

NORTH CAROLINA COURT OF APPEALS

WILLIAM MOODY, JR., on behalf of
himself and all others similarly situated,

Plaintiff,

v.

SEARS ROEBUCK AND CO.,

Defendant.

From New Hanover County
02 CVS 4892

BRIEF OF DEFENDANT-APPELLEE

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ARGUMENT

Sears and Plaintiff agree that the trial court exceeded its jurisdiction and violated the Full Faith and Credit Clause when it undertook a broad collateral review of, and then repudiated, the Illinois Judgment in *Wrobel v. Sears Roebuck and Co.* A few points in Plaintiff's appellate brief warrant elaboration.

First, with respect to the value of the settlement benefits in *Wrobel*, Plaintiff asserts that the benefits went beyond what was achieved by the New Jersey Attorney General in related litigation because "the New Jersey litigation granted a release without benefit for claims brought under Sears' 'one price' all wheel alignment policy" (Plf.'s Appellate Brief 33) However, Plaintiff does not elaborate on the "one price" policy or the distinction between that policy and a different policy, a distinction which resulted in *Wrobel* subclasses and divergent benefits. Thus, Sears provides more detail for context.

Before 1 October 2000, Sears offered different alignment services with different prices, in essence depending upon whether the customer's vehicle had two factory-adjustable wheels ("thrust alignment") or four ("four-wheel alignment"). (R p. 237) "Thrust" alignments were \$10.00 less than "four-wheel" alignments. (*Id.*) Plaintiffs in *Wrobel* alleged that customers were overcharged insofar as they purchased "four-wheel" alignments for vehicles that were not capable of having all four wheels adjusted. (*Id.*) In the *Wrobel* settlement, class

members who fell within the pre-October 2000 period were eligible for a payment of \$10.00 a piece, which represented the difference in price between a “thrust” alignment and a “four-wheel” alignment. (*Id.*) This was the same amount (\$10.00) that the New Jersey Attorney General had negotiated in a settlement on behalf for eligible customers who purchased “four-wheel” alignments before October 2000. (*Id.*)

As for those customers who purchased alignment services *after* 1 October 2000, the circumstances were different. After 1 October 2000, Sears maintained a “one price” policy by offering an “all-wheel” alignment service for a single price. (R pp. 237-38) What this means is that virtually all customers who purchased wheel alignment services after 1 October 2000 paid *the same* price, regardless of what type of vehicle they had and regardless of how many wheels on their vehicle were factory-adjustable. (R p. 238) Sears thus argued in *Wrobel* that (putting aside the absence of any alleged deception) customers who purchased alignment services after 1 October 2000 could not prove that they sustained *any injury*; they could not show they could have paid a lower price for a different alignment service at Sears. (*Id.*) With respect to this class of customers, the New Jersey Attorney General’s office did not require Sears to make *any* payments. (R pp. 238, 395) In fact, the New Jersey Attorney General’s office released Sears from any claims related to its all-wheel alignment program and agreed that Sears was not required

to make *any* changes to its all-wheel alignment practices. (*Id.*) Thus, with respect to those customers who purchased alignment services after 1 October 2000, Sears' position was, and is, that they could not reasonably expect to claim any damages even if they somehow could establish liability. Nonetheless, to facilitate settlement, Sears agreed to give eligible customers within that class coupons redeemable at any Sears store, for \$4.00. Given Sears's position that these persons in particular could not prove damages—and given the fact that the New Jersey settlement did not produce *any* recovery for them—it is remarkable that Judge Tennille used this case as a platform to complain about coupon settlements.¹

Second, at page 23 of Plaintiff's appellate brief, Plaintiff cites *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 354 S.E.2d 459 (1987) for the proposition that the class action device is designed to promote “the efficient resolution of the claim or liabilities of many individuals in a “single action” through the “elimination of repetitious litigation.” *Id.* at 280, 354 S.E.2d at 464 (internal

¹ In light of the foregoing circumstances surrounding the benefits negotiated for the class, it is impossible to conclude that the settlement was negotiated through inadequate representation. Judge Tennille harped on the attorney's fee award, but (1) the Illinois court specifically found that the proposed attorney's fee was not negotiated until after the settlement benefits for class members were negotiated, and therefore it did not drive the settlement; (2) the attorney's fee award was paid by Sears, not out of any recovery, and thus a smaller fee award would not have resulted in more money to class members; and (3) the Illinois court specifically determined that the fee was not excessive in relation to the work performed on the case and that the lodestar method was a preferable method of assessing fees in this case. (R pp. 238-39 (¶¶15-17), 242-44(¶¶25-26))

quotation marks omitted). That objective can be accomplished only when class action judgments, no less than other judgments, are afforded the finality the Full Faith and Credit Clause requires. Without a relatively secure promise of finality, class actions become bereft of their utility as a dispute resolution mechanism. Defendants will not risk committing and paying significant sums to settle them if there is a risk that court-approved settlements will not conclusively end the litigation—a risk created by the very *willingness* of courts to entertain the type of broad collateral review undertaken by Judge Tennille below.

To make matters worse, Judge Tennille relied on data that was not available at the time the Illinois court approved the settlement – the claims rate – to reject the Illinois court’s antecedent due process determinations about the adequacy of notice and representation. Such a hindsight approach not only is contrary to public policy (it would destabilize class action settlements by destroying their finality and predictability), it is impracticable.

It is not difficult to see why. If a certifying court were to use the claims rate as the barometer of due process, neither the parties nor the court could know at the critical time—when the settlement is negotiated and submitted for court approval—whether the notice plan satisfies due process. The parties would present a proposed settlement and notice plan to the certifying court for its approval, and the court would adopt a notice plan for the parties to implement, with no idea

whether it comports with due process. After implementation of the notice plan, the court would hold a fairness hearing, approve the settlement, enter judgment, and order the defendant to satisfy it and report back on the final claims rate. Then, upon receiving that final report, the court would have to decide again, this time using hindsight, whether the notice plan it previously approved satisfied due process based on the claims rate. If the claims rate were deemed too low, then the already-executed notice plan would be deemed unlawful. In that event, the certifying court would have to vacate its judgment. The parties and the court presumably would have to go back to the drawing board to devise and execute another settlement and notice plan (the adequacy of which, again, could not be finally determined until the claims rate is determined), or forgo a settlement and restart the litigation—thus promoting, rather than eliminating, “repetitious litigation.” *Crow*, 319 N.C. at 280, 354 S.E.2d at 464. This is considerably unfair to the defendant, who would have already paid for both the notice and the settlement that the court had earlier approved.

Such a regime is untenable and certainly not required by due process. It would subvert finality and greatly impede the settlement of class actions, thereby undermining the utility of the class action device. Yet Judge Tennille takes it one step further, holding the such a hindsight approach may be applied by a foreign court on *collateral review* even after the certifying court has satisfied itself that the

requirements of due process were met. The fairness and adequacy of a class settlement should be judged at the time of certification and approval by the certifying court, and not by foreign courts on the basis of information that did not exist when the settlement was negotiated and approved.

Nor is there a legitimate basis for concluding that the claims rate is an appropriate barometer of due process. There are many reasons why people may choose not to take the minimal steps required to file a claim. Rather than involve due process, a low claims rate may simply reflect a perception by the class members that the claims are baseless, that they were not deceived or harmed, or that the cause or relief is unimportant to them. In Sears's view, if there ever was a case where those factors would produce a low claims rate, it is this one.

In any event, as Plaintiff points out (at p. 34), Judge Nowicki was fully aware of the claims rate and she was convinced that due process was met. (E.g., R p. 476). Indeed, it is a matter which Judge Tennille specifically brought to her attention in his correspondence with her. (R pp. 467-71)

As Plaintiff points out (at p. 33), Judge Nowicki properly concluded that the notice plan provided the best notice *practicable* under the circumstances, which is all that due process requires. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("This Court has not hesitated to approve of resort to publication as a customary substitute . . . where it is not reasonably possible or

practicable to give more adequate warning. Thus it has been recognized that, in the case of persons . . . unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.”).

In concluding that publication notice was the best means practicable, Judge Nowicki necessarily concluded that *direct notice* (which of course would have first required *identifying* the absent class members) was not practicable. Judge Nowicki received empirical evidence on the impracticability of direct notice. It was the New Jersey experience. (R p. 404) The State of New Jersey attempted to identify New Jersey customers who purchased alignment services from Sears, but data was not available in any database, so the State had to undertake a *manual* review of paper invoices and other transaction documents from all of Sears’s New Jersey auto centers, in an effort to find information on the type of vehicle serviced, the service requested, the type of alignment performed, and all of the charges and credits to the customer, as well as the contract information for each customer. (*Id.*) Even though the review covered a *much smaller period of time* than the one in *Wrobel* (less than half) and covered customers from only one jurisdiction (New Jersey), the State of New Jersey spent over \$800,000 to review and scan paper transaction documents and develop a database of New Jersey customers eligible for settlement funds. (*Id.*) The New Jersey experience resulted in an average direct-

notice cost of \$65.00 *per claimant* to deliver a \$10 *benefit* – a cost of 6.5 *times* the amount of recovery. (R p. 441, ¶24 (reciting that the State identified 12,544 customers, producing \$125,440 aggregate benefit)) Judge Nowicki was right to conclude that due process did not require the parties in *Wrobel* to undertake such an unduly burdensome and cost-prohibitive review *nationwide*, for a period of time *twice as long* as that involved in New Jersey. It would not have been “practicable,” *Mullane*, 339 U.S. at 314, for Judge Nowicki to have required Sears to fund a notice plan that exponentially exceeded its exposure. It is implausible that Sears would have agreed to settle *Wrobel* had it been required, as a condition of settlement, to undertake and fund a multi-jurisdiction, multi-year search to identify alignment customers who might be eligible to participate in a settlement, when Sears has always deemed the allegations to be devoid of merit.

The cost of notice cannot blithely be ignored. It factors heavily into a plaintiff’s interest in bringing a proposed class action. Absent a settlement, the cost of the class notice is borne by the plaintiff, who retains the risk that he may lose the suit and be stuck with the bill. With a settlement, on the other hand, the cost of notice is paid voluntarily by the defendant. Thus, the cost of notice affects both sides’ assessment of the economics of proceeding to trial or compromising through settlement. In a case like this one, where the cost of individual notice greatly exceeded the relief the class members reasonably could have been awarded

at trial, it was perhaps the most important factor of whether the case could be settled at all. The flexible due process standard, the touchstone of which is “practicability,” should be sensitive to these considerations.

Judge Nowicki was correct that due process did not require direct notice, and, after reviewing Judge Tennille’s concerns about the claims rate, she decided that the judgment should not be disturbed. Her judgments regarding due process and the adequacy of plaintiff’s counsel are entitled to full faith and credit.

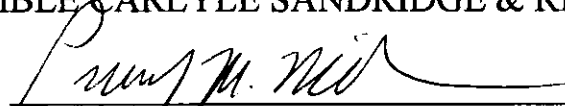
CONCLUSION

Sears agrees with Plaintiff that the orders entered by Judge Tennille after the entry of the Illinois Judgment and the filing of the parties’ Stipulation of Dismissal should be vacated.

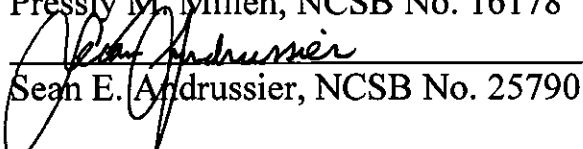
This the 7th day of December 2007.

WOMBLE CARLYLE SANDRIDGE & RICE, PLLC

By:


Pressly M. Millen, NCSB No. 16178

By:


Sean E. Andrussier, NCSB No. 25790

Attorneys for Defendant-Appellee

P.O. Box 831

Raleigh, NC 27602

Telephone: (919) 755-2100

Facsimile: (919) 755-2150

pmillen@wcsr.com

OF COUNSEL: McCARTER & ENGLISH, LLP

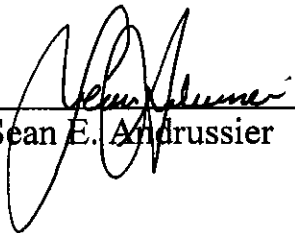
By: Ed Fanning / SEA
Edward J. Fanning, Jr.
(Admitted *Pro Hac Vice*)

Attorneys for Defendant-Appellee
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102-4056
Telephone: (973) 639-7927
Facsimile: (973) 297-3868
efanning@mccarter.com

CERTIFICATE OF COMPLIANCE WITH RULE 28(j)

This is to certify that the foregoing brief, drafted in proportional type, complies with the requirements of Rule 28(j) of the North Carolina Rules of Appellate Procedure and that the text (including citations and footnotes) contained herein is less than 8,750 words (exclusive of covers, table of authorities, indices, and certificates of service and compliance), as reported by Microsoft Word.

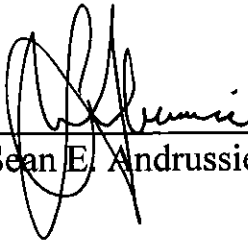
This the 7th day of December 2007.


Sean E. Andrussier

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on the 7th day of December, 2007, he caused the foregoing **BRIEF OF DEFENDANT-APPELLEE** to be served upon counsel for Plaintiff shown below by first-class mail, postage prepaid, addressed to said attorney:

Gary K. Shipman
Shipman & Associates, LLP
11 S. Fifth Avenue
Wilmington, NC 28403



Sean E. Andrussier