

**Federal Trade Commission Workshop**  
***Protecting Consumer Interests in Class Actions***

**Panel: *The Use of “Coupon” Compensation and Other Non-Pecuniary Redress***<sup>1</sup>

September 13, 2004

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***I. THE USE OF “COUPON” COMPENSATION***

“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.” Geoffrey P. Miller & Lori S. Singer, Nonpecuniary Class Action Settlements, 60 Law & Contemp. Probs. 97, 102 (1997).

**A. Key Considerations in Evaluating the Merits of a Coupon Settlement**

- *A cash settlement is not practical.* If even under the best of circumstances a cash settlement would not reach every injured class member and administratively could not be calculated reliably to account for the actual loss suffered by each class member, then a coupon settlement may be appropriate. In re Compact Disc Minimum Advertised Price Antitrust Litig., 292 F. Supp. 2d 184, 186 n.2 (D. Me. 2003).
- *The claim has only modest value.* A coupon settlement may be less subject to attack as too low if the claim itself is of questionable value. In the Matter of: Mexico Money Transfer Litig., 267 F.3d 743, 749 (7th Cir. 2001) (“Nothing in this transaction smacks of fraud, so the settlement cannot be attacked as too low.”); In re Compact Disc Minimum Advertised Price Antitrust Litig., 292 F. Supp. 2d 184, 186 n.2 (D. Me. 2003).
- *The good or service covered by the coupon is one that members of the class might want to purchase.* If the item is usually purchased on a one-time basis or rarely purchased, this may count against the reasonableness of the settlement. But, if most members of the class purchase the item on a fairly regular basis, this can count in favor of the settlement. Compare O’Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D. 266, 303 (E.D. Pa. 2003) (approving \$35 dollar voucher for oil change because “all vehicles need an oil change eventually and all vehicle owners anticipate oil changes”) with Clement v. Am. Honda Fin. Corp., 176 F.R.D. 15, 27-

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<sup>1</sup> This Outline was prepared for distribution in connection with United States District Judge D. Brock Hornby’s participation in a panel on the use of coupon compensation and other non-pecuniary redress, part of the Federal Trade Commission’s workshop on consumer class actions. It is an attempt to organize the relevant caselaw and commentary and should not be viewed as expressing Judge Hornby’s personal or official positions on these issues.

28 (D. Conn. 1997) (rejecting \$75 or \$150 coupon requiring class members to purchase or lease a vehicle).

- ***The price of the item that will be discounted is not so high that no one will actually use the coupon.*** Compare In re Compact Disc Minimum Advertised Price Antitrust Litig., 292 F. Supp. 2d 184, 186 n.2 (D. Me. 2003) (“[T]he price of the discounted CD is not so high as to foreclose use of the voucher at all.”) with In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 808 (3d Cir. 1995) (declining approval of a \$1000 coupon to be used for new trucks that may cost as much as \$33,000 because so few coupon holders would actually be able to afford a new vehicle).
- ***The voucher does not require unanticipated future dealings between the parties.*** Coupon settlements should not be a future sales and marketing bonanza for an industry. A chief concern is that the coupon will serve as another contribution to a nationwide marketing program, and may actually lead to additional profits for a defendant. See, e.g., In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 808 (3d Cir. 1995).
- ***The voucher is transferable.*** Geoffrey P. Miller & Lori S. Singer, Nonpecuniary Class Action Settlements, 60 Law & Contemp. Probs. 97 (1997). See, e.g., In re Compact Disc Minimum Advertised Price Antitrust Litig., 292 F. Supp. 2d 184, 187 (D. Me. 2003) (vouchers transferable even to non-class members).
- ***The value of the coupon will not be offset by other discounts.*** If the coupon cannot be used with other discounts, it may be essentially valueless if businesses usually offer similar discounts. See, e.g., In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 220 (D. Me. 2003).
- ***The average class member would likely use the coupon quickly.*** “If customers are likely to use their coupons quickly, this weighs in favor of the settlement. On the other hand, if the item requires replacement infrequently, this will count against the usefulness of a coupon. If there is a long delay before using the coupon, consumers may lose, misplace, or forget about them.” Geoffrey P. Miller & Lori S. Singer, Nonpecuniary Class Action Settlements, 60 Law & Contemp. Probs. 97 (1997).
- ***A minimum threshold of use will be met.*** Approval of coupon settlements may be contingent on a certain number of coupons being used so the defendants can be said to have satisfied their obligation. See, e.g., In re Compact Disc Minimum Advertised Price Antitrust Litig., 292 F. Supp. 2d 184, 187 (D. Me. 2003) (delaying award of attorney fees “until experience shows how many vouchers are exercised and thus how valuable the settlement really is”).
- ***How long are the coupons valid?*** “For items that are frequently purchased, a fairly short claim period would be appropriate in order to reduce the costs of administering the settlement. If items are not frequently purchased, an abbreviated claim period may be unreasonable because the coupon may have expired by the time a class member needs the item.” Geoffrey P. Miller & Lori S. Singer, Nonpecuniary Class Action Settlements, 60 Law & Contemp. Probs. 97 (1997). Others have argued that in order for defendants not to raise retail prices as

a result of coupon settlements there must be “no (binding) time limit on the use of the coupon.” See Severin Borenstein, Settling for Coupons: Discount Contracts as Compensation and Punishment in Antitrust Lawsuits, 39 J.L. & Econ. 379, 402 (1996).

## B. Possible Benefits of Coupon Settlements

- *Economic advantages.* Defendants may be willing to offer more total value in coupons than in cash. If the coupons are worth the same to the plaintiffs, a coupon settlement can be “economically optimal.” Note: In-Kind Class Action Settlements, 109 Harv. L. Rev. 810, 821 (1996). See also Geoffrey P. Miller & Lori S. Singer, Nonpecuniary Class Action Settlements, 60 Law & Contemp. Probs. 97, 113 (1997) (difference between wholesale and retail cost of marketing goods and services passed on to class members).

## C. Possible Drawbacks to Coupon Settlements

- *Valuation problematic.* From the court’s perspective, valuing coupon settlements can be very difficult. Courts may have “little reliable evidence with which to work because the attorneys for both parties have abandoned their adversarial stance.” Note: In-Kind Class Action Settlements, 109 Harv. L. Rev. 810, 817 (1996). Moreover, the value of a coupon is very subjective. The court cannot assume “that the value of the coupon [to each consumer] is equal to the full value of the discount over market price.” Geoffrey P. Miller & Lori S. Singer, Nonpecuniary Class Action Settlements, 60 Law & Contemp. Probs. 97, 108 (1997).
- *Class counsel motivation.* “Because class counsel are paid in cash, the attorneys [may] have insufficient interest in ensuring that the settlement coupons confer value on the class.” Christopher R. Leslie, A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation, 49 UCLA L. Rev. 991, 1081-1085 (2002). This problem has led some commentators to suggest that lawyers be required to accept a portion of their fees in the same non-cash consideration being offered to the class. E.g. Judge Thomas A. Dickerson and Brenda V. Mechmann, Consumer Class Actions and Coupon Settlements: Are Consumers Being Shortchanged?, in Advancing the Consumer Interest, vol. 12, no. 2 (2000), available at <http://www.classactionlitigation.com/library/dcoupon.html>.

## II. *CY PRES DISTRIBUTION OF CLASS ACTION SETTLEMENT FUNDS*

In a [class action] settlement context, when an aggregate class recovery cannot economically be distributed to individual class members, or when a balance of the recovery fund remains after individual distribution, the parties, subject to court approval, may agree that undistributed funds will be distributed or disposed of

for the indirect benefit of the class. This disposition of funds that have not been individually distributed, by distributing them for the next best use which is for indirect class benefit, has been approved under the equitable power of courts in various cases under the analogous doctrine of *cy pres*.

Newberg on Class Actions, § 11:20 (2003).

**A. Factors supporting the use of *cy pres* distribution:**

- ***It is difficult or impossible to identify or locate all of the potential claimants.***
  - *Cy pres* programs may be appropriate in cases where potential claimants cannot be given adequate notice of the case or, for whatever reason, are not likely to participate. E.g., In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197 (D. Me. 2003).
  - In cases involving inexpensive goods or services, where there are no warranty cards returned by consumers or similar documentation, it may be particularly difficult to trace possible claimants. E.g., New York v. Reebok Int'l Ltd., 903 F. Supp. 532 (S.D.N.Y. 1995).
- ***Proving the actual loss of each claimant is impracticable.***
  - Consumers rarely retain records of purchases of relatively inexpensive goods. In cases involving inexpensive goods, therefore, it will typically be very difficult, if not impossible, to assess a claimant's actual loss. E.g., In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197 (D. Me. 2003) See also Susan Beth Farmer, More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought By State Attorneys General, 68 Fordham L. Rev. 361, 391 (1999) ("The problem for courts is that, while automobile and real estate purchasers typically keep records of their purchases, many cases involve inexpensive goods such as milk and articles of clothing for which consumers rarely retain records.").
  - This proof problem also entails a risk of fraudulent claims. New York v. Reebok, 903 F. Supp. 532, 537 (S.D.N.Y. 1995).
- ***Even if individual damages could be proved, potential individual recoveries are very small.*** E.g., In re Toys "R" Us Antitrust Litig., 191 F.R.D. 347, 353 (E.D.N.Y. 2000).
- ***The costs of administering individual recoveries are high and may even exceed the rebates due.*** E.g., New York v. Reebok, 903 F. Supp. 532, 537 (S.D.N.Y. 1995).
- ***There is a nexus between the injury and the indirect compensation provided by the *cy pres* distribution.*** "The goal of the *cy pres* remedy . . . is to effectuate the normal damage distribution to class members as closely as possible, and this should be the purpose of the courts whenever feasible." Stewart R. Shepherd, Damage Distribution in Class Actions: The Cy Pres Remedy, 39 U. Chi. L. Rev. 449, 457 (1972). E.g., In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 208 (D. Me. 2003) ("[M]embers of the public (and thus potentially class

members who did not file a claim, as well as those who did) will benefit either in using the CDs themselves or in the general public benefit from recurrent music CD availability.”).

- *Few class members object to the proposed cy pres plan.* E.g., New York v. Reebok Int’l Ltd., 903 F. Supp. 532, 537 (S.D.N.Y. 1995) (“The lack of opposition to the settlement also supports its approval.”).

## B. Some Cy Pres Options

- *Price reduction.* E.g., Colson v. Hilton Hotels Corp., 59 F.R.D. 324 (N.D. Ill. 1972) (hotel room rate reduction of fifty cents per day until settlement funds depleted). “This option is . . . subject to criticism because class members must continue buying from the defendant to recover their refund. An unintended effect of this remedy is to give the antitrust violator an overall advantage in the marketplace because the artificially low prices increase its sales.” Susan Beth Farmer, More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General, 68 Fordham L. Rev. 361, 395 (1999).
- *Charitable distribution of consumer goods.* E.g., In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 208 (D. Me. 2003) (5.6 million compact discs distributed to, mainly, libraries and schools); In re Toys “R” Us Antitrust Litigation, 191 F.R.D. 347 (E.D.N.Y. 2000) (toys distributed to public and charitable entities).
- *Charitable monetary distribution.* E.g., New York v. Dairylea Coop., Inc., 1985 WL 1825 (S.D.N.Y. 1985) (settlement funds distributed to schools located within the geographical area covered by the complaint, to be used for nutrition-related programs); New York v. Reebok Int’l Ltd., 96 F.3d 44 (2d Cir. 1996) (settlement funds distributed pro rata to the States to be used to support recreational activities); In re: Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392 (N.D. Ga. 2001) (leftover, undistributed, settlement funds distributed to nine different non-profit organizations).

## C. Benefits of Cy Pres Payments

- *May be the only way to compensate injured class members.* When the class is large and many members cannot be identified or are unlikely to file a claim, *cy pres* may be the only way to ensure that class members are compensated.

## D. “Cons” or Criticisms of Cy Pres Settlements

- *Imperfect analogy between charitable trusts and class actions.* *Cy pres* in the class action settlement context is not perfectly analogous to *cy pres* in the charitable trust context. Unlike the traditional use of *cy pres*, where the court makes a modification in an attempt to carry out the testator’s expressed purpose, in the case of class action *cy pres* distributions “where millions of so-called ‘silent’ plaintiffs have never provided the slightest hint of what they desire, there is no expressed purpose to modify.”

Martha A. Churchill, Fluid Recovery: Not a Class Act, 72 Mich. Bar J. 1184, 1187 (1993) (suggesting that courts use statistical science to ascertain buying habits and personal preferences of class members).

- ***Windfall to non-class members.*** *Cy pres* distributions will inevitably benefit non-class members as well as class members. They have therefore been criticized as providing a windfall to non-members. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973). But see Newberg on Class Actions, § 10.22 (2002) (“To the extent that *cy pres* distribution actually benefits a sufficient number of injured class members, the monies paid to third parties are an incidental but necessary cost that must be accepted in order to confer the benefits in a feasible way to a large proportion of the injured class members. This result is fully consistent with and promotes the historic objectives of class actions, which were originally created as a court rule of convenience.”).
- ***Valuation problems.*** Valuing a *cy pres* distribution can be complicated because, inevitably, some of the distribution winds up in the hands of non-class members. “If others get part of the fund, the value of the settlement may not be the value to the class members only, since the defendant is paying out additional sums. Should sums by others receive full credit in the valuation process?” Geoffrey P. Miller & Lori S. Singer, Nonpecuniary Class Action Settlements, 60 Law & Contemp. Probs. 97, 109 (1997).