# Considering Coupons

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We all know that attorney fees awards play an integral role in class action settlements. This is equally true in "coupon" settlement cases — those where class members receive in-kind benefits rather than money, usually in the form of a discount off of a future purchase from the defendant company. But, because lawyers' fees are paid in cash while class members' relief is not, courts are often skeptical of fee awards in such cases. Congress joined the fray in 2005, via the Class Action Fairness Act. Among other provisions, the act sets out a framework for federal courts to use when analyzing fee applications in coupon settlements. These provisions can be more restrictive than the standards applicable to fee applications in non-coupon cases, and in some instances lead courts to reject the settlement itself.

Yet, despite judicial and legislative scrutiny of fee awards in coupon settlement cases, such settlements are still frequently negotiated. For lawyers considering a coupon settlement — whether representing the class or the defense — understanding the act's impact on fee awards in theses cases, and the factors courts will weigh in considering fee applications, is vital.

The first question a lawyer must consider is whether the act's attorney fees provisions will apply to her case. By their terms, these provisions apply only to federal cases involving "coupon" settlements. However, the act itself never defines "coupon," giving the courts some discretion to decide the scope of the act's fee provisions. And indeed, several courts have applied these fee provisions (or their logic) to settlements that did not involve coupons as traditionally understood, but rather involved what some call "vouchers" — free goods or services from the defendant company, rather than just a discount off of a future purchase.

Two cases exemplify this approach. The Northern District of California in *Yeagley v. Wells Fargo* found the Class Action Fairness Act's fee provisions "instructive" in analyzing class counsel's fee application, even though the settlement involved a free item (a credit report), instead of a coupon. The court reasoned that the act' fee provisions were relevant to the fee request, because of its concern that frequently "[c]ounsel are awarded large fees, while leaving class members with coupons *or other awards of little or no value*" (emphasis added). Thus, *Yeagley* considered reference to the actual settlement participation rate important in determining attorney fees, to ensure that the settlement "addresses the needs of the class" rather than simply remunerating class counsel. In *Perez v. Asurion*, the Southern District of Florida held that the act's fee provisions applied because "[a]lthough the phone cards and vouchers supplied here are not literally 'coupons' — in that they do not require the Class to purchase anything — neither are they cash." These rulings suggest that the fee provisions may govern *any* in-kind settlement, and consequently counsel negotiating non-cash settlements should be prepared to defend their fee requests accordingly.

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If the act's fee provisions apply, the next question is how the fee award will be calculated. The act provides two alternative approaches: Courts can calculate the fee award based on the actual "value to class members of the coupons that are redeemed," or they can assess fee applications using the traditional "lodestar" method (i.e., multiplying hours worked by a reasonable hourly rate, and then increasing this amount by a multiplier). The act does not explicitly require use of one standard over the other, and commentators agree that in most circumstances courts have discretion to choose the method they consider appropriate. The act only requires use of the "value-to-the-class" method of calculating fees when class counsel explicitly request that their fees be calculated as a percentage of the benefit obtained for the class.

While the act delineates these two mechanisms for calculating a fee award, class and defense counsel may well prefer the lodestar approach. The lodestar can provide finality, because fees can be determined shortly after settlement — as opposed to the value-to-the-class approach, which delays the fee award until the court can determine how many coupons actually have been redeemed by class members. Additionally, both counsel and the court will be more familiar with the well-known lodestar method. The value-to-the-class model has merit as well, but if lodestar is preferred, recent cases suggest several steps counsel can take to convince the court to apply that standard.

First, counsel should demonstrate to the court that the bargained-for settlement consideration is a fair and reasonable result that gives class members a good deal. If the court believes counsel obtained a fair and reasonable outcome under the circumstances, the court may feel less compelled to attempt to measure the settlement's worth by applying the value-to-the-class method. By contrast, if the court is not so convinced, it might refuse to use the lodestar standard — as happened in *Yeagely,* where the court concluded the settlement "had little value to the class" and rejected the requested $1.5 million lodestar fee and instead awarded a $326,000 value-to-the-class fee. The Southern District of New York, in *In re Excess Value Insurance Coverage Litigation*, came to a similar conclusion when it refused to use the lodestar because it found the settlement consideration to be of minimal value, and instead applied the value-to-the-class method.

Relatedly, counsel should provide the court with a realistic estimate of the number of coupons expected to be redeemed. This step will give the court further comfort that the settlement is a fair and reasonable outcome for the class, as it can corroborate the parties' position that the class is receiving desirable consideration. Indeed, anecdotal evidence suggests that courts considering coupon settlements may affirmatively demand such information. One option is to offer expert testimony on this subject, as the Class Action Fairness Act expressly permits a court to allow; alternatively, if available, counsel can supply actual data from the defendant company regarding past coupon redemption rates. Not taking this step — or, worse, blithely assuming a 100 percent redemption rate — can result in rejection of the lodestar and application of the value-to-the-class model. Or, the court may decide on a unpalatable hybrid approach: In *Fleury v. Richemont North America Inc.*, the Northern District of California used the lodestar, but because counsel had assumed (without any basis) a 100 percent redemption rate the court deferred ruling on whether to apply a multiplier to the lodestar for many months, until the court could determine how many coupons actually had been redeemed.

Counsel can develop a settlement that mixes coupons with other relief, particularly relief that the court may conclude has a clear value. In *In re HP Power Plug and Graphics Card Litigation*, the various settlement packages offered to class members provided a choice of a free computer repair, $650 toward the cost of obtaining the repair on their own, or a $50 coupon for Hewlett-Packard products in lieu of any repair. The *In re HP* court concluded that the "main value" of the settlement was the repair option, not the coupon, and thus employed a lodestar calculation with a multiplier. Consequently, a settlement that offers some hybrid consideration may well convince a court that the lodestar is the more appropriate fee model.

If despite these efforts a court appears inclined to use the value-to-the-class model, counsel can emphasize any policy reasons why the lodestar standard should be applied instead. For example, the court in *Perez* opted for a lodestar approach in part because several of the settled claims were brought under state private attorneys general statutes, which themselves provide for attorney fees "regardless of the eventual monetary results."

The *Perez* court reasoned that using the lodestar method was necessary to achieve the policy goals underlying those statutes. Counsel may want to point to these and other policy concerns implicated by the value-to-the-class method when advocating for a lodestar-based award.

A final issue lawyers considering coupon settlements should keep in mind is when to seek fees. *Figueroa v. Sharper Image* provides a cautionary tale, and suggests that counsel should seek separate court approvals for the substantive settlement and the fee application. In *Figueroa*, simultaneous approval was sought of both the settlement (a $19 coupon) and fees ($1.875 million). Although the Southern District of Florida court never reached the fee request itself, it rejected the settlement in part because "Class Counsel [will] receive close to $2 million in fees and class members are given a $19 coupon." In other words, the court refused to approve the settlement in part because the relief to the class was, in the court's view, disproportionate to the requested fee award. After *Figueroa*, counsel may want to consider waiting to submit a fee application until after the court has approved the settlement itself.

The Class Action Fairness Act has sharpened courts' already-keen attention to attorney fees in coupon settlements, and counsel considering such a settlement should bear in mind the impact its fee provisions may have on their case. Just because the parties agree that the proposed attorney fees are fair and reasonable does not mean the court will always concur.

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