

CLIENT UPDATE

NINTH CIRCUIT REJECTS LODESTAR FEES IN COUPON CLASS ACTION SETTLEMENTS

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Yesterday a divided panel of the Ninth Circuit Court of Appeals reversed a district judge's approval of a class action settlement that would have provided class members with discount coupons the court valued at \$1.5 million and paid an equivalent \$1.5 million fee (plus \$500,000 in costs) to plaintiffs' counsel. The majority held that where settlement consideration takes the form of coupons, the plaintiffs' counsel's fee can *only* be calculated as a percentage of the actually-redeemed coupons' value, and cannot be calculated based on counsel's "lodestar" of time spent on the case. *In re HP Inkjet Printer Litig*, 2013 WL 1986396.

Focusing on a section of the Class Action Fairness Act, 28 U.S.C. § 1712(a)—which states that "if a proposed settlement in a class action provides for recovery of coupons to a class member, the portion of any attorneys' fee attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed—the panel held this provision to mean that *all* coupon-based awards have to be calculated in this way, even if the plaintiffs' counsel are seeking an award based on their lodestar of time (which, in this case, they asserted to be over \$7 million).

The contrary view, articulated by the dissenting judge, is that § 1712(a) only prohibits a plaintiffs' counsel from saying, in effect, "the coupons we obtained have a massive value, if everyone redeems them, and we would like to be paid a percentage of that maximum theoretical value."

En banc review is possible, but if the majority's view holds, defendants may find it more difficult to settle class actions with coupon-based relief. The *HP* case involved claims that the district judge characterized as weak, exactly the types of claims that courts reasonably could conclude are appropriately settled with noncash consideration. But if plaintiffs' counsel cannot expect to recover even a good fraction of their investment in the case in a coupon settlement, they may resist the use of coupons.

Importantly, even if yesterday's decision holds, it should still be possible for defendants to offer *free* goods or services as settlement relief and not have the fee calculation be subject to § 1712(a). Language in the majority's opinion, which focuses on the specific ills of discount coupons, leaves ample room for this argument.

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Please do not hesitate to contact us with any questions.

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