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*Protecting Consumer Interests in Class Actions*  
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Chicago Clearing Corporation (CCC), formerly Certificate Clearing Corporation, has been the premier market maker for in-kind settlement awards since its founding in 1993. CCC has successfully made markets in ten unique certificate settlements, nine more than anyone else. CCC has paid tens of millions of dollars to tens of thousands of class members, most of who would have received nothing but valueless paper without CCC's presence. Through its rich and numerous affidavits, expert witness testimony, newspaper articles and class action committee membership, CCC has been a strong and often lone advocate for the secondary market on which most absent class members rely to realize the award promised them.

If class members redeemed certificate awards in abundance, there would be no need for secondary markets and market makers. However, redemption rates in class action coupon settlements, without the presence of a strong market maker, mirror the redemption rates of consumer coupons issued as marketing tools by corporations – around 2%. Yet, attorney awards, paid in cash, all too often rely on grossly inflated projections of coupon redemption, ignoring the overwhelming empirical evidence that shows persistently puny class action coupon redemption rates. This leads to press ridicule and tremendous consumer animosity towards in-kind settlements and threatens to destroy a potentially useful tool for everyone involved.

Moreover, CCC believes that the structure of class action certificate settlements is grossly unfavorable to the class and in need of reform. The consumer class member's value derives directly from the redemption or sale of the certificate. As stated, very few class members redeem certificates themselves. They rely on selling their certificate in a secondary market, yet it is rare indeed when the parties create the environment that would encourage a secondary market. This is witnessed by the fact that there have been hundreds of coupon settlements and only a handful of secondary markets. Without a viable secondary market structure in place, defendants have every incentive to diminish the certificate redemption rate and thus their financial liability. Plaintiff's attorneys, having already received their fees, have moved on to their next case. Judges can only rule on what is brought to their attention formally by the parties. And coupons expire, so if there is a grievance, the defendant can continuously appeal any adverse rulings until after the certificate expiration date. This structure makes creating a secondary market

very risky. And without standing to bring grievances to the Court, sharp entrepreneurs snub all but a few potential certificate markets.

Despite the numerous hurdles, CCC has brought value to consumer class members by creating secondary markets in the following class action settlements:

- 1) In re BMW M5 Litigation;
- 2) Johnson, et. al. v. Nissan;
- 3) Hamburg, M.D. v. American Honda Motor Co.;
- 4) Weiss v. Mercedes-Benz of North America, Inc.;
- 5) Princeton Economics Group Inc. vs. American Telephone and Telegraph Company;
- 6) Dismuke et al. v. Edina Realty Inc.;
- 7) Lustine Litigation;
- 8) Nancy Wolf, et al. v. Toyota Motor Sales, U.S.A.;
- 9) In re Auction Houses Antitrust Litigation;
- 10) In re Lloyd's American Trust Litigation

In addition, CCC has provided expert witness testimony on numerous class action settlements, including:

- 1) In re The Coca-Cola Company Apple Juice Consumer Litigation;
- 2) Francine Pickett, Brian Cohen, Jack Masin, and Belle Masin, individually and on behalf of all others similarly situated, vs. Holland America Line-Westours Inc.;
- 3) In re Louisiana Automobile Dealers Association Ad Valorem Tax Antitrust Litigation;
- 4) Computer Monitor Cases;
- 5) In re General Motors Corp. Pick-Up Truck Product Liability Litigation

These affidavits and expert witness testimonies consistently echo what CCC's unique and rich market making experiences have instructed – for class members to receive the

promised value from their settlement award, certain terms and mechanics must be favorably present and the means for their enforcement must be effective.

Briefly, these are some of the important components necessary for a successful coupon settlement:

- 1) Diligent pursuit of eligible class members
  - a. Follow up on Post Office undeliverables and return mail
  - b. Notice placement in national newspapers
  - c. Dedicated web sites for settlements

All too often the defendant, or its paid proxy, the claims administrator, is in charge of identifying and locating class members. The defendant has no incentive to provide a current and thorough class list or to follow up on Post Office returns. This, of course, diminishes class size and ignores class members who could be found with minimal effort. The class list, if one can be created, must be independently vetted and an independent third party should be employed to find the missing class members.

- 2) Class action notices must be understandable
  - a. Clear statement of value to class members
  - b. Clear instructions

Intimidating legalese is not an incentive for positive class member involvement. Proof of claim forms must be simple and clearly spell out what the class member will get from participating in the settlement.

- 3) Avoid claims made settlements
  - a. If claim forms are necessary, simplify claim forms
  - b. Settlement distribution must be non-reversion

All the evidence shows that class coupon claims rates are shockingly low, quite often less than 1%. This occurs when the class does not perceive value. Forcing a class member to file a claim form further diminishes class participation. Claims not filed should not revert back to the benefit of the defendant, but instead should inure to the class.

- 4) Objectors must have rights and standing
  - a. Objectors should be allowed limited discovery
  - b. Objectors should be allowed to file motions

To pass judicial scrutiny, the plaintiff's and defendants many times will join forces to fight objectors tooth and nail, even though the objector is often working to improve the settlement and bring more value to the class.

- 5) Certificates must be freely and easily transferable
  - a. Certificates should resemble currency as closely as possible
  - b. Rules of Redemption must be clearly stated on the coupon

Freely transferable certificates must be a minimum hurdle for a settlement to be considered a fair, reasonable, and adequate settlement. Without transferability, redemptions are unacceptably low.

- 6) Market makers must be sanctioned by the Court
  - a. Market maker access to the class
  - b. Market maker access to the Court

Simply making a coupon transferable does not inspire transfers. Indeed, overwhelming evidence shows that redemption rates of transferable certificates, without the presence of a market maker, mirror the redemption rates of a non-transferable coupon. A market maker must be readily available to purchase the certificates and market makers must be introduced uniformly and formally to the class. Rarely are class members easily identified without access to the class list. Without access, part of the class (often a very large part of the class) is unaware of the market maker's offer and is prejudiced. Market makers must have confidential access to the class. Also, as the market unfolds, market makers should report monthly or quarterly to the Court to disclose how it sees the market developing. Market makers also need access to the Court if disputes arise.

- 7) The certificates must be marketable and have favorable economics
  - a. The products or services the certificates are redeemable against must be current, useful and plentiful and must remain so throughout the life of the coupon
  - b. The number of possible redemptions should far outweigh the number of coupons issued to the class
  - c. The coupons must have value. For example, a one dollar coupon off a twenty dollar item is not going to inspire redemptions
  - d. The coupons should be stackable, or used together, to be redeemed against the full value of the product or service

All too often defendants will make the coupons redeemable against products they know will soon be obsolete or will change pricing structures or product configurations to diminish the value and effectiveness of the coupon. Defendants will also disallow coupon redemptions in conjunction with other promotions, and then they will conduct promotions foreclosing the use of the coupons to the detriment of the class and the secondary market.

- 8) Redemption rules must be simple, clear, and plainly determined ahead of time
  - a. Class members must be able to redeem coupons at as many points of purchase in as many ways as possible
  - b. The defendants redemption network must be educated and aware of the use of coupons
  - c. The rules of redemption must be clear and appear on the coupon

The defendant's most effective way to diminish redemption rates lies in its control of the redemption process. Too often, the rules of redemption are not fully scrutinized by the plaintiff's attorneys or Courts before issuance of the coupon. Then, as redemptions occur, the defendants unilaterally and arbitrarily change the rules to suit themselves, sometimes going so far as to shut down redemptions altogether. Rules must be spelled out in advance and the Court or its surrogate must approve any change to those rules.

- 9) Redemption reimbursements must be swift
  - a. If a coupon is a rebate coupon, then the reimbursement period to the class member must be short
  - b. If a coupon is redeemed through a dealer network, the defendant must not be allowed to influence or punish the dealer for legitimate redemptions

Often, defendants have sway over their volume purchasers. If volume purchasers, such as fleets in the case of automotive cases, try to use the coupons, defendants threaten retribution - they will never get a discounted price again or get the desirable cars for their fleet, or perhaps won't even be able to get cars. Also, defendants control the livelihood of their dealers. Similar to fleets, defendants have intimidated their dealer network into rejecting or limiting the redemption of class action coupons. Threats include poor allocation of autos, accounting audits, slow reimbursement for the coupons and threats to rescind the dealership.

- 10) Independent administrators must be present
  - a. Much of the defendant's manipulation of certificate settlements can be solved with the presence of a third party administrator to redeem certificates and oversee that the rules are followed
  - b. Administrators must not be paid directly by the defendant, or the defendant is viewed as their "client" and the administrator becomes a patsy for the defendant

If the defendant pays the administrator, then the administrator is working for the defendant, not the Court or in the best interests of the class. The administrator should be paid out of a blind fund overseen by the Court and should report its activities regularly to the Court.

- 11) Swift dispute resolution and enforcement mechanisms must be perfected before the settlement is approved.
  - a. Special Masters with mechanical oversight and binding decisions should be in place
  - b. Committees consisting of the plaintiff's attorney, defense attorney, market maker, class representative, administrator and the Court should meet regularly to oversee the settlement.

CCC believes that much of the structural deficiencies of in-kind class action settlements can be fixed by adopting two of the proposed points of the recent Class Action Fairness Act that died by filibuster. First, class actions that are national in scope should be heard

in Federal Court; and the multiplier portion of the plaintiff attorney's fees should be paid either in coupons or based on a percentage of the face value of coupons redeemed. If the multiplier portion of attorney's fees were tied to redemption rates, suddenly, the redemption rates, and therefore the value the class realizes, would skyrocket and most of what we propose would occur naturally. This would end the press ridicule and public skepticism and all the parties, not just the class, ultimately would benefit.