CLIENT UPDATE

DID THE THIRD CIRCUIT JUST IMPOSE A PROOF-OF-PURCHASE REQUIREMENT IN CONSUMER PRODUCT CLASS ACTIONS?

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Last Friday, for the second time in a year, a panel of the Third Circuit Court of Appeals decertified a class because the defendant lacked records showing who bought the products in question. Both times, the court held it would be improper to decide someone is a member of a class simply on his or her "say so," even where that "say so" takes the form of a sworn affidavit, and that a class cannot be certified absent more tangible proof of who is in it.

Hayes v. Wal-Mart Stores, Inc., 2013 WL 3957757 (3d Cir. Aug. 2, 2013), involved "as-is" clearance items sold at Wal-Mart's Sam's Club stores. The plaintiff purchased a power washer "as-is" and contends Wal-Mart also sold him a store-plan extended warranty for it, even though the warrantor does not cover items sold in an unsealed box. Sam's Club's receipts show only that an item's regular price was overridden at the register, not the reason why: It may or may not have been sold in its originally sealed box, and if it was, the warranty was valid. The receipts, in other words, did not constitute proof one way or the other as to whether Sam's Club sold a warranty for an unwarrantable product.

Last year, in *Marcus v. BMW of North America, LLC*, 687 F.3d 583, (3d Cir. 2012), a different Third Circuit panel reversed certification of a class comprising purchasers of BMW cars with "run-flat" tires because BMW lacked records showing which cars were shipped with which tires, and because dealers often installed different tires before selling cars to consumers. "On remand," the panel wrote, "the

District Court . . . must resolve the critical issue of whether the defendant's records can ascertain class members and, if not, whether there is a reliable, administratively feasible alternative." The court then "caution[ed] . . . against approving a method that would amount to no more than ascertaining by potential class members' say so," because "simply having potential class members submit affidavits" that they meet the class definition "may not be 'proper or just.'" *Id.* at 594.

Judge Thomas L. Ambro wrote the *Marcus* decision and was a panelist in Friday's *Hayes* decision. *Hayes* quoted and expanded on the "say so" language, noting that "the nature and thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden to fulfill Rule 23's requirements." Those requirements, the court held, "cannot be relaxed or adjusted on the basis of Hayes' assertion that Wal-Mart's records are of no help to him." Lacking those records, the plaintiff's burden is to "offer some reliable and administratively feasible alternative that would permit the court to determine" whether someone is or is not a member of the putative class.

The "say so" language may very well apply equally where the consumer bought a small-dollar consumer product some time ago and no longer has either the product or a receipt evidencing the purchase. Companies that sell through retailers usually have no idea who their ultimate consumers are. If even a sworn affidavit from the purchaser cannot suffice as proof of membership in a class, as *Hayes* and *Marcus* suggest, defendants in Third Circuit class actions may now have a powerful new argument at their disposal.

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Please do not hesitate to call us with any questions.

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