Extreme Couponing: Reforming the Method of Calculating Attorneys' Fees in Class Action Coupon Settlements

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ABSTRACT: The class action device is an important tool for injured consumers. It allows hundreds of consumers to aggregate their injuries and enables them to litigate their claims. However, the system is vulnerable to abuse. One form of alleged abuse is the class action coupon settlement. In many coupon settlements, the members of the class receive valueless coupons, while the class's attorney is paid millions. Congress sought to eliminate this practice by enacting section 1712 of the Class Actions Fairness Act ("CAFA"), which attempts to regulate how attorneys' fees are calculated in a coupon settlement. Unfortunately, section 1712 was poorly drafted, which has led to opposing interpretations from the Seventh and Ninth Circuits. This Note argues that the Seventh Circuit correctly interpreted the current version of section 1712 of CAFA, but that Congress should rewrite section 1712 in accordance with the Ninth Circuit's interpretation, to better protect future class members in coupon settlements.

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I. INTRODUCTION

On August 20, 2015, in *In re Southwest Airlines Voucher Litigation*, the Seventh Circuit created a clear circuit split when the court decided that the lodestar method can be used to ascertain attorneys' fees in a coupon settlement under the Class Action Fairness Act of 2005 ("CAFA").[1] This holding is contrary to the Ninth Circuit's approach in *In re HP Inkjet Printer Litigation*, which held that the lodestar standard was prohibited in class action

1. *In re* Sw. Airlines Voucher Litig., 799 F.3d 701, 710 (7th Cir. 2015) ("We hold that § 1712 permits a district court to use the lodestar method to calculate attorney fees to compensate class counsel for the coupon relief obtained for the class. When a district court considers using the lodestar method in this manner, it will need to bear in mind the potential for abuse posed by coupon settlements and should evaluate critically the claims of success on behalf of a class receiving coupons . . . .").

coupon settlements in some aspects.[2] These countervailing interpretations highlight that the current version of CAFA is poorly written and ambiguous. Congress must act and reform the statute to better protect class members in coupon settlements. This Note suggests such a reform.

Part II of this note will discuss the importance of class action settlements and examine the history of Congress's attempts to reform the class action system. Part III will then explain and analyze the Seventh and Ninth Circuits' interpretations of CAFA. Lastly, this Note will offer a reformed version of section 1712 and discuss how the various changes to the statute would better protect class members in a class action coupon settlement.

II. CLASS ACTIONS AND COUPON SETTLEMENTS: HISTORY, BENEFITS, DISADVANTAGES, AND FAILED REFORM

Part II will discuss the history of class actions and coupon settlements, why class actions are needed, the alleged abusive practices by class action lawyers, and Congress's attempt to fix these abusive practices with CAFA. Lastly, this part will highlight section 1712's ambiguity and help illustrate why the Seventh and Ninth Circuits have interpreted the statute differently, creating a clear circuit split and the potential of undermining the intended reforms of CAFA.

A. HISTORY OF CLASS ACTIONS AND COUPON SETTLEMENTS

A class action lawsuit allows "a single person or a small group of people to represent the interests of a larger group" against one or more defendants.[3] The class action lawsuit in the United States is derived from the English common law.[4] In 1842, the Federal Rules of Equity codified attorneys' ability to litigate on behalf of absent plaintiffs.[5] After several changes to the Federal Rules of Equity, the class action device was eventually included in the Federal Rules of Civil Procedure via Rule 23.[6] Following the inception of Rule 23, courts and attorneys struggled with the classifications that the rule provided.[7]

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2. *In re* HP Inkjet Printer Litig., 716 F.3d 1173, 1175–76 (9th Cir. 2013) ("When a settlement provides for coupon relief, either in whole or in part, any attorney's fee 'that is attributable to the award of coupons' must be calculated using the redemption value of the coupons. Since the district court awarded fees that were 'attributable to' the coupon relief, but failed to first calculate the redemption value of those coupons, we reverse the orders of the district court and remand for further proceedings consistent with this opinion." (citation omitted)).

3. *Class Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

4. Susan T. Spence, *Looking Back . . . in a Collective Way*, BUS. L. TODAY, at 21 (July–Aug. 2002), http://www.americanbar.org/content/dam/aba/publications/blt/2002/07/looking-back-200207.authcheckdam.pdf.

5. *Id.* at 23.

6. *Id.*

7. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 736 (2013) ("The prior version, from 1938, contained several classifications—'true,' 'hybrid,' and 'spurious' classes—that were difficult to apply and 'baffled both courts and commentators.'" (quoting

As a result, the rule was amended in 1966 to provide a supposedly simpler format, in an attempt to encourage more class action lawsuits.[8] Since 1966, Congress and courts across the country have continued to wrestle with the alleged benefits and procedural difficulties that class actions create.[9]

In general, the class action lawsuit is a hotly debated issue, both in and outside of the legal community. Proponents of class actions argue that class action lawsuits provide similarly situated plaintiffs with access to justice.[10] On the other hand, opponents of class actions argue that the class action system is abused by plaintiffs' lawyers and does not provide members of a class with the requisite justice or monetary reward.[11] Opponents' main contention is

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Charles A. Wright, *Class Actions*, 47 F.R.D. 169, 176 (1970))).

8. *Id.*

9. *Id.* at 736–38. One such procedural problem that the courts and Congress have wrestled with over the years is diversity jurisdiction in class action lawsuits. Class action claims arising under a federal question have not caused much difficulty. On the other hand, the amount in controversy requirement for diversity jurisdiction in relation to multiple class members has required a lot of litigation and changed significantly over the years. Originally the Supreme Court ruled that each member of the class had to meet the minimum amount in controversy requirement. Due to the fact that class actions are designed to aggregate small claims of individuals, the Supreme Court's ruling made bringing a class action lawsuit in federal court nearly impossible. However, two changes in 2005 drastically altered plaintiffs' ability to file class action lawsuits in federal court. The first was a Supreme Court ruling in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, which ruled that the supplemental jurisdiction statute meant that as long as the named plaintiff met the $75,000 amount in controversy requirement, other class members did not have to meet the requirement to bring their claim. The second change came from CAFA, which states the amount in controversy is met if any one of the class members satisfies the requirement or if the class has at least 100 members and the claims of those members in the aggregate exceed $5 million. 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 6:4 (5th ed. 2011).

10. Klonoff, *supra* note 7, at 815–16 ("Without the class action device, a company or individual could cause small harm to many people, knowing that the costs of bringing individual suits would be too great to warrant hiring an attorney and filing a lawsuit. The class action . . . provid[es] them with a vehicle for recovering the harm suffered . . . .").

11. *See generally* MAYER BROWN LLP, DO CLASS ACTIONS BENEFIT CLASS MEMBERS? AN EMPIRICAL ANALYSIS OF CLASS ACTIONS (2013), https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf (finding that "class actions provide far less benefit to individual class members than proponents of class actions assert"). It is important to note that Mayer Brown LLP conducted this analysis for the Institute for Legal Reform, which is an affiliate of the U.S. Chamber of Commerce. Daniel Fisher, *Study Shows Consumer Class-Action Lawyers Earn Millions, Clients Little*, FORBES (Dec. 11, 2013, 8:46 AM), http://www.forbes.com/sites/danielfisher/2013/12/11/with-consumer-class-actions-lawyers-are-mostly-paid-to-do-nothing. The U.S. Chamber of Commerce is a tax-exempt organization that advocates "for the American business community at large." Jim Vandehei, *Business Lobby Recovers Its Clout by Dispensing Favors for Members*, WALL STREET J., http://www.wsj.com/articles/SB10001541197921934 6 (last updated Sept. 11, 2001, 12:01 AM). Because defending and settling class actions hurt businesses' bottom line, it is not surprising that this report commissioned by the U.S. Chamber of Commerce comes to such a drastic conclusion. Furthermore, some critics may raise questions as to why 2009, one of the worst years for the American economy, was picked as the sample year for the empirical study. However, with all that being said, the numbers show that the major benefactors of class action lawsuits are the lawyers for both the plaintiffs and the defendants.

that all of the monetary benefits go to the class attorney, leaving the actual class members with little or nothing at all.[12]

One of the most notorious forms of alleged abuse is the class action coupon settlement.[13] Although each class action coupon settlement can vary in form, a classic example is when the class counsel settles the dispute as follows: the defendant agrees to give each member of the class a coupon to be used on the purchase of a new product or upcoming bill, while the class counsel is paid in cash for her services and expenses.[14] Because the coupons are often not redeemed, they provide little compensation to the class. The lawyer, however, is paid in large amounts of cash. This type of settlement, along with other alleged abusive practices, has drawn a large amount of scrutiny from both the general public and the legal community.[15] This outcry, along with other alleged abusive class action practices, prompted Congress to pass CAFA.[16] One of the reforms CAFA provided, and the subject of this Note, is a section on how attorney's fees should be calculated in a class action coupon settlement.[17] However, as this Note argues, this portion of the statute is poorly written and provides little instruction to courts and lawyers.

B. THE NEED FOR CLASS ACTIONS

The class action lawsuit serves two very important functions: (1) enables wronged parties to aggregate their claims against the same or common defendants;[18] and (2) incentivizes private enforcement of the law.[19]

1. The Aggregation Principle

Setting aside spite or filing a lawsuit based purely on principle, the average person will not file a lawsuit if the expected benefit, usually monetary relief, does not outweigh the cost of the lawsuit. This basic notion is especially problematic for consumers in the market for goods and services. For example,

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12. MAYER BROWN LLP, *supra* note 11.

13. Michelle Singletary, *Class-Action Coupon Settlements Are a No-Win for Consumers*, WASH. POST (Apr. 27, 2011), http://www.washingtonpost.com/business/economy/class-action-coupon-settlements-are-a-no-win-for-consumers/2011/04/27/AFJITL1E_story.html.

14. Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 GEO. J. LEGAL ETHICS 1395, 1396 (2005) ("Settlement coupons are sometimes structured as an absolute dollar discount, or as a percentage off of the retail price. In many ways, settlement coupons may resemble traditional promotional coupons. Hundreds of millions of dollars of settlement coupons have been issued over the past decade." (footnote omitted)).

15. *Id.* at 1396–99; *see also* Singletary, *supra* note 13.

16. William Branigin, *Congress Changes Class Action Rules*, WASH. POST (Feb. 17, 2005, 3:55 PM), http://www.washingtonpost.com/wp-dyn/articles/A32674-2005Feb17.html ("'Today marks the culmination of nearly a decade of legislative efforts to end systematic abuse of our class-action system,' said Rep. James Sensenbrenner (R-Wis.) . . . .").

17. 28 U.S.C. § 1712 (2012).

18. 1 RUBENSTEIN, *supra* note 9, § 1:7.

19. *Id.*

suppose a service provider is over-charging each customer two dollars on every monthly bill. Although the consumer would undoubtedly be upset, he would not file a lawsuit to recover two dollars because the cost of the lawsuit would be astronomically high in comparison to the two-dollar compensation. Even if the injured consumer decided to wait two years to sue for a larger sum, he would only be seeking $24 in compensatory damages. This situation is precisely why the aggregative nature of a class action lawsuit protects similarly situated, injured parties.[20] While the individual may never bring suit by himself, the class action device allows parties wronged by the same defendant to consolidate or aggregate their injuries into one.[21] As a result, the larger the class of injured plaintiffs grows, the more financially feasible a lawsuit becomes because the cost of litigation is spread evenly across the class.[22] In addition to the purely financial advantage, class actions also provide plaintiffs with "notice of their legal rights . . . [and] enable[s] wide participation of class members" in the lawsuit.[23]

Although recent rulings have given businesses a way of curtailing class actions via mandatory arbitration clauses[24] and providing a limited, alternative mode of recourse, plaintiffs are not likely to take the time to arbitrate each individual claim. Thus, without the class action device, injured plaintiffs with small monetary claims would not have a feasible avenue of recourse.

2. Private Enforcement of the Law Through Class Actions

In addition to the aggregative advantage, class action lawsuits also provide a way for private enforcement of the law.[25] Take the above example regarding the two-dollar per month over charge. The service provider should absolutely not get away with this kind of practice. However, due to the vast amount of businesses that provide goods and services to the American public, regulatory

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20. It is important to note that consumer class actions are in decline due to a Supreme Court decision that allows companies to put provisions in contracts that prohibit consumers from joining a class action and, instead, force mandatory arbitration to quash disputes. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 333–34 (2011). It is currently being debated whether this practice should be allowed. *Compare* Klonoff, *supra* note 7, at 815–19 (discussing the Court's ruling that the Federal Arbitration Act's irrevocability favors enforcing mandatory arbitration clauses), *with* Aldo Svaldi, *Consumer Advocates Want Class Actions Restored as Legal Remedy*, DENVER POST (Oct. 7, 2015, 12:02PM), http://www.denverpost.com/2015/10/07/consumer-advocates-want-class-actions-restored-as-legal-remedy (discussing the Consumer Financial Protection Bureau's push to end mandatory arbitration clauses that individual plaintiffs often fail to understand and rarely take advantage of).

21. 1 RUBENSTEIN, *supra* note 9, § 1:7(1).

22. *Id.* § 1:7(3).

23. *Id.*

24. *See, e.g.*, *AT&T Mobility LLC*, 563 U.S. at 352.

25. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 216 (1983) (An "attorney general is someone who . . . represent[s] collectively those who individually could not afford the costs of litigation; and, as every law student knows, our society places extensive reliance upon such private attorneys general to enforce . . . and to protect a host of other statutory policies.").

agencies and attorneys general do not have the resources to catch all of the unfair business practices that affect consumers. Class actions provide a device for private attorneys to ensure that unlawful practices not caught by the government or other regulatory agencies are brought to the public's attention and accordingly fixed.[26] In bringing suits, private attorneys are deterring defendants from subsequently engaging in the unlawful practices, while also deterring other businesses from engaging in unlawful practices in the future because those business know that even if they evade the government, they will mostly likely not evade the private attorneys.[27]

The current class action system rewards private enforcement.[28] This relationship is evidenced by "incentive awards," which are monetary awards given to the class representative and the class attorney for bringing the case.[29] Unsurprisingly, there is also a considerable amount of dispute about whether the judicial system should allow these awards, how the awards should be determined or scrutinized by the courts during a settlement approval, and possible conflicts of interest created through the use of incentive awards.[30]

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26. *Id.* at 218 ("The conventional theory of the private attorney general stresses that the role of private litigation is not simply to secure compensation for victims, but is at least equally to generate deterrence, principally by multiplying the total resources committed to the detection and prosecution of the prohibited behavior.").

27. 1 RUBENSTEIN, *supra* note 9, § 1:8; *see also* JANET COOPER ALEXANDER, AN INTRODUCTION TO CLASS ACTION PROCEDURE IN THE UNITED STATES 1–2 (2000), https://www.law.duke.edu/grouplit/papers/classactionalexander.pdf ("[Class actions] are an alternative to government regulation and industry self-regulation. Self-regulation may be ineffective, as the industry may not be motivated to discipline its members, or may not be sufficiently coherent or organized to assure that its members will comply with self-regulation. Government regulation may be impractical or undesirable, as it requires the creation and financing, at public expense and on an ongoing basis, of a government bureaucracy. Government agencies, particularly consumer protection agencies, frequently do not have enough resources to detect and prosecute all violations, and do not usually seek to recover compensation for consumers. Even the U.S. Securities and Exchange Commission, a venerable and respected regulatory agency, has consistently stated that private class actions are essential to enforcement of the securities laws because the agency lacks resources to provide effective enforcement on its own. Moreover, the level of government enforcement is variable, as it depends on the priorities of the political groups that staff, fund, and set policy for the agency. Finally, regulators, who are continually lobbied by industry representatives, may be 'captured' and become more loyal to the regulated industry than to the public interest.").

28. Theodore Eisenberg & Geoffery P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1313 (2006) ("In the absence of appropriate incentives, the public policy objectives of the class action procedure may not be achieved. From a doctrinal perspective, incentive awards have been justified as a form of restitution for a benefit conferred on others."); *see also* Cont'l Ill. Sec. Litig., 962 F.2d 566, 571 (7th Cir. 1992) ("Since without a named plaintiff there can be no class action, such compensation [(the incentive award)] as may be necessary to induce him to participate in the suit could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses.").

29. In re *Sw. Airlines Voucher Litigation*, 799 F.3d 701, 715–16 (7th Cir. 2015), the court revoked the $15,000 incentive awards for the class counsel and class representative because the two parties failed to identify a possible conflict of interest.

30. *See generally* Elisabeth M. Sperle, *Here Today, Possibly Gone Tomorrow: An Examination of Incentive Awards and Conflicts of Interest in Class Action Litigation*, 23 GEO. J. LEGAL ETHICS 873

C. COUPON SETTLEMENTS: COMPENSATION, ABUSE, AND ATTEMPTED REFORM

As previously mentioned, one of the biggest arguments against class action lawsuits is that the lawsuits only financially benefit the lawyers, while the class is left with little to nothing.[31] This is exactly the claim made in a recent empirical study. The study examined a sample set of class actions that were filed or removed to federal court in 2009 and found "that class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys."[32]

Another claim opponents of class actions make is that lawyers continually abuse the legal system.[33] This is especially true on the subject of class action coupon settlements.[34] Although the class's lawyer is supposed to advocate for the interests of the class, a coupon settlement provides the class counsel and the defendant with an opportunity to strike a deal that benefits everyone except the class members.[35] The defendant, knowing that class members might not fully redeem the coupons, could offer the class lawyer "a high[er] fee award [in exchange] for a low[er] recovery."[36] Since the lawyer is paid in cash irrespective of the coupons, she is not incentivized to bargain for the best value of the coupons. Moreover, the defendant will likely pay out less in a coupon settlement than it would in an all cash settlement, because many class members will likely fail to redeem their coupons.

To better ensure that a coupon settlement is in its best interests, the defendant will take steps to decrease the chances of the plaintiffs redeeming the coupons.[37] The most common step is restricting how the coupons can be used. Use restrictions can include an early expiration date, specific weeks or

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(2010) (discussing that although incentive awards "create conflicts of interests" and are vigorously debated, "they should not be eliminated" because they encourage people to serve as class representatives and pursue legitimate claims).

31. *See generally* MAYER BROWN LLP, *supra* note 11 (empirically analyzing class action cases to determine actual benefit to class members).

32. *Id.* at 2.

33. *See* Svaldi, *supra* note 20 (citing as an example recent trends showing that consumers cannot join class actions because of arbitration clauses, further exacerbating the consumers' harm).

34. *See* Leslie *supra* note 14, at 1396–97 ("There are three major problems with coupon settlements. First, it is doubtful that coupon settlements provide meaningful compensation to most class members. Many, if not most, coupon settlements have been marked by low participation rates by class members. In his study of antitrust class actions settled by coupon distributions to the class, Gramlich found an average redemption rate of 26.3%. The anecdotal evidence from class action litigation as a whole paints an even bleaker picture, with redemption rates as low as 3% or less. . . . Second, coupon settlements often fail to disgorge ill-gotten gains from the defendant. . . . Third, independent of low redemption rates, coupon settlements also raise concerns because they may require the class members to do future business with the defendant in order to receive compensation." (footnote omitted)).

35. *Id.* at 1398.

36. *Id.* (quoting John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883 (1987)).

37. *Id.* at 1403–07.

months in a year when the coupon can be used, transfer restrictions, product restrictions, and more.[38] For example, in *In re HP Inkjet Litigation*, a case that will be extensively discussed below, the coupons given to class members expired after six months and were not transferable.[39] These two factors contributed to an extremely low actual coupon value, but this is of little concern to the class attorney because the attorney was paid in cash instead of worthless slips of paper or electronics codes. As a result, the lawyer and defendants are the real beneficiaries of the settlement, while the injured people, whom the lawsuit was supposed to make whole, are not fully compensated.

1. Lawyer's Cash Compensation: Percentage-of-Recovery vs. the Lodestar Standard

A lawyer's cash compensation in a class action coupon settlement is determined by one of two methods: the lodestar standard or the percentage-of-recovery method.[40] Despite Congressional attempts to fix the problem of abuse with CAFA, both methods still have the potential for abuse.

i. The Lodestar Standard

The lodestar standard is a particular method of determining attorneys' fees that was first introduced by the Third Circuit in 1973 and "has since become the predominant basis for determining attorney fee awards."[41] This standard is not only used in class action coupon settlements but also in many situations where the American Rule does not apply.[42] These situations include cases controlled by fee shifting statutes and contractual agreements where "one party or the other will be responsible for attorney fees in the event of

38. *Id.*

39. *In re* HP Inkjet Printer Litig., 716 F.3d 1173, 1176 (9th Cir. 2013). The Kaplan/West Publishing antitrust litigation is another famous example of a coupon settlement where the defendants tried to create a set of coupons that they knew would not be redeemed. James J. Ferrelli & Christopher L. Soriano, *You'll Get Nothing and Like It! CAFA's Efforts to Provide Real and Substantial Relief to Class Members by Scrutinizing Coupon Settlements*, N.J. LAW., Apr. 2015, at 57, 59 ("In a case that will surely hit home with many lawyers, a California federal court rejected a coupon settlement in an antitrust case brought against West Publishing, the producer of the Bar/Bri bar review course. The plaintiffs in this case alleged that defendant West and its competitor, defendant Kaplan, had conspired to artificially inflate the cost of bar review courses. One aspect of the proposed settlement was a certificate that would entitle the class member to a credit toward a future class offered by Kaplan. But Kaplan was no longer in the bar preparation class business and, even if it were, the class members were mostly students who had already taken a bar exam. So why would they want to take an exam preparation course in some other field when they were already members of the *greatest profession in the world*?" (emphasis added) (citations omitted)).

40. *See HP Inkjet*, 716 F.3d at 1193–95 (Berzon, J., dissenting).

41. Brooks Magratten et al., *How Do Courts Calculate Attorney Fee Awards?*, 39 FALL BRIEF 52, 53 (2009).

42. *Id.* at 52–53.

litigation."[43] Absent such a statute or contract, under the American Rule "[e]ach party is . . . obligated to pay his or her own attorney's fees, regardless of the outcome of the litigation."[44] This contrasts with the English Rule, where the loser is required to pay for both parties' attorneys' fees.[45]

Determining an attorney's fee under the lodestar standard requires two steps. "First, courts multiply the hours an attorney works by the attorney's hourly rate—this process yields the lodestar—and then courts adjust the lodestar up or down 'to reflect the characteristics of a given action.'"[46] In other words, an attorney's compensation under the lodestar standard equals a reasonable number of hours times a reasonable hourly rate.[47] The court determines the amount of compensation using the lodestar standard during the court's review of the settlement because the court must approve all class action coupon settlements.[48]

Under the lodestar standard, the class counsel in a class action coupon settlement is not affected by the actual value of the coupons because her compensation is determined by the reasonable amount of hours she worked on the case and not the value of the coupons. Therefore, if class counsel worked 500 hours on one settlement and the coupons are basically valueless, but she works 500 hours on another settlement that provides the class with a fair coupon settlement, the class counsel will be paid the same amount of cash for each settlement. For these reasons, many argue that the lodestar standard in class action coupon settlements incentivizes a quick deal between the defendant and class counsel at the expense of the class members across the country.[49]

ii. Percentage-of-Recovery Method

The percentage-of-recovery method is an alternative to the lodestar standard for determining the attorneys' fees. The percentage-of-recovery method uses preset percentages to determine an attorney's fee.[50] Once the attorney gains recovery for her clients, the preset percentage is taken out of the clients' recovery and is given to the attorney as her compensation; for

43. *Id.* at 52.

44. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993).

45. *Id.*

46. Magratten et al., *supra* note 41, at 53 (quoting Tolefree v. Cmty. Blood Ctr. of Greater Kansas City, No. 03-1087-CV-W-GAF, 2005 WL 1669762, at *4 (W.D. Mo. July 18, 2005)).

47. *See id.* (discussing the definition of the lodestar standard).

48. 28 U.S.C. § 1712(b)(2) (2012).

49. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883 (1987) ("The classic agency cost problem in class actions involves the 'sweetheart' settlement, in which the plaintiff's attorney trades a high fee award for a low recovery.").

50. *See In re* HP Inkjet Printer Litig., 716 F.3d 1173, 1193 (9th Cir. 2013) (Berzon, J., dissenting) (discussing how percentages are used in contingent-fee arrangements).

instance, "25% of the recovery if the case is settled, and 33% if the case is won at trial."[51]

Prior to CAFA, the percentage-of-recovery method provided class action attorneys a way to abuse the class action system during a class action coupon settlement.[52] The class counsel could agree to a coupon settlement with valueless coupons, but determine the percentage-of-recovery off of the face value of the coupons.[53] This results in the class counsel's compensation vastly outweighing the recovery of the class.[54]

2. Reasoning Behind the Class Actions Fairness Act of 2005

In 2005, Congress responded to calls for class action reform by passing CAFA. The Congressional findings listed at the beginning of the statute list some of the abuses that CAFA intended to prevent.[55] These findings include "counsel [being] awarded large fees, while leaving class members with coupons or other awards of little or no value" and "confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights."[56]

The Senate Judiciary Committee report advocating for the passage of the bill highlights the abusive nature of coupon settlements prior to the adoption of CAFA.[57] One example is a settlement that involved KB Toys, in which the toy store agreed to hold a 30 %-off sale for the class members over a weeklong period.[58] The class counsel, on the other hand, received one million dollars in fees and expenses.[59] To make matters worse, an independent analyst concluded that KB Toys would actually benefit from the sale.[60]

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51. *Contingent Fee*, BLACK'S LAW DICTIONARY (10th ed. 2014).

52. *In re* Sw. Airlines Voucher Litig., 799 F.3d 701, 708 (7th Cir. 2015).

53. *Id.*

54. *Id.* at 708 n.1 ("[S]ee the pre-CAFA settlement approved in Todt v. Ameritech Corp. . . . . A settlement provided class members with discounts on certain telephone services—services they might or might not have wanted—and prepaid calling cards good only for nearly obsolete pay telephones, and even then good only for local toll ('intraLATA') calls. In valuing these discounts and nearly useless coupons, the Illinois courts used their full face values. All the cash in the Todt settlement went to the lawyers." (citing Sloop v. Ameritech Corp., No. EV 95–128–C H/L, 2003 WL 21989997, at *2–3 (S.D. Ind. Aug. 14, 2003))).

55. 28 U.S.C. § 1711 findings and purposes (2012).

56. 28 U.S.C. § 1711 findings and purposes (a)(3)(A), (a)(3)(C).

57. Ferrelli & Soriano, *supra* note 39, at 57 (citing S. REP. NO. 109-14, at 4, 14, 16 (2005)).

58. S. REP. NO. 109-14, at 16–17 (2005). This settlement helps to illustrate the restrictive covenants that companies place on coupons that make their value plummet. *See id.* Rather than provide class members with a thirty-percent-off shopping trip redeemable at a convenient time for the class members, KB Toys placed a one-week limitation on the sale. *Id.* What if many class members did not have notice of the sale or could not make it to the sale because of prior schedule constraints? They were simply out of luck. *See id.* Furthermore, the fact that the class members did not find value in the settlement is of little consequence to the class counsel because she was paid in cash regardless of the actual value of the coupons. *Id.*

59. *Id.*

60. *Id.*

The evidence that coupon settlements provided class members with little to no compensation but over-compensated class counsel caused Congress to devote an entire section of CAFA toward acceptable methods for determining attorneys' fees in class action coupon settlements.[61] The coupon settlement section of the Act attempts to better align the interest of the class with the interest of the class counsel. Congress attempted to do this by basing the attorneys' fees off of the actual redemption value of coupons, rather than the face value of coupons.[62] Unfortunately, Congress was not successful.

3. The Failed Congressional Solution: 28 U.S.C. § 1712

Critics of class actions advocated for realigning the interests between the class counsel and class members through using redemption value rather than face value of coupons in determining attorneys' fees prior to the passage of the Act.[63] With attorneys' compensation tied directly to the redeemable value of the coupons, the hope is that attorneys will either push for all cash settlements or coupon settlements that will actually be redeemed and provide value to class members.

Although Congress acted with the right goal in mind, Congress ultimately failed by writing the following unclear coupon settlement section:

> (a) CONTINGENT FEES IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for a recovery of coupons to a class member, 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.
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> (b) OTHER ATTORNEY'S FEE AWARDS IN COUPON SETTLEMENTS.—
>
> > (1) IN GENERAL.—If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.
> >
> > (2) COURT APPROVAL.—Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a

61. 28 U.S.C. § 1712.

62. 28 U.S.C. § 1712(a).

63. *See* Leslie, *supra* note 14, at 1398 (discussing how the decoupling of interests between the class counsel and class members in a class action coupon settlement is a major problem that needs to be rectified).

> lodestar with a multiplier method of determining attorney's fees.
>
> (c) ATTORNEY'S FEE AWARDS CALCULATED ON A MIXED BASIS IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief—
>
> > (1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and
> >
> > (2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).[64]

The requirements of section 1712 seem straightforward in (a), but become increasingly confusing and ambiguous in (b) and (c). For example, by quickly reading (a), one might think that any fees resulting from a coupon settlement must be determined by the redemption value of the coupons and that the lodestar standard cannot be used. This is a reasonable reading of (a) because the word "shall" usually represents a command that must be complied with.[65] However, (b) makes what seemed like a straightforward approach in (a) extremely confusing. Does (b) give courts the option of using the lodestar standard for the entire fee award, or does (b) just pertain to relief aside from the coupons, such as injunctive relief? And then to make matters more confusing, (c) explicitly references both mixed relief and injunctive relief. So, does that rule out the use of injunctive relief in (b)?

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64. 28 U.S.C. § 1712 (a)–(c). Subsections (d) and (e) of section 1712 are as follows:

> (d) SETTLEMENT VALUATION EXPERTISE.—In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.
>
> (e) JUDICIAL SCRUTINY OF COUPON SETTLEMENTS.—In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

28 U.S.C. § 1712(d)–(e). Both of these subsections provide significant protection to class members during the settlement process. Subsection (d) allows the court to seek expert evidence to make sure that the class members are not being undersold. 28 U.S.C. § 1712(d). Additionally, subsection (e) provides a strict review of the settlement by a judge. 28 U.S.C. § 1712(e).

65. Alabama v. Bozeman, 533 U.S. 146, 153 (2001) (quoting Anderson v. Yungkau, 329 U.S. 482, 485 (1947)).

These are all questions that the Seventh and Ninth Circuits have tried to answer in recent cases. The Ninth Circuit criticized the writing of CAFA in *In re HP Inkjet Printer Litigation* by stating that "CAFA is poorly drafted. We have previously commented on the 'clumsy' and 'bewildering' wording of other provisions of CAFA."[66] This poor drafting has led to opposing interpretations of section 1712 and created a circuit split between the Seventh Circuit and Ninth Circuit. The current ambiguity of the statute and the circuit courts' opposite interpretations threaten to undermine the very reforms that CAFA was designed to implement.

III. ANALYZING THE OPPOSING INTERPRETATIONS OF SECTION 1712

This Part will first discuss the background of *In re HP Inkjet Printer Litigation* and analyze the Ninth Circuit's interpretation of section 1712. Then the discussion will shift to the facts of *In re Southwest Airlines Voucher Litigation* and an analysis of the Seventh Circuit's interpretation of section 1712. Lastly, this Part will discuss which interpretation is the correct statutory interpretation and which interpretation better protects the interests of the class members and should serve as a model for statutory reform.

A. THE NINTH CIRCUIT APPROACH: IN RE *HP INKJET PRINTER LITIGATION*

From 2001 to 2011, Hewett Packard ("HP") sold inkjet printers with a smart chip which promised to enhance the printer's performance and alert users when the ink needed to be replaced.[67] However, the smart chips allegedly failed to function properly and "live up to their performance-boosting promises."[68] Eventually a class was formed and sued HP.[69] In the complaint, the plaintiffs claimed that the smart chips actually ended up costing them more money rather than optimizing performance.[70] The plaintiffs lost money because the smart chips allegedly "sen[t] premature and false messages that ink-jet printers [were] out of ink when the printer cartridge [was] far from empty and capable of printing hundreds of extra pages."[71] Once the low-ink message appeared, consumers were directed to purchase new cartridges from an HP website and were also led to believe that "their empty cartridges could cause damage to their printers."[72] HP allegedly "programmed [the chips] with certain HP printer models to automatically prevent the use of an ink cartridge on a predetermined expiration date,

66. *In re* HP Inkjet Printer Litig., 716 F.3d 1173, 1181 (9th Cir. 2013).

67. Liz McKenzie, *HP to Settle 'Smart Chip' Printer Class Action*, LAW 360 (June 14, 2010, 6:13 PM), http://www.law360.com/articles/174716/hp-to-settle-smart-chip-printer-class-action.

68. *Id.*

69. *See id.*

70. *See id.*

71. *Id.*

72. *Id.*

regardless of whether the cartridge [was] full, empty or still usable."[73] As a result, consumers mistakenly bought new cartridges sooner than necessary, spending an extra $35 per cartridge they should not have had to spend.[74] "The complaint [against HP] alleged breach of express warranty, breach of implied warranty, unjust enrichment and violations of the Consumer Legal Remedies Act and other state statutes."[75]

Eventually, in the summer of 2010, the parties reached a settlement agreement.[76] HP agreed to pay the class "up to $5 million" worth of "e-credits" redeemable on the company's website, the cost of notice to potential class members, and "up to $2,900,000 in attorneys' fees and expenses."[77] The district court reviewed the settlement and deemed that the settlement was fair to the class members.[78] The court issued another ruling on the class counsel's compensation request for a portion of his lodestar in the sum of "$2.3 million in fees and roughly $600,000 in costs."[79] The court first held that the lodestar method was a permissible way of calculating the fees under section 1712(b)(1) of CAFA.[80] The court then "[r]ecogniz[ed] that it would be improper to award fees that outstrip the calculated class benefit, [so] the court ordered HP to pay a reduced lodestar amount of $1.5 million and $596,990.70 in costs."[81] Soon after, members of the class objected and the case eventually made its way to the Ninth Circuit.[82]

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73. *Id.*

74. *Id.*

75. *Id.*

76. *In re* HP Inkjet Printer Litig., 716 F.3d 1173, 1176 (9th Cir. 2013).

77. *Id.* ("In exchange for the plaintiffs' release of all claims against it, HP agreed to: (1) provide eligible class members with up to $5 million in 'e-credits' redeemable for printers and printer supplies on HP's website; (2) make additional disclosures on its website, in its user manuals, or in its software interfaces to explain its business practices to future purchasers of HP printers and ink; (3) pay up to $950,000 for class notice and settlement administration costs; and (4) pay up to $2,900,000 in attorneys' fees and expenses. The 'e-credits'—a euphemism for coupons—expire six months after issuance, are non-transferable, and cannot be used with other discounts or coupons. By the express terms of the settlement, no coupons may issue until after all appeals are resolved." (footnote omitted)).

78. *Id.* at 1177 ("(1) '[T]he settlement was arrived at as a result of arms-length, non-collusive negotiations'; (2) due to the complexity, expenses, and duration of the litigation, class members would receive 'meaningful benefits on a much shorter time frame than otherwise possible'; (3) class counsel supported the settlement; (4) there was 'no reason to believe that the posture of any of the cases would improve through further litigation'; and (5) the number of class members disapproving of the settlement is 'miniscule by any measure.'").

79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.* For more information about objectors, see 4 RUBENSTEIN, *supra* note 9, § 13:20 ("Given the role that objectors might play in providing information directly to the court, one would think that they would be welcome players in the class action arena. However, in fact there are few actors in the pantheon of American adjudication more disliked than objectors to class action settlements. To be sure, the villains are so-called 'professional objectors'—lawyers who have created legal practices around objecting to settlements on a regular basis. The villainy is

The Ninth Circuit disagreed with the district court's finding and held that CAFA does not allow the lodestar standard as a method of calculating attorneys' fees stemming from a class action coupon settlement.[83] Prior to marching through the statutory interpretation, the court highlighted the fact that Congress enacted CAFA, in part, as an attempt to curb the abusive practices of the parties in class action coupon settlements.[84] The court used Congressional intent to help interpret the ambiguous statute.[85]

The court first looked at the express language of section 1712(a)—"the portion of any attorney's fee award to class counsel that is attributable to the award of coupons shall be based on the value to class members of the coupons that are redeemed"—and focused closely on certain words and phrases—"any," "shall," "attributable to," and "redeemed."[86] The court reasoned that because Congress decided to use the words "any" and "shall," subsection (a) was not permissive and must be followed when the award is "attributable to" coupons.[87] However, Congress did not define "attributable to" in CAFA.[88] So the court used its ordinary meaning and determined that "attributable to" meant "a 'consequence' of."[89] As a result, the court eventually concluded that subsection (a) requires any attorneys' fees that are a consequence of the coupons in a coupon settlement to be determined by the redemption value of the coupons.[90] Any other method of calculation, such as the lodestar standard or percentage of recovery, is disallowed by section (a) of the statute.[91]

After interpreting (a) as prohibiting the lodestar standard for the coupon portion of relief, the court determined that subsection (b) requires attorneys' fees based on any other type of relief, such as injunctive relief, to be calculated

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rooted in the sense that the objections they bring are boilerplate and immaterial, while their true goal is to get paid some fee to go away. What is most odd is that they often achieve that goal, primarily because lawyers settling class suits have within their grasp significant attorney's fees and they do not want to wait out an appeal—even a frivolous one—that could take years, so they often settle the objections. Congress and the courts have wrestled with this problem without great success, in part because the underlying concept—enabling absent class members to register concerns about proposed class action settlements—is so important." (footnotes omitted)).

83. *HP Inkjet*, 716 F.3d at 1187.

84. *Id.* at 1179 ("[I]f the legislative history of CAFA clarifies one thing, it is this: the attorneys' fees provisions of § 1712 are intended to put an end to the 'inequities' that arise when class counsel receive attorneys' fees that are grossly disproportionate to the actual value of the coupon relief obtained for the class. . . . [F]or we can only properly interpret CAFA's text if we keep the statute's purposes clearly in mind.").

85. *Id.*

86. *Id.* at 1181–83.

87. *Id.* at 1181.

88. *Id.*

89. *Id.*

90. *Id.* at 1187.

91. *Id.* at 1181–83.

using the lodestar standard.[92] Lastly, the court found that subsection (c) provides a general rule for determining attorneys' fees when the attorney acquires mixed relief for the class:

> If a settlement gives coupon and equitable relief and the district court sets attorneys' fees based on the value of the entire settlement, and not solely on the basis of injunctive relief, then the district court must use the value of the coupons redeemed when determining the value of the coupons part of the settlement.[93]

The dissent strongly disagreed with the majority's interpretation.[94] The dissenting judge's interpretation allows courts to use the lodestar standard when calculating attorneys' fees based on the coupon relief.[95] This interpretation is premised on a different dichotomy of the statute.[96] Rather than basing subsections (a) through (c) of section 1712 on the different types of relief in the settlement (coupons vs. injunctive relief), the dissent argues "[t]he dichotomy addressed in § 1712 as a whole is between [percentage-of-recovery and the lodestar standard]."[97] Under this interpretation, the dissenting judge believes that subsection (a) requires the redemption value of the coupons to be used when the court uses the percentage-of-recovery method, subsection (b) allows the use of the lodestar standard as an alternative to the percentage-of-recovery method, and subsection (c) addresses how each method is to be used in a settlement that has mixed relief.[98]

B. The Seventh Circuit Approach: In re *Southwest Airlines Voucher Litigation*

For many years, Southwest Airlines gave every passenger who purchased a Business Select ticket a voucher that the passenger could use to redeem a free alcoholic drink during the flight.[99] Because these vouchers had no expiration dates, many passengers saved their vouchers and planned to use them in the future.[100] However, in 2010 Southwest decided to stop honoring the older vouchers and announced that the airline would only honor the vouchers "on the flight covered by the accompanying ticket."[101] This meant that all of the vouchers passengers saved, in hopes of using them in the future, were suddenly valueless. Eventually, a class action lawsuit was filed.

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92. *Id.* at 1183–84.
93. *Id.* at 1184.
94. *See generally id.* at 1187–99 (Berzon, J., dissenting).
95. *Id.* at 1187.
96. *Id.* at 1191–92.
97. *Id.*
98. *See id.* at 1192–97.
99. *In re* Sw. Airlines Voucher Litig., 799 F.3d 701, 704 (7th Cir. 2015).
100. *Id.*
101. *Id.*

In the complaint, the class sued under "breach of contract, unjust enrichment, and violations of state consumer fraud laws."[102] The district court dismissed all claims except for the breach of contract claim.[103] Rather than litigate, the parties decided to settle the breach of contract claim.[104] In the settlement agreement, Southwest Airlines did not admit any wrongdoing.[105] As part of the agreement, Southwest agreed to issue replacement coupons to each member of the class, refrain from any similar conduct in the future with respect to retroactively voiding vouchers for lack of expiration dates, and pay incentive awards to the two lead plaintiffs.[106]

After agreeing on the terms of the settlement, the parties entered a four-month period of negotiation surrounding the attorney's fees for class counsel.[107] Eventually Southwest agreed to pay the class counsel up to $3,000,000 in fees and up to $30,000 in expenses, pending the required court approval for class action settlements.[108] The district court determined that CAFA permitted the lodestar standard "to determine attorney fees based on coupon relief" and used the lodestar standard to award the class counsel a fee of $1,332,206.25 and $18,522.32 in expenses.[109] Two members of the class objected to the district court's fee calculation by claiming the court erred when it used the lodestar standard.[110]

The Seventh Circuit weighed in on the issue in August of 2015, when the case moved up on appeal.[111] The Seventh Circuit agreed with the dissenting judge's interpretation from *In re HP Inkjet Litigation*, and held that CAFA does not prohibit the lodestar standard when calculating attorneys' fees based on coupon relief.[112] The Seventh Circuit did not agree with the Ninth Circuit's majority interpretation for two primary reasons: "the need to construe statutory language in context and with a view to its place in the overall

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102. *Id.* at 705.

103. *Id.*

104. *Id.*

105. Juan Carlos Rodriguez, *Southwest Inks Deal Worth Up to $58M in Drink Coupon Suit*, LAW 360 (Dec. 4, 2012, 4:00 PM), http://www.law360.com/articles/398595/southwest-inks-deal-worth-up-to-58m-in-drink-coupon-suit.

106. *Sw. Airlines*, 799 F.3d at 705 ("The settlement provides for class certification and includes three types of relief. First, it requires Southwest to issue replacement coupons to each class member who files a claim form. The coupons are transferable and good for one year on any Southwest flight. Second, the settlement provides injunctive relief to prevent similar controversies over expiration dates if Southwest issues new coupons in the future. Third, the settlement provides for incentive awards to the two lead plaintiffs of $15,000 each.").

107. *Id.*

108. *Id.*

109. *Id.* The fee award was subsequently increased to $1,649,118, after the class counsel filed a motion to use a higher hourly rate in the lodestar calculation. *Id.*

110. *See id.*

111. *See id.* at 703.

112. *Id.* at 710.

statutory scheme" and the canon against surplusage.[113] The court criticized the Ninth Circuit's interpretation by claiming that the Ninth Circuit looked at subsection (a) in isolation, rather than interpreting the statute as a whole, which makes the meaning of (a) clearer.[114] The Seventh Circuit also found that the Ninth Circuit's interpretation rendered subsection (c) surplusage.[115] The court reached this conclusion by examining the Ninth Circuit's interpretation of subsection (c), which the Seventh Circuit believes simply restated the Ninth Circuit's interpretation of subsection (a), meaning that subsection (c) does not provide anything new under the Ninth's interpretation, rendering it surplusage.[116]

In the Seventh Circuit's view, the dichotomy of the statute is based on different methods of calculating fees; each subsection of the statute has a specific function:

> Subsection (a) prohibits basing a percentage-of-recovery fee on the face value of all coupons . . . . Subsection (b) says that lodestar is the only permissible alternative to percentage-of-coupons-used. And subsection (c) allows, though does not require, a blend of the two methods when a coupon settlement also provides some equitable or cash relief.[117]

C. THE INTERPRETATION THAT BETTER PROTECTS THE MEMBERS OF THE CLASS

In comparing the Seventh and Ninth Circuits interpretations, the Seventh Circuit's interpretation is the correct statutory interpretation, although the Ninth Circuit's interpretation better protects the members of a class in a class action lawsuit. The main reason that the Seventh Circuit's interpretation is correct under the current CAFA is that the interpretation takes into account both the canon against surplusage and the legislative history of the statute.[118] On the other hand, the Ninth Circuit relied solely on the legislative history and overlooked the fact that its interpretation made subsection (c) superfluous.[119] Nevertheless, the Ninth Circuit's interpretation better protects the members of the class and needs to be used as an instructive guideline to reform CAFA.

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113. *Id.* at 708–10. For an explanation of the canon against surplusage see Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO L.J. 341, 363 (2010).

114. *Id.* at 708 ("Taken on its own, subsection (a) is ambiguous on this point. It can be fairly read as the *HP Inkjet* majority read it, but that is not the only possibility. The meaning of subsection (a) becomes clearer, however, when we look at how it fits together with the other fee provisions in subsections (b) and (c).").

115. *Id.* at 710.

116. *Id.*

117. *Id.*

118. *Id.* at 706–10.

119. *Id.* at 710.

1. The Canon Against Surplusage

The canon against surplusage is a basic statutory interpretation tool.[120] The canon against surplusage suggests to the interpreters that they "should avoid interpretations of statutes that would render provisions of an act superfluous or unnecessary."[121] The Ninth Circuit's interpretation of section 1712 renders subsection (c) superfluous. The Ninth Circuit stated that subsection (a) prohibited the use of a lodestar standard and that any compensation that is a consequence of the coupon relief must be determined using the redeemable value of the coupons.[122] Then during the interpretation of subsection (c), the Ninth Circuit simply restated that the calculation of attorneys' fees that are attributable to coupon relief must use the value of the coupons actually redeemed.[123] On the other hand, the Seventh Circuit's interpretation gives subsections (a), (b), and (c) different functions, which satisfies the canon against surplusage.[124]

2. The Legislative History Debate

Both the Seventh and Ninth Circuits relied on the legislative history of CAFA to defend their respective interpretations of CAFA.[125] The Ninth Circuit claimed that its interpretation was correct because the dissent's interpretation (and eventually the Seventh Circuit's majority interpretation) failed to take into account that Congress passed CAFA to destroy abusive practices in the coupon settlement realm.[126] However, the Seventh Circuit's interpretation still eliminates one of the most abusive practices in a class action settlement—

120. *Id.*

121. *See* Scott, *supra* note 113, at 363.

122. *In re* HP Inkjet Printer Litig., 716 F.3d 1173, 1184 (9th Cir. 2013).

123. *Id.*; *see also Sw. Airlines*, 799 F.3d at 710 ("Under Markow's approach, also adopted by the Ninth Circuit majority in *HP Inkjet*, subsection (c) seems to become surplusage. If subsection (a) requires use of percentage-of-coupons-used for any fee award based on coupons, and if subsection (b) requires use of lodestar for non-coupon relief, as Markow argues, that leaves nothing for subsection (c) to do other than repeat subsection (a) and (b). '[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.'").

124. *Sw. Airlines*, 799 F.3d at 710 ("The approach we adopt, also taken by the district court and by Judge Berzon in *HP Inkjet*, gives all three subsections different roles to play.").

125. *Id.* at 709 ("This view of subsections (a) and (b) is the same described in the key Senate committee report on the bill that became CAFA."); *HP Inkjet*, 716 F.3d at 1184 ("[T]he legislative history of § 1712(b) confirms the majority's understanding of § 1712(b)—a district court may award lodestar fees under subsection (b)(1) but only where the settlement is based 'in part' on coupon relief.").

126. *HP Inkjet*, 716 F.3d at 1186 ("The dissent, however, would apparently allow district courts to award attorneys' fees based entirely on the perceived value of the coupons. Indeed, our dissenting colleague argues that we should permit district courts to award lodestar fees in exchange for coupon relief without ever requiring the district court to consider the actual value of the class relief, as measured by the coupons' redemption value. Thus, in spite of Congress's clear intention to tie class counsels' compensation to that of the class, the dissent asks us to tolerate the precise abuse § 1712 set about to eliminate. We decline to do so." (footnotes omitted)).

the use of the face value of the coupons in determining attorneys' fees under the percentage-of-recovery method.[127] As a result, the Seventh Circuit's interpretation uses the legislative history of CAFA and does not render any portion of the statute superfluous, making the Seventh Circuit's interpretation the correct one under the current version of CAFA.

3. Better Protection of the Class

Although the Seventh Circuit correctly interpreted the current CAFA by giving effect to all sections of the statute and considering the legislative history, the Ninth Circuit's interpretation better protects the members of a class in a class action lawsuit. This is because under the Ninth Circuit's approach all fees generated by the coupons are subject to the redeemable value, which better aligns the interest of the class with the interest of the class counsel and should be used as a guideline for CAFA reform.[128]

IV. REWRITING SECTION 1712 TO BETTER PROTECT THE CLASS

This Part will first use the Ninth Circuit's approach as an instructive guideline in rewriting section 1712 of CAFA. Then this Part will discuss each change to the statute and highlight how each change better protects class members in future class action coupon settlements.

A. THE NEW AND IMPROVED: 28 U.S.C. § 1712 COUPON SETTLEMENTS

The reformed CAFA should be written as:

> (a) COUPON RELIEF IN COUPON SETTLEMENTS.—Any attorneys' fees that are generated as a consequence of coupon relief in a class action coupon settlement, must be calculated using the redeemable value of the coupons. The use of a lodestar to determine attorneys' fees generated by coupon relief is prohibited.
>
> (b) EQUITABLE RELIEF IN COUPON SETTLEMENTS.—Any attorneys' fees that are generated as a consequence of equitable relief in a class action coupon settlement, must be calculated using a lodestar with a multiplier method. The use of a percentage-of-recovery method to determine attorneys' fees generated by equitable relief is prohibited.
>
> (c) COUPON RESTRICTIONS.—All coupons given as relief in a class action coupon settlement must:
>
> > (1) Be valid for a period of at least one year from the date that the coupons are redeemed by each individual class member;

127. *Sw. Airlines*, 799 F.3d at 708 ("What [subsection (a)] does, unambiguously, is reject the most abusive method for calculating a fee in a coupon settlement: calculating the fee as a percentage of the *face value* of *all* the coupons issued.").

128. *See* Leslie, *supra* note 14, at 1398–99.

(2) Include a locked-in, non-raiseable product price, if the class members can only use the coupon to receive a discount on or purchase a specific product;

(3) Section (c)(2) does not apply if the coupon can be used as a credit against or to purchase any one of the defendant's products.[129]

1. New Subsection Titles

The changes in the titles of subsections (a) and (b) are designed to make the dichotomy of the statute clear. Instead of relying on ambiguous titles to interpret the statute, courts can depend on the reformed titles to clarify the functions of each subsection and show that the dichotomy of the statute is based on type of relief rather than methods of calculating attorneys' fees.[130]

2. Alignment of Interests: Class and Class Counsel

By far, the most beneficial reform is an unambiguous and mandatory requirement in subsection (a) that all attorneys' fees calculated as a consequence of coupon relief must be based on the redemption value of the coupons. This helps to align the interest of the class members and class counsel.[131] As previously discussed, under both the lodestar standard and a percentage-of-discovery method based on face value, the class counsel is paid large sums of cash regardless of the actual value of the coupons.[132] However, when the class counsel's compensation is directly linked to the amount of coupons that are actually redeemed, the class counsel has a direct stake in ensuring that as many coupons are redeemed as possible because the class counsel's fee will increase as more coupons are redeemed. The class counsel will have incentive to negotiate for the best value coupon because the better

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129. Subsections (d) and (e) from the current version of section 1712 should also be included in the reformed version of section 1712.

130. The dichotomy of the statute is at the center of the circuit split. *See HP Inkjet*, 716 F.3d at 1192 (Berzon, J., dissenting) ("The dichotomy addressed in § 1712 as a whole is between these two approaches to awarding attorney's fees in coupon settlements—not, as the majority suggests, between two types of class relief: coupons and injunctions. Section 1712 provides for the use of either fee calculation method, as alternatives or in combination, regulating *how* each method should be applied, not which method a court should use.").

131. *See* Leslie, *supra* note 14, at 1398 ("Although class counsel are the guardians of the class, when the interests of the class and its counsel diverge, plaintiffs' attorneys may pursue their own interests. When they are not properly monitored, the 'plaintiff's attorney [may] trade[] a high fee award for a low recovery.' In theory, under a contingency fee structure [percentage-of-recovery is a contingency fee], the interests of attorney and client are coupled. By making any award of attorneys' fees a percentage of the class recovery, the class counsel increases its reward by maximizing the payment to the class." (first and second alterations in original) (footnote omitted)).

132. *See supra* Part II.C.

the value of the coupon, the more likely members of the class will redeem them.

Subsection (a)'s proposed prohibition on the lodestar standard furthers the goal of determining attorneys' fees on the coupons' redeemable value. Under the lodestar method, there is no way to attribute the attorney's compensation to the redeemable value of the coupons, because the lodestar formula—a reasonable number of hours times a reasonable hourly rate—does not take into account the value of the coupons. On the other hand, the percentage-of-recovery method can consider the actual redemption value of the coupons. For example, if the face value of the coupons is $5,000,000, but only $2,000,000 worth of coupons are redeemed, the attorneys' fees would be 25% (assuming 25% is the pre-agreed upon compensation percentage) of $2,000,000, rather than 25% of $5,000,000.

As a result of realigning the interest between the class and class counsel, the interests of the class are put back at the forefront. The opportunity for defendants and class counsel to abuse the system by striking a quick deal is eliminated.[133] Furthermore, private enforcement of the law becomes more effective. Prior to CAFA, and under the Seventh Circuit's interpretation, coupon settlements provided defendants with a way of providing relief for an alleged wrong, but the relief often did not negatively affect the defendant since many of the coupons were not redeemed.[134] Therefore, the lack of financial loss to the defendant failed to create the deterrent effect that private enforcement of the law is meant to provide.[135] However, under the reformed version of section 1712, there is a greater chance that the class members will redeem the coupons, resulting in a greater financial loss to the defendant and a stronger deterrence from committing the alleged wrongdoing again.[136]

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133. *See* Leslie, *supra* note 14, at 1398.

134. For example, *HP Inkjet* had the following redemption statistics:

> On October 1, 2010, the district court consolidated the three putative class actions for settlement, granted preliminary settlement approval, provisionally certified a nationwide settlement class, and directed that the parties provide notice of the settlement. In compliance with the court's order, the parties provided notice via email, publication, and online advertisements, reaching approximately 74 percent of potential class members. Of the millions of class members who received notice, three filed formal objections, 458 submitted informal comments, 810 opted out of the settlement, and 122,000 filed claims.

HP Inkjet, 716 F.3d at 1176.

135. *See* 1 RUBENSTEIN, *supra* note 9, § 1:8 ("By avoiding liability, the defendants place the social costs of their actions on others. In enabling small-claim suits, class actions expose the defendants to the risk of liability and thereby deter them from engaging in wrongdoing in the first place. The class action's compensatory mechanism thereby serves a deterrent function. In so doing, class actions provide an important private supplement to public enforcement of social norms." (footnote omitted)).

136. *See id.*

3. Coupon Restrictions

The main purposes of subsection (c) of the reformed statute are to provide valuable coupons to the injured class members and to prevent a decline in value once the class members acquire the coupons. In a class action coupon settlement, defendants often take steps to mitigate their financial losses.[137] One of the steps is to place restrictions on the coupons, such as making them inalienable or giving the coupons a short expiration period.[138] With short expiration periods, many class members may fail to find the time to use the coupons. The reformed version of subsection (c)(1) requires a minimum one-year expiration period from the date that each individual class member acquires the coupon. This change will allow a significant amount of time for the class members to actually use their coupons and receive their full value.

Defendants also mitigate financial loss by raising the price of the product on which the coupon can be used.[139] For example, if a defendant agrees to issue a five-dollar coupon that can only be used on a specific product, but subsequently raises the price of the product by five dollars, the defendant has not lost anything and the injured class member has not gained anything. In fact, the defendant would actually come out ahead because each injured class

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137. Leslie, *supra* note 14, at 1403 ("Because defendants prefer outcomes where the class member either does not use the coupon (and the defendant thus pays nothing) or uses the coupon to make an induced purchase (and the defendant actually earns additional revenues), defendants often structure settlement coupons to increase the probability of achieving one of these two outcomes.").

138. *Id.* at 1401 ("Because corporate defendants have great latitude in structuring the terms of settlement coupons, they design settlement coupons to increase the probability of achieving their preferred outcomes, which are disfavored by the class members. Defendants do so by imposing transferability restrictions, short expiration dates, aggregation restrictions, and product restrictions, among other limitations. As a result, class members can fall victim to collusive coupon-based settlements in which the defendant essentially pays the class counsel to accept worthless coupons for the class.").

139. *Id.* at 1397 ("[C]oupon settlements also raise concerns because they may require the class members to do future business with the defendant in order to receive compensation. This is particularly the case with nontransferable coupons, which necessarily require the class members to either continue purchasing the defendant's product or receive nothing from the settlement. Yet while the class members may feel compelled to purchase a product from a particular defendant, that firm may be able to undermine any settlement value by increasing product price or decreasing product quality." (footnote omitted)); *see also HP Inkjet*, 716 F.3d at 1179 n.6 ("Objectors presented evidence that the prices charged at HP.com—the only retailer that will accept the settlement coupons—are higher than those charged by other retailers. For instance, Objectors presented evidence that the same HP 'Combo Pack Ink Cartridge' sells for $42.99 on HP.com, while selling for $36.99 on Amazon.com. The $6 price difference is equal to the face value of the e-credits to be awarded to *Blennis* class members, and is greater than the face value of the e-credits to be awarded to the *Rich* and *Ciolino* class members. Thus, with the possible exception of the *Blennis* class members, Objectors have presented evidence that tends to show that the redemption rate of the e-credits may be very low; presumably *Rich* and *Ciolino* class members will prefer to allow their coupons to expire rather than pay a higher price solely to gain the satisfaction of using their coupons.").

member would be an additional consumer for the defendant, and the coupon discount would be offset by the increase in price.[140] Subsection (c)(2) of the reformed statute attempts to eliminate this exact abuse. However, subsection (c)(2) only applies when the coupon can be used to purchase or receive a discount on the purchase of one specific product. The reason behind the one product condition is that creating a list and agreeing on a price lock for every single product offered by a defendant would be too much of an onerous task.

4. Eliminating the Mixed Settlement Subsection

The reformed version of section 1712 purposely does not include a subsection alluding to mixed settlements. This avoids any questions about surplusage.[141] Instead, any portion of attorneys' fees generated by coupon relief, whether in a mixed settlement or in a pure coupon settlement, must be calculated according to subsection (a) of the reformed statute. Likewise, any portion of attorneys' fees generated by equitable relief, whether in a mixed settlement or in a settlement consisting of only equitable relief, must be calculated according to subsection (b) of the reformed statute.

V. CONCLUSION

The class action device is an important tool that enables similarly injured parties to litigate their claims. However, the importance of such a device is lost if it fails to provide value to the wronged parties. The best way to protect class members and ensure they receive full compensation in a class action coupon settlement is to realign the interests of the class with the interests of the class counsel. Congress can do this by rewriting section 1712 of the Class Action Fairness Act in accordance with the reformed version of the section proposed above.

140. This price-raising anecdote assumes that the cost of producing and marketing the product has not increased, but rather the defendant has increased the prices simply to mitigate financial loss from the settlement; *see also* Leslie, *supra* note 14, at 1397 ("[C]oupon settlements often fail to disgorge ill-gotten gains from the defendant. When coupons are not redeemed, the defendant suffers no loss. When class members do redeem their coupons, it often represents a purchase induced by the settlement. In many cases, coupons are not punishment; they are promotional. Settlement coupons are the economic equivalent of a court-supervised promotional campaign.").

141. *In re* Sw. Airlines Voucher Litig., 799 F.3d 701, 710 (7th Cir. 2015) ("If subsection (a) requires use of percentage-of-coupons-used for any fee award based on coupons, and if subsection (b) requires use of lodestar for non-coupon relief, as Markow argues, that leaves nothing for subsection (c) [covering mixed relief] to do other than repeat subsection (a) and (b).").