

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.

The Court finds that the e-mail notice, supplemental e-mail notice and the publication notice constitute adequate notice under these circumstances. Carfax conducts 99 percent of its business online and its primary form of communication with its customers is e-mail. Therefore, it is appropriate for Carfax to provide notice to its customers through e-mail. In fact, the only way for a consumer to purchase a Carfax report is online through the Carfax website. Even customer service issues are handled by Carfax through e-mail. The Court finds that appropriate notice must be determined on a case-by-case basis and under the particular circumstances and type of business which Carfax conducts, e-mail could appropriately and adequately replace mail as a preferred method. While notice by mail is certainly not antiquated, for an online business who communicates with its customers almost exclusively via e-mail, e-mail may actually be a better method. In addition, the publication notice in USA Today and Investors Business Daily were appropriate means of publication. Despite the affidavit provided by the Objectors, the Court notes that the same expert approved publication in USA Today as appropriate notice in a prior case. The publication, the e-mails and the considerable media attention to this case and the cases across the country all contribute to this Court's approval of the notice.

Voucher Value:

The Objectors attack the settlement as a whole because it is generally based on "coupons." The Court recognizes that coupon settlements are typically not well-received as providing the best benefit to class members and are therefore subject to strict scrutiny. However, the vouchers in the Revised Settlement are not the typical

promotional gimmicks frowned upon by Courts. *Cooper v. Musicland Group, Inc.*, 2005 WL 1618791 (Minn. Dist. Ct.). The Court does not accept the analogy that the vouchers offered in the Revised Settlement equate to the typical market coupon offered in many class actions.

First, there are a variety of options available to the class members – some of which do not even involve a continued relationship with Carfax and some of which will assist in discovering underlying mechanical problems with their vehicles. For example, if a class member chooses to redeem a voucher for a mechanical inspection of their vehicle, they could receive a cash refund up to \$20.00 without ever being involved with Carfax again. It is also important to note that this not only includes inspections on vehicles currently owned by a class member, but also a used vehicle they are considering for purchase. Value is not always a number which can be ascertained by looking at the dollars and cents in a particular equation. For example, the face value of the maximum refund = \$20.00; the actual value of catching a mechanical defect due to the inspection and avoiding a potentially life-threatening accident due to said defect = priceless.

The second option available to class members is more tangible. The face value of two Carfax vehicle reports, at the present time, is equal to \$49.98. It is unlikely this value is going to decrease over the next year during the redemption period. Therefore, a class member has the potential to more than double their initial investment in their original Carfax report. Likewise, the third option presents the class member with at least a *quid pro quo* by offering a single Carfax Vehicle History Report.

The transferability option likewise makes the vouchers subject to a particular voucher's marketability. In addition, the fourth option; "50% off an unlimited number of Carfax Vehicle History Reports," could potentially have significant value to a properly-suited individual. Transferability equates to value not typically present in the run-of-the-mill coupon settlements. *In Re Mexico Money Transfer Litigation* (2001), 267 F.3d 743, 748.

With these different options and wide range of "value," the Court cannot simply lump the Revised Settlement vouchers into the category of other "coupon" settlements. The vouchers offered in the instant case are not merely de minimis discounts offered in promotion of the same continued product. Rather, the vouchers provide class members with the opportunity to have a vehicle inspected or to obtain Carfax reports at a significant discount – which could amount to a complete refund of their original investment; a double return on their original purchase; or an amount dependent upon market value but equivalent to no less than 50% of their original cost. These values are not minimal in comparison to the size of the class, the difficulties in management and certification of the class and the ultimate likelihood of success – all factors this Court is required to take into consideration. "[A]fter all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *In Re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 806 (C.A. 3(Pa.), 1995).

"Furthermore, courts have approved settlements which give class members a benefit in a form other than a cash recovery. *See, e.g., In re Alcoholic Beverages*

Antitrust Litigation, No. CV-81-0092 (E.D.N.Y. November 10, 1982) (Sifton, J.) (cash fund established to provide credits redeemable against future purchases); *C. G. Dairies, Inc. v. Wholesale Tobacco Distributors of New York, Inc.*, No. 77 Civ. 841 (PNL) (S.D.N.Y. January 12, 1982) (Leval, J.) (\$150,000 worth of discount coupons provided to class members, who could use them to obtain discounts of \$10 for each \$100 of future purchases of cigarettes); *In re Southern Florida Building Supplies Cases*, Nos. 77-463-Civ.-NCR et al. (S.D. Fla. February 17, 1980) (coupons with maximum total credit of \$700,000 distributed to class members, who could use them to obtain discounts of \$2.50 for each \$100 of future purchases of building supplies); *In re Montgomery County Real Estate Antitrust Litigation*, 83 F.R.D. 305, 311-313 (D. Md. 1979) (certificate entitling holder to list properties with defendants at brokerage fee of 5% distributed to class members). See, also *Ohio Public Interest Campaign v. Fisher Foods, Inc.*, 546 F. Supp. 1 (N.D. Ohio 1982)." *In re Cuisinart Food Processor Antitrust Litigation*, 1983 WL 153, (D. Conn.), *7, (citations included). Even settlements that require return business to the defendants accused of some wrongdoing are approved by Courts. *Ohio Public Interest Campaign v. Fisher Foods, Inc.*, 546 F.Supp 1, *7 (N.D. Ohio 1982) (settlement approved where coupons were redeemable for groceries at defendant's stores); see, also, *In Re Montgomery County Real Estate Antitrust Litigation*, 83 F.R.D. 305, 312-313 (D. Md. 1979) (approving coupon settlement for discount on real estate broker fee).

Therefore, based on the numerous vouchers available to the class members and the transferability, value and options, the Court is not persuaded by the Objectors'

arguments against the vouchers proposed in the Revised Settlement and find the same to be fair, adequate and reasonable.

Disclosure Language:

Finally, the Objectors are dissatisfied with the disclosure language to be included on the claim form. The Revised Settlement provides for the following language to be included on the claim form:

"CARFAX does not have the complete history of every vehicle. A CARFAX Vehicle History Report is based only on information supplied to CARFAX. Other information about the vehicle, including problems, may not have been reported to CARFAX. Use a Vehicle History Report as one important tool, along with the a vehicle inspection and test drive, to make a better decision about a used car."

According to the Objectors, "this language is too vague to be of much use to anyone." The Objectors would prefer to amend the language with the following verbage:

"CARFAX receives accident data updates on a regular basis. The frequency of these updates varies by source and by state, and ranges from monthly to annually. Once the information is delivered to CARFAX, it becomes available on the CARFAX Vehicle History Report within a couple of days.

"CARFAX receives additional records from police reports in most States. CARFAX also receives other accident indicators from many other sources, such as DMVs. Insurance companies do not supply CARFAX with most insurance claim information."

In addition, the Objectors propose the addition of a link to a supplemental web page which would list each and every source and limitation of the Carfax database.

The Court finds that from a consumer standpoint, the origin for this litigation, the important thing regarding disclosure is to stress that Carfax does not profess to have ALL information about a used car. Carfax is not omniscient. The disclaimer language clearly and unambiguously informs the consumer of this fact. The language, in fact, is included up front: "CARFAX does not have the complete history of every vehicle." This is a basic, straightforward, easy-to-understand statement. The language proposed by the Objectors muddies the waters of this easy-to-read disclaimer.

By stating what information Carfax has, when it is posted, and what information Carfax may not have, the Objectors have turned a simple task into a torrential undertaking. The Court believes that the average consumer would place more confidence in the straightforward statement: "CARFAX does not have the complete history of every vehicle" versus the more confusing statement: "CARFAX receives additional records from police reports in most States. CARFAX also receives other accident indicators from many other sources, such as DMVs. Insurance companies do not supply CARFAX with most insurance claim information."

It is unnecessary to bog down a consumer with the knowledge that the reporter has some information from this source, but not most information from that source. What the consumer truly needs to know, what Carfax is required to disclose, is the fact that it does not replace the other methods of verification and inspection in the used-car purchase process. The language in the Revised Settlement accomplishes this task in the

simplest and most comprehensive manner. The Objector's language, although clearly carefully crafted, falls short next to the Revised Settlement's disclaimer language in terms of readability and comprehensiveness.

The Court finds the distinctions proposed by the Objectors regarding the disclaimer language are distinctions without a significant difference. Furthermore, the Court finds that the Revised Settlement disclaimer language is properly drafted in consideration of the audience.

Therefore, the Court finds, after careful deliberation of the Objectors' concerns, that the terms of the Revised Settlement are fair, adequate and reasonable. The Court does note the improvements over the proposed settlement and considers the resultant outcome to be an approvable settlement.

4. Recommendation and experience of counsel

Both Plaintiffs' class counsel and counsel for Defendant Carfax recommend approval of the Revised Settlement. Atty. William B. Federman has been designated as lead class counsel for the Plaintiffs. Atty. Federman has significant class-action experience in litigation and in publication regarding the same. The firm, Federman & Sherwood, has served a lead or co-lead class counsel in more than 45 class actions, including securities, derivative, MDL proceedings and ERISA class actions. Atty. Christopher M. Mason is the lead counsel for Defendant Carfax. Atty. Mason is also co-head of the Class Action Defense section of Nixon Peabody, LLP.

The experience and recommendations of both class counsel and Defendant's counsel factor in favor of the approval of the Revised Settlement.

5. *Future expenses and likely duration of litigation*

As is typically the case with many class actions, the expense for an individual plaintiff to continue to litigate the underlying issues without the aid of a class certification is high in relation to any potential benefit. As previously stated, this class has already had significant difficulty being certified in other courts across this country. Therefore, the Court finds that the future expenses would be significant in comparison to the individual damages as opposed to the culmination of a settlement as a whole. In addition, the duration of the litigation would also be significant. The Court is aware that other litigation has been effectively "stalled" while the Court has deliberated over this Revised Settlement. However, given the expansive nature of this settlement and potential ramifications nationwide, the Court dedicated resources and time to adjudicating this issue in a fair and complete manner, irrespective of the lingering litigation in other states. The Court is certain the judiciary as well as the parties appreciate the Court's diligence. Nevertheless, if the Court does not approve the Revised Settlement, continued expense and time are guaranteed. The Court does not find this continuation to be beneficial in light of the provisions of the Revised Settlement.

6. *Recommendation of neutral parties, if any*

The Court does not find this factor to be applicable in the present case. Two affidavits were filed in this matter, by the Objectors and by the Plaintiffs, each advocating, respectively, the rejection and approval of this Revised Settlement. The Court has taken these affidavits into consideration and has reviewed each in its entirety,

