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Dark Side of Loyalty Programs

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Loyalty programs operated by retailers allow the retailer to track the purchases made by customers and offer customers tailored information about products and sales. However, there is a dark side to such programs. The tracking may also provide plaintiffs' lawyers a method of identifying potential class members thereby providing a basis for such litigation to proceed where it otherwise might not.

A current issue in consumer class action litigation is "ascertainability," the ability to identify (ascertain) individual members of a plaintiff class. Some courts have taken the position that it is unfair to allow individual consumers to join a class action suit just on their say so without any independent confirmation such as a receipt. Given that many consumer class action suits involve low cost items and make claims going back for years, few purchasers will have such independent evidence. Now, it appears, some retailers may be providing that evidence.

A judge in the Southern District of California recently received a request from plaintiffs' counsel to allow the filing of 53,000 pages of "confidential" records that plaintiffs' counsel wanted to submit in response to an argument that the class they sought to certify could not be "ascertained." The 53,000 pages had been obtained from third parties in a lawsuit over the sale of allegedly tainted bird seed. Purchasers of bird seed are not likely to keep receipts for their purchases. However, reading between the lines of the court's order, it appears that certain retailers do and plaintiffs intend to argue that with such records they can sufficiently "ascertain" members of the class.

The outcome of the bird seed request is uncertain. However, plaintiffs have tried to rely on loyalty programs in the past without much success. In a settlement with CVS over the sale by CVS of a supplement, the *Federal Trade Commission* noted that "purchasers" of the product at issue would be identified through the CVS ExtraCare card program. In that case, however, CVS was the only retail outlet. In another case, the United States Court of Appeals for the Third Circuit rejected an attempt to rely on the CVS program, among others, to ascertain a class of vitamin purchasers because plaintiffs did not produce sufficient evidence that the CVS and other retailers' records would reveal purchases of the product at issue. *See* ***Carrera v. Bayer***, 727 F.3d 300 (3d Cir. 2013). The *Carrera* plaintiffs had not offered evidence that any other retailer of the vitamins had membership card or what information loyalty cards would provided.

In ***In re Clorox Consumer Litigation***, the trial court rejected the use of loyalty card information to ascertain a class of kitty litter purchasers. Plaintiffs' counsel had obtained information from some

major retailers of the product such as Wal-Mart and Target. No retailer tracked all purchases; rather, only purchasers by members of the loyalty program were tracked. Wal-Mart estimated it tracked about 18 percent of transactions, other retailers could not provide an estimate. One retailer that tracked sales did not track the date of purchases. The records of large national retailers identified customers who were geographically outside the potential classes being sought. Thus, the trial judge found that

> there is no administratively feasible method for ascertaining the plaintiff classes. Customers do not remember when they purchased Fresh Step cat litter or how much they bought. Of the retailers who responded to Plaintiffs' inquiries, six do not have any way of identifying Fresh Step purchasers. Five can track some customers through loyalty programs or store credit cards, but three of those five can identify customers in only a small minority of Fresh Step transactions. Ultimately, only two of the sixteen retailers Plaintiffs contacted can help identify a substantial number of plaintiffs. The Court finds that there is no administratively feasible method of determining membership for the vast majority of potential members of Plaintiffs' proposed sub-classes. Therefore, Plaintiffs' proposed classes are not ascertainable.

310 F.R.D. 436, 441–42 (N.D. Cal. 2014).

Even though there is some doubt about the efficacy of loyalty programs in this context, we can expect plaintiffs' lawyers to continue to offer them as evidence of an ascertainable class. In a case where the product is a private label, evidence from a loyalty program may be more compelling than in a case brought against a manufacturer. In cases involving private brand products the retailer's loyalty program likely tracks a significant percentage of purchases. In other cases, there may be sufficient evidence to identify a significant percentage of the class which may convince a court to allow the case to proceed as a class rather than requiring individual suits by individual plaintiffs. As the cases proceed, we expect that plaintiffs' counsel will start to seek such information early in order to provide the court with as full a picture of the evidence available as possible when the court considers the question of class certification. In that case, companies will have to spend the time and resources responding to such requests and may ultimately provide damning evidence against themselves or their suppliers.

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