Coupons and the Class Action Fairness Act

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In 1992 the phone rings amidst the chaos of the SPX pit on the Chicago Board Options Exchange ("CBOE"). An old college friend, a lawyer representing BMW in a class action lawsuit, is calling me. The case is weak, my friend explains, and BMW will accept only coupons to settle the case. Class counsel, fearing a recent Audi ruling rejecting a non-transferable coupon, is requiring a transferable coupon with some form of cash value. To provide cash value, BMW will consider a market maker, someone to purchase all the coupons at a guaranteed price or better, then resell the coupons in a market created by the market maker. So my friend called me, a seasoned market maker on the floor of the CBOE, to query my interest. I said yes, and a cottage industry was born.

Since 1993, Certificate Clearing Corporation, now Chicago Clearing Corporation ("CCC"), has created a market in ten unique class action coupon settlements.[1] CCC is the only entity that has created a class action coupon market more

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Mr. Tharin and CCC have provided active commentary and advocacy for consumers in class action certificate settlements for over ten years. CCC has provided expert witness testimony in countless class action certificate cases. CCC and Mr. Tharin have appeared in print and electronic media, such as articles appearing in the CHICAGO TRIBUNE, CHICAGO MAGAZINE, ART & AUCTION, ANTIQUE TRADE GAZETTE, the NEW YORK TIMES, the SAN FRANCISCO DAILY LAW JOURNAL, and the MINNEAPOLIS STAR TRIBUNE. Channel 26 in Chicago recently interviewed James Tharin and profiled CCC in its *Morning Business Report*.

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1. *In re* Auction Houses Antitrust Litigation, 00 Civ.0648 (S.D.N.Y. 2001); *In re* Lloyd's American Trust Litigation, 96 Civ. 1262 (S.D.N.Y. 2001); Wolf *ex rel* Toyota Motor Sales, U.S.A., Inc., Case Nos. C94-1359-MHP, C94-1377-MHP, and C94-1960-MHP (N.D. Cal. 1997); Dismuke v. Edina Realty, Inc., Court File No. 92-8716 (D. Minn. 1995); Weiss *ex rel* Mercedes-Benz of N. Am., Inc., Master File No. 93-96 (D.N.J.

than once. In addition, CCC has submitted affidavits and expert witness testimonies in numerous class action coupon settlements or in-kind settlements over the last twelve years.[2] CCC has been mentioned in numerous publications.[3] It has, quite by accident, become our life's work. This rich background uniquely qualifies CCC to comment on the Class Action Fairness Act of 2004 ("CAFA"), specifically on the section concerning coupon settlements and attorney's fees.[4]

The press, scholars, practitioners, and lawmakers increasingly have maligned class action settlements, especially coupon settlements, and sadly, often deservedly so. However, class action settlements can serve society to both deter and punish corporate misconduct. They allow a large number of claimants, similarly situated, to file their grievances as one, often because their individual claims are too meager to cost-effectively file alone. Unfortunately, more and more high profile abuses have tainted what is otherwise a useful tool.[5]

1995); Hamburg v. Am. Honda Motor Co., No. 3014 (Cal. App. Dep't Super. Ct. 1994); Johnson v. Nissan, No. 730558 (Cal. App. Dep't Super. Ct. 1994); *In re* BMW M5 Litigation, 91 CH 04192 (Ill. Cir. Ct. 1993); Harden v. Lustine Chevrolet, Inc., Case No. CAL 99-18474, (Md. Cir. Ct. 2000); Princeton Econ. Group, Inc. v. American Tel. & Tel. Co., No. L-91-3221 (N.J. Super. Ct. 1995) (all cases on file with authors).

2. *See also In re* General Motors Corp. Pick-Up Truck Fuel Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 88 (1995); *In re* La. Auto. Dealers Assoc. Ad Valorem Tax Antitrust Litig., Civil Suit No. 94-1730 (D. La. 1997); Clement *ex rel* Am. Honda Finance Corp., 145 F. Supp. 2d 206 (D. Conn. 1997); Pace v. Heilig-Meyers Furniture Co., No. 5f: 96CV457 (N.D. Fla. 1997); Laughman *ex rel* Wells Fargo, 96-CV-925 (N.D. Ill. 1997); Williams v. General Elec. Capital Autolease, No. 94 C 7410 (N.D. Ill. 1995); Dansby v. Carroll, No. 195183 (Ala. 1997); Russell v. VT Inc., Civil Action No. 98-A-817-S (Ala. Dis. Ct. 1999); Cellular Phone Cases Coordinated Actions, Judicial Council Coordination Proceeding No. 4000 (Cal. Super. Ct. 1997); Computer Monitor Cases, Judicial Council Coordination Proceeding No. 3158 (Cal. Super. Ct. 1997); *In re* Coca-Cola Co. Apple Juice Consumer Litig., Master File No. E-47054 (Ga. Super. Ct. 1998); Pickett v. Holland Am. Line-Westours, Inc., Case No. 96-2-10831-6KNT (Wash. Super. Ct. 1998) (all cases on file with authors).

3. Neal Gendler, *Firm May Make Market for Edina Realty Coupons*, MINNEAPOLIS STAR TRIB., Jan. 21, 1995, at 1D; Margaret Littman, *Suitable Solution*, ART & ANTIQUES, July 2003, at 26; Margaret Littman, *Funny Money Chasing Multimillion-Dollar Lawsuit Settlements*, CHI. MAG., Aug. 2003, at 20; Barry Meier, *Fistfuls of Coupons*, N.Y. TIMES, May 26, 1995, at D1; Dennis Pfaff, *Critics Aside, Auto Case Pact Allowed*, S.F. DAILY L. J., Oct. 1, 1997, at 1; Ameet Sachdev, *Coupon Awards Reward Whom?*, CHI. TRIB., Feb. 29, 2004; Judd Tully, *Flipping Coupons*, ART + AUCTION, Jan. 2004.

4. The Class Action Fairness Act of 2004, S. 2062, 108th Cong. § 1712 (2004).

5. Meier, *supra* note 3; Lewis H. Goldfarb, *Selling Res Judicata: Class Action Abuse and How To Fix It*,10 METROPOLITAN CORPORATE COUNSEL 5, Oct. 1997, at 1; *Plaintiff's Bar Examines Ethical Issues of Consumer Class Actions*, 1 CONSUMER FIN. SERVICES L. REP 1997 n.10; 1 CONSUMER FIN. SERVICES L. REP. (1997) n.12 (on file with authors); Brendan Stephens, *Proposed Settlement Stiffs Class, Group Says*, CHI. DAILY L. BULL., May 28, 1998, at 1; 3 CONSUMER FIN. SERVICES L. REP. (1999) n.7 (on file with authors); Julia Brunts, *When a Class Action Leads to Redemption*, CHI. DAILY L. BULL., Mar. 11, 2002, at 3; *Approve Class-Action Reform: A Bill That Would Help Prevent Corporate Shakedowns, Without Harming Real Victims, Deserves Passage in Senate*, OREGONIAN, July 29, 2002, at E06; *Protection for Plaintiffs*, BUFFALO NEWS, Jul. 2002, at C4; Sen. Chuck Grassley, *Should Congress Step in To Reform the Current System of Class-Action Lawsuits?; YES: Lawyers Game the Rules, Enriching Themselves but Not the Injured Consumer*, INSIGHT ON NEWS, Nov. 12, 2002, at 46; Dan Margolies, *Block Settlement Draws Criticism*, KAN. CITY STAR, Dec. 25, 2002, at C3; Joseph T. Hallinan, *Fees for Lawyers Questioned in H&R Block Settlement*, WALL ST. J., *reprinted in* HOUSTON CHRON., Dec. 25, 2002, Business, at 9; Terry Maxon, *And Coupons for All; Ratliff's Bill Would Give Attorneys Same Payout Class-Action Clients Get*, DALLAS MORNING NEWS, May 5, 2003; 7 CONSUMER FIN. SERVICES L. REP. (2003) n.3 (on file with authors); Santa Mendoza, *Viewpoint; Class Actions, Reform, and the Impact on Franchisors*, 10

These abuses beg reform. We believe, on balance, that the reforms proposed in the CAFA will remedy the expanding exploitation and structural flaws of class action coupon settlements. Specifically, the reforms proposed in Section 1712, which states: "the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed" should fix the systemic problems of class action coupon awards, hopefully with few negative unintended consequences.[6]

If structured correctly, coupon settlements can work. Coupon settlements benefit class members when the coupon's face value exceeds the class member's claim and the discount coupon is used to purchase the defendant's product or service. If the coupon is transferable and a vibrant secondary market exists, the class member benefits when he sells his coupon for more than his underlying claim. Defendants accept coupon settlements because they pay only when a sale is made, spreading their liability over time while ridding themselves of risky litigation. Class counsel benefits because they get paid to deliver justice to their class in cases that are complex and often difficult to prosecute.

So, what's the problem? While the breathtaking headlines of "those grubby attorneys get all the cash and the class gets worthless coupons" grab all the attention, the real problem is persistently puny coupon redemption rates that deliver little value to the class, and contingency fees based on inflated redemption rate projections that far exceed the true value realized by the class. Class action coupon redemption rates, particularly absent a market maker and a viable secondary market, typically mirror the annual corporate issued promotional coupon redemption rates of 1-3%.[7] Yet, class action contingency fee awards are predominantly paid to class counsel immediately upon final approval in cash, not coupons, before a single coupon has been issued or redeemed by the class. Attorney's fees are often based on experts' unrealistic coupon redemption projections that disregard the overwhelming evidence of meager coupon redemption rates.

For example, in *In re Domestic Air Transportation Antitrust Litigation*, the experts, paid by class counsel, estimated a redemption rate of 50-75% of the $400

FRANCHISING BUS. & L. ALERT 3 (2003); Sachdev, *supra* note 3; Greg Burns & Michael J. Berens, *The Class-Action Game*, CHI. TRIB., Mar. 7, 2004, at 1; *Fees Line Lawyers' Pockets*, USA TODAY, Apr. 7, 2004, at 20A; 7 CONSUMER FIN. SERVICES L. REP. (2004) n.19 (on file with authors); Patti Waldmeir, *Time to End This Class-Action Craziness*, FIN. TIMES, June 7, 2004, at 10; *Pay the Lawyers in Coupons, Too: Class-Action Excesses*, ROCKY MOUNTAIN NEWS, July 25, 2004, at 7E.

6. The Class Action Fairness Act of 2004, S. 2062, 108th Cong. § 1712 (2004).

7. George Lazarus, *Manufacturers Clip Coupon Distribution*, CHI. TRIB., Jan. 7, 1994, at 2; Pat Sloan, *P&G Tops Rivals in No-Coupon Push; Colgate Promotion Preceded Test in N.Y. State*, ADVERTISING AGE, Jan. 1996; Raju Narisetti, *Move to Drop Coupons Puts Procter & Gamble in Sticky PR Situation*, WALL ST. J., Apr. 17, 1997, at A-1; Natalie Schwartz, *Clipping Path*, PROMO MAG., Apr. 1, 2004, *available at* http://promomagazine.com/mag/marketing_clipping_path/index.html.

million of potential award, yet less than 10% of the potential class members bothered to claim the non-transferable coupons and well below 10% of the coupons issued were actually redeemed.[8] At a minimum, the experts missed the mark by $160 million. Based on the experts' projections, the court in *Domestic Air Transportation Antitrust Litigation* awarded class counsel $14.4 million in fees.[9] In *Princeton Economics Group, Inc. v. AT&T*, class counsel's expert predicted a redemption rate of 77.5% of the potential $160 million award.[10] The final redemption rate was closer to 12%. The expert was over $100 million off. Class counsel in *AT&T* requested $16 million dollars in fees based on their expert's projections.[11] In the *Dismuke v. Edina Realty Co.*, CCC discovered that the defendant took a $260,000 charge against earnings for a coupon settlement that they and the plaintiff's experts argued in Court was worth $7 million to the class.[12] Class counsel in *Edina Realty Co.* requested $2.5 million in fees and expenses.[13] Reports and articles abound with similar examples of the disparity between attorney's fees and actual value delivered to the class.[14] It's no wonder class action coupon settlements are so maligned.

To remedy these conflicts, the class and class counsel's interests must be aligned. CCC knows first-hand how mis-aligned the parties' interests can be, especially once the litigation is settled and the class member receives his coupon. Unfortunately, class counsel, once paid, often neglect their charge and set the class adrift to fend for themselves in the coupon redemption market. Yet, the class

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8. *In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993); *see also* Christopher Reynolds, *Coupon Settlements Offer Little Help to Consumers*, L.A. TIMES, Mar. 12, 2000, at 2.

9. *See* Betsy Wade, *Creeping Toward Resolution: A Judge's Ruling Clears One More Hurdle for Huge Airline Suit, but Consumers Still Can File*, CHI. TRIB., Apr. 11, 1993, Travel, at 12; *see also* Alan Solomon, *The $458 Million Clip Job: How Airscrip Turned into Scraps*, CHI. TRIB., Mar. 12, 1995, at 1.

10. Aff. of Dr. Itamar Simonson at 24, Princeton Econ. Group, Inc. v. Am. Tel. & Tel. Co., No. L-91-3221 (N.J. Super. Ct. 1995).

11. Opinion of Carchman, A.J.S.C. at 32, *Princeton Econ. Group., Inc.*

12. Plaintiff's Mem. in Support of Final Approval of Settlement at 1, Dismuke v. Edina Realty, Inc., Court File No. 92-8716 (D. Minn. 1995).

13. *Id.* at 6.

14. *See, e.g.*, Hoffman v. BancBoston Mortgage Corp., No. CV-91-1880 (Ala. Cir. Ct. 1994) (This case is often cited as a prime example of class action abuse. The class received a refund of up to $8.76 in their bank accounts, but some class members had as much as $99 removed from their accounts to pay for the $8.5 million in attorney fees.); W. David Gardner, *Microsoft Antitrust Settlement Dollars Going Largely Unclaimed*, INFORMATIONWEEK, Dec. 27, 2004, *at* www.informationweek.com/story/showArticle.jhtml?articleID=56200598; Bernadette Tansey, *Claim Deadline Set at Jan. 22: Microsoft Customers Get More Time to Get Share of Settlement*, S.F. CHRON., Jan. 11, 2005, at D1 (Plaintiff's attorneys in class action suit against Microsoft have been awarded $101 million in fees. However, class members can claim vouchers ranging in value of $5 to $29 reimbursement on future software, desktop, and laptop purchases. Of the approximate fourteen million class members, less than one million class members had filed claim forms as of Jan. 11, 2005.); Trisha L. Howard, *Lawyers Profit Most in Suit, Defendant Says*, ST. LOUIS POST-DISPATCH, Mar. 31, 2004, at A1. (In a class action settlement with AT&T and Lucent valued at $350 million, plaintiff's attorney represented at one point twenty-nine million potential class members, however only 92,000 class members made claims to the settlement equaling a total value of $8.4 million. The plaintiff attorney's fees and expenses equaled $84.5 million.).

member's true benefit is realized only upon the redemption or sale of the coupon. Rules of redemption and enforcement are rarely sufficient to seamlessly redeem a coupon, and few coupons are saleable at any price. Most coupons are burdensome, restrictive and confusing. The redemption rules are defaulted to the defendant, or its paid proxy, the claims administrator. The defendant's legal department controls the process, preferring to quell redemptions rather than promote redemptions.

An example where the interests of the class and their attorneys did not align is *Wolf v. Toyota Motor Sales.*[15] Toyota Motor Sales issued 2.8 million transferable coupons to class members good for $150 off the best-negotiated price of the purchase or lease of a new or used Toyota.[16] Toyota dealers were expected to redeem and pay for the coupons themselves. The Toyota coupon was confusing, difficult to transfer, and very difficult to redeem. CCC received numerous complaints from consumers whose redemption was rejected by the Toyota dealer because the negotiated price was low and the dealer chose not to accept the coupon. Class counsel, who received $4.2 million in fees based on expert opinion, instructed CCC to send disgruntled coupon users to them. Rarely did that solve the problem. Many transferees simply returned their coupons to CCC for a refund. Of course, this chilled the secondary market and rendered the transferability feature nearly worthless, leaving most of the class with nothing.

Another example of a coupon settlement gone awry is *Johnson v. Nissan.*[17] Nissan issued certificates good for $1000 off the purchase or lease of any new or used Nissan from an authorized Nissan dealer, or upon transfer the coupon was good towards a $750 discount on a new or used Nissan vehicle.[18] The Nissan coupon was redeemed upon purchase through the Nissan dealer. The Nissan dealer would then send the coupon to Nissan for reimbursement. Nissan dealers, like Toyota dealers, own their own dealerships. Many Nissan dealers bought coupons from CCC to use as sales promotions. Many dealers told CCC that once Nissan discovered this, Nissan threatened Nissan dealers with audits, poor allocation of desirable new car models, restrictive loans, unilateral money withdrawals from their shared accounts, and even rescinding the dealership franchise. Nissan immediately audited dealers it suspected were doing business with CCC, then proceeded to make good on the other threats if the dealer persisted in buying coupons from CCC. In addition, Nissan, in direct contravention of the settlement agreement, flatly rejected coupons redeemed by car rental agencies. When this behavior was presented to the plaintiff's attorneys, they did nothing. CCC, without standing to bring this matter in front of the judge, was left

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15. Wolf v. Toyota Motor Sales, U.S.A., Inc., Case Nos. C94-1359-MHP, C94-1377-MHP, and C94-1960-MHP (N.D. Cal. 1997).

16. *Id.*

17. Johnson v. Nissan, No. 730558 (Cal. Super. Ct. 1994).

18. *Id.*

with little redress. Naturally, the Nissan coupon market was also chilled, leaving most of the class with a coupon of no value to them.

Rarely, if ever, do the parties voluntarily disclose the problems we've just described. Nor do they advertise coupon redemption rates, so final redemption figures are scant. Where evidence does exist, redemptions rates are tiny. In *Buchet v. ITT Consumer Finance Corp.*, the district court rejected a proposed settlement under which the class would receive freely transferable coupons worth $25 off a variety of insurance products due to the low redemption rates of earlier, similar coupons. The court cited actual redemption rates for previous settlements involving the same parties ranging from 0.002% to 3.277%.[19] Chrysler Corporation revealed that less than 1% of nontransferable certificates were redeemed in a Renault Encore and Alliance settlement.[20] In *Perish v. Intel Corp.*, only 150 claims were made from a class of 500,000 for a $50 coupon off the purchase of a new microprocessor.[21] In *In re Cuisinart Food Processor Antitrust Litigation*, the claims rate was only 0.54%.[22]

CCC has final redemption data on three cases in which CCC has made a market. In the aforementioned *Nissan* case, CCC discovered that less than 10% of the Nissan coupons were redeemed outside of CCC. In spite of Nissan's behavior, CCC caused redemption of another 12% of the outstanding coupons.

In the 1993 *In re BMW M5 Litigation*,[23] the settlement provided the purchaser or lessee of a new 1988 M5 BMW a coupon, good for thirty months, entitling the bearer to a $4,000 discount toward the purchase or lease price of certain models of new BMW automobiles.[24] The court authorized CCC to act as a market maker. Originally, BMW claimed there were 1,233 *BMW M5 Litigation* class members. However, BMW located only 1,022 class members for the initial coupon mailing. Of the 1,022 coupons BMW originally mailed by certified mail, over 330 coupons were returned as undeliverable to BMW. BMW made no further effort to find these people. CCC found and secured coupons for over 363 class members that neither BMW nor class counsel bothered to find. Many of the 363 class members CCC found sold their coupons to CCC. In the end, CCC bought and sold 631 coupons. Only eighty-six (seven percent) of the *BMW M5 Litigation* class members used their own coupon to purchase or lease a new BMW.

Princeton Economics Group, Inc. v. AT&T, resulted from AT&T's 1986 to 1991 manufacture of the Spirit Phone System on which the conferencing feature allegedly did not work.[25] In May 1995, AT&T issued 3,200,000 freely

19. Buchet *ex rel* ITT Consumer Fin. Corp., 845 F. Supp. 684 (D. Minn. 1994).
20. Meier, *supra* note 3.
21. Perish v. Intel Corp., No. CV-75-51 (Cal. Super. Ct. 1998).
22. *In re* Cuisinart Food Processor Antitrust Litig., 1983-2-CCH Trade Cas. 65 n.14 (D. Conn. 1983).
23. *In re* BMW M5 Litigation, 91 CH 04192 (Ill. Cir. Ct. 1995).
24. *Id.*
25. Princeton Econ. Group, Inc. v. Am. Tel. & Tel. Co., No. L-91-3221 (N.J. Super. Ct. 1995).

transferable bearer coupons to approximately 200,000 original buyers of the AT&T Spirit System. The coupons were good towards a 20% discount off certain AT&T phone systems for two years and certain other AT&T products for one year. Each coupon was worth $50.

Class counsel asked CCC to act as a market maker in the settlement. Both the court and the defendant approved CCC's participation in the secondary market. In fact, Superior Court Judge Philip Carchman stated that he would not have approved the settlement absent a market maker.

> What the market maker [Certificate Clearing Corporation] has been able to do, he has been able . . . it has been able to identify those who are most interested in purchasing the coupon. Who better benefits from that than the class member? . . . I will tell you point blank . . . I would not have approved this settlement in the absence of a market maker.[26]

CCC's introduction and offer to the class was included in the original coupon mailing. CCC bought and sold approximately 260,000 coupons. CCC learned in a post-settlement dispute that approximately 150,000 coupons were redeemed outside of CCC, a redemption rate of less than 5%.

CCC would have redeemed far more coupons in the AT&T case had AT&T not arbitrarily shut down the redemption market. The plaintiff's attorneys petitioned the court to adjudicate. Judge Carchman repeatedly ruled in the class' favor, yet AT&T appealed Judge Carchman's rulings and refused to redeem coupons awaiting appellate judgment. By the time the appellate court finally affirmed the trial court's rulings, the coupon had expired and the damage was done. The class once again was foiled.

We believe the only way to affect change in coupon settlements and bring true value to class member consumers is to link the attorney's fees to coupon redemption rates, which CAFA has theoretically done. Under CAFA, class counsel will focus sharply and intently up-front on making the coupon redeemable, and therefore valuable. They will make class action notices simple, easy to read, and ubiquitous; settlements that needlessly require the completion of claim forms to receive the award will be avoided whenever possible. Coupons will be freely and easily transferable, redeemable on enduring products or services, marketable, and easily saleable. Court sanctioned market makers will be introduced to the class in the coupon mailing and easily identified on the coupon itself to provide a meaningful cash alternative; rules of redemption and reimbursement will be clear and overseen by an independent third party administrator, not an administrator paid directly by the defendant; swift dispute resolution mechanisms will be negotiated prior to settlement approval allowing all interested parties access to timely redress. Currently, few coupon settlements possess these necessary ingredients for success.

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26. *Id.*

One current case where many of these ingredients exist is the *In re Auction Houses Antitrust Litigation*.[27] Class counsel agreed to accept coupons as part of their fee and then negotiated a well-considered coupon settlement. Approximately 65,000 class members will share $412 million in cash and $125 million in transferable coupons.[28] Class counsel received $6 million in coupons.[29] The Auction Houses coupons are freely transferable, redeemable on an enduring service, marketable, and easily saleable. Court sanctioned market makers, CCC being the only one, exist; rules of redemption and reimbursement are largely clear and largely followed. In addition, the coupons can be redeemed for their face value in cash after four years, assuming both Sotheby's and Christie's are still in business. This coupon has served the class well. CCC alone has purchased over $20,000,000 of Auction Houses certificates at an average price of 71.5% of face value. While we prefer tying attorney's fees to the coupon redemption rate, paying attorney's fees in coupons is the next best alternative and the Auction Houses litigation shows that.

There are potential drawbacks to the coupon provisions of CAFA and there are detractors. CAFA likely will result in far fewer class action coupon cases, meaning fewer awards to class members; though few consumers redeem coupons anyway and few consumer advocacy groups have forcefully opposed the coupon provisions of CAFA. Some consumer groups, like Public Citizen, support it.[30] Fewer coupon settlements could hurt CCC and other potential market makers, but we favor CAFA because we believe fewer but significantly better coupon settlements will result. Some corporate defendants might oppose the coupon provisions of CAFA because they see an avenue for cheap settlements foreclosed.[31] However, most corporate defendants, along with business groups, favor the coupon provisions of CAFA because they believe fewer marginal lawsuits will be filed against them.[32] Plaintiff's attorneys are uniformly and vocally opposed to CAFA because, in reality, an avenue for significant fees could disappear if fewer settlements result.

However, we believe CAFA will force coupon settlements to be structured correctly and therefore everyone should benefit. The class, numbed by years of

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27. *In re* Auction Houses Antitrust Litig., 2001 WL 170792 (S.D.N.Y. 2001).

28. *Id.* at *15-16.

29. *Id.*

30. *Cf.* Brian Wolfman, *Statement of Brian Wolfman Before the Third Circuit Task Force on Appointment of Class Counsel*, June 1, 2001, *available at* http://www.citizen.org/litigation/briefs/Class_Action/articles.cfm?ID=5808.

31. *Cf.* Tom McCann, *Class Actions: The Battle Heats Up*, CHI. LAW., Apr. 2004, at 8 ("It's going to be the companies who will miss coupons more than us. They use it as a way to have a settlement actually make money for them.").

32. United States Chamber of Commerce, *Class Action Reform*, July 2004, *available at* http://www.uschamber.com/government/issues/reform/classaction.htm (on file with authors); National Association of Mutual Insurance Companies, *Legal Reform: Class Action Jurisdiction*, Jan. 27, 2005, *available at* http://www.namic.org/fedkey/04ClassAction.asp.

meaningless coupon settlements and outraged over outlandish attorney's fees, will receive an award of real value and the satisfaction of knowing their attorneys side squarely with them from start to finish and will fight for a redeemable coupon. CAFA will require plaintiff's attorneys to settle class action coupon litigation with meaningful coupon awards resulting in significantly higher redemption rates and much greater value to their class. As a result, plaintiff's attorneys should share in the success of these valuable settlements through an increase in their contingency fee percentage. Defendants will continue to settle with coupons because they still get the benefit of releasing risky litigation and paying the settlement award only when a sale occurs. Defendants will be forced to view and structure coupon settlements as a promotion aimed at increasing their revenue as opposed to a nuisance to be squashed.

In conclusion, we believe the best way to bring balance back to class action coupon settlements is to tie attorney's contingency fees with actual coupon redemption rates. We believe the Class Action Fairness Act does that and we support its passage.