fax (216) 443-9011
hmckay@porterwright.com

CHRISTOPHER M. MASON
NIXON PEABODY LLP
437 Madison Avenue
New York, NY 10022
Tel. (212) 940-3000
Fax (866) 947-2229
cmason@nixonpeabody.com

Counsel for Appellants Carfax, Inc. and Polk Carfax, Inc.

DEEPAK GUPTA (*pro hac vice*)
Counsel of Record
ALLISON M. ZIEVE (*pro hac vice*)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
Tel. (202) 588-1000
Fax (202) 588-7795
dgupta@citizen.org, azieve@citizen.org

RONALD FREDERICK (Bar No. 0063609)
RONALD FREDERICK & ASSOCIATES
55 Public Square, Suite 1300
Cleveland, OH 44113
Tel. (216) 502-1055
Fax (216) 781-1749
ronf@clevelandconsumerlaw.com

Counsel for Objectors-Appellees Center for Auto Safety, et al.

CURTIS J. AMBROSY (Bar. No. 0022121)
Counsel of Record
JAMES J. FREDERICKA (0022130)
AMBROSY AND FREDERICKA
144 N. Park Avenue, Suite 200
Warren, OH 44481
Tel. (330) 393-6400
Fax (330) 392-5685
af44481@aol.com

WILLIAM B. FEDERMAN
FEDERMAN & SHERWOOD
120 N. Robinson, Suite 2720
Oklahoma City, OK 73102
Tel. (405) 235-1560
Fax (405) 239-2112
wbf@federmanlaw.com

Counsel for Plaintiff-Appellant
Edward B. West

TABLE OF CONTENTS

THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

This appeal presents case-specific, factbound questions of class-action-settlement administration that were correctly decided below. Because these questions are unlikely to recur in the Ohio courts, and because the ultimate disposition of this appeal would remain the same even if all three of Appellants' propositions of law had merit, this case does not warrant review.

The appeal arises out of Appellants' attempt to secure approval of a class-action settlement in which the primary relief for the class consists of coupons for discounted purchase of the defendants' product. A class-action settlement may be approved only if it is fair, adequate, and reasonable. Civ.R 23(E). The Eleventh District correctly held that the settlement here fell short of that standard. *See West v. Carfax, Inc.* (Ohio Ct. App. Dec. 28, 2009), 2009 Ohio 6857 ("Opinion").

Appellants' first proposition of law concerns the requirement that class members be notified of a settlement. Ohio's Civil Rule 23 incorporates the due-process requirement that notice of a proposed settlement "shall be given to all members of the class," and must be "the best notice practicable under the circumstances, including *individual notice to all members who can be identified through reasonable effort*." Civ.R. 23(E), (C)(2) (Emphasis added). Despite those clear requirements, the parties here did not even attempt to notify a majority of the class. Out of ten years of customers whose claims were released, the settlement required individual notice only to customers whose purchases fell within a three-year period. The rest got "no individualized notice whatsoever." Opinion at ¶ 16. As a result, under the settlement, most class members would have released their claims in exchange for nothing—not even the knowledge that

they had done so. Such a settlement simply cannot be reconciled with the requirements of Rule 23.

Appellants make no serious effort to defend this fundamental flaw in the notice program. Instead, they focus on a narrower issue: whether, as to the minority of the class to whom individual notice was attempted, notice by email (as opposed to regular mail) constituted "the best notice practicable under the circumstances." Civ.R. 23(C)(2). But the answer to this question cannot change the disposition of this case. Regardless of the *method* of notice used for a minority of the class, the notice program fails because of the *lack* of individual notice to the majority of the class. Moreover, the email-versus-mail issue is itself case-specific. The court concluded that mail notice was appropriate under the circumstances of this particular case because the defendants are themselves in the business of selling mailing lists for use in automotive class actions.

Appellants' second and third propositions of law both criticize the Eleventh District's holding that the settlement should not have been approved without consideration of the number of class members and the number of claims made under the original settlement. This information would have produced a projected redemption rate for the coupons—a valuable piece of information for evaluating a proposed class-action settlement. Appellants, however, suggest that the court created a new, burdensome requirement for the approval of class-action settlements.

Once again, Appellants' criticism overlooks the case-specific nature of the Eleventh District's determination, which rested on the unique fact that the settling parties knew—both at the fairness hearing and prior to approval of the revised settlement—how many claims had been made under an initial settlement that largely resembled the revised settlement. The requirement to produce such information does not arise in most cases for

the simple reason that such information rarely exists. And Appellants' refusal to disclose it should have raised a red flag, as it suggests that very few class members found the deal worthwhile.

As the Eleventh District recognized, the Appellants' refusal to release the claims information is particularly troubling because "this is a 'coupon' case, i.e. the class members do not receive monetary damages from the settling defendants, but rather, alleged cash substitutes." Opinion at ¶ 24. Such settlements are widely criticized because the relief is often worthless; most class members will not use the coupons. Accordingly, courts evaluating coupon settlements routinely consider estimated redemption rates to ensure that the settlement offers value. Where such information is readily available there is no excuse for hiding it, and the Appellants conspicuously do not offer any.

STATEMENT OF THE CASE AND FACTS

The underlying lawsuit was brought as a statewide class action under Ohio's Consumer Sales Practices Act and common law to remedy allegedly misleading practices of Carfax in suggesting to consumers that its Vehicle History Reports were based on accident data provided from all 50 states, when in fact Carfax's database does not include police accident data from 23 states. In September 2006, plaintiff West and defendant Carfax (collectively, "Appellants" or "settling parties") proposed a nationwide class-action settlement under which each class member who submitted a claim form would, after approval by Carfax, have been eligible to receive one of four types of coupons—three for one or more Carfax reports and one for a discount off a car inspection. One year later, the trial court gave preliminary approval to the settlement and ordered the parties to notify class members in accordance with the notice plan set forth in the settlement.

Although the class definition included all customers who bought Carfax reports prior to October 27, 2006, and the complaint alleged that injured class members are those who bought Carfax reports in 1998 or later, the settling parties agreed to give individual notice via email to only a fraction of class members: those who bought Carfax reports during *one year* of the approximately ten-year class period. A notice also appeared once in USA Today and once in Investor's Business Daily. The notice set a deadline of May 27, 2007, for class members to submit claims, and only class members who submitted claims would receive a coupon.

The non-profit Center for Auto Safety, together with 17 individual class members (collectively, "Objectors"), moved to intervene and filed objections to the settlement, arguing that the notice program was deficient and that the coupon relief offered was likely to be of little or no value to class members. The Ohio Attorney General appeared in support of the objections.

In June 2007, one month after the fairness hearing on the original settlement, the settling parties revised the proposed settlement agreement to respond to some of Objectors' arguments. With respect to notice, the revised agreement provided that email notice would be sent only to class members who bought Carfax reports during *three years* of the ten-year class period. Appellants continued to object to the settlement, and in particular to the failure even to attempt individual notice to a majority of the class. In addition, because the May 27, 2007, deadline for submitting a claim under the original settlement had passed and the revised settlement was similar to the original, Appellants moved the court to order the settling parties to disclose the number of claims made and the total number of class members, so that the court could assess the percentage of class members who received notice and whether the class would obtain value from the

settlement. The trial court nonetheless approved the revised settlement agreement, without requiring disclosure of the number of class members or the number of claims filed.

The Court of Appeals for the Eleventh District reversed. The court found the settlement's notice program defective under the parallel requirements of Ohio Civ.R. 23(C)(2) and *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732, both of which require "individual notice to all members who can be identified through reasonable effort." Civ.R. 23(C)(2). Contrary to that requirement, most of the class members in this case would "get no individualized notice whatsoever." *Id.* at ¶ 16. The court further concluded that, even as to the minority of the class to whom individual email notice was attempted, the method employed was not the best notice practicable under the circumstances because the defendants are actually *in the business* of selling mailing lists for use in automotive class actions, and are thus particularly suited to provide notice by mail. *Id.* at ¶ 19.

Because "this is a 'coupon' case, i.e. the class members do not receive monetary damages from the settling defendants, but rather, alleged cash substitutes," the court also concluded that the trial court erred by approving the settlement without requiring the parties to disclose the number of class members and claims made under the original settlement—the information most relevant to a meaningful assessment of the settlement terms and whether "the vouchers, or 'coupons,' offered have any actual value." *Id.* at ¶ 24-25.

ARGUMENT

I. APPELLANTS' FIRST PROPOSITION OF LAW DOES NOT WARRANT REVIEW.

The applicable provisions of Ohio's Rule 23 require that notice of a proposed class-action settlement "shall be given to all members of the class" and shall be "the best notice practicable under the circumstances, including *individual notice to all members who can be identified through reasonable effort*." Civ.R. 23(E), (C)(2) (Emphasis added).

Appellants' first proposition of law contends that the Eleventh District Court erred when it concluded that regular mail, as opposed to email, would be "the best notice practicable under the circumstances" in this case. But the Eleventh District found the notice program in this case defective for a much more fundamental reason: Regardless of the method used, class members whose purchases occurred in seven out of the ten years covered by the settlement would "get no individualized notice whatsoever." Opinion at ¶ 16.

Thus, even if Appellants' propositions of law were correct, reversal of the trial court's decision would still be necessary. In any event, as explained below, the Eleventh District's decision concerning the appropriate method of notice (email versus mail) turns on facts unique to this case, and thus raises no legal questions worthy of this Court's review.

A. The Eleventh District's Analysis of the Appropriate Method of Notice Rested on the Unique Facts of This Case and Was Peripheral to the Decision Below.

Instead of defending the notice program as a whole, Appellants criticize the Eleventh District's holding on a sub-issue: whether, as to the minority of class members

for whom individual notice was actually attempted, email (as opposed to regular mail) constitutes "the best notice practicable under the circumstances," Civ.R. 23(C)(2).

The Eleventh District, however, did not announce a categorical rule precluding email notice in class actions. Rather, the court resolved the email-versus-mail question on narrow, case-specific grounds that are unlikely to recur. Relying on the testimony of Objectors' notice expert, Todd Hilsee, the court focused on a unique feature of this case: "[D]efendant Polk is in the business of providing names and addresses of vehicle owners in class action suits" and the preparation of mailing lists from such data is "routine in automotive litigation." Opinion at ¶ 17. The court recognized that the choice between notice methods depends on the circumstances; mailed notice may not be required, for example, where it would entail "the creation of new computer programs" to identify class members. *Id.* at ¶ 19. The court also weighed testimony from Carfax suggesting that older emails had an incrementally lower likelihood of being valid. "But in view of the fact that Carfax and Polk are interrelated entities," the court concluded, *this case* was one in which individualized mail notice was appropriate. *Id.* at ¶ 19; *accord* Opinion ¶¶ 35, 39 (Trapp, J., concurring) (stressing that because Carfax "is *in the very business* of providing names and addresses of vehicle owners in class actions," mailed notice was warranted "[u]nder the unique circumstances present in this case.") (Emphasis in original).

Because it will be the rare class action indeed in which one of the defendants happens to be in the business of selling address-updating services for the specific purpose of ensuring individual class action notice by mail in cases involving vehicles, Appellants' complaints about the implications of the decision below are greatly exaggerated. *See* Carfax Mem. 1 (predicting that, under the decision below, *all* "litigants in Ohio settling a nationwide class action must forgo fast and inexpensive modern means of

communication through e-mail."). The appropriate method of notice in a given case necessarily depends on the facts and circumstances.

B. Even If Email Were the "Best Notice Practicable Under the Circumstances," That Fact Could Not Salvage a Settlement Under Which The Parties Attempted No Notice Whatsoever to the Majority of the Class.

The settlement in this case, by design, failed even to attempt *any* individual notice to a majority of the class. That failure simply cannot be reconciled with Ohio's Civil Rule 23 or the minimum requirements of due process. To reiterate, Civil Rule 23 requires "individual notice to all members who can be identified through reasonable effort." Civ.R. 23(C)(2). The settlement approved by the trial court in this case cannot be reconciled with that requirement. The Revised Settlement would have released the claims of consumers nationwide who have done business with Carfax over a period of *ten years*—from 1996 through 2006. And the Amended Complaint identifies almost nine-years' worth of injured customers. However, the Revised Settlement provided that Carfax would send email notice to only three years' worth of Carfax customers—customers who bought Carfax vehicle history reports on or after October 27, 2003.

Thus, even if every email reached every intended recipient, which is extremely unlikely, only a fraction of the class received notice. Many years' worth of customers—customers who are giving Carfax an unconditional release of their claims—were excluded from the notice program. This unusual procedure ensured that a large percentage of the class would have had to give up their claims without even having a chance to receive any benefit from the settlement.

In approving the settlement, the trial court acknowledged that the notice procedure "leaves out the remainder of the consumers who purchased Carfax reports

prior to" the three-year cutoff, but the court nonetheless held that the notice was adequate. (Judgment Entry T.d. 96 at 7). Neither the settling parties nor the trial court, however, cited any authority excusing or authorizing such a procedure. Instead, the settling parties persuaded the trial court to set aside the plain meaning of the Ohio rule: They argued that the law does *not* require an attempt to give individual notice to all class members who can be identified and that the Supreme Court's holding in *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 173, 94 S.Ct. 2140, 40 L.Ed.2d 732, which parallels the individual-notice requirements of Ohio's Rule 23, was not binding on the court.

Neither the trial court nor the Appellants, however, identified any meaningful difference between providing "individual notice to all members who can be identified through reasonable effort" (Civ.R. 23(C)(2) and Fed.R.Civ.P. 23(c)) and providing "individual notice * * * to all class members whose names and addresses may be ascertained through reasonable effort" (*Eisen*), and, indeed, there is none. Thus, the requirement of individual notice to all reasonably identifiable class members has been upheld in actions seeking monetary relief in the Ohio courts. See *Toledo Fair Hous. Ctr v. Nationwide Mutual Ins. Co.* (Ohio Com. Pl. 1996), 94 Ohio Misc.2d 127, 130, 704 N.E.2d 648 (under *Eisen* and Ohio's Rule 23, "individual notice is required for those class members whose names and addresses can be determined by reasonable effort").

Despite Ohio Civil Rule 23's plain language requiring "individual notice to all class members who can be identified through reasonable effort" (Civ. R. 23(C)(2)), Carfax urges this Court to follow "decisions of other state courts expressly holding that such individual notice is not required." Carfax Mem. 7. Not one of the cases Carfax cites, however, supports the notice program approved here. See *Archibald v. Cinerama Hotels* (Cal. 1976), 544 P.2d 947, 953 (deciding forum non conveniens issue; no ruling as to

notice); *Sulcov v. 2100 Linwood Owners, Inc.* (N.J. Sup. Ct. App. Div. 1997), 303 N.J. Super. 13, 696 A.2d 31, 35-36 (rejecting argument that court erred by not requiring class members to acknowledge receipt of mailed notice). Most of Carfax's cases involve situations in which courts *adhered* to the requirement of "individual notice to all members who can be identified through reasonable effort," but concluded that, under the particular circumstances of the case, the class members in question could not be "identified through reasonable effort."[3]

Here, unlike in Carfax's cases, the trial court acknowledged that the notice program "leaves out" the majority of class members (Judgment Entry T.d. 96 at 7), but made no finding that the class members' names and addresses (either regular mail or email) could not be "identified through reasonable effort."

[3] See *Dumont v. Charles Schwab & Co., Inc*. (E.D.La. 2000), 2000 WL 1023231, at *7 (individual notice not required as to closed accounts "which may or may not involve class members" where defendants' "current computer programs cannot identify former class members for an individual mailing" and such notice would be an "exercise in futility"); *Rebney v. Wells Fargo Bank* (Cal.App. 1990), 269 Cal.App.3d 1117, 1138 fn. 6, 269 Cal. Rptr. 844 (noting in dicta that settlement required mail notice to bank's current customers but not to former customers with "high-volume business accounts" because no way of identifying which former customers held such accounts); *Sollenbarger v. Mountain States Tel. & Tel. Co.* (D.N.M. 1988), 121 F.R.D. 417, 436-37 (where individual mailed notice to current customers would likely reach both current and former customers, additional mailed notice program proposed by plaintiffs to reach former customers would be "futile" given numerous difficulties associated with accessing records that were based only on telephone numbers rather than customers' names, small number of affected class members, and likelihood they would get mailed notice anyway); *Cartt v. Superior Ct. of Los Angeles Cty.* (Cal.App. 1975), 50 Cal.App.3d 960, 966, 124 Cal.Rptr. 376 (reversing order requiring plaintiff to send mailed notice "guaranteed not to reach a substantial part of the class she represents, which will, however, be received by thousands who have no interest in plaintiff's suit"). The only Ohio decision cited is not on point. See *Walker v. Firelands Community Hosp*., 6th Dist. No. E-03-009, 2004-Ohio-681, at ¶ 2, 23-24 (rejecting class-action-certification notice plan that would require hospital to disclose patients' confidential medical information without their consent).

II. APPELLANTS' SECOND AND THIRD PROPOSITIONS OF LAW DO NOT WARRANT REVIEW.

A. This Case Presented a Unique, Tailor-Made Opportunity to Assess the Value of the Coupons Using Claims Information from the Original Settlement.

In the trial court, the settling parties conspicuously failed to disclose the numbers that would be most meaningful in evaluating not only the notice program, but the settlement as a whole: the number of claims made and the total size of the class. Together, those numbers would have enabled the trial court to determine what portion of the class to which email notice was originally sent decided to take advantage of the original settlement, and thereby provided valuable insight into the true value of the settlement to the class.

Appellants fault the Eleventh District for holding that the coupon settlement in this case should not have been approved without an evaluation of those numbers. Their criticism of the decision boils down to the proposition that an estimate of the number of projected claimants "is not a requirement for the approval of a class action settlement under Ohio law." West Mem. at 9. Appellants are correct that such information is not categorically required for the approval of a settlement, but such information also is not readily available in the vast majority of cases.

Appellants' characterization of the decision below ignores the unique circumstances on which the Eleventh District's decision rested. In contrast to most class-action settlements, the trial court in this case had a tailor-made opportunity to gain important insight into the settlement's true value. Although any claims made at the time of the trial court's consideration had been submitted in connection with the original settlement, before it was revised, Carfax argued below that "[t]he Revised Settlement

Agreement is largely the same as the original Settlement Agreement" (T.d. 89 at 2), and Class Counsel stated that Revised Settlement reflects only "insignificant tweaking of minor details." (T.d. 112 at 4)

Based on the settling parties' position, and because the claims period under the initial settlement ended two days after the Fairness Hearing, one month before the parties entered into the Revised Settlement, and nearly one full year before the court approved the settlement, the number of claims made would have given the trial court unique insight into the likely number of claims that would be made under the Revised Settlement and, thus, to assess whether the settlement would provide any real value to the class.

B. The Court Correctly Concluded that Approval of the Settlement Without the Claims Information Was Error and That The Parties Should Have Been Compelled to Disclose the Number of Claims Made.

The Eleventh District's analysis of the need for the claims information was premised on the observation that "this is a 'coupon case, i.e. the class members do not receive monetary damages from the settling defendants, but rather, alleged cash substitutes." Opinion at ¶ 24. Coupon settlements are widely criticized by courts and commentators in large part because coupons are worth less—often far less—than cash of the same value because most class members will not use the coupons. See, e.g., *Synfuel Tech., Inc. v. DHL Express* (C.A.7, 2006), 463 F.3d 646, 654 (vacating approval of class action settlement); *Strong v. Bellsouth Telecomm., Inc*. (W.D.La. 1997), 173 F.R.D. 167, 172 ("Neither the true economic value of an offered credit to its recipient, nor the true economic cost to its issuer, is equivalent to its face value. If it were, a newspaper containing $10 worth of coupons would be as valuable as a $10 bill. Many customers never cash in coupons.") (internal citation omitted), affirmed (C.A.5, 1998), 137 F.3d 844; National Association of Consumer Advocates, *Class Action Guidelines* 19 (2006),

available at http://naca.net/_assets/media/RevisedGuidelines.pdf ("For most of the class, redemption may not be an option, because they are unwilling or unable to make a future purchase from the defendant.").

Under settled Ohio law, a court evaluating a class-action settlement must assess the "settlement terms" to determine whether they have value to the class. See *Beder v. Cleveland Browns* (2001), 114 Ohio Misc.2d 26, 758 N.E.2d 307. Appellants concede as much. See Carfax Mem. 11; West Mem. 9-10. And Appellants conspicuously do not deny that the claims information at issue here was the most relevant information for determining whether, as the Eleventh District put it, "the vouchers, or 'coupons,' offered have any actual value." Opinion at ¶ 25. If, as Objectors suspect, the claims rate was very low, that fact would show that a large majority of class members to whom notice was sent either did not receive it or did not think that the coupons offered were valuable. See *Figueroa v. Sharper Image Corp*. (S.D.Fla. 2007), 517 F.Supp.2d 1292, 1327 ("Given the very low numbers of class members who have responded with interest to the notices provided—less than one percent—the undersigned must agree with objector Potter that the class has spoken and expressed it is not interested in this coupon settlement."). Appellants have never provided a justification for withholding this information, and their jurisdictional memoranda remain silent on that score.

Because many class members will not use coupons, coupons may provide only "illusory benefits." *Turner v. Murphy Oil USA, Inc.* (E.D.La. 2007), 2007 WL 283431, at *30; *Kearns v. Ford Motor Co.* (C.D.Cal. 2005), 2005 WL3967998, *1 n.1 (coupon settlements "produce hardly any tangible benefits for the members of the plaintiff class but generate huge fees for the class attorneys"); *Varacallo v. Mass. Mut. Life Ins. Co.* (D.N.J. 2005), 226 F.R.D. 207, 240 (contrasting "real relief" with "a coupon"); see Miller

& Singer, Nonpecuniary Class Action Settlements (1997), 60 Law & Contemp Probs. 97, 108 (for many class members, "the right to receive a discount will be worthless"). Indeed, in the Class Action Fairness Act of 2005, Congress equated settlement coupons with "awards of little or no value." Section 1711, Title 28, U.S. Code, Note (Findings and Purposes at (a)(3)) ("Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where-(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.").

In light of these concerns, courts reviewing proposed class settlements routinely consider the aggregate monetary value of a settlement, based on an estimated redemption rate. See, *e.g.*, *In re Mexico Money Transfer Litig*. (C.A.7, 2001), 267 F.3d 743, 748 (affirming approval of settlement where "[e]xperts estimated that about half of the coupons would be claimed, and 20% to 30% of those claimed would be used, implying a net value of $40 million to $60 million"); *In re Compact Disc Minimum Advertised Price Antitrust Litig*. (D.Me. 2003), 216 F.R.D. 197, 220 (rejecting settlement where, among other things, value to class had not been quantified); *Buchet v. ITT Consumer Finance Corp*. (D.Minn. 1994), 845 F.Supp. 684, 693-96, amended (D.Minn. 1994), 858 F.Supp. 944 (discussing at length likely rate of coupon redemption to ascertain settlement's value to the class); *Cooper v. Musicland Group, Inc*. (Minn.Dist.Ct. 2005), 2005 WL 1618791, unreported ("[T]he only evidence before the Court concerning the redemption of merchandise coupons indicates that the standard redemption rate for coupons ranges from 1-3% in the marketplace. The Court has serious reservations about the adequacy of this redemption rate given the large number of estimated class action members."); *In re Domestic Air Transp. Antitrust Litigation* (N.D.Ga. 1993), 148 F.R.D. 297, 348 (rejecting suggestion that "the economic value to the class of the settlement from which to calculate

the appropriate fee is equivalent to the face value of the certificates" and adjusting attorney fees "to account for the likely redemption rate of the certificates"). As these courts have recognized, the face value of the coupons offered cannot properly be equated with the value of the settlement.

Here, the trial court was unable to place a value on the settlement because the settling parties offered no evidence to enable the court to make an informed estimate of how many class members will redeem the coupons. The settling parties' failure to offer an estimate was particularly striking because, unlike in most cases, the parties here already knew the total number of claims that had been made under the original settlement, which the parties themselves argued was similar to the approved settlement. There was no excuse (and none offered) for withholding this information from the class or the court.

CONCLUSION

This Court should decline jurisdiction.

Respectfully submitted,

RONALD FREDERICK (Bar No. 0063609)
RONALD FREDERICK & ASSOCIATES
55 Public Square, Suite 1300
Cleveland, OH 44113
Tel. (216) 502-1055
Fax (216) 781-1749

DEEPAK GUPTA (*pro hac vice*)
Counsel of Record
ALLISON M. ZIEVE (*pro hac vice*)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
Tel. (202) 588-1000
Fax (202) 588-7795

Counsel for Objectors-Appellees

March 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2010, I served the foregoing MEMORANDUM OPPOSING JURISDICTION OF APPELLEES CENTER FOR AUTO SAFETY, ET AL on all parties required to be served by causing a true and correct copy thereof to be sent via regular mail to counsel as follows:

William B. Federman
Federman & Sherwood
10205 N. Pennsylvania, Suite 200
Oklahoma City, Oklahoma 73102

Christopher M. Mason
Nixon Peabody LLP
437 Madison Avenue
New York, New York 10022

Curtis J. Ambrosy
144 North Park Avenue, Suite 200
Warren, Ohio 44481

Hugh E. McKay
Tracey L. Turnbull
Porter Wright Morris & Arthur
925 Euclid Avenue, Suite 1700
Cleveland, Ohio 44115

_____
Deepak Gupta