

2012

## Tearing Down a House of Coupons: CAFA's Effect on Class Action Settlements

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### Bluebook Citation

T. James Power, Comment, *Tearing Down a House of Coupons: CAFA's Effect on Class Action Settlements*, 9 U. St. Thomas L.J. 906 (2012).

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## COMMENT

# TEARING DOWN A HOUSE OF COUPONS: CAFA'S EFFECT ON CLASS ACTION SETTLEMENTS

T. JAMES POWER\*

### INTRODUCTION

In *Ramsey v. Nestle Waters North America, Inc.*, plaintiffs filed a class action lawsuit against Poland Springs, alleging the company's bottled water did not actually "come from a spring deep in the woods of Maine" as advertised.<sup>1</sup> The parties quickly agreed to a settlement that provided class members discounts on Poland Springs' water and \$2.75 million to charities.<sup>2</sup> While class members received coupons for the very water that allegedly caused them harm, class counsel received \$1.35 million in attorneys' fees.<sup>3</sup> This settlement illustrates the main problem with coupon settlements: class members receive coupons of little value while their attorneys collect enormous fees.

Coupon settlements are agreements to dismiss a lawsuit in exchange for discounts on the defendant's products or services.<sup>4</sup> Coupon settlements

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\* University of Wisconsin-Madison, B.A. 2007; University of St. Thomas, J.D. 2012. The author would like to thank Dean Tom Mengler for his thoughtful comments and assistance in selecting this topic and writing this Comment, the University of St. Thomas Law Journal staff for their hard work during the editing process, and Professor Neil Hamilton who has served as a mentor and a role model throughout law school and the start of his legal career. He would also like to thank his family and his wonderful wife Eliana who have provided him love, support, and encouragement. The views in this Comment are those of the author and should not be attributed to his employer.

1. S. REP. NO. 109-14, at 17 (2005).

2. *Id.*

3. *Id.*

4. Laurens Walker, *The Consumer Class Action Bill of Rights: A Policy and Political Mistake*, 58 HASTINGS L.J. 849, 859 (2007); Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, LAW & CONTEMP. PROBS., Autumn 1997, at 102, 108 ("A coupon settlement is a settlement where the defendant creates a right for class members to obtain a discount on future purchases of the defendant's products or services. The right to receive a discount is the consideration class members receive instead of an immediate cash payment. The defendant receives a release from legal claims and the benefit of the consumers' increased incentives to purchase one of

are not inherently flawed<sup>5</sup> and can be an effective way to resolve consumer class action lawsuits.<sup>6</sup> But, they have been frequently abused and manipulated, causing widespread criticism and prompting Congress to address the issue in the Class Action Fairness Act of 2005 (CAFA).<sup>7</sup> CAFA proposes to

(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices.<sup>8</sup>

To accomplish these goals, CAFA regulates federal class action lawsuits in three significant ways:<sup>9</sup> First, CAFA extended diversity jurisdiction to permit more class action lawsuits to be heard in federal court.<sup>10</sup> Second, the Act eased the requirements to remove class actions to federal court.<sup>11</sup> Third, CAFA enacted the Consumer Class Action Bill of Rights.<sup>12</sup>

The Consumer Class Action Bill of Rights regulates settlements that provide little benefit to class members while their attorneys receive large fees.<sup>13</sup> To address this problem, CAFA limits attorneys' fees in coupon settlements, requires court approval of coupon settlements, and compels defendants to notify public officials of proposed settlements.<sup>14</sup>

Despite widespread criticism, coupon settlements can provide real value to class members when used appropriately and can be effective tools to remedy consumer class action claims. This Comment argues that while CAFA has effectively addressed the abuses of coupon settlements, it may prevent coupon settlements in situations where they could provide real value to class members. Part I of the Comment discusses the historic abuses and benefits of coupon settlements. Part II explains how CAFA responded to the coupon settlement manipulations. Part III examines how courts have

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its products or services.”). Coupon settlements also may include in-kind settlements that provide customers free products or services. *See infra* Part III.A.

5. James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443,1444–45 (2005).

6. *Id.*

7. S. REP. NO. 109-14, at 5.

8. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b), 119 Stat. 4 (2005).

9. Allan Kanner & M. Ryan Casey, *Consumer Class Actions After CAFA*, 56 DRAKE L. REV. 303, 305 (2008).

10. *See* 28 U.S.C. § 1332(d) (2012); Kanner & Casey, *supra* note 9, at 305; Steven M. Puiszis, *Developing Trends with the Class Action Fairness Act of 2005*, 40 J. MARSHALL L. REV. 115, 121–22 (2006).

11. *See* 28 U.S.C. § 1453(c); Kanner & Casey, *supra* note 9, at 305; Puiszis, *supra* note 10, at 148–49.

12. *See* 28 U.S.C. §§ 1711–15 (2006); Kanner & Casey, *supra* note 9, at 305. This Comment will not discuss the jurisdictional provisions of CAFA. Rather, it will focus on the provisions of the Consumer Class Action Bill of Rights.

13. S. REP. NO. 109-14, at 5 (2005).

14. *See* 28 U.S.C. §§ 1712, 1715.

interpreted CAFA's provisions, specifically advocating that courts adopt a broad definition of coupon settlements and discussing the level of scrutiny courts have applied when reviewing coupon settlements. Finally, Part IV analyzes CAFA's effect on coupon settlements.

## I. A BACKGROUND ON COUPON SETTLEMENTS

Coupon settlements are not fundamentally unfair. Rather, if structured correctly, coupon settlements can be an effective tool to resolve class action lawsuits.<sup>15</sup> Nevertheless, throughout their history, coupon settlements have been manipulated to give lawyers massive fees and class members little benefit.<sup>16</sup>

### A. *The Problems of Coupon Settlements*

Coupon settlements have been criticized because they often (1) fail to provide meaningful compensation to class members, (2) do not deter defendants, (3) force class members to do business with defendants,<sup>17</sup> and (4) promote collusion between class counsel and defendants.

#### 1. *Failure to Meaningfully Compensate Class Members*

Coupon settlements can be manipulated to deny meaningful compensation to class members.<sup>18</sup> The value of a coupon settlement to class members is not the face value of the coupons issued but rather the value of the coupons actually redeemed.<sup>19</sup> If class members do not use the coupons, they receive no value from the settlement.<sup>20</sup> Although figures vary, some studies show class members redeem 26.3% of coupons issued in settlements.<sup>21</sup> Redemption rates, however, are often far smaller.<sup>22</sup> For example, in *In re Cuisinart Food Processor Litigation*, class members redeemed only 0.54% of the coupons.<sup>23</sup> In *Perish v. Intel Corp.*, class members used only 150 of

15. Tharin & Blockovich, *supra* note 5, at 1444–45.

16. Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1344 (2005).

17. Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 GEO. J. LEGAL ETHICS 1395, 1397 (2005) [hereinafter Leslie, *The Need to Study*].

18. Tharin & Blockovich, *supra* note 5, at 1445. *But see* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105, 152 (2006) (advocating that critics should evaluate class action settlements based on their deterrent effect, not how well they compensate class members).

19. *See* Hantler & Norton, *supra* note 16, at 1347.

20. *See id.*

21. *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1035 (2002) [hereinafter Leslie, *A Market-Based Approach*].

22. *See* Tharin & Blockovich, *supra* note 5, at 1445 (suggesting that redemption rates may be as low as one to three percent); Hantler & Norton, *supra* note 16, at 1347 (describing a case involving ITT Financial Corporation where only 2 of the 96,754 coupons issued were redeemed).

23. Tharin & Blockovich, *supra* note 5, at 1447.

the 500,000 coupons distributed for a fifty-dollar discount on microprocessors.<sup>24</sup>

Defendants keep redemption rates low by incorporating restrictions into coupon settlements.<sup>25</sup> A common restriction limits class members' ability to transfer coupons.<sup>26</sup> If class members cannot transfer coupons, they cannot sell their coupons to secondary markets for cash.<sup>27</sup> As a result, if class members do not want to use the coupon, it is wasted, and the class members receive no value.<sup>28</sup>

Defendants restrict the transferability of coupons with express transfer limitations and short expiration dates.<sup>29</sup> Express transfer restrictions may prohibit or limit the transferability of the coupon<sup>30</sup> while expiration dates make coupons less attractive to secondary purchasers because they reduce secondary markets' ability to use coupons.<sup>31</sup> As a result, restrictions on transferability often limit, if not completely eliminate, class members' ability to sell the coupon to secondary markets.<sup>32</sup>

Restrictions on aggregation, products, and redemption also reduce the value of coupons.<sup>33</sup> Restrictions on aggregation prevent class members from using coupons with other deals, controlling the amount of the discount.<sup>34</sup> Product restrictions limit the products to which the coupons apply (often inferior or very expensive goods), making the coupon less attractive to class members.<sup>35</sup> Redemption restrictions make coupons difficult to

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24. *Id.* at 1448.

25. Leslie, *A Market-Based Approach*, *supra* note 21, at 1005; Hantler & Norton, *supra* note 16, at 1346–47.

26. Leslie, *A Market-Based Approach*, *supra* note 21, at 1015; J. Brendan Day, Comment, *My Lawyer Went to Court and All I Got Was This Lousy Coupon! The Class Action Fairness Act's Inadequate Provision for Judicial Scrutiny Over Proposed Coupon Settlements*, 38 SETON HALL L. REV. 1085, 1100 (2008).

27. Leslie, *A Market-Based Approach*, *supra* note 21, at 1018.

28. *Id.*

29. Leslie, *The Need to Study*, *supra* note 17, at 1403; *see* Severin Borenstein, *Settling for Coupons: Discount Contracts as Compensation and Punishment in Antitrust Lawsuits*, 39 J.L. & ECON. 379, 381 (1996) (describing the value reducing effect of short expiration dates).

30. Leslie, *A Market-Based Approach*, *supra* note 21, at 1017; *see* Tharin & Blockovich, *supra* note 5, at 1447.

31. Leslie, *A Market-Based Approach*, *supra* note 21, at 1072 (describing that restrictions such as expiration dates reduce value to secondary markets); Borenstein, *supra* note 29, at 381–82. Even without restrictions on transferability, selling coupons to a secondary market may be costly and inefficient. Miller & Singer, *supra* note 4, at 108.

32. Leslie, *A Market-Based Approach*, *supra* note 21, at 1015–17; *see* Day, *supra* note 26, at 1100.

33. Leslie, *A Market-Based Approach*, *supra* note 21, at 1018, 1021–22, 1024; *see also* Tharin & Blockovich, *supra* note 5, at 1447 (describing most coupons as “burdensome, restrictive and confusing”).

34. Leslie, *A Market-Based Approach*, *supra* note 21, at 1020–21; *see* Day, *supra* note 26, at 1100.

35. Leslie, *A Market-Based Approach*, *supra* note 21, at 1024, 1027–28; *see* Day, *supra* note 26, at 1100.

use.<sup>36</sup> For example, defendants often require class members to fill out paper work or present receipts to redeem the coupons.<sup>37</sup> As a result, many class members do not bother to go through the process to obtain the coupons.<sup>38</sup> In effect, these restrictions all work to lower redemption rates and reduce the value of the coupons.<sup>39</sup>

The coupon settlement in *In re Domestic Air Transportation Antitrust Litigation* illustrates the effects of these restrictions. In the action, the court approved a combined settlement for \$50 million in cash and \$408 million in travel certificates, which provided discounts on airline tickets.<sup>40</sup> The certificates, however, had many restrictions. Class members could only transfer the certificates once,<sup>41</sup> eliminating the ability to sell the certificates to a secondary market.<sup>42</sup> Class members could also not use the travel certificates in conjunction with other promotions.<sup>43</sup> Finally, the certificates were not valid during peak travel times, such as Thanksgiving, Christmas, and New Year's.<sup>44</sup> As a result, the coupons were not attractive to class members, and less than ten percent of the certificates were redeemed.<sup>45</sup>

## 2. Failure to Deter Defendants

Coupon settlements, moreover, often fail to deter misconduct because they do not punish or “disgorge ill-gotten gains from the defendant.”<sup>46</sup> Conversely, due to low redemption rates, defendants are largely not affected by coupon settlements.<sup>47</sup>

Even if class members redeem coupons, they promote defendants' products and increase sales.<sup>48</sup> Essentially, the settlements induce class members to buy products they would not have bought without the coupon, increasing sales.<sup>49</sup> For example, CAFA's legislative history cites a case where plaintiffs accused a cruise line of collecting excessive dock

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36. Leslie, *A Market-Based Approach*, *supra* note 21, at 1023; Day, *supra* note 26, at 1100.

37. Leslie, *A Market-Based Approach*, *supra* note 21, at 1023.

38. *Id.*

39. *Id.* at 1035; Day, *supra* note 26, at 1100.

40. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 305, 308 (N.D. Ga. 1993).

41. *Id.* at 309.

42. Leslie, *A Market-Based Approach*, *supra* note 21, at 1017.

43. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 331.

44. *Id.* at 331 n.40; Leslie, *A Market-Based Approach*, *supra* note 21, at 1025.

45. Tharin & Blockovich, *supra* note 5, at 1446; *see* Day, *supra* note 26, at 1100.

46. Leslie, *The Need to Study*, *supra* note 17, at 1398; Day, *supra* note 26, at 1086–87.

47. Leslie, *A Market-Based Approach*, *supra* note 21, at 1007.

48. Leslie, *The Need to Study*, *supra* note 17, at 1397. Defendants often structure settlement coupons like any other promotional campaign that uses coupons to promote their products. Leslie, *A Market-Based Approach*, *supra* note 21, at 1006–07; David R. Koch, *Clipping Coupons*, ORANGE COUNTY L., July 2005, at 46, 46. *See also In re Mex. Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001) (“[C]oupons serve as a form of advertising for the defendants.”).

49. Leslie, *A Market-Based Approach*, *supra* note 21, at 1006, 1012.

charges.<sup>50</sup> Before the case settled, the defendant went out of business.<sup>51</sup> Nevertheless, the parties structured the settlement so class members could receive discounts on cruises from another independent company.<sup>52</sup> Although the independent company issuing the coupons faced no liability, they agreed to provide the discounts because they viewed it as a promotional scheme, not a punishment.<sup>53</sup>

Defendants can also structure coupons to ensure they make a marginal profit on each sale. Defendants do this by either raising prices following settlements to negate the coupon's effect<sup>54</sup> or controlling the amount of the discount. Furthermore, defendants only lose money on coupon settlements when class members use coupons to buy products that they would have bought without the coupon.<sup>55</sup> In this situation, defendants lose money because they would have sold the product to the class member at full price without the coupon. Therefore, the coupon saves the class member money and reduces the defendant's profits.<sup>56</sup> Conversely, if a coupon attracts a new customer to purchase the product, the company benefits because the customer would not have purchased it without the coupon, increasing the defendant's sales. Nevertheless, as discussed above, both situations result in a marginal profit for the defendant.<sup>57</sup>

### 3. *Forcing Class Members to Do Business with Defendants*

Coupon settlements are typically only available for defendants' products.<sup>58</sup> Therefore, to benefit from the settlements, class members must be willing to do business with defendants.<sup>59</sup> But, many class members refuse to do business with defendants who have just engaged in misconduct. For example, in a suit against General Mills, class members sued the company because the oats used to make Cheerios allegedly came into contact with improper pesticides.<sup>60</sup> In response, the parties settled, and class members received a coupon for more Cheerios.<sup>61</sup> Therefore, to obtain relief, class members not only needed to do business with the company that allegedly harmed them, but they also had to buy the allegedly contaminated product.

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50. S. REP. NO. 109-14, at 16 (2005).

51. *Id.*

52. *Id.*

53. *Id.*

54. *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001); *see* Borenstein, *supra* note 29, at 381–82.

55. Leslie, *A Market-Based Approach*, *supra* note 21, at 1007.

56. *Id.* at 1008.

57. *Id.*; Borenstein, *supra* note 29, at 381. For a discussion on the economics of coupon settlements, *see id.* at 381–99.

58. Leslie, *A Market-Based Approach*, *supra* note 21, at 1028; Koch, *supra* note 48, at 46.

59. Walker, *supra* note 4, at 860.

60. S. REP. NO. 109-14, at 20 (2005); Day, *supra* note 26, at 1104.

61. S. REP. NO. 109-14, at 20; Day, *supra* note 26, at 1104.

Class members also feel they should not have to spend money to benefit from a settlement.<sup>62</sup> This is especially problematic when the coupon is only valid for expensive products.<sup>63</sup> In such situations, class members may not want to spend the money to use the coupon and are essentially excluded from relief.<sup>64</sup> For example, in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, defendants offered class members coupons for a one thousand dollar discount on a General Motors or Chevrolet truck.<sup>65</sup> Here, the benefit would only be available to class members who were willing to buy another truck; and, consequently, the court rejected the settlement.<sup>66</sup>

#### 4. *Class Counsel's and Class Members' Interests Conflict*

##### a. *Coupon Settlements Present Opportunities for Collusion*

Class counsel are considered the “guardians of the class”<sup>67</sup> and have a duty to protect class members from settlements that provide little or no value. Nevertheless, coupon settlements present opportunities for class counsel to advance their own interests at the expense of class members.<sup>68</sup> In such situations, class counsel may structure coupon settlements so they receive large fees while class members receive little value.<sup>69</sup>

In most class action lawsuits, class counsel and class members' interests are aligned. Class counsel often receive a percentage of the total class recovery. Therefore, it is in both class counsel and class members' best interest to obtain the largest possible settlement.<sup>70</sup> But, coupon settlements separate the interests of class counsel and class members.<sup>71</sup> Prior to CAFA, class counsel's attorneys' fees in coupon settlements were based on the total value of the coupons offered to class members, not the value of the coupons

62. Leslie, *A Market-Based Approach*, *supra* note 21, at 1029.

63. Hantler & Norton, *supra* note 16, at 1348.

64. Leslie, *A Market-Based Approach*, *supra* note 21, at 1029.

65. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 780 (3d. Cir. 1995); *see also* Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 472–77 (1996) (describing the problems of the proposed settlement).

66. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 808; Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 88–89 (2003).

67. Leslie, *The Need to Study*, *supra* note 17, at 1398.

68. *Id.*; *see* Miller & Singer, *supra* note 4, at 98; Lisa M. Mezzetti & Whitney R. Case, *The Coupon Can Be the Ticket: The Use of “Coupon” and Other Non-Monetary Redress in Class Action Settlements*, 18 GEO. J. LEGAL ETHICS 1431, 1439 (2005).

69. Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 ARIZ. L. REV. 1009, 1016 (2008); Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1598–99 (2008).

70. Leslie, *The Need to Study*, *supra* note 17, at 1398.

71. *Id.*; *see also* Tharin & Blockovich, *supra* note 5, at 1447–48 (describing settlements where class counsel's and class members' interests conflicted).

redeemed by the class.<sup>72</sup> Therefore, class counsel had no incentive to ensure that class members actually redeemed or received value from the coupons.<sup>73</sup> As long as the face value of the coupons offered was high, class counsel would receive large fees.<sup>74</sup> Defendants also readily paid high attorneys' fees so class counsel would agree to a settlement consisting of low-valued coupons.<sup>75</sup> Consequently, many argue that class counsel and defendants collude to inflate the face value of coupons while imposing restrictions on the coupons that undercut the actual value of the settlements.<sup>76</sup>

For example, in *In re Domestic Air Transportation Antitrust Litigation*, both parties argued that the actual value of the travel certificates was \$408 million (the face value of the discounts offered)<sup>77</sup> and that redemption rates would be fifty to seventy-five percent.<sup>78</sup> Nevertheless, as discussed above, the settlement included burdensome restrictions on transferability, aggregation, and products, which greatly reduced the value of the coupons.<sup>79</sup> Despite class counsel and defendants' assurances that the settlement provided actual value to class members, less than ten percent of the coupons were redeemed.<sup>80</sup> Class counsel, however, received over \$14 million in attorneys' fees.<sup>81</sup>

Although the court did not find evidence of collusion, class counsel and defendants grossly inflated the value of the coupons.<sup>82</sup> Class counsel and defendants exaggerated the value and the expected redemption rates despite the numerous restrictions that negated the value of the coupons. Critics argue that the settlement was "primarily 'a promotional scheme to induce travelers to fly' during off-peak travel periods and 'a deal' worked out so class counsel could reap their fees, calculated at between \$500 and \$1,400 an hour."<sup>83</sup> Even if there was no explicit collusion between the parties, at the very least, class counsel's interests were not aligned with the interests of class members.

72. Leslie, *The Need to Study*, *supra* note 17, at 1398.

73. *Id.*; see Tharin & Blockovich, *supra* note 5, at 1445 (explaining that attorneys often unrealistically inflate estimated redemption rates and ignore contrary evidence).

74. Leslie, *The Need to Study*, *supra* note 17, at 1398; Day, *supra* note 26, at 1099.

75. Leslie, *The Need to Study*, *supra* note 17, at 1398.

76. *Id.*; Hantler & Norton, *supra* note 16, at 1344 (stating that class counsel and defendants could work together to "inflate[ ] the apparent value of the coupons by overstating the number of anticipated class members so that the cumulative value of the settlement would be artificially high when it was used as the basis for plaintiffs' lawyers' fees").

77. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 320 (N.D. Ga. 1993). Defendants asserted that the value of the settlement was the face value of the coupons, and class counsel argued that the "certificates have a 'near cash' value." *Id.*

78. *Id.* at 323.

79. *Id.* at 309, 331 n.40; see Leslie, *A Market-Based Approach*, *supra* note 21, at 1017, 1025.

80. Tharin & Blockovich, *supra* note 5, at 1445-46.

81. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 306.

82. See Hantler & Norton, *supra* note 16, at 1344-45.

83. *Id.* at 1345.

*b. A Lack of Accountability in Lawyer Driven Litigation*

Furthermore, because coupon settlements and class actions are essentially “clientless law,”<sup>84</sup> class counsel’s interest often goes unchecked. Class counsel typically initiate litigation in coupon settlements, not their clients.<sup>85</sup> Class counsel look for minor corporate misconduct and then will find someone to represent the class (often a friend or colleague).<sup>86</sup> Consequently, class counsel are in complete control of the lawsuit, not their clients.<sup>87</sup> This lack of accountability to clients promotes the separation of class counsel and clients’ interests.<sup>88</sup> As “the client becomes only a distant bystander,” class counsel’s own interest may supersede the interests of the class.<sup>89</sup> Consequently, class counsel could receive fees while class members receive coupons of little value.

*B. Potential Benefits of Coupon Settlements*

Despite their history of abuse and manipulation, coupon settlements can serve as a valuable tool to settle consumer class action lawsuits, provide plaintiffs meaningful relief, and deter defendants from future misconduct.<sup>90</sup> Coupon settlements effectively compensate class members when (1) the face value of the coupons exceeds the class’s claim and (2) class members either use or sell the coupons.<sup>91</sup> Because coupon settlements are not overly burdensome on defendants, coupon settlements allow defendants to provide coupons to plaintiffs with a face value over the cash amount of their claims.<sup>92</sup> When the alleged damages are minimal, defendants can provide coupons that provide larger discounts than the few dollars that class members will receive from a cash settlement.<sup>93</sup>

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84. *Id.*

85. *Id.*

86. *Id.*

87. Leslie, *A Market-Based Approach*, *supra* note 21, at 1041.

88. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 232 (1983) (“The possibility of collusive settlements grows in direct proportion to the attorney’s ‘independence’ from his client. The naked self interest of the bounty hunter lies in his fee, not the recovery to the class.”).

89. *See id.*

90. Miller & Singer, *supra* note 4, at 130–31; *see also* Borenstein, *supra* note 29, at 402 (advocating that coupon settlements should not have an expiration date, a limit on aggregation, and should not be pooled across multiple defendants); Tharin & Blockovich, *supra* note 5, at 1445 (“If structured correctly, coupon settlements can work.”).

91. Hantler & Norton, *supra* note 16, at 1344.

92. *See* Miller & Singer, *supra* note 4, at 114–15 (providing examples of how coupon settlements potentially benefit all parties of the settlement); Borenstein, *supra* note 29, at 403; Mezzetti & Case, *supra* note 68, at 1433; William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 832 (2003) (noting that defendants may also offer larger awards in coupons to retain the business of the plaintiff customers). For a discussion on why coupon settlements are less burdensome on defendants, *see infra* Part I.A.2.

93. Day, *supra* note 26, at 1122; Mezzetti & Case, *supra* note 68, at 1433; Henderson, *supra* note 92, at 832.

Alternatively, if coupons are transferable, class members can sell the coupons on a secondary market.<sup>94</sup> Specifically, class members would sell the coupons to market makers who then resell the coupons to the secondary market.<sup>95</sup> As a result, class members can resell their coupons for value and still benefit from coupons even if they choose not to redeem them.

Furthermore, coupon settlements are effective when defendants are facing bankruptcy.<sup>96</sup> If a defendant is experiencing financial hardships, an expensive settlement could force the defendant into bankruptcy.<sup>97</sup> Since class members are non-preferential creditors, they likely will receive little to no compensation if defendants file bankruptcy before satisfying the settlement.<sup>98</sup> Coupon settlements, however, may allow defendants to avoid bankruptcy because coupons impose lighter financial burdens on defendants than cash settlements.<sup>99</sup> Accordingly, class members will receive some value for their claims “rather than a place in line at bankruptcy court.”<sup>100</sup>

Even though coupon settlements are less burdensome on defendants, coupon settlements still deter misconduct.<sup>101</sup> When participating in a coupon settlement, defendants must “internalize the costs of harm” to the class<sup>102</sup> and pay damages in the form of lost profits. Even if redemption rates are low, defendants must pay the attorneys’ fees and the administrative costs required to carry out the settlement.<sup>103</sup> Lost profits and the threat of expensive, prolonged litigation act to deter future misconduct.

Coupon settlements are also an effective means to resolve weaker class action claims.<sup>104</sup> Litigating even weak class action lawsuits is extremely expensive.<sup>105</sup> Therefore, defendants have an incentive to settle as quickly (and as cheaply) as possible.<sup>106</sup> Because coupon settlements are less burdensome on defendants, they are an attractive option to dispose of weaker claims without incurring high litigation costs.<sup>107</sup> Although class members

94. See Leslie, *A Market-Based Approach*, *supra* note 21, at 1007.

95. *Id.* at 1017; Tharin & Blockovich, *supra* note 5, at 1443. A market maker is a company that creates a secondary market for coupons, buys the coupons from class members, and then resells the coupons to the secondary market. *Id.*

96. Day, *supra* note 26, at 1099; Mezzetti & Case, *supra* note 68, at 1433–34.

97. Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 *TUL. L. REV.* 1593, 1614 (2006).

98. Miller & Singer, *supra* note 4, at 117.

99. See Sherman, *supra* note 97, at 1614.

100. Mezzetti & Case, *supra* note 68, at 1434.

101. Miller & Singer, *supra* note 4, at 113.

102. *Id.*

103. Leslie, *A Market-Based Approach*, *supra* note 21, at 1038 n.240.

104. Jennifer Gibson, *New Rules for Class Action Settlements: The Consumer Class Action Bill of Rights*, 39 *LOY. L.A. L. REV.* 1103, 1121 (2006).

105. See *id.*

106. See Charles B. Casper, *The Class Action Fairness Act’s Impact on Settlements*, *ANTI-TRUST*, Fall 2005, at 26, 26 (describing the pressure on defendants to settle even weak class action lawsuits).

107. See Gibson, *supra* note 104, at 1109.

do not receive considerable compensation, they get at least some relief for their marginal claims.

To ensure that coupon settlements are beneficial, class counsel, defendants, and the judiciary must work together to construct a settlement that provides real value to class members. Not only must coupons be for products that class members are willing to buy, they should not be limited with burdensome restrictions or redemption provisions. Furthermore, parties should consider the nature of the claim and the financial status of defendant. If parties create a settlement that focuses on the interest of class members, coupons could be an effective tool to settle the claim and compensate class members.

## II. THE RESPONSE TO COUPON SETTLEMENTS ABUSES

### A. Congressional Concern over Coupon Settlements

Despite the potential benefits of coupon settlements, their abuses sparked criticism from Congress.<sup>108</sup> Notwithstanding the numerous critiques of coupon settlements discussed above, Congress focused on settlements where class counsel's fees were disproportionate to the class's recovery.<sup>109</sup> Specifically, CAFA's legislative history criticized cases where class counsel received large fees while class members received only "promotional coupons to purchase more products."<sup>110</sup>

For example, the legislative history noted that the attorneys' fees in *In re Kansas Microsoft Litigation* were disproportionate to class members' recovery.<sup>111</sup> In this case, class members sued Microsoft for price fixing, and the settlement provided coupons for a five to ten dollar discount on Microsoft products.<sup>112</sup> Due to product restrictions and complex redemption requirements, only a small number of class members actually redeemed the coupons.<sup>113</sup> But, class counsel requested hundreds of millions of dollars in fees.<sup>114</sup>

Although *In re Kansas Microsoft Litigation* involves actual coupons, it is important to note that CAFA's legislative history cites abuses in various types of in-kind settlements, not just coupon settlements.<sup>115</sup> For example, the legislative history cites cases where class members received free products without a coupon.<sup>116</sup> Furthermore, in *Shields v. Bridgestone/Firestone*,

108. See S. REP. NO. 109-14, at 15-21 (2005).

109. *Id.* at 14-15.

110. *Id.* at 15.

111. *Id.* at 16.

112. *Id.*

113. Day, *supra* note 26, at 1102.

114. S. REP. NO. 109-14, at 16. The actual attorneys' fees received were never reported. Day, *supra* note 26, at 1102.

115. See S. REP. NO. 109-14, at 11-16.

116. *Id.* at 17-18.

class members received injunctive relief.<sup>117</sup> This is important when examining the scope of CAFA; by including various types of in-kind settlements, the legislative history suggests that CAFA attempts to protect against a broad range of in-kind settlement abuses.

### B. Consumer Class Action Bill of Rights

To address the abuses of coupon settlements, Congress passed the Consumer Class Action Bill of Rights as part of CAFA.<sup>118</sup> The Consumer Class Action Bill of Rights specifically restricts coupon settlements in four major ways:<sup>119</sup> First, the Act regulates attorneys' fees in coupon settlements.<sup>120</sup> Second, CAFA requires courts to approve coupon settlements.<sup>121</sup> Third, courts have the discretion to distribute unredeemed coupons to charitable and governmental organizations.<sup>122</sup> Fourth, defendants must notify appropriate public officials of proposed settlements.<sup>123</sup>

### C. Attorneys' Fees Under CAFA

CAFA primarily addresses the abuses of coupon settlements by regulating attorneys' fees in coupon settlements.<sup>124</sup> When a settlement provides class members with coupons, class counsel's fee award attributed to the coupons must be based on the value of the coupons that are actually redeemed.<sup>125</sup> As a result, CAFA changes prior practice where courts calculated attorneys' fees based on the value of the coupons offered to, not redeemed by, the class.<sup>126</sup> CAFA further allows experts to testify on the actual value of the coupons redeemed.<sup>127</sup> Under CAFA, if a settlement agreement issues \$1 million in coupons to class members, but only one-fourth of the coupons are redeemed, class counsel's fee will be based on a recovery of \$250,000, not \$1 million.<sup>128</sup>

CAFA section 1712(a), consequently, realigns class counsel's interest with class members' interests.<sup>129</sup> When coupon settlements are valuable to

117. *Id.* at 15–16.

118. Day, *supra* note 26, at 1105–06.

119. Walker, *supra* note 4, at 859.

120. 28 U.S.C. § 1712(a) (2006).

121. *Id.* § 1712(e).

122. *Id.*

123. 28 U.S.C. § 1715(b) (2006).

124. Day, *supra* note 26, at 1109.

125. 28 U.S.C. § 1712(a) (“If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney’s fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.”).

126. Day, *supra* note 26, at 1099.

127. 28 U.S.C. § 1712(d). Prior to CAFA, however, courts also routinely allowed experts to testify to the value of coupon settlements. Puiszis, *supra* note 10, at 174.

128. See S. REP. NO. 109-14, at 31 (2005). See also Day, *supra* note 26, at 1109–10.

129. Tharin & Blockovich, *supra* note 5, at 1449.

class members, class members will redeem more coupons, and class counsel will receive larger fees. Therefore, class counsel now have an incentive to eliminate restrictions that undercut the value of coupons and reduce redemption rates.<sup>130</sup>

CAFA, however, does not require class counsel to calculate their fees based on a percentage of the coupons that are actually redeemed.<sup>131</sup> Rather, class counsel alternatively may calculate their fees “based upon the amount of time class counsel reasonably expended working in the action.”<sup>132</sup> In other words, class counsel may use the lodestar<sup>133</sup> method with a multiplier to calculate their fees.<sup>134</sup> CAFA, nevertheless, requires the court to approve attorneys’ fees regardless of whether they are based on the percentage recovery or lodestar method.<sup>135</sup>

#### D. Judicial Review of Coupon Settlements

CAFA further requires that courts approve coupon settlements in writing.<sup>136</sup> CAFA requires that, after a hearing, courts must determine that the proposed settlement is “fair, reasonable, and adequate for class members.”<sup>137</sup> Nevertheless, under Federal Rule of Civil Procedure 23(e), courts were already required to conclude that all class action settlements were fair, reasonable, and adequate.<sup>138</sup>

The statute does not explain how § 1712(e) differs from Rule 23(e) or whether it provides a different standard for approving coupon settlements.<sup>139</sup> CAFA’s legislative history, nevertheless, suggests that courts “should consider, among other things, the real monetary value and likely utilization rate of the coupons provided by the settlement.”<sup>140</sup> Courts and commentators disagree on § 1712’s standard for settlement approval and whether it differs from Rule 23(e)(2).<sup>141</sup>

130. Puiszis, *supra* note 10, at 175.

131. 28 U.S.C. § 1712(b)–(c).

132. *Id.* § 1712(b)(1).

133. Under the lodestar method, the court awards fees based on a reasonable hourly rate multiplied by the number of hours worked and an appropriate multiplier. Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1703 (2006).

134. 28 U.S.C. § 1712(b)(2) (“Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney’s fees.”).

135. *Id.*

136. *Id.* § 1712(e).

137. *Id.*

138. FED. R. CIV. P. 23(e)(2) (“If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.”).

139. Kanner & Casey, *supra* note 9, at 306.

140. S. REP. NO. 109-14, at 31 (2005).

141. Kanner & Casey, *supra* note 9, at 306. *See infra* Part III.B.

### E. Treatment of Unredeemed Coupons

Courts may additionally require parties to distribute the value of unredeemed coupons to one or more charitable or governmental organizations.<sup>142</sup> Distributing unredeemed coupons to charities ensures that coupons will not go unused and will have a greater deterrent effect on defendants.<sup>143</sup> Class counsel, however, may not calculate their fees based on the proceeds from these charitable distributions.<sup>144</sup>

### F. Notification of Public Officials

Defendants must also notify public officials of proposed settlements under CAFA. The Act requires that, within ten days of filing the proposed settlement, each defendant participating in the settlement serve a notice of proposed settlement to the “appropriate” Federal and State official of each state in which a class member resides.<sup>145</sup> The appropriate Federal official is usually the U.S. Attorney General.<sup>146</sup> If the defendant, however, is a federal or state depository institution, the person with the primary regulatory or supervisory responsibility over the defendant is the appropriate Federal official.<sup>147</sup> The appropriate State official is the person with “the primary regulatory supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State.”<sup>148</sup> If there is no such official, the state attorney general is the appropriate public official.<sup>149</sup>

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142. 28 U.S.C. § 1712(e) (“The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties.”). Courts, however, already could designate unclaimed coupons to charities under the *cy pres* doctrine. Klonoff & Herrmann, *supra* note 133, at 1704. The *cy pres* doctrine, meaning “as near as,” allows the court to modify an award for a purpose that is closely related to the objectives of the underlying lawsuit. *Id.* at 1718.

143. Klonoff & Herrmann, *supra* note 133, at 1704–05.

144. 28 U.S.C. § 1712(e); *see* Klonoff & Herrmann, *supra* note 133, at 1704.

145. 28 U.S.C. § 1715(b) (2006) (“Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement.”). Notice of the proposed settlement consists of (1) “a copy of the complaint;” (2) “notice of any scheduled judicial hearing in the class action;” (3) any notifications to the class members of their “rights to request exclusion from the class action” or “a statement that no such right exists” and “any proposed settlement of a class action;” (4) “any proposed or final class action settlement;” (5) “any settlement or other agreement” made between the class counsel and defendants; (6) “any final judgment or notice of dismissal;” (7) “the names of class members who reside in each state and the estimated proportionate share of the claims of such members to the entire settlement to that State’s appropriate State official” but if it is not feasible then a reasonable estimate of such information; (8) “any written judicial opinion relating to the materials described under subparagraphs (3) through (6).” *Id.*

146. *Id.* § 1715(a)(1)(A).

147. *Id.* § 1715(a)(1)(B).

148. *Id.* § 1715(a)(2).

149. *Id.*

Additionally, the court must wait at least ninety days after notice is provided to approve or reject the proposed settlement.<sup>150</sup> If defendants fail to provide notification, class members may choose not to be bound by the settlement.<sup>151</sup>

CAFA, however, does not impose obligations or duties on the Federal or State officials or require them to take action.<sup>152</sup> Nor does CAFA expand the authority of the notified public officials.<sup>153</sup> Section 1715 was “designed to ensure that a responsible state and/or federal official receives information about proposed class action settlements and is in a position to react if the settlement appears unfair to some or all class members or inconsistent with applicable regulatory policies.”<sup>154</sup> In effect, CAFA ensures there is an opportunity for independent oversight over coupon settlement.<sup>155</sup>

### III. THE COURT’S APPLICATION OF CAFA

Since CAFA’s enactment, several questions have arisen concerning its application. First, CAFA never defines “coupon settlements,” creating uncertainty regarding the scope of § 1712.<sup>156</sup> Second, courts do not agree on the level of scrutiny required to approve coupon settlements under § 1712(e).<sup>157</sup>

#### A. CAFA’s Definition of Coupon Settlements

Coupon settlements traditionally consist of promotional coupons, vouchers, or discount contracts.<sup>158</sup> But, settlements that provide class members free products or other in-kind relief even without a voucher may be considered a coupon settlement.<sup>159</sup> Problematically, CAFA does not define coupon settlements,<sup>160</sup> and courts disagree whether CAFA applies to only discounts or a broader range of in-kind settlements.<sup>161</sup> Nevertheless, courts should adopt a broad interpretation of coupon settlements to ensure that CAFA prevents the settlement abuses that it was intended to address.

150. *Id.* § 1715(d).

151. *Id.* § 1715(e)(1) (“A class member may refuse to comply with and may choose not to be bound by a settlement agreement or a consent decree in a class action [if proper notice has not been provided].”).

152. *Id.* § 1715(f).

153. *Id.*

154. S. REP. NO. 109-14, at 32 (2005).

155. *Id.* at 34.

156. Kanner & Casey, *supra* note 9, at 305.

157. *See Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 55 (D.D.C. 2010).

158. Leslie, *A Market-Based Approach*, *supra* note 21, at 994.

159. *Id.*

160. *Radosti*, 717 F. Supp. 2d at 54 n.16.

161. Gibson, *supra* note 104, at 1109.

### 1. A Broad Definition of Coupon Settlements

Courts routinely apply CAFA to coupon settlements that include discounts on a defendant's products or services.<sup>162</sup> For example, in *Figueroa v. Sharper Image Corp.*, the Southern District of Florida applied CAFA to a proposed settlement that gave class members nineteen dollar coupons to Sharper Image retail stores, an OzoneGuard to protect against ozone emission, injunctive remedies, and two million dollars in attorneys' fees.<sup>163</sup> Because the nineteen dollar coupons were vouchers redeemable for discounts on future purchases from the defendant, the court found that CAFA applied.

Nevertheless, courts disagree whether CAFA also applies to settlements that provide in-kind relief.<sup>164</sup> In *Synfuel Technologies, Inc. v. DHL Express, Inc.*, although not applying CAFA,<sup>165</sup> the Seventh Circuit discussed whether pre-paid shipping envelopes constituted a coupon settlement under the Act.<sup>166</sup> The court noted "pre-paid envelopes are not identical to coupons, since they represent an entire product, not just a discount on a proposed purchase."<sup>167</sup> But, the court continued to find that pre-paid envelopes "are a form of in-kind compensation that shares some characteristics of coupons, including forced future business with the defendant and, especially for heavier users, the likelihood that the full amount of [the defendant's] gains will not be disgorged."<sup>168</sup> The court, however, did not determine whether pre-paid products are a coupon settlement.<sup>169</sup>

CAFA's legislative history, however, suggests that courts should interpret coupon settlements broadly.<sup>170</sup> The legislative history notes that coupon settlements are settlements where class members receive coupons to purchase products from defendants.<sup>171</sup> But, it continues to provide a list of

162. *In re HP Inkjet Printer Litig.*, No. 5:05-cv-3580, 2011 WL 1158635, at \*5 (N.D. Cal. Mar. 29, 2011).

163. *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1295, 1320 (S.D. Fla. 2007).

164. *See Gibson, supra* note 104, at 1110.

165. CAFA does not apply retroactively; it only applies to cases commenced after February 18, 2005. Walker, *supra* note 4, at 850 n.6. This case was commenced in 2002. *Synfuel Techs., Inc. v. DHL Express, Inc.*, 463 F.3d 646, 648 (7th Cir. 2006).

166. *Synfuel Techs., Inc.*, 463 F.3d at 654.

167. *Id.*

168. *Id. See also Yeagley v. Wells Fargo & Co.*, No. C 05-03403, 2008 WL 171083, at \*8 (N.D. Cal. Jan. 18, 2008) (suggesting that coupon settlements provide class members a discount, not the whole product, and force class members to do business with defendants).

169. *Synfuel Techs., Inc.*, 463 F.3d at 648. Similarly, *Yeagley v. Wells Fargo & Co.* examined a proposed settlement that provided class members with two free credit reports from any agency. *Yeagley*, 2008 WL 171083, at \*2. The court noted that the settlement was arguably a coupon settlement. *Id.* at \*8.

170. *Fleury v. Richemont N. Am., Inc.*, No. C-05-4525 EMC, 2008 WL 3287154, at \*2 (N.D. Cal. Aug. 6, 2008). ("The legislative history . . . suggests that even such a noncash benefit could be a coupon.")

171. S. REP. NO. 109-14, at 16 (2005) ("These settlements include many so-called 'coupon settlements' in which class members receive nothing more than promotional coupons to purchase more products from the defendants.")

abuses in class action settlements that included settlements with vouchers for discounts as well as in-kind relief, such as injunctions and free products, demonstrating coupon settlements should be interpreted broadly.<sup>172</sup>

Furthermore, a broad definition of coupon settlements that includes settlement for in-kind relief is consistent with the purposes of CAFA and is good policy. CAFA states that “[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.”<sup>173</sup> The phrase “or other awards of little or no value” suggests that CAFA’s provisions do not apply solely to settlements with discounts. Rather, CAFA attempts to address abuses in a broader range of in-kind settlements that do not adequately compensate class members.

Lawyers can, moreover, abuse in-kind settlements just as they abused coupon settlements. Like coupon settlements, in-kind settlements may not provide valuable relief to class members, do not disgorge ill-gotten gains from defendants, and require class members to do business with defendants.<sup>174</sup> By extending CAFA to apply to in-kind settlements that have similar effects as coupon settlements, the Act better protects consumers and prevents settlement abuses. Furthermore, it prevents class counsel and defendants from colluding to create in-kind settlements that act like a coupon settlement but do not fall under CAFA. If courts interpret coupon settlements strictly, CAFA will not be able to prevent many of the settlement abuses that it was intended to prohibit.

## 2. *A Restrictive Definition of Coupon Settlements*

Several courts, however, apply CAFA strictly to settlements that involve vouchers or discounts. These courts interpret *Synfuel Technologies* to conclude a “noncash benefit cannot be a coupon if it allows a consumer to buy an *entire* product.”<sup>175</sup> The Seventh Circuit in *Synfuel Technologies*, nonetheless, only compared in-kind relief with coupon settlements. It did not hold whether such relief constituted a coupon settlement under CAFA.<sup>176</sup> Moreover, the court noted that in-kind relief had characteristics of a coupon settlement.<sup>177</sup> Therefore, *Synfuel Technologies* does not limit the scope of CAFA.

172. See *id.* at 16–26; *supra* Part II.A; see also *Fleury*, 2008 WL 3287154, at \*2 (describing the legislative history of CAFA).

173. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4, 4 (2005).

174. *In re HP Inkjet Printer Litig.*, No. 5:05-cv-3580, 2011 WL 1158635, at \*6 (N.D. Cal. Mar. 29, 2011).

175. *Fleury*, 2008 WL 3287154, at \*2. See also *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 54 n.16 (D.D.C. 2010).

176. See *Synfuel Techs., Inc. v. DHL Express, Inc.*, 463 F.3d 646, 654 (7th Cir. 2006).

177. *Id.* at 654.

In *In re HP Inkjet Printer Litigation*, the Northern District of California found coupon settlements “consist[ ] of a ‘discount on another product or service offered by the defendant in the lawsuit.’”<sup>178</sup> To support the proposition, the Northern District of California cites *Fleury v. Richemont North America, Inc.*<sup>179</sup> *Fleury*, however, does not limit the definition of coupon settlements. *Fleury* stated “the legislative history suggests that a coupon is a discount on another product or service offered by the defendant in the lawsuit.”<sup>180</sup> But, *Fleury* continues to find, “the legislative history, however, suggests that even such a noncash benefit could be a coupon.”<sup>181</sup> Therefore, *Fleury* suggests CAFA may extend to a broader set of in-kind settlements.<sup>182</sup> As a result, *In re HP Inkjet Printer Litigation* incorrectly relies on *Fleury* to limit coupon settlements to discounts, undercutting the strength of the decision.

Alternatively, even if a court strictly defines coupon settlements, courts should apply CAFA’s principles to settlements that provide broader in-kind relief.<sup>183</sup> In *Yeagley v. Wells Fargo & Co.*, the Northern District of California did not determine whether the settlement was a coupon settlement under CAFA.<sup>184</sup> But, it found CAFA instructive when evaluating settlements that resemble coupon settlements and examined the settlement with greater scrutiny.<sup>185</sup> *Synfuel Technologies* likewise stated that “even if CAFA was not theoretically applicable, the ‘in-kind compensation’ component was subject to higher scrutiny by the trial court,” the same scrutiny required for coupon settlements under CAFA.<sup>186</sup> Furthermore, *In re HP Inkjet Printer Litigation* held “even if [the settlement] could be distinguished from coupons under CAFA, the statutory provisions are instructive when the benefit to the class is coupon-like.”<sup>187</sup> Therefore, courts that conclude CAFA does not apply to in-kind settlement should still evaluate the settlement using CAFA’s principles.

### B. Judicial Scrutiny Applied to Coupon Settlements Under § 1712(e)

CAFA does not state the level of scrutiny that courts should apply when evaluating coupon settlements under § 1712(e). Many courts have in-

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178. *In re HP Inkjet Printer Litig.*, 2011 WL 1158635, at \*5 (quoting *Fleury*, 2008 WL 3287154, at \*2).

179. *Id.*

180. *Fleury*, 2008 WL 3287154, at \*2 (emphasis added).

181. *Id.*

182. *Fleury*, however, again did not ultimately settle whether CAFA extends to such settlements because the settlement in the case involved a discount. *Id.*

183. See *Synfuel Techs., Inc. v. DHL Express, Inc.*, 463 F.3d 646, 654 (7th Cir. 2006); *Yeagley v. Wells Fargo & Co.*, No. C 05-03403, 2008 WL 171083, at \*9 (Jan. 18, 2008).

184. *Yeagley*, 2008 WL 171083, at \*9.

185. *Id.*

186. *Synfuel Techs., Inc.*, 463 F.3d at 654.

187. *In re HP Inkjet Printer Litig.*, No. 5:05-cv-3580JF, 2011 WL 1158635, at \*6 (Mar. 29, 2011).

terpreted § 1712(e) to require heightened scrutiny.<sup>188</sup> Nevertheless, others have rejected a heightened standard of scrutiny.<sup>189</sup> Although courts have applied two different levels of scrutiny under § 1712(e), both approaches closely examine the bargaining process and the value of the coupon settlement.

### 1. Heightened Scrutiny of Coupon Settlements

Although both § 1712(e) and Federal Rule of Civil Procedure 23(e) require courts to find that a settlement is fair, reasonable, and adequate,<sup>190</sup> several courts apply a heightened standard of scrutiny when evaluating coupon settlements under § 1712(e). Even though *Synfuel Technologies* did not apply CAFA, the Seventh Circuit commented that CAFA requires heightened scrutiny of coupon-based settlements because coupon settlements often provide class counsel large attorneys' fees while class members receive little value.<sup>191</sup> The court in *Figueroa v. Sharper Image Corp.* held that CAFA requires heightened scrutiny of coupon settlements.<sup>192</sup> Although the standard in § 1712 is identical to Rule 23(e), the court applied heightened scrutiny because Congress specifically required courts to find coupon settlements were reasonable under § 1712(e).<sup>193</sup> By requiring courts to approve coupon settlements under § 1712(e), CAFA indicates that courts must give explicit attention to coupon settlements and examine them more closely than other class action settlements.<sup>194</sup> Congress also expressed great concern over coupon settlements, suggesting that courts should review coupon settlements with heightened scrutiny.<sup>195</sup> Furthermore, the majority of state attorneys general disapprove of coupon settlements.<sup>196</sup> As a result, the *Figueroa* court held that "it is against this backdrop that the [court] undertakes her review of the procedural and substantive fairness of the proposed settlement."<sup>197</sup>

The legislative history further supports that § 1712(e) subjects coupon settlements to heightened scrutiny. The Senate Report states that CAFA "implements a consumer bill of rights that requires *greater scrutiny* of both coupon and net loss settlements."<sup>198</sup> Further, the legislative history states that coupon settlements should be "*seriously questioned*" when the attor-

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188. See, e.g., *Synfuel Techs., Inc.*, 463 F.3d at 654.

189. See, e.g., *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 55 (D.D.C. 2010).

190. 28 U.S.C. 1712(e) (2006); FED. R. CIV. P. 23(e).

191. *Synfuel Techs., Inc.*, 463 F.3d at 654.

192. *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1321 (S.D. Fla. 2007).

193. *Id.*

194. See *id.*

195. *Id.* at 1320–21.

196. *Id.* at 1321.

197. *Id.*

198. S. REP. NO. 109-14, at 27 (2005) (emphasis added).

neys' fees are disproportionate to the class recovery.<sup>199</sup> By using the phrases "greater scrutiny" and "seriously questioned," the legislative history indicates that heightened scrutiny is required under § 1712.

### 2. Section 1712(e) and Rule 23(e) Incorporate the Same Standard

Conversely, other courts held that coupon settlements should be evaluated like other class action settlements under Rule 23(e). The Central District of California refused to adopt a heightened scrutiny standard under § 1712(e).<sup>200</sup> Despite acknowledging that coupon settlements are generally disfavored, the *True* court noted that the criticism "does not mean that a coupon settlement can never be approved as fair, adequate, and reasonable."<sup>201</sup> Rather, when evaluating a proposed coupon settlement, *True* found courts "must discern if the value of a specific coupon settlement is reasonable in relation to the value of the claims surrendered."<sup>202</sup>

Furthermore, the court in *Radosti v. Envision EMI, LLC* found that "the judicial scrutiny called for by § 1712(e) is indistinct from the scrutiny required by Rule 23(e), with the understanding that coupon settlements pose a particular risk of unfairness and unreasonableness."<sup>203</sup> Even though the *Radosti* court held that § 1712(e) does not affect the level of scrutiny used to evaluate settlements, it recognized the potential dangers of coupon settlements.<sup>204</sup> As a result, the court found that judges must be cognizant of the abuses of coupon settlements while evaluating settlements under § 1712(e).<sup>205</sup> Therefore, although there is no heightened standard of scrutiny, courts must be critical of coupon settlements to ensure they are not abusive.<sup>206</sup>

### 3. Comparing the Two Approaches

Although the courts appear to apply two different standards to evaluate coupon settlements, the approaches in fact are very similar. *Figueroa* and *Synfuel Technologies* employ heightened scrutiny of coupon settlements while *True* and *Radosti* evaluate coupon settlements under the Rule 23(e) standard with an understanding that coupon settlements are often abused. Both standards are critical of coupon settlements. Furthermore, in applying § 1712, *Figueroa* and *True* rejected the proposed coupon settlements<sup>207</sup>

199. *Id.* at 32 (emphasis added).

200. *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010).

201. *Id.*

202. *Id.* at 1070.

203. *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 55 (D.D.C. 2010).

204. *Id.* at 55–56; *see also True*, 749 F. Supp. 2d at 1069 (describing common critiques of coupon settlements).

205. *See Radosti*, 717 F. Supp. 2d at 56.

206. *See id.*

207. *See True*, 749 F. Supp. 2d at 1083; *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1329 (S.D. Fla. 2007).

while *Radosti* approved the proposed coupon settlement.<sup>208</sup> Although the courts came to different conclusions in *Figueroa* and *Radosti*, they applied similar reasoning.

*a. The Figueroa Settlement*

In *Figueroa*, the Southern District of Florida rejected what it called a “near-perfect coupon settlement,”<sup>209</sup> which provided class members a nineteen dollar coupon at Sharper Image stores.<sup>210</sup> The parties even retained Professor Christopher Leslie to help structure the settlement; and, under Professor Leslie’s suggestions, they eliminated restrictions on transferability, product selection, expiration dates, and aggregation as well as simplified the redemption process.<sup>211</sup>

Nevertheless, the court found the settlement was not the result of “arms-length negotiations” between class counsel and defendants.<sup>212</sup> Although there was no evidence of collusion, the court scrutinized the negotiating process in detail and found that defendants dominated the negotiations because class counsel had little bargaining power.<sup>213</sup> In fact, Professor Leslie’s involvement in the settlement came as a result of the suggestion of class members that objected to the settlement.<sup>214</sup> Additionally, the court found that the settlement did not confer sufficient value to class members because class members had a strong probability of succeeding at trial and felt that the nineteen dollar discount was not fair.<sup>215</sup>

*Figueroa* demonstrates that under heightened scrutiny, the court will meticulously inspect both the bargaining process and the value of the proposed settlement. If the court will not approve a “near-perfect” coupon settlement designed by Professor Leslie, it is hard to imagine a coupon settlement that will pass their standard of heightened scrutiny.

*b. The Radosti Settlement*

In contrast, the *Radosti* court approved a coupon settlement that provided class members two \$625 coupons for tuition at the defendant’s educational conferences.<sup>216</sup> Like *Figueroa*, the court closely examined the bargaining process. Unlike the court in *Figueroa*, the *Radosti* court found that the settlement was “the product of [an] arm’s-length negotiation” pro-

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208. *Radosti*, 717 F. Supp. 2d at 65.

209. *Figueroa*, 517 F. Supp. 2d at 1321.

210. *Id.* at 1295.

211. *Id.* at 1323.

212. *Id.*

213. *Id.*

214. *Id.* at 1313. *Figueroa* did not make such a presumption, distinguishing the two approaches.

215. *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1326–27 (S.D. Fla. 2007).

216. *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 46 (D.D.C. 2010).

cess because the parties went through a lengthy mediation process and extensive discovery.<sup>217</sup> Additionally, the court stated that there is a presumption of fairness once the court determines there was a fair bargaining process.<sup>218</sup>

Despite the presumption of fairness, the court analyzed the settlement's value in detail.<sup>219</sup> The court found that the terms and restrictions in the settlement "provided substantially more value" than the terms in the *Figueroa* settlement.<sup>220</sup> The vouchers were valid for seven years, were fully transferable, could be aggregated, and had clear redemption instructions.<sup>221</sup> Furthermore, if less than \$8 million worth of vouchers were redeemed, the settlement called for a cy pres fund to distribute up to \$8 million in vouchers.<sup>222</sup> The parties agreed that Envision must offer at least \$8 million in coupons because Envision received \$8 million in profits from the educational conferences in question.<sup>223</sup> As a result, the settlement would disgorge the defendant's ill-gotten gains. Additionally, ninety-five percent of the participants in the conferences in question had attended prior educational conferences at Envision,<sup>224</sup> suggesting that class members had a continued interest in attending the conferences and would actually redeem the coupons.<sup>225</sup> For these reasons, the court found that the \$625 coupons provided more value to class members than the settlement in *Figueroa*.<sup>226</sup> Therefore, the settlement in *Radosti* addressed the two criticisms of the settlement in *Figueroa*; the settlement was the result of an arms-length bargaining process and provided more value to class members.<sup>227</sup> As a result, the court approved the settlement.<sup>228</sup>

Although *Radosti* applied a different standard than *Figueroa* to evaluate settlements, the two approaches are very similar. Both courts closely examined the bargaining process and the value of the settlements.<sup>229</sup> It appears that the real difference between the two approaches is that, under *Radosti*'s standard of scrutiny, courts may be more willing to approve a coupon settlement than under the *Figueroa* court's approach. This is evident from the lower standard of scrutiny *Radosti* applies and the presump-

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217. *Id.* at 57.

218. *Id.*

219. *See id.* at 56–64.

220. *Id.* at 62–63.

221. *Id.* at 46–47.

222. *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 47 (D.D.C. 2010).

223. *Id.* at 58.

224. *Id.* at 57–58.

225. *Id.* at 58.

226. *Id.* at 62.

227. *Id.* at 62–63.

228. *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 47 (D.D.C. 2010).

229. When approving the settlement, the *Radosti* court explicitly addressed the critiques of the *Figueroa* settlement. As a result, even the *Figueroa* court may have approved the *Radosti* settlement.

tion of fairness the court gave the settlement after determining the negotiations were fair. Nevertheless, both approaches critically review coupon settlements in detail.

#### IV. COUPON SETTLEMENTS AFTER CAFA

Even though CAFA regulated coupon settlements, many scholars argued that it would not prevent coupon settlement abuses. Despite criticism, CAFA has effectively restricted the abuses of coupon settlements. As a result, coupon settlements can provide real value to customers, and parties should not be discouraged from using them when appropriate.

##### A. CAFA's Benefits

Despite some criticism, CAFA addresses many problems of coupon settlements by increasing judicial scrutiny of coupon settlements,<sup>230</sup> encouraging public officials to participate in coupon settlement approval hearings,<sup>231</sup> and aligning class counsel's interest with their client's interest.<sup>232</sup>

First, CAFA effectively regulates coupon settlements because it has increased judicial awareness of the problems associated with coupon settlements. Although critics argue that the standard in § 1712(e) already existed under Rule 23(e), as discussed in *Figueroa* and *Synfuel Technologies*, several courts interpret § 1712(e) to require heightened scrutiny of coupon settlements.<sup>233</sup> Even courts that reject heightened scrutiny are critical of coupon settlements and evaluate them in light of their potential abuses.<sup>234</sup> Therefore, § 1712(e) has caused courts to examine coupon settlements more critically.

Second, CAFA also encourages public officials to intervene and protect class members from unfair settlements.<sup>235</sup> CAFA requires defendants to provide notice to appropriate public officials, so they can protect class members from inequitable settlements.<sup>236</sup> After the enactment of CAFA, public officials have actually participated in, and objected to, potentially abusive coupon settlements.<sup>237</sup> The participation of public officials in the approval of coupon settlements suggests that the provision is effective and provides extra protection to class members.

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230. See 28 U.S.C. § 1712(e) (2006).

231. *Id.* §1715 (2005).

232. Puiszis, *supra* note 10, at 175.

233. *Synfuel Techs., Inc. v. DHL Express, Inc.*, 463 F.3d 646, 654 (7th Cir. 2006); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1320–21 (S.D. Fla. 2007).

234. *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 55 (D.D.C. 2010); *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010).

235. See 28 U.S.C. § 1715(b); S. REP. NO. 109-14, at 28 (2005).

236. S. REP. NO. 109-14, at 28.

237. See *Radosti*, 717 F. Supp. 2d at 51; *True*, 749 F. Supp. 2d at 1058.

Third, by encouraging defendants to create settlements that provide actual value to class members, CAFA aligns class counsel and class members' interests.<sup>238</sup> Under CAFA, class counsel will receive larger attorneys' fees if class members receive more value from coupon settlements.<sup>239</sup> Therefore, CAFA provides attorneys a large incentive to increase redemption rates and decrease burdensome restrictions on coupon settlements that negate value.<sup>240</sup>

Furthermore, although critics argue that class counsel can get around CAFA's restrictions by calculating attorneys' fees using the lodestar method or by using in-kind settlements, these fears are exaggerated. Under the lodestar method, courts must still approve attorneys' fees,<sup>241</sup> diminishing the risk that class counsel may delay negotiations to receive larger attorneys' fees.<sup>242</sup> Courts disapprove of the lodestar method when it provides large attorneys' fees that are disproportionate to the class benefit.<sup>243</sup> Courts also have the power to require attorneys to base their fees on the value of the coupons even if they elected to use the lodestar method.<sup>244</sup>

Finally, criticism that parties can avoid CAFA's provisions by structuring in-kind settlements is not persuasive.<sup>245</sup> Even if parties structure coupon-like, in-kind settlements that are not covered by CAFA,<sup>246</sup> courts find CAFA instructive when evaluating the settlement.<sup>247</sup> Therefore, class members will still be protected if the settlement is arguably outside of CAFA's provisions.

### B. CAFA's Deterrent Effect on Coupon Settlements

Although CAFA effectively responds to the abuses of coupon settlements, it may go too far to discourage coupon settlements when they could provide actual value to class members.<sup>248</sup> CAFA creates large disincentives and obstacles that prevent attorneys from using coupon settlements.<sup>249</sup> CAFA reduces attorneys' fees in coupon settlements by linking attorneys' fees to the amount of coupons redeemed.<sup>250</sup> CAFA, additionally, makes

238. Tharin & Blockovich, *supra* note 5, at 1445.

239. *Id.* at 1449.

240. Puiszis, *supra* note 10, at 175.

241. 28 U.S.C. § 1712(b)(2) (2006).

242. Casper, *supra* note 106, at 28.

243. *See True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1077–78 (C.D. Cal. 2010).

244. *Id.* (stating courts have the “discretion to use either a percentage or lodestar method in awarding fees”).

245. Day, *supra* note 26, at 1114.

246. *Id.*

247. *Synfuel Techs., Inc. v. DHL Express, Inc.*, 463 F.3d 646, 654 (7th Cir. 2006).

248. *See Walker, supra* note 4, at 859 (“In short, Congress has strongly discouraged coupon settlements, if not actually prohibited them.”).

249. Gibson, *supra* note 104, at 1119; Tharin & Blockovich, *supra* note 5, at 1450; Koch, *supra* note 48, at 48.

250. Gibson, *supra* note 104, at 1119.

coupon settlements riskier for class counsel because the redemption rate will always be uncertain, making coupon settlements economically unattractive to them.<sup>251</sup> Furthermore, since courts base attorneys' fees on the value of the coupons that are redeemed, class counsel must wait until the coupons are used to receive their award.<sup>252</sup> Depending on the settlement, this could be months or even years.<sup>253</sup> These factors make coupon settlements unattractive to class counsel. As a result, CAFA will likely serve to reduce the number of coupon settlements.<sup>254</sup>

### C. *The Need for Coupon Settlements*

Despite CAFA's discouragement of coupon settlements, parties should not dismiss them as a viable way to settle class action claims. Even though coupon settlements were traditionally abused, they can be an effective settlement tool. When a defendant is facing bankruptcy, coupons may be necessary to settle the case and ensure that class members receive some benefit.<sup>255</sup> Additionally, coupon settlements are an effective means to settle marginal or weak class action claims. Coupon settlements help defendants settle claims efficiently and inexpensively while still providing class members some relief.<sup>256</sup> Furthermore, since coupon settlements are less burdensome on defendants, defendants may provide coupons with discounts that are larger than the cash value of their claim.<sup>257</sup> In such circumstances, "a coupon would actually be more helpful to individual class members than [the] mere pennies in damages" class members would receive in cash settlements.<sup>258</sup> Therefore, when these situations apply, coupon settlements provide real value to class members and may be more beneficial than a traditional cash settlement.

### D. *Effective Coupon Settlements*

One example of an effective coupon settlement would be a class action against a company regarding "a potentially harmful product that has not yet generated any actual damage."<sup>259</sup> After the company fixes the product defect, class counsel and the company could create a coupon settlement that provides class members a discount on the replacement product.<sup>260</sup> Here, class members own the defective product and need to replace it. Therefore,

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251. *See id.* at 1119–20.

252. *Id.* at 1116.

253. *See id.* at 1120.

254. *Id.* at 1119.

255. Sherman, *supra* note 97, at 1614; Mezzetti & Case, *supra* note 68, at 1433–34; Day, *supra* note 26, at 1099.

256. *See* Tharin & Blockovich, *supra* note 5, at 1444–45.

257. *See* Miller & Singer, *supra* note 4, at 114–15.

258. Day, *supra* note 26, at 1122.

259. *Id.* at 1126.

260. *Id.*

the coupon is very valuable.<sup>261</sup> Additionally, the company could structure the coupon to give class members a larger discount than they would receive in cash value, providing class members more value than a cash settlement. “By forcing the defendant to fix the problem, and by allowing the plaintiffs to get what they wanted in the first place, everyone is better off.”<sup>262</sup>

The *Radosti* settlement is another example of an effective coupon settlement. As noted above, the settlement provided class members two vouchers for \$625 that could be used for tuition to attend the educational conferences, which provided real value to class members.<sup>263</sup> The coupons represented an eighteen to forty-one percent discount on the tuition for Envision’s programs.<sup>264</sup> Additionally, the court found that class members had a continuing interest in attending Envision’s conferences, suggesting high redemption rates.<sup>265</sup> Moreover, the coupons did not have burdensome restrictions that negate their value.<sup>266</sup>

Furthermore, Envision was in financial trouble at the time of the settlement and may have filed bankruptcy if required to pay a cash settlement.<sup>267</sup> Class counsel recognized that if Envision filed bankruptcy, class members would potentially receive no relief.<sup>268</sup> Therefore, the settlement ensured that class members received some value.

Therefore, the *Radosti* coupon settlement addressed many of the problems that have plagued coupon settlements prior to CAFA. It provided real value to class members, encouraged high redemption rates, eliminated burdensome restrictions, and deterred defendants by disgorging their profits. There was also no collusion between class counsel and defendants. Finally, there was a need to use coupons instead of a cash settlement. All these factors demonstrate that the settlement was fair, and courts should look to them when evaluating coupon settlements under § 1712(e).

Based on these examples, coupon settlements can provide real value to class members. As a result, coupon settlements should not be abandoned after CAFA. Rather, parties should work to create a settlement that addresses the past abuses of coupon settlements to benefit class members.

#### CONCLUSION

Because coupon settlements were abused and manipulated to create settlements that provided little value to class members, coupon settlements have been widely criticized. This criticism sparked Congress to pass the

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261. *Id.*

262. *Id.*

263. *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 62 (D.D.C. 2010).

264. *Id.* at 57.

265. *Id.* at 57–58.

266. *See id.* at 46–47.

267. *Id.* at 60.

268. *Id.*

Consumer Class Action Bill of Rights in CAFA, which regulated and largely discouraged coupon settlements. Although this Comment has shown that CAFA has effectively addressed the abuses of coupon settlements, the Act may go too far to deter the use of coupon settlements where they can be an effective settlement tool.

Coupon settlements can provide real benefits to class members if structured correctly. Coupon settlements are especially appropriate in cases where defendants face bankruptcy, class members' claims are weak, or the claims are for minimal damages. Therefore, coupon settlements should not be summarily dismissed as a way to settle a claim. With the changes brought by CAFA and increased judicial scrutiny, parties should be open to exploring coupon settlements as an effective means to resolve class claims.