IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

EDWARD B. WEST, Plaintiff-Appellee, vs. CARFAX, INC., and POLK CARFAX, INC., Defendants-Appellees, CENTER FOR AUTO SAFETY, *et al.*, Class members-objectors-appellants.	)	Court of Appeals No. 2008-T-0045 Court of Common Pleas No. 2004 CV 1898

REPLY BRIEF FOR APPELLANTS CENTER FOR AUTO SAFETY, *ET AL.*

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II. ARGUMENT

First Assignment of Error: The trial court erred in approving a class action settlement that does not take reasonable steps to provide individual notice to all class members. (T.d. 91, 96)

The class action settlement approved in this case does not even attempt to give individual notice to a *majority* of the class members—class members whose names and addresses could be identified and whose claims will be released without their knowledge. Such a settlement cannot be reconciled with either Civ.R. 23 or due process. See Civ.R. 23(E) (notice of a proposed settlement "*shall* be given to *all* members of the class") (Emphasis added); Civ.R. 23(B)(3) (notice must be "the best practicable under the circumstances, including *individual notice to all members* who can be identified through reasonable effort") (Emphasis added); *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 315, 70 S.Ct. 652, 94 L.Ed. 865. The settlement also cannot be reconciled with *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 173, 94 S.Ct. 2140, 40 L.Ed.2d 732, which interpreted language identical to the Ohio rule, or with Ohio decisions that have scrupulously followed *Eisen*. See, *e.g.*, *Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co.* (C.P. 1996), 94 Ohio Misc.2d 127, 130, 704 N.E.2d 649. Simply put, such a settlement cannot be allowed to stand.[1]

Carfax's brief never grapples with this central problem. Carfax says that Appellants "really have two complaints: first, a complaint about e-mail notice and, second, a complaint about publication notice." Carfax Br. 10. Although the means chosen here were indeed inadequate for the reasons identified in the Opening Brief, the Attorney General's amicus curiae brief, and the affidavit of notice expert Todd Hilsee (T.d. 73), Appellants' chief complaint is not about the *means* of notice. Rather, the primary question is whether the deliberate *lack* of individual notice of any kind to an identifiable majority of the class members whose claims will be released can withstand scrutiny. "The short answer * * * is that individual notice to identifiable class members is not a discretionary

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[1] Carfax concedes that the question whether class notice complies with the Due Process Clause is reviewed *de novo*, but argues that the question whether class notice complies with Civ.R. 23 is reviewed for abuse of discretion. Carfax Br. 10. Carfax cites no authority for such an inconsistent approach. Whether class notice satisfies Civ.R. 23 is a legal question, reviewed *de novo*. See, *e.g.*, *Fidel v. Farley* (C.A.6, 2008), 534 F.3d 508, 513 ("[W]hether a particular class action notice program satisfies the requirements of Fed.R.Civ.P. 23 and the Due Process Clause is a legal determination we review *de novo*.") (Citation omitted). See, also, *Eisen*, 417 U.S. at 176 ("individual notice to identifiable class members is not a discretionary consideration").

consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." *Eisen*, 417 U.S. at 176. See *Gross v. Standard Oil Co.* (C.P. 1975), 45 Ohio Misc. 45, 49-50, 345 N.E.2d 89 (Civ.R. 23 "mandates individual notice be given to each member of the class").

Carfax has looked far and wide for cases to support its position, but not one of the cases it cites endorses the notice program approved here. 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-certification notice plan that would require hospital to disclose patients' confidential medical information without their consent). Other cases cited involve state rules that differ from Civ.R. 23 and, moreover, do not apply or interpret the state rules in any relevant respect. Carfax Br. 13, citing *Dean v. Multiple Injury Trust Fund* (2006), 2006 OK 78, 145 P.3d 1097, 1105 (state notice rule cited but not applied); *Sulcov v. 2100 Linwood Owners, Inc.* (N.J.App. 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). Carfax also cites several California state-court cases. California's class action rule requires notice to "each member of the class" but, when individual notice is not reasonably possible, authorizes publication notice "in a newspaper of general circulation in the county in which the transaction occurred." Cal.Civ.Code 1781(d). Even if California law applied here, the settling parties have not made the showings necessary to justify publication under the California rule, and the cases cited by Carfax do not suggest that the notice program approved here would be acceptable under that rule.[2]

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[2] See Carfax Br. 13, citing *Linder v. Thrifty Oil Co.* (2000), 23 Cal.4th 429, 444, 97 Cal.Rptr.2d 179, 2 P.3d 27 (no ruling as to notice because "issue of the appropriate form of notice to class members was not before the trial court"); *Archibald v. Cinerama Hotels* (1976), 15 Cal.3d 853, 126 Cal.Rptr. 811, 544 P.2d 947 (deciding forum non conveniens issue, no ruling as to notice); *Rebney v. Wells Fargo Bank* (Cal.App. 1990), 220 Cal.App.3d 1117, 1138 fn.6, 269 Cal.Rptr. 844 (noting in dicta that settlement required notice to bank's current customers but not to former customers with "high-volume business accounts" because no way to identify which former customers held such accounts); *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").

In fact, most of the decisions Carfax cites *adhere* to the requirement of "individual notice to all members who can be identified through reasonable effort" but conclude that, under the circumstances, some class members could not be identified. For example, in one of the more recent cases cited by Carfax, *Turner v. Murphy Oil USA, Inc.* (E.D.La. 2007), 472 F.Supp.2d 830, the court noted the "unique challenges that counsel in this case faced" in providing constitutionally adequate notice where "[m]ost of the putative class members were displaced following Hurricane Katrina." *Id.* at 840. The court approved a special notice plan devised by Todd Hilsee (Appellants' expert here)—whom the court described as "a highly regarded expert in class action notice who has extensive experience designing and executing notice programs that have been approved by courts across the country," *id.* at 840 fn.10—that was "designed to reach the class members wherever they might reside" through a combination of regular mail, address updating, extensive and targeted publication, and the Internet. *Id.* at 840-41.[3]

Here, 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 standard mail or email) could not be "identified through reasonable effort." See *In re Franklin Natl. Bank Sec. Litig.* (C.A.2, 1979), 599 F.2d 1109, 1100 (individual notice

[3] Other cases cited by Carfax in which individual notice to all class members was impossible because some members could not be identified are *DeHoyos v. Allstate Corp.* (W.D.Tex. 2007), 240 F.R.D. 269, 296 (individual notice not "possible or required" where "no reasonable way to sufficiently identify the class members," who were African-American or Hispanic policyholders not identified in defendant's records, although "sending notice by mail" would be employed if "all or most of the class members" were identifiable); *Macarz v. Transworld Sys., Inc.* (D.Conn. 2001), 201 F.R.D. 54 (declining to adopt notice program that would be "both over- and under-inclusive, resulting in approximately half the notices being mailed to non-class members"); *Dumont v. Charles Schwab & Co.* (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 "exercise in futility"); *Rebney*, 220 Cal.App.3d at 1138 fn.6 (described *supra* fn.2); *Sollenbarger v. Mountain States Tel. & Tel. Co.* (D.N.M. 1988), 121 F.R.D. 417, 436-37 (where mailed notice would likely reach both current and former customers, additional mailed notice to reach former customers would be "futile" given numerous difficulties associated with accessing records based only on telephone numbers, not names, and given small number of affected class members and likelihood they would get mailed notice anyway); *Cartt*, 50 Cal.App.3d at 966 (described *supra* fn.2).

requirement cannot be excused absent "clear and explicit finding" by trial court that "all or some or any of the members of the class cannot be identified through reasonable effort"). And Carfax did not argue and made no showing that class members *cannot* be identified. The closest Carfax came was a carefully worded statement that its databases are not "designed or maintained" to collect regular mail addresses. Carfax Br. 11 fn.3. This statement does not actually deny that names, regular mailing addresses, and email addresses are readily available and that Carfax is capable of identifying class members by those names and addresses.

Indeed, Carfax and its parent company and co-defendant, Polk Carfax (also known as R.L. Polk) are particularly well situated to identify class members and their addresses because, as notice expert Todd Hilsee points out, Polk is in the business of selling lists of names and up-to-date addresses, culled from motor vehicle records, for the purpose of creating and updating class-action notice mailing lists. Hilsee Aff. T.d. 73 at ¶ 19.a. Moreover, Carfax collects not only its customers' email addresses and likely their credit-card billing addresses as well, but also their vehicle identification numbers. *Id.* ¶ 19.c. "Carfax could have cross-tabulated the names of those people in its customer records" with the data from R.L. Polk to obtain the best available address information, *id.* ¶ 19.d., and thereby provided individual notice to a large percentage of the class. *Id.* ¶ 19.c. This process is frequently employed in class-action litigation. *Id.* ¶¶ 19.a, 19.e. Indeed, a case cited by Carfax (at 18) involved mailed notice to class members whose addresses were "provided by R.L. Polk & Company." See *Dunk v. Ford Motor Co.* (Cal.App. 1996), 48 Cal.App.4th 1794, 1805, 56 Cal.Rptr. 2d 483. Carfax made no effort to counter Mr. Hilsee's expert testimony with its own evidence; the trial court made no factual findings to the contrary, and the record provides no basis to conclude that the majority of the class could not be identified through reasonable effort. See, also, *Karvaly v. eBay, Inc.* (E.D.N.Y. 2007), 245 F.R.D. 71, 92 (rejecting settlement because "Rule 23(b)(3) does not permit anything less than individual notice to each prospective Class Member, and the law is quite clear that concerns about the financial burdens of such notice cannot excuse noncompliance with that requirement").

In short, Civ.R. 23 requires "some effort to create a mailing list of class members to whom individual notice will be sent." *Toledo Fair Hous. Ctr.*, 94 Ohio Misc.2d at 132 ("It is not enough that the plaintiffs send mail notice only to those whose names and addresses are currently known to them; they must make a reasonable effort to determine the addresses of other class members."). See *Reed Estate v. Hadley* (Ohio App. 2007), 2007-Ohio-5462, ¶ 41 ("[T]hrough the use of the funeral home records and the probate court records, the estate will be able to identify many of the class members. And while identification of the class members may require some time and effort on the estate's part, the task is not unduly difficult."). As to a majority of the class, the settling parties here made no effort at all.

Finally, Carfax points to the publication notice as a justification for failing to attempt individual notice to a majority of the class. Carfax Br. 17-18. In so doing, Carfax misstates the circumstances of the publication notice in each of the cases that it cites. See *Turner*, 472 F.Supp.2d at 840-41 (publication notice *in addition to* mailed notice because many class members were displaced by natural disaster); *Wershba v. Apple Computer* (Cal.App. 2001), 91 Cal.App.4th 224, 251, 110 Cal. Rptr.2d 145 (notice was mailed or e-mailed to class members, *also* published, and also posted on defendants' website for 30 days); *Dunk*, 48 Cal.App.4th at 1800, 1805 (publication notice *in addition to* mailed notice to *all* class members, as identified by R.L. Polk); *Gilbert v. El Paso Co.* (Del.Ch. 1986), 1986 WL 6834 (ordering publication notice *in addition to* mailed notice to *all* class members because some class members may have moved). Because publication alone is "insufficient notice under any standard of fairness, justice, or due process," *Greenfield v. Village Indus., Inc.* (C.A.3, 1973), 483 F.2d 824, 830, and yet the settling parties made no other attempt to notify many class members whose claims they seek to release, the trial court's decision to approve the settlement and its defective notice program should be reversed.[4]

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[4] The notice program was also inadequate because the individual notice—for those class members to whom individual notice was attempted—was by email alone, with no U.S. mail notice. See Opening Br. 9-11. Because email "creates risks" that are "substantially reduced when first-class mail is used," it is not an "adequate substitute for the traditional method of notifying prospective class (continued...)

Second Assignment of Error: The trial court erred in approving a class action settlement without requiring the parties to provide any indication of the likely redemption rate, and, in particular, information about the number of claims made. (T.d. 96, 100)

The Opening Brief explains why the trial court erred in approving the settlement without information about the number of claims made and an estimated redemption rate. The primary relief offered under the settlement—coupons for a Carfax vehicle history report or a car inspection—is available only to class members who submit claims to Carfax. Because the claims period established by the original proposed settlement and the order granting preliminary approval of it passed before the court even held the Fairness Hearing, the number of claims made would have provided valuable insight into the effectiveness of the notice program and the benefit that class members would actually obtain from the settlement.

Carfax neither contests the value of the claims information nor offers any explanation for its failure to provide it. Instead, Carfax argues that Ohio courts look only at the eight factors listed in the trial court decision in *Beder v. Cleveland Browns, Inc.* (C.P. 2001), 114 Ohio Misc.2d 26, 28, 758 N.E.2d 307, quoting Newberg & Conte, *2 Newberg on Class Actions* (3d ed. 1992), 11-97, § 11:43, and that those factors do not include the number of claims made or an estimated redemption rate. To begin with, the listed factors set forth "general criteria" that courts have employed, *Beder*, 114 Ohio Misc.2d at 28, which are not exclusive and the specific content of which depends on the circumstances of the particular case. See *In re Kroger Co. Shareholders Litig.* (1990), 70 Ohio App.3d 52, 68 fn.9, 590 N.E.2d 391 (indicating that these factors fall within broader considerations of whether proposed settlement is fair, adequate, reasonable, and in the public interest), cited at Carfax Br. 21. In addition, the second factor listed—settlement terms and conditions—surely includes the value of the settlement to the class. Information about the number of claims made and

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[4](...continued)
members by first class mail." *Karvaly*, 245 F.R.D. at 91. See *Reab v. Electronic Arts, Inc.* (D.Colo. 2002), 214 F.R.D. 623, 630 (rejecting email notice because "[f]irst class mail ensures, at the outset, that the appropriately targeted audience receives the intended notification and maximizes the integrity of the notice process"). Notably, even in the lone class-action case on which Carfax relies in addressing this point, "notice by standard mail" was sent to class members whose email notice bounced back. *Browning v. Yahoo!, Inc.* (N.D. Cal. 2006), 2006 WL 3826714, at *8.

an estimated redemption rate easily fits within this factor. For example, in evaluating the fairness of the settlement in *In re Kroger*, the court considered the value of the relief offered, recognizing that "the amount and form of relief" are relevant considerations. *Id.* at 68 & fn.9. See, also, *id.* at 65 (trial court erred in approving settlement where, among other things, certain class members would receive no benefit).

Thus, in *Beder*, the court began its analysis of whether the settlement was fair, adequate, and reasonable by balancing the likelihood of success on the merits in litigation against the relief offered by the settlement. 114 Ohio Misc.2d at 28-29. At the same time, because the relief offered was $50 per class member, the class consisted of Cleveland Browns season ticket holders, and class members apparently were not required to submit claims or use a coupon, no question about the number of claims made or coupons redeemed would have arisen in the case. *Id.* at 29, 31. See, also, *McDonald v. Medical Mut. of Cleveland, Inc.* (Ohio App. 1975), 1975 WL 182685, *2 ("court must balance the likelihood that the plaintiff will prevail against the *benefits derived from the settlement*") (Emphasis added), cited at Carfax Br. 21; *Wershba*, 91 Cal. App.4th at 247 (noting that "list of factors is not exclusive," and observing that "coupons were just one part of a settlement that also includes cash refunds and reimbursements as well as reinstating the free service"), cited at Carfax Br. 21.

Appellants' Opening Brief noted that courts reviewing proposed coupon settlements routinely consider the aggregate monetary value of the settlement based on an estimated redemption rate. Appellants cited a number of cases, including the decision of the U.S. Court of Appeals for the Seventh Circuit in *In re Mexico Money Transfer Litigation* (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"). Opening Br. 15. In response, Carfax cites the trial court decision in that same case, *In re Mexico Money Transfer Litigation* (N.D.Ill. 2000), 164 F.Supp.2d 1002, 1029, for the proposition that the case law does not require that settlement coupons have a cash redemption value or that a settlement agreement include a minimum redemption level. Appellants have not argued either of

those points. Rather, the point is that a court errs in refusing to consider available information about actual claims made or to consider what the likely redemption rate will be—information that provides important insight into the real value of the settlement to the class. Notably, both the district court and the Seventh Circuit decisions in *In re Mexico Money Transfer Litigation* took into account expert testimony about the likely redemption rate. See, *e.g.*, *id.* at 1028 (discussing expert testimony about likely redemption rate); *In re Mexico Money Transfer Litig.*, 267 F.3d at 748 (same).

In the end, Carfax seems to agree that the value of the settlement is relevant to the question whether the agreement is fair, adequate, and reasonable. Carfax falls back on the argument that the coupons have value—if redeemed. Carfax Br. 21-22. Appellants do not disagree that a class member who uses one of the settlement coupons will obtain some value from that coupon. But the coupons' value to the class cannot be divined simply by looking to their face value, as Carfax seems to suggest. See *In re Mexico Money Transfer Litig.*, 267 F.3d at 748 ("And the coupons have value. Not the * * * face value, surely."). The concern here is that very few class members will obtain value because very few will make claims—either because they never saw a notice or because they do not think that the coupons are useful to them. The number of class members who *use* the coupons, not the face value of the coupons, is the relevant figure for assessing the value of the settlement. If few class members participate in a settlement, few obtain value. Here, because Carfax has information about the number of claims made under the original proposal, a proposal that the settling parties consider comparable to the approved settlement, see Opening Br. 13 (quoting parties' statements at T.d. 89 at 2 & T.d. 112 at 4), the trial court had a tailor-made opportunity to obtain information about the actual value that the class would obtain from the settlement. The court erred in approving the settlement without considering the number of claims made and an estimated redemption rate.

Third Assignment of Error: The trial court erred in denying the motion to compel disclosure of claims information. (T.d. 92, 100)

The Opening Brief explained why the trial court's reasons for denying the motion to compel disclosure of claims information were wholly inadequate. Carfax does not respond to the points

made in that discussion. Instead, Carfax begins by criticizing Appellants for not citing authority to support their arguments. However, as stated in the Opening Brief (at 19), the arguments and authorities offered in support of the second assignment of error apply equally to the third. Similarly, much of Carfax's brief on this issue makes arguments also made in connection with the second issue, which Appellants addressed in the Opening Brief (at 11-18) and above (at 6-8).

Carfax's only other argument is that the trial court could not have abused its discretion in denying the motion to compel because it had no obligation to consider the motion at all, because Civ.R. 37(E) required Appellants to recite in the motion "efforts made to resolve the discovery dispute covered by that motion." Carfax Br. 24. First, Civ.R. 37(E) "was designed more for the benefit of trial courts, not as an appellate obstacle." *Studer v. Senenca Cty. Humane Soc.* (Ohio App. 2000), 2000 WL 566738, *6 (citing Staff Notes pertaining to Civ.R. 37). Thus, once the trial court has ruled on the motion, as the court did in this case, there is "no useful purpose in invoking Civ.R. 37(E)." *Unklesbay v. Fenwick*, 167 Ohio App.3d 408, 413, 2006-Ohio-2630 at ¶ 11, 855 N.E.2d 516. The case on which Carfax relies is consistent with this approach. In that case, *Roth v. Roth* (Ohio App.), 2208-Ohio-927 at ¶¶ 66-67, the appellant argued that the trial court's failure to rule on discovery motions violated due process, and the appellate court held that the trial court did not abuse its discretion by not ruling on motions that did not comply with Civ.R. 37(E)'s procedural requirements. In contrast, here, the trial court *did* rule on the motion: It stated that it was denying the motion both because the court thought it was untimely and because the court disagreed *on the merits*. (T.d. 100 at 1) ("The Court does not find the motion to be well taken."). Therefore, as explained in *Unklesbay* and *Studer*, and in accordance with the rule's purpose, Civ.R. 37(E) does not provide a basis for overruling Appellants' third assignment of error.

Second, the motion in this case was not a Civ.R. 37 discovery motion in the traditional sense. The trial court had a fiduciary duty to the absent class members to ensure that the settlement would fairly and adequately protect their rights, see *Romstadt v. Apple Computer* (N.D.Ohio 1997), 948 F.Supp. 701, 705, and the motion sought to obtain information that the court should have considered

to fulfill this obligation. See T.p. 55, 61 (at Fairness Hearing, discussing relevance of the information). In any event, Carfax did not make a waiver argument below—in fact, neither Carfax nor class counsel filed an opposition to the motion to compel. Accordingly, this procedural argument, if applicable to the motion to compel, should be deemed waived.

Finally, although it does not suggest that the timing of the motion to compel caused it any prejudice, Carfax suggests that the motion was properly denied because the discovery period had ended months earlier. Carfax Br. 25. Months earlier, however, the motion could not have been made because the information sought did not exist. As explained in the Opening Brief (at 1-2, 18), the motion to compel disclosure of claims information was made six weeks after the claims period closed, two weeks after the settling parties submitted a revised proposed settlement agreement, the same day that the court set for filing of objections, and ten months *before* the court approved the proposed settlement. Accordingly, the timing of the motion was appropriate.

III. CONCLUSION

The judgment entries approving the class action settlement and denying the motion to compel claims information should be reversed.

Dated: September 17, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2008, I served the foregoing REPLY BRIEF FOR APPELLANTS CENTER FOR AUTO SAFETY *ET AL.* on all parties required to be served by causing a true and correct copy thereof to be sent by first-class mail to the following attorneys:

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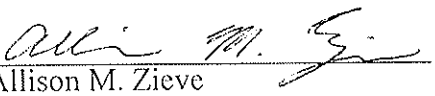

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