STATE OF VERMONT

SUPERIOR COURT
Orange County

CIVIL DIVISION
Docket No. 201-11-04 Oecv

Alfred T. Wright, on behalf of himself
and all others similarly situated
Plaintiff

v.

Honeywell International, Inc.
Defendant

Entry Order on Class Certification

On remand from *Wright v. Honeywell Intern., Inc.*, 2009 VT 123, 187 Vt. 123, plaintiff Alfred Wright seeks a Rule 23(b)(3) class-certification order and approval of his proposed class notice. After working together on the form of the order and notice, the parties have reached agreement on all but two issues: (1) whether the class definition should be refined with respect to consumers who acquired their round thermostat by purchasing a home; and (2) how notice should be provided to potential class members.

The first question is whether the class definition proposed in the complaint should be refined to exclude consumers who acquired their round thermostats by purchasing a home. In general, the rule is that the class definition "may be the one alleged in the complaint, or the class may be redefined by the court, as appropriate." See 3 Newberg on Class Actions § 7:37 (4th ed.) (emphasizing that "it is important for the court to specify with particularity the scope of the class which the plaintiff adequately represents in order to set a clear benchmark for subsequent litigation of the issues").

Here, the argument is that plaintiff conceded during the class-certification proceedings that the class should not include any consumers who purchased a home in which the round thermostat was already installed on the wall at the time of purchase. Evidence of a clear statement to this effect in the record, however, is elusive.

In his complaint, plaintiff proposed a class consisting of "all similarly situated consumer purchasers residing in the State of Vermont . . . who indirectly purchased from [Honeywell], for their own use and not for resale, round thermostats between June 30, 1986 and the present." It is undisputed that this definition includes all consumers who indirectly purchased, by any means of distribution, a round thermostat from Honeywell. Certainly nothing in this class definition excludes consumers who acquired their thermostat by purchasing a home.

Then, in seeking class certification, plaintiff identified the class as the end users of round thermostats who were overcharged as a result of defendant's monopolistic behavior. Plaintiff

further defined those end users as the consumers who indirectly purchased a round thermostat through one of several distribution channels:

> (1) Retailer – Honeywell sells to a retailer, like Lowe's or Home Depot who then sells to the final purchaser;
>
> (2) Contractor – Honeywell sells to a wholesaler or [original equipment manufacturer] who then sells to a distributor, who then sells to a contractor, who then sells to the final purchaser as part of an HVAC service purchase; and
>
> (3) Home Builder – Honeywell sells to a distributor who sells to a new home builder who incorporates the HRT into a new home.[FN23]

Plaintiff's Memorandum of Law in Support of Motion for Class Certification at 37–38, filed July 14, 2006.

Plaintiff then stated in footnote 23 that the parties had "agreed that consumers who purchase a home pre-equipped with the HRT are not part of the plaintiff class." This statement is at the heart of the present dispute.

Defendant argues that footnote 23 represents a concession that the class excludes anyone who acquired their round thermostat by purchasing a home in which there was already a thermostat on the wall at the time of purchase. Defendant further argues that it relied on this footnote when choosing not to present arguments and evidence that it otherwise would have presented during the class-certification proceedings.

Yet it would be incongruous for plaintiff to have included "home builder" as a distribution channel if plaintiff really meant to exclude all new-home purchasers from the class. It makes more sense to interpret the footnote as plaintiff has suggested: it draws a distinction between consumers who acquired their round thermostat by purchasing a new home directly from the builder (who would be included in the class) and any subsequent purchasers of the same home (who would be excluded from the class definition because their home was "pre-equipped" with a thermostat). At the very least, plaintiff's interpretation gives some effect to the fact that "home building" is included as a distribution channel in the list of class members.

Defendant then argues that plaintiff's own expert, Dr. Noll, excluded new-home buyers from the class in his testimony. Defendant points to a footnote in the expert's declaration in which he noted his understanding that "persons who purchased a residence where a Honeywell Round Thermostat was pre-installed are also excluded from the proposed class; however the original purchaser of the thermostat is part of the class unless it was pre-installed at the time of purchase." As defendant suggests, Dr. Noll's footnote does suggest a distinction between persons who contracted with a builder to construct a new home (included in the class) and persons who purchased a pre-built new home from the builder in which the thermostat was already on the wall at the time of purchase (excluded).

Yet as plaintiff points out, Dr. Noll testified elsewhere in his declaration that the members of the class are "end users of thermostats" who indirectly purchased their thermostats through one of the several distribution channels, including "when they purchase a new home, in which case the distribution channel passes through the home builder." Declaration of Dr. Noll at ¶ 10. Again, this reference would make little sense if all new-home purchasers were truly excluded from the class.

Finally, defendant argues that there is no evidence in the record to support the inclusion of new homebuyers as members of the class. But as plaintiff points out, there are numerous references in the Honeywell documents explaining that new-home construction is one of the defined distribution channels through which an end user might indirectly purchase a new thermostat. See, e.g., Honeywell Residential Thermostat Channel Policy, attached as Exhibit 5 to the Declaration of Dr. Noll. None of the documents suggest a difference between consumers who buy pre-built new homes and consumers who contract with a builder for the construction of a new home.

None of the evidence, therefore, establishes unequivocally what plaintiff meant when he said that "consumers who purchase a home pre-equipped with the HRT are not part of the plaintiff class."

If this were a question of interpreting an agreement between the parties, therefore, there would probably need to be an evidentiary hearing to determine the meaning of the term "pre-equipped." But defendant is not arguing that the parties actually agreed to exclude all purchasers of new homes from the class. Rather, defendant is arguing that homebuyers should be excluded from the class *as a matter of estoppel* because of the foregoing representations.

Equitable estoppel applies when, "in all the circumstances of the case, conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct." *Greenmoss Builders, Inc. v. King*, 155 Vt. 1, 7 (1990) (quoting *Neverett v. Towne*, 123 Vt. 45, 55 (1962)). Here, the court cannot find that the foregoing representations are clear enough to support a finding that plaintiff is now attempting to "speak against his own act" by including homebuyers in the class. *Dutch Hill Inn, Inc. v. Patten*, 131 Vt. 187, 193 (1973). More likely is that plaintiff wrote an imprecise footnote whose meaning was subject to multiple and competing interpretations, and that no one sought to clarify the meaning of the footnote during the class certification proceedings. Estoppel is too harsh an outcome under the circumstances.

Adding to this conclusion is the consideration that the Vermont Supreme Court expressly approved certification of the class as it was proposed in the complaint. See *Wright*, 2009 VT 123, ¶¶ 4 & 31, 187 Vt. 123. Nothing in the Supreme Court opinion suggests that plaintiff conceded that the class definition should be narrowed, or that plaintiff failed to meet his burden of proof with respect to one of the distribution channels of round thermostats.

Finally, defendant argues a due-process deprivation if plaintiff is allowed to proceed with the class as proposed in the complaint. Any prejudice here is overstated, however, because

further refinements of the class definition can be made after the completion of discovery if it becomes apparent "that no reasonable jury could possibly determine that monopolistic overcharges passed through to end users" either as a whole or with respect to one of the distribution channels. See *Wright*, 2009 VT 123, ¶ 29. It is well established that the court has "continuing power to adjust its class decisions in light of evidentiary developments and the general progression of the case from assertion to facts." *Alger v. Dep't of Labor & Indus.*, 2006 VT 115, ¶ 40, 181 Vt. 309.

Yet there is one specific area where defendant makes a valid point: some of the consumers who bought homes directly from the builder have since sold their homes to other consumers. Should these consumers still be part of the class?

Here, the answer is no. One of the premises of the consumer-fraud complaint is that the class members were overcharged, and thus harmed, when they acquired their round thermostat. But a homeowner who has sold her home has already been compensated for any harm she suffered. Even if she was overcharged when she bought the home directly from the builder, she passed on that overcharge when she sold her home to the subsequent buyer. As a result, she has already been compensated for the overcharge; further recovery in this case would amount to a windfall. On this narrow issue, therefore, the court agrees with defendant that the class should not include consumers who purchased their home directly from the builder but who have since sold their home.

For these reasons, the class definition is amended as follows: The class includes consumers who purchased a new home directly from the builder so long as they are still the owner of that home. This sentence should be included in the class definition set forth in the notice. Otherwise the class definition should be the one proposed in the complaint (as modified by agreement of the parties).

The second issue involves the manner of notice. Vermont Civil Procedure Rule 23(c)(2) provides that members of the class are entitled to "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." In general, this means that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 7AA Wright, Miller, Kane & Marcus, Federal Practice and Procedure: Civil 3d § 1786 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Notice is especially important in class actions such as this one because the judgment will be binding against all the class members who do not specifically exclude themselves from the suit, even if they are "absent" and thus do not recover any benefits from the suit. As a leading treatise explains:

> Without the notice requirement it would be constitutionally impermissible to give the judgment binding effect against the absent class members. The notice serves to inform absentees who otherwise might not be aware of the proceeding that their rights are in litigation so that they can take whatever steps they deem appropriate to make certain that their interests are protected. In

> this way, it guarantees each class member an opportunity to have a day in court or, at least, to oversee the conduct of the action by the representatives.

7AA Federal Practice and Procedure, *supra*, at § 1786. With these considerations in mind, the court turns to the forms of notice proposed by the parties.

First, the parties have agreed to provide a first-class mailing to any potential class member who can be identified with reasonable effort. This is required by Rule 23(c)(2).

Second, the parties have agreed to publish notices in the *Burlington Free Press* and the *Rutland Herald* on two separate occasions, on the theory that, together, these two newspapers "cover both the northern and southern portions of the state." In this court's view, if publication is limited to these two newspapers, the notice is not likely to apprise all interested parties of the pendency of the action. As the complaint makes clear, the class includes all similarly-situated consumer purchasers residing in the State of Vermont. Although the *Free Press* and the *Herald* are important newspapers in this state, they are not necessarily the most widely-read and relied-upon newspapers in all parts of the state. Other important and widely-read papers exist in the Northeast Kingdom, in the Upper Valley, and in the southern counties. For that reason, the court will require plaintiff to publish two separate notices in each of the following newspapers:

1. *Burlington Free Press*
2. *Rutland Herald*
3. *Caledonian Record*
4. *Valley News*
5. *Bennington Banner*
6. *Brattleboro Reformer*

Publication of notice in each of these newspapers is necessary to ensure that consumers in all parts of the state have an opportunity to learn of the pendency of the action and to make an informed decision about whether or not to participate in the class. *Mullane*, 339 U.S. at 314; see also 3 Newberg on Class Actions § 8:2 (4th ed.) (explaining that judges have discretion in every case to determine what efforts to identify and notify class members are reasonable under the circumstances of the case).

Third, the parties have agreed to publish notice of the lawsuit on a website that is created and maintained by the claims administrator. A dispute has arisen, however, as to whether another notice must be posted on Honeywell's corporate website. Plaintiff argues that such notice is necessary to apprise consumers of the pendency of the lawsuit. Defendant argues that such notice is not reasonably calculated to reach potential class members because its website is designed to advertise its many products to a worldwide audience (rather than to advertise round thermostats to Vermonters) and that, in any event, it does not sell to individual consumers through the website.[1]

[1] The court has specifically avoided visiting the Honeywell website for reasons related to the prohibition against *ex parte* investigations into the facts of case. So the court does not know, for example, whether Honeywell actually sells to consumers or whether Honeywell posts notices of its other class-action lawsuits on the website.

For two reasons, the court does not find it necessary to post notice of this class action on the Honeywell corporate website. The primary reason is that Vermont consumers seeking information about round thermostats are more likely to begin their internet search by visiting a search engine such as Google rather than by going directly to the Honeywell website. Presumably the website created by the claims administrator will appear in the internet search results. Best practices should be used to ensure that the website is named and tagged in such a way that its nature will be readily apparent in internet searches.

Secondarily, the court has little interest in policing the Honeywell corporate website to ensure that the notice is adequately visible. Honeywell has represented that it sells many products in many countries, and that it would be disproportionate to insist that the company post notice on its front page regarding this class action, which involves one of its products in one of its many sales territories. Moving beyond that to specify where on the interior pages notice should be posted would quickly amount to micromanagement. It makes much more sense to post the notice on a separate, dedicated website that will be readily discoverable through use of an internet search engine.

The court would prepare its own class-certification order and notice in response to this order except that the court is under the impression that the parties have agreed on further refinements to the form of the order and the notice since the last submission to the court. For that reason, the parties shall submit a final form of the class-certification order and the class notice to the court by July 28, 2011.

SO ORDERED.

Dated at Chelsea, Vermont this 11 day of July, 2011.

Harold E. Eaton, Jr.
Superior Court Judge