

Non-cash settlements

*When intended payout is in coupons,
court approval is possible, but not easy*



**Gregory D. Call, Douglas W. Sullivan
& Trina D. McAlister**

As class action practitioners are well-aware, parties may litigate class actions in either state or federal court depending on the claims, the citizenship of the parties and the amount in controversy. For example, if the amount in controversy exceeds \$5 million and there is diversity of citizenship between one putative class member and any defendant, then the class may proceed in federal court.

Consequently, practitioners may find themselves seeking approval of class settlements involving noncash relief (such as coupons) in state court under state court procedures or in federal court under federal court procedures, including the Class Action Fairness Act of 2005, which has specific rules relating to “coupon settlements.” This article outlines some of the factors courts takes into account when evaluating these settlements and requests for attorneys fees.

SECURING SETTLEMENT APPROVAL

Class actions in both state and federal court require court approval for settlement. Regardless of where the action is pending, however, the standard for approval is generally the same: whether the proposed settlement is fair, reasonable and adequate.

CAFA outlines certain procedures to ensure that coupon settlements in federal courts meet the fair, reasonable and adequate standard. California does not have legislation analogous to CAFA, but California courts have expressly rejected the argu-

ment that coupon settlements are inherently suspect or improper.

CAFA does not define “coupon settlements,” but federal courts have looked to CAFA when analyzing settlements featuring coupons that provide discounts on future purchases or featuring in-kind relief. When evaluating class settlements, both state and federal courts analyze several factors, and class settlements featuring noncash relief are generally no different. Courts may consider factors such as the merits of the case, the extent of provable damages, the risk,

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expense and duration of further litigation, the settlement amount offered, the stage of proceedings and the reaction of putative class members to the proposed settlement. Moreover, there is a presumption that a settlement is fair if it was the result of arms-length negotiation, if there was sufficient investigation to allow counsel and the court to “act intelligently,” and if the percentage of objectors is small.

While any of these factors (and others) can come into play, certain factors particularly weigh in favor of approval in the context of coupon settlements: arms-length negotiations, weak claims and few objectors.

FAIR, ARMS-LENGTH NEGOTIATIONS

The courts will examine whether class counsel and defendants “colluded” to defraud the class. It is therefore critical that

parties reach settlement by engaging in good faith, arms-length negotiations. In particular, there should be evidence that class counsel sufficiently appreciated the merits of their case as they negotiated settlement.

Parties can develop evidence of arms-length negotiations by separating the negotiations over the settlement terms from the negotiations over attorneys fees. If parties negotiate these items simultaneously, the court may find that counsel improperly traded the class benefit for attorneys fees. This obstacle should not exist where the parties negotiate settlement terms before discussing attorneys fees and where the settlement itself is not contingent on court approval of the requested fees.

MERITS OF THE CASE

Another factor is the strength of the plaintiffs' case. Courts tend to approve coupon settlements more readily where there are issues with the merits of plaintiffs' claims, including difficulty proving damages and obstacles to class certification. The Northern District of California recently approved a settlement of “nominal value to the class” (free credit reports and potential rebates on loans) because “plaintiff's case [was] weak.” *Yeagley v. Wells Fargo & Co.*, 2008 WL 171083 (2008), *rev'd on other grounds*. Similarly, the First District Court of Appeal approved a coupon settlement where “plaintiffs would have encountered considerable difficulties in trying to prove their [damages] amount.” *Chavez v. Netflix, Inc.*, 162 Cal. App.4th 43 (2008) Parties seeking court approval of a coupon settlement should create a record addressing these factors.

OBJECTIONS TO THE SETTLEMENT

Achieving settlement without any objections would be highly unusual, but silence from a significant majority of the class favors approval. Moreover, where applicable, courts may find the absence of govern-

mental objectors particularly compelling: “Because numerous governmental agencies were given notice of the settlement and have not objected, this factor weighs in favor of settlement.” *Browning v. Yahoo! Inc.*, 2007 WL 4105971 (N.D.Cal. 2007). This factor can come into play in federal court because CAFA mandates that defendants notify certain state and federal officials of proposed settlements to allow them to comment.

Nevertheless, a settlement is not unfair simply because a large number or a certain percentage of class members oppose it, as long as it is otherwise fair, adequate and reasonable. Class settlements can and do survive objectors. Courts will reject meritless objections, and practitioners should fully address objectors’ arguments. Outside of litigation, practitioners facing objections may wish to discuss a public relations strategy with their clients as objectors may generate negative press.

SECURING APPROVAL OF ATTORNEYS FEES

After determining that the proposed settlement is fair, reasonable and adequate, the court will next analyze whether the requested attorneys fees are reasonable.

Practitioners in federal court should pay close attention to CAFA, which has specific rules regarding contingent fees in coupon settlements. Under CAFA, “the portion of any attorney’s fee award to class counsel that is attributable to ... coupons shall be based on the value to class members of the coupons that are redeemed,” not the value of coupons available. Further, distribution of unclaimed coupons to charitable or governmental organizations cannot be included when calculating fees on this basis.

Alternatively, attorneys fees in coupon settlements may be based on the amount of time class counsel “reasonably ex-

pected” on the case. Both state and federal courts permit the lodestar/multiplier method of calculating fees in coupon settlements. Under the lodestar method, the court multiplies the number of hours that class counsel reasonably worked against a reasonable hourly rate. A “multiplier” can enhance that amount to compensate counsel for things like risk of loss, result and quality of work.

Also, for settlements subject to CAFA that include both coupons and equitable relief, attorneys fees may be calculated based on a combination of these methods. Practitioners may further argue that courts may approve “an appropriate attorney’s fee” based on equitable or injunctive relief included in the settlement that is calculated using different methods, as provided in CAFA. Regardless of the method used, the court’s analysis will focus on whether the award is reasonable.