



EDITORIAL

A number of years ago, completely out of the blue, I received a letter and a bundle of documents from a firm of lawyers in Nevada.

Apparently I was one of up to 2.6 million consumers who had hired a car at either Reno or Las Vegas airports between 2003 and 2009 and had, allegedly, been illegally overcharged by the car hire firm. The allegation was that they had claimed an airport recovery concession fee which they were not entitled to. The letter invited me to join a class action against a number of well known car hire companies including Hertz, National and Alamo. It further informed me that negotiations with the defendants had reached quite an advanced stage and that a provisional settlement had been reached which was to be put before a judge for approval.

The settlement went something like this. As a plaintiff I would be awarded \$10 in damages. This would come in the form of a voucher which could only be redeemed on the hire of a car from the car hire company. The voucher was time limited – it would expire after 18 months. Additionally it had only limited transferability – I could only give it to close family members, I could not sell it to anyone I wished. There was no cash alternative.

There were four named class representatives in the case and they would each receive \$20,000 if the case succeeded.

As for the lawyers bringing case, the defendants had agreed to pay them attorneys' fees of \$1.44 million plus \$150,000 of costs because the settlement had been "arrived at through arm's length negotiations by highly experienced counsel and after four years of litigation and after extended mediation". These were the words of the defendants' lawyers in a document supporting the settlement.

Everything was now ready to go to the judge to be rubber stamped, all I had to do was choose to join the class action or not. The choice was not difficult. As a resident of the UK who was unlikely to want to rent a car in the US within the 18 month period and had no close relations who might want to take up the offer, the offer was entirely worthless whether I joined the class action or not.

My response was to ignore the letter and write direct to the judge suggesting that the settlement was a stitch up; everyone benefited except the poor consumers who had been misled in the first place. Many consumers, international tourists like myself, would simply be unable to take up the offer and would receive no financial compensation in lieu of the voucher. Those consumers who did take up the offer would only get their \$10 back by hiring a car from Hertz or one of the other companies – who would not be suffering from having to give a discount – merely giving back the \$10 they originally overcharged in the first place. In addition Hertz would probably benefit from extra custom generated by the settlement. They would also get to keep the \$10 they originally overcharged those consumers who failed to redeem the voucher.

As for the lawyers they would of course receive an enormous sum for the hours they devoted to the case. Reading between the lines, managing a large class action like this is an extremely burdensome

administrative task and I am sure that large sums were disbursed in order to bring the case, but even so they would be generously rewarded for bringing the case. It may also have been the case that costs were inflated by the defence lawyers who might have hoped that by placing expensive procedural obstacles in the way of the plaintiffs' lawyers they could be persuaded to abandon the case because it was too costly to pursue. I do not know if this is the case but it was a tactic pursued by 'Big Tobacco' when defending claims brought by lawyers working on a contingency fee basis; several firms were driven to the wall before success was eventually achieved.

Even the nominated plaintiffs would get a generous \$20,000 each for reasons I fail to understand.

What lessons can be derived from this case? On the one hand there may be many consumers who benefit from the settlement who would not have otherwise have done so without the efforts of this firm of lawyers. Who would bother to sue Hertz over a sum of only \$10 even assuming that they knew about the overcharge, knew their rights, had the time and were prepared to enforce them beyond writing a letter to customer services? This is a classic consumer detriment case – small sums of money involved, ignorance of the law, a potentially recalcitrant defendant and a life to live beyond the legal system – a recipe for overcharging and getting away with it. So without the lawyers most consumers would receive no redress at all.

But is this the best way to solve the problem? Lurking deep within the papers was the implication that the overcharging may have amounted to a criminal offence. Again, I make no comment on the substance of this, but if this was the case why are the appropriate authorities not taking up the baton on the consumers' behalf? Most countries have consumer legislation relating to misleading prices and I would assume that Nevada has something along those lines. Why then are the authorities leaving this matter to expensive and time consuming civil litigation instead of instituting a criminal prosecution. Are they underfunded, as many consumer protection authorities are; are they intimidated by a defendant with deep pockets; or are they simply applying American principles of rugged individualism – leaving it up to individuals to enforce their contractual rights without the intervention of the state? It might also be the case that the remedies available are inadequate. Fining Hertz may signal public disapproval but if there is no civil remedy available a successful prosecution may be an empty gesture if it cannot be accompanied by an order for restitution – which raises another question.

Why have not the lawyers negotiated a settlement that would require Hertz to pay a cash settlement – preferably straight back to my credit card so that I don't incur foreign exchange charges?

Post Script

Having penned this polemic some months ago and not having heard anything from the plaintiffs' lawyers for some time I was moved to do some research into the outcome of the case. It took no more than a couple of clicks on Google to discover that as far back as June 2011 the judge in the case had not approved the settlement. The reasons given are complex but are worth exploring.¹ Gratifyingly, he agreed with my point of view "... the settlement appears to have real value only for Class Counsel, the Class Representatives, the claims administrators, and the Defendants." In another telling phrase he refers to an argument against settlement "In other words, the class is being asked to 'settle', yet Class Counsel has applied for fees as if it had won the case outright."

¹ At <http://www.cafalawblog.com/Sobel%20v%20The%20Hertz%20Corp%20.pdf>.

The case appeared to go dormant at that stage – the official class action website <http://nevadacarrentalsettlement.com> disappeared from the internet and there was no further correspondence from the court or the lawyers. However, beneath the surface, the case is still rumbling on. The Ninth Circuit of the Court of Appeals had a motion filed as recently as October 2013²; Hertz are appealing a decision made earlier in the year³ – clearly class action lawyers do not give up easily. However, even if the action is ultimately successful, the time it has taken to reach this inconclusive stage suggests that we will all be paying full price for our car hire for the foreseeable future.

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2. <http://dockets.justia.com/docket/circuit-courts/ca9/13-17186>.

3. http://nv.findacase.com/research/wfrmDocViewer.aspx/xq/fac.20130321_0001562.DNV.htm/qx.