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

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

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I. TABLE OF CONTENTS AND ASSIGNMENTS OF ERROR

Authorities

Authorities

Ohio Civil Rule 23

CERTIFICATE OF SERVICE

This appeal challenges the lower court's approval of a class action settlement. A class action settlement can be approved only if it is fair, adequate, and reasonable. Civ.R. 23(E). For two independent reasons, the court below erred in approving the settlement at issue here. First, the notice program violates both Civil Rule 23 and federal due process requirements because it does not even attempt to notify a majority of the class. As a result, under the settlement, most class members will release their claims in exchange for nothing—not even the knowledge that they have done so. Second, the settling parties have failed to provide any assurance, in the form of information about the number of claims made or an estimated coupon redemption rate, that the class will obtain any value from the settlement. This failure is all the more apparent because the settling parties knew—both at the fairness hearing and prior to seeking approval of the revised settlement—how many claims had been made under the initial settlement.

II. STATEMENT OF THE CASE

This lawsuit was brought as a class action under Ohio's Consumer Sales Practices Act, R.C. 1345.01, and common law to remedy the allegedly misleading practices of Carfax in suggesting to consumers that Carfax Vehicle History Reports (Carfax 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. (Am. Compl. T.d 61 at ¶¶ 1, 44, 46, 47) The amended complaint sought refund of the purchase price of Carfax reports and/or actual damages and an injunction requiring the defendants to disclose the limitations of the Carfax database, including that it does not include complete accident data for 23 states. (*Id*. T.d. 61 at VI & VII)

On September 6, 2006, plaintiff West and defendant Carfax (the settling parties) proposed a class action settlement. (T.d. 58) On October 27, 2007, 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. (T.d. 59) Appellants timely filed objections to the settlement and moved to intervene. (T.d. 72, 76) The court held a fairness hearing on May 25, 2007, after which it set a schedule for further briefing. (T.d. 88) On June 29, 2007, West and Carfax submitted a Revised Settlement Agreement and supporting papers. (T.d. 89, 90, 91) On July 13, 2007, Appellants filed

objections to the revised agreement. (T.d. 93) Also on July 13, 2007, after the claims period set forth in the original settlement and notice had ended, Appellants filed a motion to compel disclosure of information about the number of claims made and the number of members in the class. (T.d. 92)

By Judgment Entry dated May 6, 2008, the court below approved the Revised Settlement Agreement. (T.d. 96) On June 4, 2008, the court denied the motion to compel disclosure of claims information. (T.d. 100) On June 9, 2008, the court granted the Appellants' motion to intervene. (T.d. 109)

III. STATEMENT OF FACTS

A. The Settlement And Appellants' Objections

On September 5, 2006, West and Carfax entered into a proposed class action settlement. (T.d. 58) Under the proposed settlement, 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 by a company called SGS SA. (Settl. Agmt. (at ¶ V) T.d. 57 at Exh. A) The proposed settlement also would have required Carfax to make certain changes to its website or to maintain certain existing features of its website for two years from the date of settlement approval. (*Id*. at ¶ O.3)

The court below preliminarily approved the settlement and ordered the parties to send out notice in accordance with the notice program described in the agreement. (T.d. 59) Although the class definition included all customers who bought Carfax reports prior to October 27, 2006 (see Settl. Agmt. T.d. 57 at Exh. A, I.E.), and the complaint suggested that injured class members are those who bought Carfax reports in 1998 or later (Am. Compl., T.d. 61 at ¶ 17), the settling parties attempted to give individual notice, via email only, only to people 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*. (Settl. Agmt. T.d. 57 at Exh. A, ¶ I.T) 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. (See Notice (email version), available at www.westcarsettlement.com/ email.pdf)

Appellants filed objections, arguing that the notice was deficient under both Ohio law and federal due process, that the coupon relief offered was likely to be of little or no value to class members, and that the injunctive relief was inadequate to address the deficiencies in the Carfax website on which the case was based. (T.d. 72) In response to Appellants' objections, the settling parties revised the proposed settlement agreement. (T.d. 91) The new agreement contains a number of improvements. For example, the current agreement makes the coupons for Carfax reports freely transferable, expands the scope of the vehicle inspection coupons to cover inspections by certified local mechanics and service stations rather than by a single company, and extends the redemption period for the inspection coupons from six months to two years. The revised agreement also provides that email notice will be sent to class members who bought Carfax reports during the last three years of the ten-year class period and extends the claims period until thirty days after the notice is sent. (*Id*. at 9, 11.)

Appellants continued to object that the settlement, and in particular the notice provided, was still not fair, adequate, and reasonable. (T.d. 93) 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. (Motion dated July 13, 2007 T.d. 92) The court nonetheless approved the revised settlement agreement, without requiring disclosure of the number of class members or the number of claims filed. (T.d. 96)

B. Identity Of Appellants-Objectors

Appellants are the not-for-profit organization Center for Auto Safety (CAS) and 17 individuals—Gwynneth Anderson (Maryland), Bernard Brown (Kansas), Nikita Brown (Ohio), Jeff Crabtree (Hawaii), Pedenia Evans (Missouri), Joanne Faulkner (Connecticut), Craig Friedberg

(Nevada), Norman Lau (Hawaii), Steven Moseley (Florida), Greg Paulson (Minnesota), Ira Rheingold (Maryland), Mark Steinbach (District of Columbia), Frank Thurman (Missouri), Robert Thuss (South Carolina), Edward Uechi (District of Columbia), David Wolfe (Missouri), and Brian Wolfman (Maryland)—who purchased Carfax reports prior to October 27, 2006, and filed objections to the settlement agreement. (See Affs. of Objectors/Class Members, T.d. 71) Appellant CAS objected on behalf of itself as a Carfax customer and on behalf of its members, all of whom are interested in auto safety and some of whom have purchased Carfax reports. (*Id*. at Tab 5)

Only three of the appellants received an email notice; the other 15 did not. None saw a notice in *USA Today* or *Investor's Business Daily*. Appellants include individuals who bought just one Carfax report, individuals who bought several reports, and individuals who purchased a 30-day subscription for an unlimited number of reports. *Id.*

Several appellants had learned first-hand about the deficiency of Carfax reports. For example, two appellants had discovered that the cars for which they had purchased Carfax reports had been involved in major accidents that were not shown on the report. (*Id*. at Tabs 10, 14) Others did not know about the incompleteness of Carfax's "nationwide database" until they learned about it as a result of this settlement. (*E.g.*, *id*. at Tabs 1, 14, 18)

IV. ARGUMENT

When considering a class action settlement, the court "acts as a fiduciary who must serve as guardian of the rights of absent class members." *Romstadt v. Apple Computer* (N.D.Ohio 1997), 948 F.Supp. 701, 705 (citations omitted). The burden is on the settling parties to show that the settlement is fair, adequate, and reasonable. *Id.,* citing *In re GM Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig*. (C.A.3, 1995), 55 F.3d 768, 785. Before approving a class action settlement, "a court must 'independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished.'" *Romstadt,* 948 F.Supp. at 705, quoting 2 Newberg & Conte, *Newberg on Class Actions* (3d ed. 1992) § 11.41 at 88-89. Here, given the inadequacy of the notice provided and the failure to disclose

available information about the number of claims made, the order approving the revised settlement agreement and the order denying the motion to compel disclosure of claims information should be reversed.[1]

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)

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

The notice program approved by the trial court violates Civil Rule 23, does not satisfy the Due Process Clause of the United States Constitution, and creates an unacceptably high risk that a majority of class members will never know that they have released their claims.[2]

A. The Trial Court Erred In Approving A Settlement That Does Not Provide Individual Notice To All Class Members Who Can Be Reasonably Identified.

Ohio Civil Rule 23's requirement is clear: Notice of a proposed class action settlement "*shall* be given to *all* members of the class." (Emphasis added.) Civ.R. 23(E). And where, as here, a court has conditionally certified a settlement class in a consumer fraud case under Rule 23(B)(3), the notice must be "the best notice practicable under the circumstances, including *individual notice to all members who can be identified through reasonable effort*." (Emphasis added.) Civ.R. 23(C)(2); see *Gross v. Standard Oil Co*. (Ohio Ct. Com. Pl. 1975), 45 Ohio Misc. 45, 50, 345 N.E.2d 89 (describing the additional "heavy notice requirements" that apply where the complaint is framed as an action under Rule 23(B)(3)).

In addition to Rule 23's stringent requirements, notice must also satisfy constitutional standards imposed by the Fourteenth Amendment's Due Process Clause. The touchstone for procedural due process analysis remains the United States Supreme Court's decision in *Mullane v.*

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[1]Because of the similarities between Ohio Civil Rule 23 and Federal Rule of Civil Procedure 23, "federal authority is an appropriate aid to interpretation of the Ohio rule." *Sutherland v. ITT Resid. Capital Corp*. (1997), 122 Ohio App.3d 526, 536 n.1, 702 N.E.2d 436 (citation omitted).

[2]This issue raises a question of law, for which the standard of review is de novo. *Searles v. Germain Ford of Columbus, L.L.C.* (2007), 174 Ohio App.3d 555, 558, 883 N.E.2d 480.

Central Hanover Bank & Trust Co., which held that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." (1950) 339 U.S. 306, 315, 70 S.Ct. 652, 94 L.Ed. 865; see *Phillips Petroleum Co. v. Shutts* (1985), 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 ("The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable.").

The settlement approved by the trial court in this case cannot be reconciled with these standards. Under the settlement approved by the court, Carfax (1) provided no mailed notice at all, (2) attempted notice by email to only a minority of class members, and (3) employed one-time publication notice that was unlikely to be seen by the vast majority of class members.

The most glaring failure of this notice program is that the settling parties did not even *attempt* to send individual notice to a significant portion of the class. The Revised Settlement releases the claims of consumers nationwide who have done business with Carfax over a period of *ten years*—from 1996 through October 27, 2006. See Rev. Settl. T.d. 96 at I.E.; Carfax Timeline, www.carfax.com/about/press/pr_timeline.cfm (Carfax started marketing to dealers in 1986 and to individual consumers in 1996). And the Amended Complaint identifies almost nine-years' worth of injured customers. (T.d. at ¶ 17) However, the Revised Settlement provides that Carfax will send email notice to only three years' worth of Carfax customers—customers who bought Carfax vehicle history reports on or after October 27, 2003. (T.d. 96 at III.D) The Revised Settlement thus replaces one arbitrary notice cut-off with another arbitrary cut-off, and does not even attempt to provide individual notice to seven years' worth of customers. In this way, the Settlement fails to satisfy Civil Rule 23 or the federal due process standard, both of which require the settling parties to make a reasonable attempt to notify *all* class members.

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 ensures that a large percentage of the class will 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, was not binding on the court.

First, the due process underpinning of *Eisen*—which *was* binding on the trial court—is reinforced by the fact that Rule 23 effectively incorporates the *Mullane* due process standard. *Id*. at 173-75. See Advisory Comm. Note, Amendments to R. of Civ. P. 23(d)(2) (1966), 39 F.R.D. 69, 107 (notice provisions of Fed.R.Civ.P. 23 "designed to fulfill requirements of due process to which the class action procedure is of course subject"). Second, *Eisen*'s holding—that "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort," 417 U.S. at 173, even though most of the 2.25 million class members in that case had small claims—was based on language in Federal Rule of Civil Procedure 23 that is identical to Ohio's Civil Rule 23. Below, the settling parties relied on cases applying Federal Rule 23 and agreed that "federal authority is an appropriate aid to interpretation of the Ohio rule." Pltfs. Br. in Sppt. of Prelim. Approval T.d. 57 at 3 n.2, quoting *Sutherland*, 122 Ohio App.3d at 536 n.1; Mem. of Carfax in Sppt. of Prelim. Approval T.d. 55 at 11 n.1 (same).

Neither the trial court nor the settling parties 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"). See, also, *Thompson v. Midwest Found. Indep. Physicians Ass'n* (S.D. Ohio 1988), 124 F.R.D. 154, 157 (where "the names and last known address of all class members were available from [the defendant's] business records," mailed notice was "the best notice practicable under the circumstances").

B. Publication Notice Cannot Excuse The Failure To Attempt Individual Notice To Most Of The Class.

Responding to Appellants' argument that the notice program impermissibly fails even to attempt notice to customers who purchased Carfax reports prior to the three-year cutoff, the trial court appeared to accept Carfax's response that publication notice "provided sufficient notice" for those class members. (T.d. 96 at 7-8). However, Carfax's position is wrong as a matter of law and is irreconcilable with the unequivocal individual notice requirement of Civil Rule 23(C)(2) and the Due Process Clause.

In *Jones v. Flowers* (2006), 547 U.S. 220, 126 S. Ct. 1708, 1720, 164 L.Ed.2d 415, the United States Supreme Court reiterated that publication notice alone is acceptable only when other measures are unavailable—for example, when there is no way to obtain someone's address. The Court explained that "'[c]hance alone' brings a person's attention to 'an advertisement in small type inserted in the back pages of a newspaper,' and that notice by publication is adequate only where 'it is not reasonably possible or practicable to give more adequate warning.'" *Id.* (internal citations omitted), quoting *Mullane*, 339 U.S. at 315, 317. See, also, *Greenfield v. Village Indus., Inc.* (C.A.3, 1973), 483 F.2d 824, 830 (two-time publication in *Wall Street Journal* and *Philadelphia Evening Bulletin* "was insufficient notice under any standard of fairness, justice, or due process"); Rossman & Delbaum, Consumer Class Actions (2006) § 10.1.4 at 137 ("If class members cannot be located by resorting to the Internet, credit records, postal records, motor vehicle records, and similar sources,

they probably cannot be found, and notice by publication is a meaningless and expensive gesture."); cf. *In re Orthopedic Bone Screw Prods. Liab. Litig.* (C.A.3, 2001), 246 F.3d 315, 327 & n.11 (excusing class member's late filing because he could not be blamed for his "failure to note a small advertisement run once on page 50 of a newspaper he does not receive").

As in *Jones*, the publication notice provided here was not a constitutionally adequate substitute for individual notice because it was "possible and practicable to give more adequate" notice. 126 S. Ct. at 1720. The unlikelihood that the publication advertisements in this case would have come to a class member's attention is not a matter of speculation. Audited circulation and audience readership data, combined with demographic and media usage data for adults who purchased used cars, indicates that one-time publication notice in *USA Today* and *Investor's Business Daily* would reach at best only 2.41% and 0.18% of used car purchasers, respectively. (Hilsee Aff. T.d. 73 at ¶ 26). And not only is publication alone generally an ineffective form of class action notice, but the publications chosen by the settling parties in this case were particularly poor choices to reach the demographic audience of used car buyers. (*Id*. ¶ 28) (*USA Today* "generates much of its readership among business travelers" and *Investors' Business Daily* serves "one of the more upscale audiences" compared to other publications). It should come as no surprise, then, that none of the 18 Appellants saw the publication notices. (Affs. of Objectors/Class members T.d. 71). The United States Supreme Court could have been speaking about the publication notice in this very case when it warned that "when notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315.

C. Even As To Class Members For Whom Individual Notice Was Attempted, The Email Notice Program Was Inadequate Under Rule 23 And The Due Process Clause.

The settling parties attempted notice by email to some class members. As discussed above, the most obvious and inexplicable failure of the notice program is that the emails were directed to only a portion of the class of consumers whose claims the parties purport to release—a failure that, as a matter of law, publication notice cannot cure. But even as to the minority of class members for

whom individual notice was attempted, the notice was inadequate because the nature of mass email notice made it extremely unlikely that they would learn of the settlement.

Absent unusual circumstances, such as the impossibility of obtaining postal address information, email is generally not an appropriate substitute for mailed notice. To be sure, email offers a cheap and easy means of *supplementing* mailed notice. See Rossman & Delbaum, *supra*, §10.3 at 164 (suggesting that written notice may be "supplemented by e-mail notice to at least some class members as part of a 'belts and suspenders' approach"). However, particularly when the goal is to send mass notice to consumers, email is less reliable than mail.

> Some consumers have email accounts they do not check regularly. Consumers change email addresses frequently, in some instances more frequently than they move. Often there is no system of forwarding for email. A consumer may terminate an account and not open another one. In contrast, regular mail is typically delivered six days a week and is forwarded. Only the homeless have no address at all.

Braucher, Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online (2001), 2001 Wis.L.Rev. 527, 539.

By far the biggest hindrance to using email for class notice is the ever-increasing volume of unwanted commercial email, commonly known as "spam." See Mossoff, Spam—Oy, What a Nuisance! (2004), 19 Berkeley Tech.L.J. 625, 631-32. Congress has concluded that consumers' "receipt of a large number of unwanted messages * * * creates a risk that wanted electronic mail messages, both commercial and noncommercial, will be lost, overlooked, or discarded amidst the larger volume of unwanted messages, thus reducing the reliability and usefulness of electronic mail to the recipient." Section 7701(a)(4), Title 15, U.S. Code (congressional findings accompanying CAN-SPAM Act of 2003). Despite legislative efforts, the problem has increased exponentially in recent years. See Arora, The CAN-SPAM Act: An Inadequate Attempt to Deal with a Growing Problem (2006), 39 Colum.J.L. & Soc.Probs. 299; Zeller, Law Barring Junk E-Mail Allows a Flood Instead, N.Y. Times, Feb. 1, 2005, at A1 (lamenting that within one year of passage of federal anti-spam law, spam accounted for 80% or more of all email sent). Consumers' responses to spam—such as changing email addresses more frequently and making use of filters—only makes

email an even less effective tool for class action notices. See Kelman, E-Nuisance: Unsolicited Bulk E-mail at the Boundaries of Common Law Property Rights (2004), 78 S.Cal.L.Rev. 363, 394 ("[E]ven after a volume of spam is automatically identified and sorted, the filters are overinclusive, throwing out desirable mail with the spam.").

Thus, although the trial court noted that 92 percent of the email notices were "successfully sent" (Judgment Entry T.d. 96 at 6), it would be wrong to equate the number of emails that did not bounce back to the number of class members that read the email. As explained by Appellants' notice expert, "[b]ecause of the tremendous volume of junk or spam email messages sent today, it is too much to suppose that un-requested non-personal email messages, sent by entities unknown to class members, are actually received, opened, or read." (Hilsee Aff. T.d. 73 at ¶ 24.c & n.8, citing statistics showing that spam constituted 88.7% of all emails sent in October 2006 and 93% of all emails sent in February 2007). Email notice, if it is employed at all, should be employed as a supplement to mailed notice. And as discussed above, regardless of the method used, it must be attempted for *the entire class*, not an arbitrarily-defined subset of the class.[3]

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)

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

Where the primary relief offered in a class action settlement is a coupon, the trial court cannot properly evaluate the value of the settlement to class members, and thus whether the

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[3] The settlement also failed to require any follow-up action with respect to emails that were returned as undeliverable. (T.d. 73 at ¶ 24.d). The Supreme Court has held that federal due process requires such efforts. See *Jones*, 547 U.S. 220. See, also, *Browning v. Yahoo! Inc.* (N.D.Cal. 2006), 2006 WL 3826714, at *8 ("[I]n the event that an Email Notice sent to a Settlement Class Member is bounced back as undeliverable, the [a]greement provides for notice by standard mail. The notice program also has comprehensive and adequate procedures for identifying the names, email addresses, and postal addresses for Class Members, so that individual notice will be directed to all Class Members who can be identified through reasonable effort.").

settlement is fair, adequate, and reasonable, without information about the number of claims made or likely to be made and an estimated redemption rate.[4]

The settling parties conspicuously failed to provide 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. Under the settlement, class members must submit an approved claim form to receive one of the four coupons offered. (Rev. Settl. Agmt. T.d. 91 at I.X.1) Below, Carfax repeatedly touted the relatively low number of opt-outs and objections (Defs' Mem. T.d. 89 at 1, 8, 21, 26-28), as if silence were tantamount to satisfaction. The trial court also relied on these numbers. (Judgment Entry T.d. 96 at 16) But the absence of an objection or opt-out "proves neither knowledge nor endorsement of the proposed settlement." Leslie, The Significance of Silence: Collective Action Problems and Class Action Settlements (2007), 59 Fla.L.Rev. 71, 122. Accord *In re GM Corp. Pick-up Truck*, 55 F.3d at 812 ("[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement."); *In re Ford Motor Co. Bronco II Prods. Liab. Litig*. (E.D. La. 1994), 1994 WL 593998, at *5 ("The vast majority of class members have no ability to evaluate the fairness of the proposed settlement. The court must thus rely upon its own investigation and the input of the few objecting class members who do have the resources to provide the court with pertinent information.").[5]

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[4]Although the trial court has discretion in applying the class certification requirements of Civil Rule 23, this issue raises a question of law, for which the standard of review is de novo. *Searles* (2007), 174 Ohio App.3d at 558.

[5]"If silence were acceptance, then we would expect the silent class members to actually participate in the settlement after it is approved. We do not see this. * * * There are so many examples of shockingly low participation rates that what used to be extreme is becoming ordinary. * * * Response rates are particularly low in coupon-based settlements, where settlement coupon redemption rates are as low as 0.002%. In most coupon settlements, the vast majority of class members received absolutely nothing from the class action settlement. It would simply be irrational to infer that these class members embraced the settlement." Leslie, The Significance of Silence, at 119-20.

At the same time, the settling parties refused to provide, and the trial court refused to order them to provide, the two numbers that would be most useful in evaluating whether the settlement provides value to the class: (1) the total number of class members and (2) the total number of claims made by the class. 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 court an important tool to assess 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. The parties' unwillingness to disclose the number of claims made strongly suggests that few were made and that few coupons are likely to be redeemed under the approved settlement.

A. Knowing the size of the class together with the number of claims made 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. If, as Appellants 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.").

Below, the settling parties provided no reason for withholding the claims made. Instead, focusing on the face value of the coupons, Carfax did no more than assert that "[t]here is no doubt

that Vouchers" have value. (T.d. 96 at 34) And in the Judgment Entry approving the settlement, the court stated that the coupons offered class members an "opportunity to have a vehicle inspected or to obtain Carfax reports at a significant discount." (T.d. 96 at 10) However, 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; NACA, Class Action Guidelines 19 (2006 revision), 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.").[6]

Because many class members will not use coupons, the 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

[6]The original 1997 version of NACA's Class Action Guidelines, in which the discussion of coupon settlements is substantially similar to the 2006 revised version, is entitled *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, and was published at 176 F.R.D. 375.

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"); cf. *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions* (C.A.3, 1998), 148 F.3d 283, 328 ("[W]e are impressed with the nature and extent of the relief provided under the settlement. * * * Rather than offering 8 million class members a small refund or a coupon towards the purchase of other policies (which we believe would have failed the fairness evaluation), the ADR process responds to the individual claims of the class and provides compensation based on the harm they have suffered.").

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.[7]

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. See *supra* p. 13. There was no excuse (and none offered) for withholding this information from the class or the court. The court below erred in approving the settlement without first requiring disclosure of this information and considering its relevance to the settlement's fairness, adequacy, and reasonableness.

B. In this case, there are compelling reasons (such as the inadequacies in the notice program and the parties' unwillingness to disclose the number of claims made) to believe that the coupon redemption rate will be very low. The settlement does nothing to protect against this likelihood. For example, some class action settlements have provided that if a minimum number of coupons are not

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[7]Echoing the concerns of the courts discussed above, the National Association for Consumer Advocates has issued the following guidelines for courts considering coupon settlements:

- Certificate settlements should never be proposed to the court unless it is apparent that the defendant is providing greater true value (i.e., not just the face value of the certificates or their potential value) to class members than would be available from an all-cash settlement. * * * Since defendants will usually be in a superior position to predict the ultimate redemption rate and benefit to the class, their preference for a non-cash settlement should be viewed with skepticism.
- A settlement involving certificates should *require a minimum level of redemption by the class members* within a reasonable period of time. In the event actual redemption does not meet this minimum level, the defendant should provide alternative relief in the form of a common fund, or, as has been done in some case, a second release of additional coupons, perhaps printed in a newspaper as, in effect, a fluid recovery mechanism.
- Class counsel and defendants should *submit to the court and all counsel of record detailed information about redemption rates* and coupon transfers during the entire life of the coupon. By doing so, a public record will be made of what works and what does not work in non-cash settlement cases.

(Emphasis added.) NACA, Class Action Guidelines 20-21.

used, the value of unused coupons up to that minimum will be distributed to the class in another form or will be awarded as cy pres. See, *e.g.*, *Perez v. Asurion Corp*. (S.D.Fla. 2007), 501 F.Supp.2d 1360, 1383 ("negotiated $1.5 million minimum redemption floor (and lack of ceiling), and the pro-rata distribution method for the phone cards in the event of a low claims rate * * * ensures that Defendants must disgorge $1.5 million to the Class regardless of the claims rate."); *In re Motorsports Merchandise Antitrust Litig*. (M.D.Ga. 2000), 112 F.Supp.2d 1329 ("Defendants participating in the coupon program have agreed to continue issuing coupons until the face value of each of the settlements is reached in redemptions. * * * Only if several years elapse and the redeemed value has not reached the limit of the Defendants' obligations may Defendants discharge their liability at that time by making donations to charitable organizations. They are, therefore, not completely freed from liability by lapse of time."); *States of N.Y. & Md. v. Nintendo of Am.* (S.D.N.Y. 1991), 775 F.Supp. 676, 679 ("If fewer than a million purchasers redeem the coupons, Nintendo will pay the difference up to $5 million to the Attorney Generals."). See, also, *Henry v. Sears Roebuck & Co.* (N.D.Ill. 1999), 1999 WL 33496080, *2, unreported ("There is no requirement that Class members submit a proof of claim form or take any other action in order to obtain the benefits of the Settlement, thereby ensuring 100% distribution of the Settlement consideration.").

At least one court has noted that the lack of a minimum pay-out by the defendant suggests that the defendant is assuming that the coupon redemption rate will be low—in other words, that the settlement will provide little value to the class. See *Buchet*, 845 F.Supp.. at 696; see also *Clement v. Am. Honda Fin. Corp*. (D.Conn. 1997), 176 F.R.D. 15, 28 (disapproving settlement) ("The value of these coupons is too speculative. Absent a transfer option or other guaranty of some minimal cash payment, there is a strong danger that the settlement will have absolutely no value to the class.").

The settling parties' reluctance to disclose the number of claims made and to provide an estimated redemption rate strongly suggests that few claims had been made and thus that few coupons are likely to be redeemed. The inadequate notice program only exacerbates these concerns. Yet if few claims are made, most class members will get no value from the settlement, although

Carfax will get its broad release. The bottom line is that "a settlement is not fair where all the cash goes to expenses and lawyers, and the members receive only discounts of dubious value." *In re Compact Disc*, 216 F.R.D. at 221. The court below had a tailor-made opportunity to gain important insight into the settlement's true value to the class. The court erred in approving the settlement without the benefit of that information.

THIRD ASSIGNMENT OF ERROR

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

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

Proper assessment of the proposed settlement required consideration of information about the size of the class and the number of claims made, which was readily available to the settling parties.[8]

As discussed above, the original proposed settlement and the revised settlement were similar; the period for submitting a claim under the original settlement ended before the May 27, 2007 Fairness Hearing, and yet the settling parties refused voluntarily to disclose the number of claims made under the original deal. Accordingly, on July 13, 2007, Appellants moved to compel disclosure of the number of claims made and the total number of class members. (T.d. 92) The court below offered two grounds for denying the motion to compel. First, the court stated that "[t]he motion was filed four years into the case." (T.d. 100 at 1) Although that was true, it was also irrelevant because claims were submitted only between December, 2006, and May 27, 2007. In other words, the information sought in the motion did not exist until shortly before it was filed. Moreover, the motion was filed before the briefing on the motion to approve the revised settlement was complete and ten months before the trial court approved the settlement. Thus, the July 13, 2007,

[8]The trial court's decision to deny a motion to compel is reviewed for abuse of discretion. *Mauzy v. Kelly Servs. Inc.* (1996), 75 Ohio St.3d 578, 592, 664 N.E.2d 1272. "[A]n appellate court will reverse the decision of a trial court that extinguishes a party's right to discovery if the trial court's decision is improvident and affects the discovering party's substantial rights." *Id*. (citation omitted).

motion was timely. Moreover, the settling parties could not have possibly suffered any prejudice from the timing of the motion.

Second, the court stated that the motion was denied "in light of this Court's previous order approving the final settlement." (*Id.*) With respect, that statement does not provide a reason for denying the motion. Both the motion and an important aspect of Appellants' objections were premised on the argument that the settlement should not be approved unless it would provide a benefit to the majority of the class, and that the claims information was the best indicator of whether the class thought that the settlement had value. In approving the settlement, the court stated that the coupons appeared valuable to it, and that the low number of opt-outs and objections supported this finding. However, the court never addressed the argument that information about the number of people in the class and the number of claims made would provide important insight into whether class members would claim the coupons (a prerequisite to redeeming them), and thus provide the best information about whether the settlement would be valuable to class members. Rather, the trial court ignored the opportunity to obtain information that would have allowed it to test its assumption that the settlement was valuable to the class as a whole.

Thus, the reasons offered by the court below do not support denial of Appellants' motion to compel. For the reasons discussed in connection with the second assignment of error, above, the information sought in that motion was crucial to evaluating whether the settlement was fair, adequate, and reasonable, and the trial court abused its discretion in denying the motion.

V. CONCLUSION

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

Dated: August 1, 2008

Respectfully submitted,

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APPENDIX

United States Constitution
Fourteenth Amendment
The Due Process Clause

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law.

Ohio Civil Rule 23

* * * .

(C) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.

* * * .

(2) 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.

(3) The judgment in an action maintained as a class action under subdivision (B)(1) or (B)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (B)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (C)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

* * * .

(E) Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2008, I served the foregoing 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 to counsel as follows:

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