

## FTC CLASS ACTION WORKSHOP

### PROTECTING CONSUMER INTERESTS IN CLASS ACTION

Panel No. 1: The Use Of "Coupon" Compensation And Other Non-Pecuniary Redress

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#### I. INTRODUCTION

Class actions, born and perfected in the United States, provide access to the judicial system to case and controversies that otherwise may not be heard. However, they are a controversial tool for dispute resolution. On the one hand, class actions serve as an efficient and economical method for a group of plaintiffs who, but for this method would not likely bring an action because each individual claim lacks sufficient economic interest. Similarly, plaintiffs' attorneys would not have the means or incentive to bring such suits. Moreover, class actions can be a mechanism for the courts and the parties to adjudicate efficiently multiple claims. However, class actions are subject to abuse and can be misused as a tool to overwhelm and harass defendants, forcing settlement on cases of dubious merit because the aggregation of claims creates enormous risk. And the costs of class action litigation ultimately translate into higher prices to consumers.

Settlement negotiations in class actions usually are more difficult than settlement negotiations in non-class actions. Because there are many more participants the negotiations are generally complex and slow. Class representatives, class counsel, objecting class members, opt-out class members, defendants, defendants counsel and the court all may have a role in the settlement negotiations and process. All bring their individual views of the merit of the claims, the likelihood of success and the measure of damages.

Accordingly, often settlements are difficult because the multiple parties assessments of the value of the claims and the corresponding risk of the litigation differ. Non-cash settlements can facilitate settlements by allowing class members to receive greater value at a lower cost to the settling defendants thus bridging the gap between perceived risks. To the extent that non-cash settlements bring the parties to a settlement, non-cash settlements can be a classic "win-win" dispute resolution mechanism.

Critics of non-cash settlement argue that such settlements do not bring "value" to the class. Low redemption rates and required additional purchases they claim translate into a lower value to the class. But such criticisms often ignore the reality of the lack of predictability of litigation. Parties sometimes win cases they should lose and sometimes lose cases they should win. Settlements cannot be valued as if liability or the measure of damages are absolute. They

are not. Settlements must be valued with full recognition that litigation is unpredictable, costly and risky.

## II. NON-CASH SETTLEMENTS ARE CONSISTENT WITH RULE 23

A. Class actions may not be settled without approval of the court and only after notice to the class. Thus, the court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. FED. R. CIV. P. 23(e)(1)(C).

B. Courts cite multiple factors to be used in determining fairness, reasonableness and adequacy: "(1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation." *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F. 3d 768, 785 (3d Cir.) *cert. denied*, 116 S.Ct. 88 (1995) (*citing Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), although not approving discount coupon proposed settlement).

C. Courts have approved non-cash settlements. Non-cash settlements may include product or coupons offering a discount on future purchases. *See lists of courts cited by: Buchet v. ITT Consumer Fin. Corp.*, 845 F. Supp. 684, 692 n. 5 (D. Minn. 1994) (holding, however, that value of proposed scrip was too tenuous to approve settlement); *N.Y. v. Nintendo of America, Inc.*, 775 F. Supp. 676, 682 (S.D.N.Y. 1991) (approving settlement agreement including \$5.00 discount coupons).

## III. NON-CASH SETTLEMENTS CAN BE A "WIN-WIN" PROPOSITION FOR CLASS ACTION PLAINTIFFS AND DEFENDANTS

A. Class actions, like all litigation, can be difficult to settle because the parties assess differently the risk of liability and the measure and amount of damages. Non-cash settlements may help to bridge that gap by providing value to class members at a lower cost to settling defendants.

B. Use of discount certificates in settlement approved by the court where the arrangement struck a balance between fairness to plaintiffs and recognition of strained financial positions of the airlines. *See In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 325 (N.D. Ga. 1993).

C. Court, in ruling in favor of a settlement of discount coupons, reasoned that plaintiffs benefited because it would have been impractical to distribute cash, and such a process would have made it hard to accurately calculate the actual loss suffered by each class plaintiff. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 191 F. Supp. 2d 184, 187 n. 1 (D. Me. 2003).

#### IV. COURTS CAN AND DO EVALUATE THE VALUE OF NON-CASH COMPENSATION

A. The Court's decision turns on whether the settlement agreement confers adequate value to class in light of merits of case. Essentially the court under the "fair, reasonable and adequate" standard of Rule 23(e)(1)(C) must determine that the settlement compensation to the class members represent a value commensurate with what the class would have received had the litigation reached a litigated determination. In short, the class must receive fair value. *See e.g. In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768 (3<sup>rd</sup> Cir.), *cert. denied*, 116 S.Ct. 88 (1995).

B. Value of non-cash settlements depends on when and how they will be used, and who will be using them. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 322.

#### V. NON-CASH SETTLEMENTS ARE NOT MORE LIKELY TO BE ABUSIVE THAN OTHER TYPES OF SETTLEMENTS

A. Non-cash settlements, like other types of settlements, are the product of arms length negotiations by adversaries that through the litigation process are knowledgeable about the merits of the litigation. Usually the litigation and settlement are in "good faith and with great vigor throughout . . . [negotiations] were conducted at arms' length . . . [and there was] nothing to suggest that collusion, coercion, or conflict of interest played any part in reaching the final settlement compromise" *In re Cuisinart Food Processor Antitrust Litig.*, 1983 WL 153, at \*8 (D. Conn. Oct. 24, 1983).

B. Prohibiting non-cash settlements may result in some class actions not being settled thereby forcing either continued litigation with corresponding increased costs and continuing risk to the parties or the unlikely result of abandonment of the litigation.

C. Non-cash compensation can be combined with cash to settle a class action. For example, Bausch & Lomb settled allegations of deceptive pricing practices by paying cash and coupons providing discounts on future purchases. As a consequence, differences in the parties assessment of the risks in the litigation are more easily bridged. Similarly, a class settlement was approved settling allegations of price fixing against certain airlines which included \$50 million in cash and \$408 million in discount certificates for future travel. And in *New York v. Nintendo of America, Inc.*, 775 F. Supp. 676 (S.D.N.Y. 1991), a settlement was approved pursuant to which Nintendo agreed to pay \$25 million in \$5 coupons. But if fewer than one million purchasers redeemed the coupons, Nintendo would pay up to \$5 million to certain state attorney generals. *In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 304-06 (N.D.Ga. 1993). Or non-cash compensation can be offered to class members as an alternative to cash compensation thereby allowing the class member to decide what it values. *See e.g. Sampson v. Kodak*, 552 N.E.2d 1194, 1195 (Ill.App.Ct. 1990).

D. Requiring class counsel to take part or all of their fees in non-cash compensation will make settlement more difficult and is not necessary. While individual class members have

no difficulty in obtaining and utilizing coupons and/or product, class counsel may have difficulty. Presumably class counsel will receive more value than an individual class member. Obtaining and utilizing the coupons and/or product in such greater quantities may be difficult. Correspondingly the settling defendant may face market disruption problems depending upon how class counsel utilizes the coupons or products. And use of non-cash fees is not necessary. Class counsel fees ultimately are determined by the Court.

E. Courts can and do supervise non-cash settlements. Non-cash settlements often are structured so that defendants must pay out at least a minimum amount. *Buchet*, 845 F. at 696. Courts may chose not to value airlines certificates of settlement at face value of certificates. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 321. Courts may delay awarding attorneys' fees until subsequent evidence of how valuable non-cash settlement was, based on how many vouchers were used. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 191 F. Supp. 2d at 190.

## VI. CONCLUSION

Non-cash settlements should continue to be allowed. Non-cash settlements, like all settlements, have the potential to be abused. But that potential is not a reason to prohibit such settlement. The requirement of judicial review of the settlement after notice to the class is an adequate safeguard. Non-cash settlements create flexibility in settlement process and help bridge the gap between the parties' perception of risk. Settlements cannot be valued without factoring into the valuation the unpredictability of litigation. Settlements should not be valued as if liability and the measure of damages are certain.