

FILED
COURT OF COMMON PLEAS

MAY 06 2008

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

**IN THE COURT OF COMMON PLEAS
- GENERAL DIVISION-
TRUMBULL COUNTY, OHIO**

CASE NUMBER: 2004 CV 01898

**EDWARD B WEST
AN INDIVIDUAL OF NILES
PLAINTIFF**

VS.

JUDGE ANDREW D LOGAN

**CARFAX INC
A FOREIGN CORPORATION
DEFENDANT**

JUDGMENT ENTRY

On May 25, 2007, this Court held a hearing regarding the proposed settlement of the class action claims as submitted by Class Counsel and Defendant CarFax, Inc.¹ Following this hearing, a briefing schedule was adopted by the Court for the submission of closing arguments and/or the submission of any revisions to the proposed settlement agreement. It is important to note that the revised settlement will not only settle the underlying claims in this action, but also litigation currently pending in other states nationwide.²

Revised Settlement Agreement:

On June 29, 2007, and in accordance with the Court's briefing schedule, a Revised Settlement Agreement was submitted by Plaintiffs and Class Counsel and

¹ The Court conditionally certified the class and preliminarily approved the Proposed Settlement in October 2006.
² The Revised Settlement Agreement also resolves the following matters: *Bryson v. Carfax, Inc. & R.L. Polk & Co.*, No. 5CV500734 (N.C. Super Ct. Craven County); *Davis v. Carfax, Inc. & R.L. Polk & Co.*, No. CJ-04-1316L (OK Dist. Ct. Cleveland County); *Fitchett v. Carfax, Inc. & R.L. Polk & Co.*, No. 426331 (Cal. Super. Ct. Riverside County); *Hajovsky v. Carfax, Inc. & R.L. Polk & Co.*, Case No. 04-002148-CV-272 (Tex. Dist. Ct. Brazos County); *Janota v. Carfax, Inc. & R.L. Polk & Co.* No. A-04-0219-CV-A (Tex. Dist. Ct. Aransas County); *Jay Automotive Group, Inc. v. Carfax, Inc. & R.L. Polk & Co.*, File No. SU 04 CV 3103 (Ga. Super. Ct. Muscogee County); *Lifsey v. Carfax, Inc. & R.L. Polk & Co.*, Case No. NC 329052 (Cal. Super. Ct. Los Angeles County); *Mid-South Motors, Inc. v. Carfax, Inc. & R.L. Polk & Co.*, CT-006060-03 (Tenn. Cir. Ct. Shelby County).

Defendant CarFax, Inc. Consistent with the original Proposed Settlement, class members are permitted to choose from one of four options. However, each option includes modifications from the original Proposed Settlement.

The first option available under the Revised Settlement is, "a non-transferable Voucher for a refund of up to \$20.00 for documented payment by the Class Member *** for any comprehensive mechanical inspection." This Voucher is redeemable for a period of two years following approval of the Revised Settlement and includes "ASE-certified or AAA-approved mechanic, service station or garage" as potential refundable inspection entities. This is an expansion on the entities under the original proposed settlement. In addition, in order to qualify for the Voucher, the inspection must have been performed for one of three approved purposes: "inspection of a used car the *** member is considering buying, or inspection of the *** member's own car in anticipation of selling that car to a third party," or "inspection of the *** member's own car in anticipation of a change in the primary driver or state of registration of such car."

Under the Revised Settlement, the redemption period for the Voucher has been extended to two years post Court approval of the Revised Settlement. The original proposed settlement only allowed a redemption period of six months. In addition, the specific purposes for redemption and inspection entities were expanded. The original proposed settlement was restricted to SGS inspectors only – the Revised Settlement includes AAA-certified and ASE-certified mechanics.

The remaining three options contain the same provisions as the original proposed settlement, except that the Vouchers described are expressly "transferable."

This includes the following vouchers redeemable for: "****two free Carfax Vehicle History Reports from Carfax, redeemable within one year after Final Approval; or *** one free Carfax Vehicle History Report from Carfax, redeemable within two years after Final Approval; or *** a [v]oucher for 50% off an unlimited number of Carfax Vehicle History Reports (for personal, not commercial use) over 30 consecutive days, redeemable within three years after Final Approval."

In addition to these changes in the Vouchers for class members, the Revised Settlement contains specific language to be added to the Carfax website regarding the extent and limitations of the Carfax database for vehicle history information. Specifically, the Revised Settlement requires Carfax to post the following language on its homepage for two years after final approval of the Revised Settlement: "Carfax Vehicle History Reports are based on information supplied to CARFAX. CARFAX does not have the complete history of every vehicle." This caveat is included again in the customer agreement portion of the website which requires consumers to click the link to acknowledge that the Carfax database is not an exhaustive source. In addition, a link to a webpage that specifically details the database available to Carfax will be added to the website. Carfax will also continue to maintain the "Instant Answer" portion of its website with more specific information regarding the limits of its sources.

Also, within 5 business days of final approval, Carfax will add to the settlement website, links to the following documents: "(1) the Complaint, (2) the original Settlement Agreement, (3) this Revised Settlement, and (4) any order or judgment of the Court with respect to Final Approval."

These revisions will be disseminated to class members by a supplemental e-mail notice. Specifically, "[w]ithin 30 days of Final Approval, Carfax will send Supplemental E-mail Notice to all e-mail addresses Carfax has for consumer Class Members who purchased a Carfax Vehicle History Report directly from Carfax on or after October 27, 2003." This is an expansion of the original e-mail notice. In addition, this supplemental e-mail notice will contain a subject line stating "Legal Notice from Carfax re Settlement." The content of this supplemental e-mail includes specific information regarding the available options for class members including benefits, opt-outs, claim information and available websites for additional information including a downloadable copy of the Revised Settlement Agreement.

In general, settlements are favored in the law. *State ex rel. Wright v. Weyandt* (1977) 50 Ohio St.2d 194, 197. Class action litigation is no exception to this general rule. *Sutherland v. ITT Residential Capital Corp.* (1997), 122 Ohio App.3d 526, 536. There are eight criteria utilized to analyze whether a class-action settlement is fair, reasonable and adequate: "(1) likelihood of recovery or likelihood of success; (2) amount and nature of discovery or evidence; (3) settlement terms and conditions; (4) recommendation and experience of counsel; (5) future expense and likely duration of litigation; (6) recommendation of neutral parties, if any; (7) number of objectors and nature of objections; and (8) the presence of good faith and the absence of collusion." *Beder v. Cleveland Browns, Inc.* (2001), 114 Ohio Misc.2d 26, 28 quoting 2 Newberg on Class Actions (3 Ed.1992) 11-97, Section 11:43.

1. *Plaintiffs' likelihood of recovery or likelihood of success.*

The complexity of the individual claims in this case that could theoretically be litigated in courts across the nation negates a high likelihood of success on behalf of these Plaintiffs. Although the Plaintiffs' claims each involve Carfax, the nature of each specific alleged injury is unique to their own situation, car and history. Due in part to these differences, the Plaintiffs had previously been unsuccessful in achieving certification of the class in two cases. The likelihood of an individual Plaintiff's success is also low in light of the complexity of the legal issues, multiple venues and law and limited access to potential resources and the judicial system. Therefore, the likelihood of success as both a class and as individuals is low, and the cost involved would likely be prohibitive.

2. *Amount and nature of discovery or evidence*

According to Carfax, it has provided more than 6,000 pages of discovery in addition to interrogatories and depositions. It is clear to the Court based on the pleadings that both parties, as well as the objectors, are in possession of information sufficient on which to base and articulately argue their respective positions. Neither party nor the objectors are accusing the other of hoarding documents that could be pertinent to the potential settlement or investigation of the underlying issues in the case.³

³ Although the Court does take notice that the Objectors have filed a Motion to Compel Claims Information, this is relevant to the number and nature of claims submitted thus far in this litigation – the Objectors are not seeking to compel the production of discovery documents withheld with malice or ill intent.

3. Settlement terms and conditions

Both Carfax and Plaintiffs assert that the terms and conditions of the Revised Settlement are fair, adequate and reasonable. However, the Objectors, despite their purported involvement and instigation of the changes from the proposed to the Revised Settlement, allege severe malignancies remain which are fatal to the approval of the revised settlement.

Notice:

First, the Objectors attack the notice provision of the Revised Settlement as inadequate and a violation of due process. Ohio Civil Rule 23(C)(2) provides: "In any class action maintained under subdivision (B)(3), the court shall direct to the members of the class *the best notice practicable under the circumstances*, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel." (Emphasis added).

In the present case, the original e-mail notice was sent to 1,770,929 potential class members. Ninety-two percent of these original e-mails were successfully sent. The Revised Settlement provides for an additional e-mail notice to be sent to an even larger section of potential class members including consumers who purchased Carfax reports as early as October 27, 2003. In addition, the supplemental e-mail notice will contain a

subject line that identifies Carfax so that the recipient will be more likely to open the e-mail rather than disregard as spam.

Notice of the proposed settlement was also published in USA Today and Investors Business Daily, together a circulation of over 2.7 million.

The Objectors claim the expansion of the additional two-years worth of consumers to be included in this mass e-mail is not inclusive enough as it leaves out the remainder of the consumers who purchased Carfax reports prior to this period. Carfax rebuts this position by claiming the publication notice, as well as the substantial media attention to this case and those like it in courts across this nation, provided sufficient notice. In addition, Carfax avers that the likelihood of reaching a consumer with an e-mail address more than a few years old significantly decreases due to frequent changes in e-mail addresses. The Court would also note that the odds of an individual retaining a used car purchased prior to 1993 would also significantly decrease with each passing year.

However, the intention of the rule is to provide the "best practicable notice." This includes providing sufficient notice so that general objections might be made. "To state it another way, "the question is ... not whether some individual ... got adequate notice, but whether the class as a whole had notice adequate to flush out whatever objections might reasonably be raised to the settlement.'" *Turner v. Murphy Oil USA, Inc.* (E.D. La. 2007), 472 F.Supp2d 830, 840 quoting *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.1993); *see also DeJulius*, 429 F.3d at 945-47.

