[Cite as *West v. Carfax, Inc.*, 2009-Ohio-6857.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

EDWARD B. WEST,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-T-0045**
- vs -	:	
CARFAX, INC., et al.,	:	
Defendants-Appellees,	:	
CENTER FOR AUTO SAFETY, et al.,	:	
Class Members-Objectors-Appellants.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 04 CV 1898.

Judgment: Reversed and remanded.

Curtis J. Ambrosy and *James A. Fredericka*, Ambrosy & Fredericka, 144 North Park Avenue, #200, Warren, OH 44481 and *William B. Federman* and *Jennifer Sherill*, Federman & Sherwood, 10205 North Pennsylvania, #200, Oklahoma City, OK 73102 (For Plaintiff-Appellee).

Hugh E. McKay and *Tracey L. Turnbull*, Porter, Wright, Morris & Arthur, LLP, 925 Euclid Avenue, #1700, Cleveland, OH 44115 and *Christopher M. Mason*, Nixon Peabody, L.L.P., 437 Madison Avenue, New York, NY 10022 (For Defendants-Appellees).

Ronald I. Frederick, Ronald Frederick & Associates Co., L.P.A., 55 Public Square, #1300, Cleveland, OH 44113-2204 and *Allison M. Zieve*, *Deepak Gupta*, and *Brian Wolfman*, Public Citizen Litigation Group, 1600 20th Street, N.W., Washington, D.C. 20009 (For Class Members-Objectors-Appellants).

COLLEEN MARY O'TOOLE, J.

{¶1} The Center for Auto Safety, Gwyneth Anderson, Bernard Brown, Nikita Brown, Jeff Crabtree, Pedenia Evans, Joanne Faulkner, Craig Friedberg, Norman Lau, Steven Moseley, Greg Paulson, Ira Rheingold, Mark Steinbach, Frank Thurman, Robert Thuss, Edward Uechi, David Wolfe, and Brian Wolfman appeal from the judgment of the Trumbull County Court of Common Pleas approving the settlement of a class action suit between Edward B. West, a resident of Trumbull County, Ohio, on behalf of himself and other similarly situated persons and entities, and Carfax, Inc. and Polk Carfax, Inc. We reverse and remand.

{¶2} Carfax sells information about used cars. It is an online business: customers can view vehicle history reports on the Internet; and, Carfax sends the reports to customers via email. Evidently, Polk owns Carfax. This action, alleging that Carfax violated the Ohio Consumer Sales Practices Act, and the common law, by not informing customers its reports did not contain all information regarding vehicles' histories, commenced on or about August 4, 2004. At the same time, nine similar actions were filed in seven states against Carfax. Eventually, an amended complaint demanding compensatory and punitive damages, plus an injunction requiring disclosure of the limitations of the Carfax database, was filed.

{¶3} On or about September 5, 2006, Mr. West and Carfax entered a proposed settlement. October 27, 2006, the trial court gave preliminary approval to the proposed settlement, certified a class, appointed Mr. West the class representative, and ordered that class members be notified of the proposed settlement in the manner specified therein.

{¶4} Various objections to the proposed settlement were filed with the trial court, including those of appellants. Appellants moved to intervene April 3, 2007, which motion the trial court eventually granted. May 25, 2005, fairness hearing was held. Following counsels' presentations, the trial court ordered further negotiations between the parties regarding the settlement.

{¶5} June 29, 2007, the parties filed a revised settlement agreement with the trial court. July 13, 2007, appellants filed objections to the revised settlement, and moved the trial court to compel discovery regarding claims made.

{¶6} May 6, 2008, the trial court approved the revised settlement. June 4, 2008, it denied appellants' motion to compel. Appellants timely noticed appeal June 5, 2008. June 18, 2008, they moved this court for leave to file their revised notice of appeal. We granted this motion July 15, 2008. August 4, 2008, the state of Ohio, through the Attorney General of Ohio, moved this court for leave to file an amicus curiae brief in support of appellants. January 21, 2009, we granted this motion.

{¶7} Appellants assign three errors:

{¶8} "[1.] The trial court erred in approving a class action settlement that does not take reasonable steps to provide individual notice to all class members.[1]

{¶9} "[2.] 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. "[3.] The trial court erred in denying the motion to compel disclosure of claims information."

---

1. In her brief, the Attorney General of Ohio reiterated this assignment of error.

{¶10} Class actions are governed by Ohio Civ.R. 23. Given the similarity between the rules, federal case law interpreting F.R.C.P. 23 is persuasive when interpreting the Ohio rule. *Sutherland v. ITT Residential Capital Corp.* (1997), 122 Ohio App.3d 526, 536, fn.1.

{¶11} "A class action cannot be settled unless class members have been afforded notice of the proposed settlement and the trial court has determined, after a hearing on the matter, that the settlement is fair, adequate and reasonable. Civ.R. 23(E); *Thompson v. Midwest Found. Indep. Physicians Assn.* (S.D.Ohio 1988), 124 F.R.D. 154; *Bronson v. Bd. of Ed.* (S.D.Ohio 1984), 604 F.Supp. 68." *In re Kroger Co. Shareholders Litigation* (1990), 70 Ohio App.3d 52, 67. "The determination of whether a settlement is fair, adequate and reasonable is committed to the sound discretion of the trial court and will not be disturbed on appeal in the absence of some demonstration that the trial court abused its discretion." Id. at 68 (citation omitted). An abuse of discretion is no mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Rather, the phrase connotes an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Id. "Abuse of discretion" is a term of art, describing a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶12} Insofar as a party alleges that a class notice approved by the trial court violates procedural due process, appellate courts review the matter de novo. Cf. *Whitman v. Whitman*, 3d Dist. No. 5-05-36, 2007-Ohio-4231, at ¶15.

{¶13} By their first assignment of error, appellants assert that the notice of the proposed settlement provided under the revised settlement agreement is constitutionally

defective for failure to comport with federal due process standards. Consequently, we review this assignment de novo. Appellants cite to the lead case of *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, wherein the United States Supreme Court, interpreting the due process requirements embodied in F.R.C.P. 23, held that in a case involving a class certified pursuant to F.R.C.P. 23(b)(3), F.R.C.P. 23(c)(2) requires that individual notice be given all class members "who are identifiable through reasonable effort." *Eisen* at 175. Only such notice meets F.R.C.P.'s requirement that notice to the class be the "'best notice practicable.'" Id.

{¶14} The class herein was certified pursuant to Ohio Civ.R. 23(B)(3); the language of Ohio Civ.R. 23(B)(3) and (C)(2) complies with the federal rule; and, at least one Ohio court has held that *Eisen* controls notice requirements when a class is certified pursuant to Ohio Civ.R. 23(B)(3). See, e.g., *Gross v. The Standard Oil Co.* (1975), 45 Ohio Misc. 45, 49-50.

{¶15} In this case, the class consisted of all persons purchasing a Carfax Vehicle History Report directly from Carfax in the United States prior to the date the trial court gave its preliminary approval to the settlement agreement: i.e., October 27, 2006. This class may include people extending as far back as 1996. Ultimately, the notice of the proposed settlement pursuant to the revised settlement agreement included: (1) individual email notice to email addresses of purchasers in the Carfax database extending back to October 27, 2003; and, (2) publication, one time each, in *Investor's Business Daily* and *USA Today*. Further, Carfax and class counsel published notice on their websites. As of early 2007, Carfax had emailed 1,770,929 customers: 92% of the emails had not been rejected. *Investor's Business Daily* and *U.S.A. Today* have a joint

circulation of some 2,700,000 readers per day. Considerable attention to the settlement occurred in other media outlets.

{¶16} Pursuant to *Eisen*, appellants contend this notice of the revised settlement is constitutionally defective. They note that pre-2003 Carfax customers get no individualized notice whatsoever. They question the effectiveness of email notice to post-2003 customers, observing that many people simply delete unsolicited emails as spam.

{¶17} Further, through the affidavit testimony of their expert, Todd B. Hilsee, they question whether mail notice was not possible to the balance of Carfax customers. Mr. Hilsee is a nationally-recognized expert in designing notices for class actions. In his affidavit, he noted that Carfax always obtains the vehicle identification number ("VIN") of a car for which it prepares a report. He also noted that co-defendant Polk is in the business of providing names and addresses of vehicle owners in class action suits. Mr. Hilsee postulated that Carfax could have provided Polk with a list of the VINs for which it had prepared reports; Polk could have provided an address for the present owner of any vehicle included; and, Carfax could have prepared a list for mail notification, by comparing the names of current owners of vehicles for which it had prepared a report, with those on its customer lists. Mr. Hilsee testified that similar procedures are routine in automotive litigation.

{¶18} Mr. Hilsee also questioned the efficacy of the publication notice given in *Investor's Busines Daily* and *USA Today*, testifying that these papers were unlikely to be read by the population demographic which dominates the used car market.

{¶19} We agree with appellants that, pursuant to *Eisen*, the notice provided in this case was defective. Courts have required notice by mail in class actions when the names and last known addresses of customers were available from a defendant's own business records. *Thompson v. Midwest Found. Indep. Physicians Assn.* (S.D. Ohio 1988), 124 F.R.D. 154, 157. On the other hand, they have found the creation of new computer programs to determine potential class members for notification purposes unnecessary. *Dumont v. Charles Schwab & Co., Inc.* (E.D.La. July 21, 2000), Case No. 99-2840 c/w 99-2841 Section "A," 2000 U.S. Dist. LEXIS 10906, at 23-25. The affidavit testimony of David L. Silversmith, Chief Technology Officer for Carfax, established that the Carfax database does not, itself, have address information for customers and former customers. It further established that, as of June 2007, there was an incrementally lower chance of customer email addresses older than October 2005 being valid, the percentage dropping to about sixty-nine percent for 2003, and only fifty percent for 2000. But in view of the facts that Carfax and Polk are interrelated entities, we think this case falls within the rule that a defendant must provide individualized mail notice of the settlement to all members of the class who may be identified with reasonable effort.

{¶20} We also note that Mr. Silversmith's own affidavit testimony establishes that a large percentage of potential class members from as far back as 2000 might be reached by email. Consequently, we cannot find that the limitation of email notice to potential class members back to October 2003 reasonable, either.

{¶21} Appellants further object that the publication notice in *Investor's Business Daily* and *USA Today* was insufficient to overcome the failings of the email notice

provided. They base this particularly on the likelihood that only a small percentage of class members are actually readers of these two publications.

{¶22} In view of our holding that individual mail notice must be given to as many members of the class as is reasonably possible, we find this issue moot.

{¶23} The first assignment of error has merit.

{¶24} In analyzing appellant's second assignment of error, we first remark that this is a "coupon" case: i.e., the class members do not receive monetary damages from the settling defendants, but rather, alleged cash substitutes. Under the revised settlement herein, class members can accept one of four items: (1) a voucher for a twenty dollar refund on a vehicle inspection by any AAA or ASE certified mechanic, redeemable for two years following final approval of the revised settlement; (2) a voucher for two free Carfax vehicle history reports, redeemable for one year following final approval of the revised settlement; (3) a voucher for one free Carfax vehicle history report, redeemable for two years following final approval of the revised settlement; or (4) a voucher for a fifty percent discount on an unlimited number of Carfax vehicle history reports within a thirty day period, redeemable for three years following final approval of the revised settlement. These last three vouchers are expressly transferable. By their second assignment of error, appellants contend the trial court erred in failing to determine the number of claims made or likely to be made, and the probable redemption rate for the vouchers offered.

{¶25} In exercising its discretion to determine whether a proposed class action settlement is "fair, adequate and reasonable," *In re Kroger Shareholders Litigation* at 67, the trial court should consider the following eight factors: (1) the action's likelihood of

success; (2) the amount and nature of discovery; (3) the settlement terms; (4) the recommendations and experience of counsel; (5) the future expense and duration of litigation; (6) the recommendation of neutral parties, if any; (7) the number of objectors and the nature of their objections; and (8) the presence of good faith and absence of collusion. *Beder v. Cleveland Browns, Inc.* (2001), 114 Ohio Misc.2d 26, 28. Appellants' assigned error relates to the third factor, the settlement terms, in that it questions whether the vouchers, or "coupons," offered have any actual value. As appellants note, courts have used projections of claims made and projected redemption rates in determining whether proposed coupon settlements have value to the settling class. *In re Mexico Money Transfer Litigation* (N.D.Ill., 2000), 164 F.Supp.2d 1002, 1028, affirmed (C.A.7, 2001), 267 F.3d 743.

{¶26} We agree that some survey of the claims made and projected redemption rate of the vouchers would help determine if this settlement has value. Consequently, we find the second assignment of error has merit.

{¶27} By their third assignment of error, appellants contend the trial court erred in overruling their motion to compel discovery of the number of claims made and thus, the class size. As appellants note, this would have provided insight into whether the class was responding to the voucher offer made under the revised settlement.

{¶28} We review a trial court's decision to deny a motion to compel for abuse of discretion. *Hoyle v. Gombeh-Alie*, 11th Dist. No. 2006-A-0067, 2007-Ohio-1641, at ¶33. In this instance, we find such abuse. In effect, the motion to compel relates to the same question raised by appellants' second assignment of error: whether the trial court abused its discretion in failing to demand projections of the numbers of claims which

would be made, and the redemption rate for the vouchers, in determining the value of the settlement. Having found merit in that assignment of error, we find it was an abuse of discretion for the trial court to deny a motion designed to solicit that very information.

{¶29} The third assignment of error has merit.

{¶30} The judgment of the Trumbull County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this opinion.

{¶31} It is the further order of this court that appellees are assessed costs herein taxed.

{¶32} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J., concurs in judgment only with Concurring Opinion,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

MARY JANE TRAPP, P.J., concurs in judgment only with Concurring Opinion.

{¶33} I agree with the outcome reached by the majority. I write separately to elaborate on the majority's analysis on the first assignment of error regarding the adequacy of the email notification to class members in this case.

{¶34} Pursuant to *Eisen*, individual notice must be given to all class members "who are identifiable through reasonable effort." *Eisen* at 175. See, also, *Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co.* (1996), 94 Ohio Misc. 2d 127, 130 ("individual notice is required for those class members whose names and addresses can be determined by reasonable effort"). "The hallmark of the notice inquiry in cases before

and after *Eisen* is reasonableness." *Sollenbarger v. Mountain States Tel. and Tel. Co.* (D.N.M. 1988). 121 F.R.D. 417, 436-437.

{¶35} In this case, Mr. Hilsee, a nationally recognized expert in designing notices for class actions, stated in his affidavit that Carfax has a VIN for each car which was a subject of a report, and that co-defendant Polk Carfax is *in the very business of* providing names and addresses of vehicle owners in class actions. He opined that Carfax could have provided Polk Carfax a list of the VINs for the subject vehicles, and Polk Carfax could have prepared an address list for the current owners of the vehicles. By comparing the names of the current owners and those on its customer list, Carfax could have then prepared a list for mail notification. Mr. Hilsee testified similar procedures are routine in automotive litigation.

{¶36} The problems of communication by email are well-known. "Email *** might not be opened right away, making communication less effective than when the consumer is handed a piece of paper. Many people use email infrequently. With email, there can be compatibility problems, such as an attachment that cannot be opened or that appears as gibberish. *** 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." Jean Braucher, Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online, 2001 Wis. L. Rev. 527, 540.

{¶37} "Historically, first class mailing has been utilized because it provides a controlled method by which individual notification can be provided through a reliable process which ensures that proper notice is received by the potential class members." *Karvaly v. EBay, Inc*. (E.D.N.Y. 2007), 245 F.R.D. 71, 91, citing *Reab v. Electronic Arts, Inc*. (D. Colo. 2002), 214 F.R.D. 623, 630. "[N]otification by electronic mail creates risks of distortion or misleading notification that are substantially reduced when first-class mail is used." Id. "First class mail ensures *** that the appropriately targeted audience receives the intended notification and maximizes the integrity of the notice process." *Reab* at 631. Obviously, notification by email is more convenient and less expensive. However, "the law is quite clear that concerns about the financial burdens of such notice cannot excuse noncompliance with that requirement." *Karvaly* at 92.

{¶38} I recognize, as the majority does, the courts have not required the creation of new computer programs to determine potential class members for notification purpose. See *Dumont* at 23-25. I also recognize that the courts have deemed email notice particularly suitable in cases where, as in the instant case, class members' claims arise from their visits to the defendant's Internet business. See *Browning v. Yahoo! Inc*. (N.D. Cal. Nov. 16, 2007), 2007 U.S. Dist. LEXIS 86266, *13, citing, e.g. *Lundell v. Dell, Inc*. (N.D. Cal. Dec. 5, 2006), 2006 U.S. Dist. LEXIS 90990, *1.

{¶39} In this case, however, both Carfax and Polk Carfax, its parent company and co-defendant, *are* in the business of information retrieval and database maintenance. The nature of their businesses is particularly well suited to identify class members and their addresses. Under the unique circumstances present in this case, the "reasonable effort" standard requires Carfax to utilize its database and the expertise

of its parent company in address retrieval to obtain class members' mail address and notify them accordingly. Email notification in this particular case falls short of the "reasonable effort" required by due process and is not an adequate substitute for the more reliable method of first class-class mail notification.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶40} The trial court properly exercised its discretion in approving the revised settlement. Accordingly, I respectfully dissent.

{¶41} The multiple forms of notice provided in the revised settlement were constitutionally adequate for the purposes of due process.

{¶42} *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 175, a case which the majority cites, purports the requirement that the notice to the class be the "best notice practicable." Further, to comport with due process "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." Id. at 173.

{¶43} The notice in the instant case, set forth in the revised settlement, satisfied Federal Rule of Civil Procedure 23(c)(2)(B) (certification notice requires "best notice that is practicable under the circumstances"), Ohio Civ.R. 23(E) ("notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs"), and other applicable rules of the court and case law, including *Eisen*.

{¶44} As the majority writes, Carfax is "an online business: customers can view vehicle history reports on the Internet; and, Carfax sends the reports to customers via email." Hence, email notice would be the "best notice practicable under the

circumstances" to reach the intended persons. Fed.R.Civ.P. 23(c)(2)(B). Moreover, "[e]mail notice [is] particularly suitable *** where settlement class members' claims arise from their visits to Defendants' Internet websites." *Browning v. Yahoo! Inc*. (N.D.Cal.2007), 2007 U.S. Dist. LEXIS 86266, at *13. As the trial court stated, "1,770,929 potential class members" were notified in the original email notice and the "[r]evised settlement provides for an additional e-mail notice to be sent to an even larger section of potential class members." Under the circumstances and the type of business Carfax conducts, it was appropriate and reasonable to provide notice to customers via email.

{¶45} Additionally, as the majority noted, "[c]onsiderable attention to the settlement occurred in *** media outlets." It has been held under certain circumstances that news media coverage of the class action constitutes adequate published notice to class members. See *West Virginia v. Chas. Pfizer & Co*., (C.A.2.1971), 440 F.2d 1079, 1090.

{¶46} Furthermore, the revised settlement notice included publication in *Investor's Business Daily* and *U.S.A. Today,* which have a joint circulation of 2,700,000 readers per day. Courts have held that publication *alone* satisfies due process where individual mailed notice would have been expensive and would not guarantee individualized notice. See *Thomas v. NCO Fin. Sys. Inc.,* (E.D.Pa.2004), 2004 U.S. Dist. LEXIS 5405, at *14-*15.

{¶47} Individual notice is not required when there is no reasonable way to sufficiently identify the class members*. In re Domestic Air Transp. Antitrust Litigation*, (N.D.Ga.1992), 141 F.R.D. 534, 539. "Receipt of actual notice by all class members is

required neither by Rule 23 nor the Constitution." Id. "The hallmark of the notice inquiry in cases before and after *Eisen* is *reasonableness*." *Sollenbarger v. Mountain States Tel. and Tel. Co*. (D.N.M.1998), 121 F.R.D. 417, 436 (emphasis added). Obtaining individual addresses would be expensive and there is no certainty that a significant number of additional class members would be notified. Carfax does not use direct mail as its primary means of communication; it would not be reasonable or practicable under the circumstances to require Carfax to endeavor to ascertain accurate mailing addresses for millions of customers, especially after taking into consideration the other viable options of notice provided for in the revised settlement. Additionally, in light of the testimony of Carfax's Chief Technology Officer which revealed that there was only about a 50% chance of email addresses being valid after the year 2000, the limitation of email notice to potential class members back to October 2003 was reasonable.

{¶48} Furthermore, based on the numerous vouchers available to the class members, the transferability, value, and options, the vouchers proposed in the revised settlement were fair, adequate, and reasonable. Thus, there was no error in the trial court's analysis of the voucher's potential value. See *In re Cuisinart Food Processor Antitrust Litigation*, (D.Conn.1983), 1983 U.S. Dist. LEXIS 12412, at *7 ("the fact that some objectors would have preferred cash cannot be determinative of the issue whether the settlement before the court is reasonable"); *In re Mexico Money Transfer Litigation* (C.A.7.2001), 267 F.3d 743, 748 ("because they are transferable, even class members who do not again use defendants' services may obtain some value (if not by selling them, then by giving them to relatives)"). Consequently, as the final assignment of error relates to the redemption rate of the vouchers to determine value, the trial court

did not abuse its discretion in denying the Motion to Compel discovery of the number of claims made.

{¶49} Accordingly, I would affirm the decision of the trial court to approve the revised settlement.