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Clearing Ascertainability Hurdle Yields \$30M Accord

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A \$30 million settlement by OSRAM Sylvania Inc. in a class action over automotive replacement headlamps shows the increased efforts class-action attorneys are making to meet the heightened ascertainability standard set by the U.S. Court of Appeals for the Third Circuit.

The first checks to class members were issued this week in the suit, which asserted that Sylvania's top-of-the-line SilverStar headlamps cost much more than standard bulbs but were falsely promoted as providing better visibility. In March, U.S. District Judge Madeline Cox Arleo of the District of New Jersey approved the settlement and a fee award of \$10 million, which is to be drawn from the settlement fund. An objector, Clarence Morrison, appealed the judge's approval to the Third Circuit but withdrew his appeal June 3.

But class counsel faced a challenge in counting and identifying class members because Sylvania sells its products to retailers, not to consumers. According to Barry Eichen of Eichen, Crutchlow, Zaslow & McElroy in Edison, that problem made the suit vulnerable to a challenge under the Third Circuit's strict ascertainability standard, most recently expressed in an April decision in *Byrd v. Aaron's Inc.*

To identify persons who bought the SilverStar headlamps, class counsel served third-party subpoenas on seven retailers that represent the majority of the sales of the products. The retailers resisted production of data about their customers but ultimately agreed to turn over names that were obtained from loyalty-card programs and credit-card transactions, Eichen said. The seven retailers can't be identified because their cooperation was conditioned on confidentiality orders, Eichen said. After spending months obtaining the data and analyzing it, class counsel ended up with a list of nearly 1.7 million names, he said.

Eichen represented the class along with Evan Rosenberg of his firm and John Keefe Jr., Stephen Sullivan Jr. and Paul DiGiorgio of Keefe Bartels in Red Bank.

The settlement will also be distributed through a more traditional claims process, in which the call for class members is published in major publications, in addition to the list of buyers obtained from the retailers, Keefe said.

According to Eichen, some of the retailers the attorneys contacted said they had never received such requests for customer names, and took a lot of convincing.

"We had to educate some of them on the law. I think once they understood we were not looking for proprietary information, we were able to break through," Keefe said.

Under the settlement, buyers of SilverStar headlamps will receive a check averaging \$12 each, which represents 70 percent of actual damages, Eichen said. Any funds left over from the \$30 million after payments are made to class members and class counsel will not revert to the settlement, but will be used for a supplementary payment to class members. The settlement also calls for Sylvania to change the language on its packaging to eliminate misleading claims, Eichen said.

The \$10 million fee award is comprised of \$277,652 in costs and \$9,772,347 in attorney fees. The fee award is approximately 1.5 times the lodestar of roughly \$6.5 million. The seven class representatives will share in \$19,000.

The settlement is unusual because it provides class members with cash payments, rather than coupons for future purchases, and because any leftover funds go to the class members instead of the defendant, Eichen said.

"We don't want to be one of those class-action firms that give coupons and only worry about their fees," Eichen said.

David Kistler and Stephen Orlofsky of Blank Rome in Princeton, who represented Sylvania, did not return calls for comment about the settlement. A Sylvania spokesperson also did not return a call.

Contact the reporter at ctoutant@alm.com.

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