TRUE TO THEIR WORD: STATE ATTORNEYS GENERAL MOVE TO BLOCK ANOTHER CLASS ACTION "COUPON SETTLEMENT"

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To Our Clients and Friends:

Building on their success in *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292 (S.D. Fla. 2007), when 36 state Attorneys General convinced a federal judge not to approve a "coupon settlement" in a consumer class action case, many of those same state AGs have asked another federal judge to reject the settlement proposed in *True v. American Honda Motor Co.*, No. 5-07-CV-287-VAP-OP (C.D. Cal.), which would provide $500 or $1000 rebates to class members who purchase certain new Hondas.[1] Coupon settlements already appear to be an endangered species and, should these AGs succeed in blocking the *True* settlement, the once-common use of coupons as settlement currency likely will fall even further out of favor.

True involves allegations that Honda misled 158,639 purchasers of its Civic hybrid models about the cars' fuel economy. Under the settlement, class members would receive a DVD with information on how to improve their mileage. Only a very small number of class members — those who were on record complaining about their fuel economy prior to March 2009 — are eligible for a $100 cash payment. All other class members can receive monetary benefits only by purchasing, with a coupon, certain models of 2009, 2010 or 2011 Hondas or Acuras. (Interestingly, hybrids are not included.) They can receive $1,000 off their new purchases if they also trade in their subject hybrids, or $500 off if they do not. The named plaintiffs, however, are set to receive $22,500 in "incentive payments" and the attorneys for the plaintiffs have requested to be awarded a fee of $2.95 million.

The Class Action Fairness Act of 2005 ("CAFA") requires courts to give substantially heightened scrutiny to coupon settlements. In asking the court to reject the *True* settlement, the AGs argue that coupons are *per se* unfair because they require class members to do business once again with the company that allegedly defrauded them. At the very least, the AGs contend, coupons should be fully transferable (which those proposed in the *True* case are not, except to spouses or domestic partners), and the value of unused coupons should be

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1 *The Attorneys General of Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Iowa, Maine, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Vermont and West Virginia objected in the True case. Because eight of these AGs were not among the 36 who objected in Figueroa, a total of 44 states are on record opposing coupon settlements in one or both cases.*

directed by the court to a worthy *cy pres* recipient. The AGs make clear, however, as a different group did in *Figueroa*, that even transferability would not necessarily satisfy them.

The AGs' brief also focuses on the proposed release provisions in *True*. In exchange for the right to use the $500 or $1,000 coupons, class members would lose their right to "participat[e] . . . in any other . . . administrative [or] regulatory . . . proceeding . . . arising" from the same facts. The AGs contend that this language is unacceptable because, should the AGs seek to bring enforcement actions against Honda, this language "could be interpreted to bar cooperation from consumers in an enforcement action."

Companies facing potential consumer class actions can draw several lessons from the AGs' staunch opposition to the *True* settlement. First and foremost among these lessons is that state AGs clearly are reviewing the CAFA notices that defendants must send them during the settlement approval process, and now have an established interagency cooperation procedure to respond when parties propose coupons, rather than pure cash, as settlement currency. The AGs may object regardless of the face value of the coupons (only $19 in *Figueroa*, but up to $1,000 in *True*). Indeed, *any* coupon settlement may now draw an AG objection, and because courts are required to consider state authorities' reaction to any proposed settlement, an objection by an organized group of AGs may prove fatal.

To improve the chances that a coupon settlement will be approved, defendants should at least follow the template the AGs suggest in their *True* brief, which would require the settling parties to (1) make the coupons fully transferable, (2) submit expert testimony about the value of the coupons and (3) provide for a substantial *cy pres* award if the coupon redemption rate proves to be low. Notably, however, a different group of AGs objected successfully in *Figueroa* even when the parties followed this template because the defendant still would reap benefits from requiring class members to buy new products from the company that had aggrieved them.

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In the years since CAFA's passage, we have helped clients to resolve class action cases inexpensively, without providing relief that the plaintiffs or the courts construed to be "coupons." Please do not hesitate to contact us if you have any questions about actual or potential class actions in which this issue may arise.

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