

**MY LAWYER WENT TO COURT AND ALL I GOT WAS THIS
LOUSY COUPON! THE CLASS ACTION FAIRNESS ACT'S
INADEQUATE PROVISION FOR JUDICIAL SCRUTINY OVER
PROPOSED COUPON SETTLEMENTS**

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Craig Martin buys a brand new car, complete with the latest edition of Firestone all-weather tires. Months later, Craig reads in the newspaper that a class action lawsuit has been filed against Firestone on behalf of fifteen million tire purchasers, alleging that the manufacturer's latest tire rollout had been defectively designed and now poses a significant hazard to consumers. Months later, Craig receives a confusing postcard. This postcard informs him that the case has been settled, and if he has an original receipt of his tire purchase, he may apply online within the next month for a coupon good for a ten dollar rebate from his next in-store purchase of Firestone tires, something he has no interest in. His right to sue Firestone independently has been automatically waived. He later learns that his attorney, whom he has never met, spoken to, or heard from, has earned nineteen million dollars from the settlement. Craig Martin now has a set of potentially deadly tires, a complicated set of directions to recoup ten dollars from the cost of the expensive replacement tires that he must now buy, and the infuriating realization that his "advocate" has walked away with a windfall.¹

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¹ This account is a fictional example adapted from an actual case, *Shields v. Bridgestone/Firestone Inc.*, No. E-0167637 (Tex. Dist. Ct. July 31, 2002). See *infra* notes 135, 278–86 and accompanying text.

I. INTRODUCTION

Congress enacted the Class Action Fairness Act of 2005 (CAFA) primarily to expand federal jurisdiction over multi-state class action lawsuits and to limit unfair class action practices that inflicted concentrated damage upon absent class members.² By passing CAFA, Congress purportedly desired to “assure fair and prompt recoveries for class members with legitimate claims,”³ to restore the constitutional intent of the framers to provide for “[f]ederal court consideration of interstate cases of national importance under diversity jurisdiction,”⁴ and to “benefit society by encouraging innovation and lowering consumer prices.”⁵

CAFA covers a broad spectrum of issues designed to promote efficiency and uphold fairness of class action litigation, as a result of specific congressional findings that “abuses of the class action device have harmed class members with legitimate claims,”⁶ and have “undermined public respect for the [American] judicial system”⁷ by awarding class counsel large fees,⁸ “while leaving class members with . . . little or no” meaningful compensation for their alleged injuries.⁹ One such abuse, demonstrated above,¹⁰ commonly occurs in the form of “coupon settlements,” whereby class counsel and defendants agree to distribute to class members coupons, discounts, or credits on a product or service offered by the defendants in lieu of a cash award.¹¹ Attorneys representing the class, on the other hand, receive attorney’s fees in cash, based on a percentage of the aggregate face value of the coupon settlement.¹² The coupon settlement innovation is justifiably a cause for concern—the very party accused of legal transgressions stands to benefit (perhaps even profit) from increased sales,

² John F. Harris, *Victory for Bush on Suits: New Law to Limit Class-Action Cases*, WASH. POST, Feb. 18, 2005, at A1.

³ Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(1), 119 Stat. 4, 5 (2005).

⁴ *Id.* § 2(b)(2).

⁵ *Id.* § 2(b)(3).

⁶ *Id.* § 2(a)(2)(A).

⁷ *Id.* § 2(a)(2)(C).

⁸ *Id.* § 2(a)(3)(A).

⁹ Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3)(A), 119 Stat. 4, 5 (2005).

¹⁰ See *supra* note 1 and accompanying text.

¹¹ Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor’s Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1344 (2005).

¹² *Id.* Valuation of coupon settlements and the attorney’s fees tied to them are a major focus of CAFA, and will be discussed more thoroughly in Parts III and IV, *infra*.

while class members, allegedly harmed by the defendant, continue to be inexorably tethered to the defendant.¹³

To ameliorate the fundamentally unfair coupon settlement practices¹⁴ that pierced the class action landscape upon the genesis of coupon settlements in the early 1990s,¹⁵ Congress ratified a “Consumer Class Action Bill of Rights” within CAFA,¹⁶ which created the central mechanism designed to correct the Coupon Settlement Problem (as well as other settlement process issues).¹⁷ The primary objective of the Consumer Class Action Bill of Rights is to limit the exorbitant fees class counsel were obtaining from coupon settlements by mandating that fees be calculated on a basis commensurate with the actual value of the proposed settlement.¹⁸ Specifically, the Act directs that fees be based on the value of coupons that are actually redeemed, and not the theoretical face value of the aggregate coupon offering in which a significant number of absent class members are unlikely ever to acquire.¹⁹

CAFA endeavors to solve the Coupon Settlement Problem by implementing a market mechanism designed to provide incentives to attorneys to increase the value of individual coupons in a proposed settlement (thus increasing the amount of redeemed coupons and, in turn, attorney’s fees).²⁰ Unfortunately, this solution is unlikely to be effective. As this Comment argues, the Act’s attorney’s fees provisions are far from airtight and are susceptible to lawyerly circumvention.²¹ Additionally, this Comment contends that CAFA’s judicial re-

¹³ WILLIAM B. RUBENSTEIN, UNDERSTANDING THE CLASS ACTION FAIRNESS ACT OF 2005, at 10 (2005), *available at* <http://www.classactionprofessor.com/cafa-analysis.pdf>; *see also* *The Use of “Coupon” Compensation and Other Non-Pecuniary Redress*, 18 GEO. J. LEGAL ETHICS 1161, 1168 (2005) [hereinafter *FTC Workshop*].

¹⁴ This Comment refers to the issue presented by unfair coupon settlements as the “Coupon Settlement Problem.”

¹⁵ *See* Hantler & Norton, *supra* note 11, at 1344; *see also* *Analysis: Class Action Litigation—A Federalist Society Survey, Part II*, CLASS ACTION WATCH, Spring 1999, at 5–12, *available at* http://www.fed-soc.org/doclib/20070321_classaction12.pdf (detailing survey of generally perceived increases in class action litigation during the 1990s).

¹⁶ Class Action Fairness Act of 2005 § 3(a), 28 U.S.C.A. §§ 1711–1715 (West 2007). Section 3 of CAFA amends Title 28 of the United States Code by inserting §§ 1711–1715. The focus of this Comment is on § 1712, which deals with coupon settlements in general. To a more specific level, this Comment scrutinizes § 1712(e), dealing with judicial scrutiny of proposed coupon settlements. *See infra* Parts III.B and IV.B.

¹⁷ Rubenstein, *supra* note 13, at 10.

¹⁸ *Id.* at 11.

¹⁹ *Id.*

²⁰ 28 U.S.C.A. § 1712(a)–(e).

²¹ *See infra* Part IV.A.

view guideline, which professes to direct the court in its assessment of a proposed coupon settlement, provides an insufficient backstop for unfair settlement proposals.²² A district judge may only approve a coupon settlement upon a written finding that it is “fair, reasonable, and adequate for class members.”²³ This scrutiny standard is virtually identical to the language of Rule 23(e) of the Federal Rules of Civil Procedure, which calls for a fairness hearing before a proposed class action settlement can be approved.²⁴ However, because trial judges regularly approved unfair coupon settlements prior to the enactment of CAFA,²⁵ there is no reason to believe that the substantively identical review standard will prevent the qualification of similarly inequitable settlement proposals. Additionally, CAFA’s jurisdictional expansion principles will transfer even more class action cases in which a coupon settlement is proposed into federal courts,²⁶ further increasing the likelihood of federal court approval of iniquitous coupon settlements.

This Comment asserts that in the coupon settlement context, CAFA’s judicial scrutiny provision provides substandard protection to class members given the history of fundamentally unfair awards to

²² See *infra* Part IV.B.

²³ 28 U.S.C.A. § 1712(e).

²⁴ See *infra* Parts III, IV. The only difference between the two standards is that CAFA mandates the finding be in writing. Compare FED. R. CIV. P. 23(e), with 28 U.S.C.A. § 1712(e).

²⁵ Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 200 (2006) (stating that “courts often give settlements only a perfunctory review, resulting in inadequate protection of absent class members’ interests”); see also Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1692 (2004). Professor Mullenix states:

[C]ourts pay lip service to the concept of adequate representation but fail to robustly engage in any meaningful inquiry to establish the existence of such adequate representation. For judges, the adequacy inquiry usually is the least-rigorously examined requirement for certification, either for litigation or for settlement classes. Instead, courts routinely wave their blessings over class counsel and proposed class representatives and presumptively make findings of adequacy on non-existent or scant factual showings.

Id. This argument can plausibly be extended to the adequacy review of proposed settlements. See *infra* Parts III.A and IV.B.

²⁶ See Class Action Fairness Act of 2005 §§ 4–5, 28 U.S.C.A. §§ 1332(d), 1453 (West 2007). The expansion of federal court jurisdiction over multi-state class actions is relevant to this Comment insofar as the number of class actions that were previously filed in state court before the passage of CAFA will now be scrutinized by federal courts. Thus, a description of CAFA’s jurisdictional provisions is provided in Part II.A, *infra*.

those absent litigants.²⁷ By focusing almost exclusively on attorney's fees,²⁸ Congress ignored the fact that there is no indication that restraining excessive fees necessarily precludes class counsel and defendants from agreeing on a mutually beneficial bargain that hurts absent class members. While the Act may or may not effectively limit excessive attorney's fees, it does little with respect to substantive protections for absent class members. Given those flaws, the Act should have incorporated a more exacting standard of settlement review. This Comment argues that, as codified, CAFA's judicial review standard lacks the foundation to mount an adequate second line of defense. Hence, CAFA is incapable of achieving its stated objectives.

Because the judicial scrutiny standard provided in CAFA does not adequately protect absent class members where a coupon settlement is proposed, the Act should be amended. An amendment to CAFA providing district judges with a test that presumptively invalidates all coupon settlements would realistically enable the Act to filter out the substantively harmful settlement proposals, thus restoring fundamental fairness to the class action system.²⁹

This Comment proceeds in four parts. Part II describes the class action mechanism and discusses the Coupon Settlement Problem by exploring attorneys' inherent economic incentives that give rise to the problem, as well as judicial review over class action settlement proposals. Part II also demonstrates the Coupon Settlement Problem by providing specific examples of coupon settlements that have undermined the interests of absent class members.

Part III discusses CAFA's relevant provisions and how the Act attempts to solve the Coupon Settlement Problem. Particularly, Part III fleshes out the statutory device designed to provide relief to absent class members by tying attorney's fees to a more realistic valuation of the proposed coupon settlement. In addition, Part III outlines CAFA's jurisdictional rule changes for interstate class actions. Finally, this Part explicates the Act's judicial scrutiny provision devised as a supervisory instrument to ensure sufficient relief to absent class members.

Part IV examines why CAFA, as written, does not provide satisfactory protection for absent class members. Due to the inadequate oversight provision in the legislation, reviewing judges are just as apt

²⁷ See John H. Beisner, Matthew Shors & Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1446–50 (2006) (reviewing historical inequities of various coupon settlement proposals).

²⁸ See Rubenstein, *supra* note 13, at 11.

²⁹ See *infra* Part V.A.

to rubber-stamp a substantively unfair coupon settlement proposal as they were before CAFA was enacted. This section supports this contention by elucidating a number of theoretical and practical concerns with the Act's judicial scrutiny standard, as well as CAFA's fees-related provisions. Part IV concludes by arguing that because CAFA is unable to ensure truly valuable relief to injured class members, the Act should be amended to empower the legislation that is, at least in theory, beneficial to the individuals who are most in need of judicial protection.

Finally, Part V proposes and explains an amendment to CAFA that would best rectify the Act's shortcomings. Specifically, Part V argues that the Act should be amended to include a strong yet rebuttable presumption against all proposed coupon settlements. Pursuant to this proposed amendment, a judge should allow the settlement to proceed only upon a collective showing by class counsel and defendants that there is a bona fide rationale for structuring a particular settlement to include coupons instead of cash, and that such a proposal does in fact provide substantive value to class members commensurate with their alleged injuries.³⁰ By constructing a more restrictive judicial filter, the Act would better accomplish the goals it seeks to attain. Part V also briefly spells out several competing theories on how best to perfect CAFA's coupon provisions, and argues why a rebuttable presumption against all proposed coupon settlements would best revamp the legislation's deficiencies.

II. CLASS ACTIONS AND THE COUPON SETTLEMENT PROBLEM

A. *The Class Action Device*

Simply stated, class actions are representative, large-scale lawsuits in which the rights of many people are adjudicated in a single proceeding.³¹ They function to protect defendants from inconsistent judicial obligations, to protect the interests of absentee litigants, to provide "a convenient and economical means for disposing of similar lawsuits," and to facilitate "the spreading of litigation costs among numerous litigants with similar claims."³² In order to understand the full dimensions of the Coupon Settlement Problem, it is necessary to first explore the roles of the stakeholders in class action litigation.

³⁰ See *infra* Part V.A.

³¹ Rubenstein, *supra* note 13, at 2.

³² U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980).

Since 1966, Rule 23 of the Federal Rules of Civil Procedure has governed federal class action litigation.³³ The rule “permits single-action litigation of multiple claims involving similar or identical questions of law and fact that arise from a common set of operative facts. . . . [It] constitutes an exception to the usual rule that litigation is conducted by, on behalf of, or against the named parties only.”³⁴ Class actions benefit plaintiffs because collective litigation of a large number of common claims “afford aggrieved persons a remedy when it is not economically feasible to obtain relief through the traditional framework of multiple individual damage actions as, for example, when each claim involves only a small dollar amount.”³⁵ On the other hand, defendants view class action litigation as a means of “provid[ing] a single proceeding in which to determine the merits of the plaintiffs’ claims and . . . [as] protect[ion] . . . from repeated and potentially inconsistent adjudications.”³⁶

Because absent class members do not play a direct participatory role in the representative litigation, Rule 23 sets forth stringent guidelines for whether and when a complaint may be certified as a class action so as to ensure that absent class members’ best interests are protected.³⁷ The rule “attempts to balance judicial efficiency of litigation by or against classes against fairness and due process concerns, and does so by providing procedures and safeguards designed to ensure fair and adequate protection of the interests of absentee

³³ FED. R. CIV. P. 23; *see also* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (explaining the “innovative” revisions of the class action mechanism); *see generally* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375–400 (1967) (summarizing and commenting on the 1966 amendments to the Rules).

³⁴ 5 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 23.02 (3d ed. 1998) (citing *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 (1982); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974); *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773, 781 (9th Cir. 1994)).

³⁵ *Id.* (quoting *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device.”)).

³⁶ *Id.* (quoting *Geraghty*, 445 U.S. at 402–03 (“The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations”); *First Fed. Bank v. Barrow*, 878 F.2d 912, 919 (6th Cir. 1989) (“The absence of class certification in the instant case would have precipitated a multitude of separate actions against the individual members of the certified classes which would have created the risk of inconsistent or varying adjudications . . . which, in turn, would have established incompatible standards of conduct for the trustee.”)).

³⁷ *See* FED. R. CIV. P. 23; FED. R. CIV. P. 23 advisory committee’s notes (1966 amendment).

class members.”³⁸ The threshold requirements of Rule 23 are found in subdivision (a).³⁹ In order for any class to be certified, the rule mandates that four necessary conditions be met: numerosity of plaintiffs so as to render joinder impracticable,⁴⁰ commonality of questions of law or fact with respect to the entire class,⁴¹ typicality of class members’ claims,⁴² and adequate class representation so as to protect absent class members’ interests.⁴³ Once the conditions of Rule 23(a) have been fulfilled, a court may certify a class pursuant to one of three categories before progressing further into the settlement negotiation and trial phases.⁴⁴

As an essential part of determining whether a class should be certified under Rule 23(a), the court must carefully scrutinize the adequacy of the counsel who will represent the class.⁴⁵ Because of the

³⁸ 5 MOORE ET AL., *supra* note 34, ¶ 23.02 (citing *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940) (due process requires that interests of absent party be protected)).

³⁹ FED. R. CIV. P. 23(a).

⁴⁰ FED. R. CIV. P. 23(a)(1).

⁴¹ FED. R. CIV. P. 23(a)(2).

⁴² FED. R. CIV. P. 23(a)(3).

⁴³ FED. R. CIV. P. 23(a)(4).

⁴⁴ Rule 23(b) sets forth three categories of class actions which may be certified, conditioned upon the satisfaction of Rule 23(a). FED. R. CIV. P. 23(b). Rule 23(b)(1) applies “if individual actions would create a risk of mandating that the defendant engage in incompatible conduct, or would as a practical matter substantially impair the interests of other identically situated class members.” Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 259 (2002); *see also* FED. R. CIV. P. 23(b)(1). Rule 23(b)(2) applies when “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole” FED. R. CIV. P. 23(b)(2). Finally, Rule 23(b)(3) applies when “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” FED. R. CIV. P. 23(b)(3); *see also* Romberg, *supra*, at 258–61 (discussing Rule 23 generally). Subdivisions (b)(1) and (b)(2) are somewhat extraneous to the focus of this Comment. (Injunctive relief may come with a proposed issuance of coupons, making a proposed settlement more palatable; however, the focus here is on the substitution of coupons in place of cash.) Because Rule 23(b)(3) centers around the award of money damages, it provides the ideal backdrop for analysis of settlements that include the substitution of coupon distributions instead of cash awards to absent class members. Thus, in order to focus on post-certification issues (as opposed to various topics involved with whether an action should be certified at all), and for simplification, this Comment proceeds upon the presumptions that the class actions at issue: (1) have been certified by a federal district court, or would have been had they not been filed in state court; and (2) have been certified pursuant to Rule 23(b)(3) in a federal district court, or would have been had they not been filed in state court.

⁴⁵ 5 MOORE ET AL., *supra* note 34, ¶ 23.01.

inherent ability of class counsel to effectively collude⁴⁶ with the defendants to arrange a settlement optimally suited to each other's interests at the expense of absent class members without a seat at the bargaining table, a judge should be careful to "ensure that the . . . class counsel will represent [the] class . . . fairly, adequately[,] and efficiently."⁴⁷

However, ensuring this is easier said than done. Of particular relevance to the Coupon Settlement Problem is the perverse incentive structure attorneys face in pursuing damages on behalf of absent class members.⁴⁸ While class action attorneys have been beneficently labeled "private attorneys general" to describe their theoretical ability to ensure adequate statutory enforcement, they have simultaneously been criticized as "bounty hunters."⁴⁹ In a seminal attorney's fees article, Professor John Coffee has argued that the economic incentives for attorneys generate the disparate impact that class action settlements tend to have on absent class members.⁵⁰ The structural reality that the lawyer "is unconstrained by the dictates or interests of a specific client" reinforces the disharmony between the incentives of absent class members and their representative in court.⁵¹ A number of the resulting effects of this practical inability of absent class members to influence the litigation highlight the economic incentive problem.⁵²

First, because they have a larger economic stake in the litigation than any individual class member, attorneys become more risk averse than the absent class members they represent, increasing the likelihood of accepting a substantively inadequate settlement.⁵³ Moreover, this risk aversion entices class action attorneys to file a high volume of cases, thereby spreading risk and decreasing the time and effort the attorney is willing or able to devote to any one action.⁵⁴ This also tends to result in inadequate relief to aggrieved class members.⁵⁵

⁴⁶ See, e.g., Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Prods., Inc.*, 80 CORNELL L. REV. 1045, 1050 (1995) (arguing that defendants "bought off class counsel and other plaintiffs' lawyers").

⁴⁷ 5 MOORE ET AL., *supra* note 34, ¶ 23.01; see also *infra* notes 69–77 and accompanying text.

⁴⁸ See 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, 236–61 (1983).

⁴⁹ *Id.* at 218.

⁵⁰ *Id.* at 284.

⁵¹ *Id.* at 229.

⁵² See *id.* at 230–35.

⁵³ *Id.* at 230–32.

⁵⁴ Coffee, *supra* note 48, at 230–32.

⁵⁵ *Id.*

Second, counsel autonomy significantly increases the risk of collusion between lawyer and defendant.⁵⁶ For example, a self-interested attorney would prefer a \$500,000 settlement with a fee of \$300,000 over a settlement of \$1,000,000 with a fee of \$200,000.⁵⁷ Knowing this, defendants are, of course, willing to exploit the attorney's self-interest by settling for a lesser total dollar amount with a higher percentage going to the class advocate.⁵⁸ Coffee asserts that:

The possibility of collusive settlements grows in direct proportion to the attorney's "independence" from his client. The naked self interest of the bounty hunter lies in his fee, not the recovery to the class. As others have said many times, the parties can find a variety of means by which to trade a low settlement for a high attorney's fee, once the client becomes only a distant bystander to the litigation. To say this is not to claim that plaintiffs' attorneys systematically subordinate the class recovery to their own fee, but it is to say that the plaintiff's attorney is subject to a serious conflict of interest—one that can distort the settlement process and reduce the deterrent effect of private litigation⁵⁹

Third, the complete absence of a vested property right for attorneys who institute class action litigation creates a collective action problem.⁶⁰ Other potential advocates for the class are easily attracted to free-ride on the instituting attorney's diligence.⁶¹ As a result, that attorney has no incentive to expend the "same effort in search and discovery as [he] would if [he] could be assured of the ability to reap the full economic return" of filing a successful class action.⁶² Again, this leads to an increased tendency to accept a less than optimal remedy for absent class members.⁶³

The disparity between the motivations of absent class members and class counsel underlies the historic abuse of absent class members.⁶⁴ As the economic incentives of class action lawyers and their clients diverge, self-interest heavily influences settlement practices, resulting in a "nonzero-sum game" where adversaries (i.e., defendants and class counsel) can structure a solution to their respective bene-

⁵⁶ *Id.* at 232–33.

⁵⁷ *Id.* at 243.

⁵⁸ *Id.*

⁵⁹ *Id.* at 232–33.

⁶⁰ Coffee, *supra* note 48, at 233.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See infra* Part II.B.

fit.⁶⁵ Unfortunately, absent class members normally bear the brunt of this incentive structure. Settlement practices “end[] not with the bang of victory or defeat, but only the whimper of dubious settlements,” which quite often includes inadequate compensation for injured class members.⁶⁶ As Professor Susan Koniak asserts, class counsel are “quite capable of talking themselves into believing that a deal promising them a sure and hefty fee also does right by the class, however much a disinterested observer in possession of all the facts would think the class had been seriously short-changed.”⁶⁷ As this Comment argues, more aggressive steps must be taken to prevent these external motivations from driving the substantive remedy available to absent class members.⁶⁸

Finally, of central importance to the issues discussed in this Comment is the background practice of judicial supervision over class action settlements. As a practical matter, class action lawsuits rarely go to trial.⁶⁹ While some are dismissed on legal motion, the vast majority are settled.⁷⁰ Rule 23(e) mandates that before going into effect, agreed-upon settlements are subject to a fairness review hearing conducted by the trial judge to ensure that the settlement proposal provides for “fair, reasonable, and adequate” relief for all parties to the action.⁷¹ In the 1966 revisions of the Federal Rules of Civil Procedure, the Advisory Committee gave little guidance on the application of Rule 23(e), merely “restat[ing] the rule’s instruction without elaboration: ‘Subdivision (e) requires approval of the court . . . for

⁶⁵ Coffee, *supra* note 48, at 244–45.

⁶⁶ *Id.*

⁶⁷ Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1798 (2004).

⁶⁸ See *infra* Parts IV.B, V.A.

⁶⁹ Stephen Shapiro, *Restrictions on Class Action Settlement Agreements*, 12 IUS GENTIUM 175, 175–76 (2006).

⁷⁰ *Id.*

⁷¹ FED. R. CIV. P. 23(e). Rule 23(e) provides in pertinent part:

[C]laims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise: (1) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise; (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

FED. R. CIV. P. 23(e). The remaining subparagraphs of Rule 23(e) are largely outside the scope of this Comment. They deal mostly with disclosure of agreements relating to the proposed settlements, exclusion opportunities for individual class members, and objections to the proposed settlement by individual class members. *Id.*

the dismissal or compromise of any class action.”⁷² This lack of guidance has translated into decades of judicial interpretation of “fair, reasonable, and adequate,”⁷³ and forms the primary basis for this Comment—the context-specific interpretation of CAFA’s judicial scrutiny over proposed coupon settlements.

A number of courts have attempted to explicate exactly what level of scrutiny a judge should maintain when reviewing a proposed settlement.⁷⁴ Judge Posner writes that Rule 23(e)

requires district judges to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions. We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.⁷⁵

Notwithstanding this theoretically strong judicial review directive, significant concerns exist regarding improper qualification of proposed settlements.⁷⁶ One critic argues that “judicial review of a proposed . . . settlement provides insufficient protection to the class [J]udges approve . . . settlements even while admitting that the settlement[s] . . . ‘do not provide plaintiffs substantial monetary relief.’”⁷⁷

⁷² *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citing FED. R. CIV. P. 23(e) advisory committee’s note).

⁷³ *See, e.g., Reynolds v. Benefit Nat’l Bank*, 288 F.3d 277, 279 (7th Cir. 2002); *Culver v. City of Milwaukee*, 277 F.3d 908, 915 (7th Cir. 2002); *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001); *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995); *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22–23 (2d Cir. 1987). Part IV, *infra*, relates applications of Rule 23(e)’s standard of review to the coupon settlement context and argues that the rule provides substandard assurance of relief for class members.

⁷⁴ *See, e.g., Culver*, 277 F.3d at 915 (fiduciary duty of district judge to class is non-delegable); *Grant*, 823 F.2d at 22 (citing *In re Warner Commc’ns Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986)) (“In approving a proposed class action settlement, the district court has a fiduciary responsibility to ensure that the settlement is fair and not a product of collusion, and that the class members’ interests were represented adequately.”) (internal quotations omitted); *Stewart v. Gen. Motors Corp.*, 756 F.2d 1285, 1293 (7th Cir. 1985) (judge has fiduciary duty to class and motions to substitute counsel must be closely scrutinized).

⁷⁵ *Reynolds*, 288 F.3d at 279–80.

⁷⁶ *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1070 (2002). Professor Leslie’s argument, while specific to the coupon settlement context, *id.*, can be logically extrapolated to reveal a larger problem with the current state of judicial review over class action settlements.

⁷⁷ *Id.*

Other scholars support this contention.⁷⁸ One commentator asserts that “[p]rocedural rules, such as the requirements for notice and judicial approval of settlements, provide only a weak bulwark against self-dealing and collusion.”⁷⁹ Another maintains that “[t]he trial court’s approval is a weak reed on which to rely once the adversaries have linked arms and approached the court in a solid phalanx seeking its approval.”⁸⁰

The mechanics of settlement and review also play a considerable role in improper approval of bad settlements under Rule 23(e). Professor Koniak claims that because only defendants and counsel for the plaintiff class are seated at the bargaining table, the judge is not privy to the give and take of settlement negotiation, and is

thus at a distinct disadvantage [The judge] has no reliable way to discern in which nook or cranny . . . evidence of collusion may lie. She may not even know what she should be looking for By and large she knows just what she is told. And the telling is not done by adversaries presenting clashing views on the settlement’s fairness or the adequacy of the representation provided [but by both class counsel and defendant, who are in explicit agreement] So all most judges hear is a one-sided presentation about how wonderful the settlement is and how aggressively class counsel championed the absent class’s cause. . . . Judges, honest as they may be and diligently as most may work, have an interest in settling any and all cases, and an even bigger interest in seeing large and cumbersome class actions settle.⁸¹

Indeed, even Judge Friendly, the renowned Second Circuit jurist, acknowledged that once the central players in a class action have agreed on a settlement, “[a]ll the dynamics conduce to judicial approval of such settlements.”⁸²

The background issues discussed in this section frame the Coupon Settlement Problem. Specifically, the class action mechanism

⁷⁸ See DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 27, 488, 545 (2000); John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5, 70 (1985) (reiterating argument that stricter judicial review should be implemented over nonpecuniary settlements in securities class actions).

⁷⁹ HENSLER ET AL., *supra* note 78, at 120.

⁸⁰ Coffee, *supra* note 78, at 26–27.

⁸¹ Koniak, *supra* note 67, at 1797–98 (internal citations omitted). The reality that a reviewing judge is at a disadvantage in smoking out inequitable coupon settlements provides a strong justification for a presumption against all coupon settlements. See *infra* Part V.A.

⁸² *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting).

can and should be used to resolve large-scale litigation concerns that otherwise could not be addressed through individual actions.⁸³ The baseline incentives, however, for the attorney representing the class are inherently out of line with those of the absentee litigants.⁸⁴ This influences proposed settlements that can award starkly disproportionate relief to the attorney over absent class members. Additionally, the ambiguity of Rule 23(e) and the actual procedures of settlement negotiation hinder the reviewing judge's ability to identify collusive inequities contained in the proposed settlement.⁸⁵ This results in the fundamental flaw addressed in this Comment—the improper ratification of unfair coupon settlements.

B. The Coupon Settlement Problem

When used correctly, class actions can effectively kill three birds with one procedural stone: they can serve to efficiently compensate a vast number of plaintiffs who otherwise would not have been able to litigate legitimate claims due to prohibitive economies of scale; they allow defendants to rest easy with the knowledge that any and all claims against them will be resolved in one action; and they relieve courts of the “flood of duplicative claims.”⁸⁶ However, as sophisticated defendants and class counsel gained experience in class action litigation, the laudable goals of Rule 23 seemed to be lost amongst the widespread public scorn for class actions.⁸⁷

One such abuse, repeatedly decried as the class action equivalent to squeegee boys splashing water on a clean windshield expecting to get paid for a problem they created,⁸⁸ is the coupon settlement. In such an agreement, defendants agree to compensate class members solely through the provision of coupons, or other promises for discounts on future purchases of the company's products or services.⁸⁹ Historically, very few of these coupons are redeemed, and, as discussed below, those that are redeemed are often of less actual

⁸³ See *supra* notes 31–47 and accompanying text.

⁸⁴ See *supra* notes 48–68 and accompanying text.

⁸⁵ See *supra* notes 69–82 and accompanying text.

⁸⁶ Hantler & Norton, *supra* note 11, at 1343.

⁸⁷ See, e.g., Darryl Haralson & Adrienne Lewis, *USA Today Snapshots: Opinions on Class-Action Lawsuits*, USA TODAY, Mar. 24, 2003, at 1B.

⁸⁸ See FTC Workshop, *supra* note 13, at 1176; Jason Hoppin, *Florida Judge Compares Milberg to Squeegee Boy*, RECORDER, Apr. 16, 2002, at 1.

⁸⁹ Hantler & Norton, *supra* note 11, at 1344.

value than the ostensible face value of the coupon.⁹⁰ Class counsel, in contrast, receive attorney's fees in the form of large sums of cash, historically based on a significant percentage of the aggregate face value of the coupons offered to the class.⁹¹ The overriding fear of these settlements is that the three central players in the class action drama come out ahead: the court clears its docket; defendants receive global peace at relatively little cost (including the potential to induce future transactions that are profitable, even discounted by the coupon); and class counsel is handsomely compensated. Absent class members—those whose rights are waived, and who receive only a coupon in compensation—are very often left out in the cold.⁹²

Coupon settlements are not inherently problematic.⁹³ When structured even-handedly, they benefit plaintiffs by providing redress from injury, present defendants with an incentive to correct their allegedly wrongful or tortious behavior, as well as provide global peace to the claims alleged against them by allowing avoidance of duplicative litigation.⁹⁴ Furthermore, they are often necessary—"a defendant might be driven into bankruptcy if substantial cash damages are awarded, while coupons can provide class members with at least some benefit."⁹⁵ However, as coupon settlements became more prevalent, they revealed a serious defect: class counsel and defendants began collusively structuring settlements that benefited each other, to the detriment of absent class members.⁹⁶ Counsel and defendants were able to use coupon settlements as a smoke screen to justify disposing of the litigation to each other's substantive advantage.⁹⁷ By structuring damages in the form of a theoretically high-value aggregate coupon offering to the plaintiff class, attorneys were able to take home

⁹⁰ *Id.* at 1344, 1346–49 (discussing low coupon realization percentages and the comparatively low value of actual coupon relief in relation to the face value of the coupon).

⁹¹ *Id.* at 1344; *see also* Rubenstein, *supra* note 13, at 11.

⁹² *See* Hantler & Norton, *supra* note 11, at 1343.

⁹³ James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443, 1445 (2006).

⁹⁴ Hantler & Norton, *supra* note 11, at 1344.

⁹⁵ Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1614 (2006).

⁹⁶ *See* FTC Workshop, *supra* note 13, at 1167. Unlike private litigation, class action litigation, particularly in the coupon settlement context, features settlements that "run a significant risk of collusion between opposing counsel." *Id.*

⁹⁷ *See id.* at 1168 (discussing the various structures of coupon settlements that defendants tend to employ); *see also* Hantler & Norton, *supra* note 11, at 1344 (stating that lawyers in the coupon settlement context normally "receive cash fees in amounts that generally dwarf the award recovered by individual plaintiffs"); *supra* notes 48–68 and accompanying text.

sizable fees, and defendants were able to get away with paying much less than they would have if the settlement had called for a cash award.⁹⁸

Today, few proposed coupon settlements successfully and substantially benefit absent class members.⁹⁹ In the classic unfairly structured coupon settlement, class attorneys inflate the apparent value of the coupon offering so as to receive a fee that dwarfs the award recovered by individual plaintiffs.¹⁰⁰ In return, the defendants implement usage restrictions, limiting the ability and desire of absent class members to redeem their coupon compensation.¹⁰¹ Implementation of these usage restrictions takes a variety of forms: imposing administrative hurdles to the acquisition of the coupons; restricting the products or services to which the coupons may be applied; limiting the transferability of the coupons; enforcing a prohibitive expiration date; enforcing “blackout” dates on which the coupons are non-usable; and imposing limits on the aggregation of coupons.¹⁰² By restricting the practical ability or desire of class members to redeem the coupons, the actual value of the coupon offering is normally worth far less than advertised.¹⁰³

In this archetypical example, the class counsel obviously benefits from exorbitant fees generated by an inflated settlement value.¹⁰⁴ As a complement benefit, defendants realize value added from the settlement when they are able to buy off—cheaply—any future suits, given the preclusive effect of the class action settlement, and are able to pay very little in the way of actual damages (when coupons go unredeemed).¹⁰⁵ Defendants also benefit when class members are in-

⁹⁸ See Sherman, *supra* note 95, at 1614.

⁹⁹ Tharin & Blockovich, *supra* note 93, at 1449.

¹⁰⁰ Hantler & Norton, *supra* note 11, at 1344.

¹⁰¹ Robert H. Klonoff & Mark Hermann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1699–1700 (2006).

¹⁰² *Id.*

¹⁰³ Rubenstein, *supra* note 13, at 11.

¹⁰⁴ Tharin & Blockovich, *supra* note 93, at 1446.

¹⁰⁵ FTC Workshop, *supra* note 13, at 1167–68. At the FTC Workshop, Professor Christopher Leslie detailed four possible outcomes that accrue to defendants when individual class members act with respect to their coupon payment. First, an individual “class member might not use the settlement coupon at all.” *Id.* at 1167. Second, the class member “could use the coupon because the settlement coupon induced her to make a purchase that she otherwise would not have made.” *Id.* at 1167–68. Third, the “class member could use her coupon for a purchase that she was planning to make anyway.” *Id.* at 1168. Finally, the “class member could transfer the settlement coupon to a third party who uses it.” *Id.* Because defendants benefit when the first two options occur—under the first outcome, the defendant pays nothing; under the second outcome, the defendant earns revenue that it otherwise would

duced to purchase a product or service that they otherwise would not have purchased (so they can avoid the feeling of getting nothing from the settlement).¹⁰⁶ Absent class members, however, are relegated to the receipt of a coupon which very often provides little or no value.¹⁰⁷ Compounding this problem is the reality that neither class attorneys, who benefit (notwithstanding their fiduciary duty to the class) from maximizing their fees, nor defendants, who obviously prefer to minimize the amount they must pay under the settlement, have an incentive to put the interests of allegedly harmed plaintiffs before their own.¹⁰⁸

This “horror story”¹⁰⁹ is more than a theoretical nightmare. In an oft-cited Seventh Circuit decision,¹¹⁰ the plaintiffs alleged that the Bank of Boston had over-collected escrow monies from homeowners and profited from the interest.¹¹¹ The settlement, which had been approved by an Alabama judge, awarded up to \$8.76 in account credits to individual class members.¹¹² The plaintiffs’ lawyers received more than \$8.5 million in fees, which were debited directly from individual class members’ escrow accounts,¹¹³ resulting in a *net loss* to many or all of the class members.¹¹⁴

In its report supporting the passage of CAFA, the Senate Judiciary Committee catalogued specific examples of the Settlement Coupon Problem in practice.¹¹⁵ A few cases the Committee noted are summarized below.

not have earned—they have additional incentive to structure coupon settlements to reach these outcomes. *Id.* at 1167–68.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1163 (describing how coupon settlements often provide consumers with no meaningful relief).

¹⁰⁸ *Id.* at 1169–70 (explaining that evidence suggests that procedural safeguards designed to inhibit self-interested settlements between class counsel and defendants are insufficient).

¹⁰⁹ Shapiro, *supra* note 69, at 191–92.

¹¹⁰ Kamilewicz v. Bank of Boston, 92 F.3d 506 (7th Cir. 1996).

¹¹¹ Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 494 (2000).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *See id.* (detailing one class member whose escrow account was debited \$144.25 as a miscellaneous disbursement which paid for the attorney’s fees agreed upon in the settlement); *see also* Beisner, Shors & Miller, *supra* note 27, at 1446 (relating the story of another class member whose account was debited eighty dollars toward the payment of the class counsel fee).

¹¹⁵ S. REP. NO. 108-123, at 16–18 (2003); *see also* Beisner, Shors & Miller, *supra* note 27, at 1447 (summarizing the various cases that the Senate Judiciary Committee flagged due to inequitable coupon settlement proposals).

In *Ramsey v. Nestle Waters North America, Inc.*,¹¹⁶ a prime example of a so-called “squeegee boy” case,¹¹⁷ plaintiffs alleged that Poland Springs water actually did not come from a deep spring in the woods of Maine, as the company had advertised. The proposed settlement provided discounts on Poland Springs water to class plaintiffs, while the attorneys pocketed \$1.35 million. In other words, the absent class members received discounts on the very product they alleged caused them harm.¹¹⁸

*In re Kansas Microsoft Litigation*¹¹⁹ is an excellent example of restrictive coupon provisions that devalue a proposed settlement. Microsoft settled ten state antitrust class actions in which the software giant allegedly used its monopolistic powers to unfairly increase prices. The settlement called for the distribution of a five- to ten-dollar coupon, good for a discount on future purchases of particular computer software or hardware.¹²⁰ To realize the value of the settlement, class members had to download a special redemption form on Microsoft’s website, fill it out, and mail it in. Furthermore, to redeem the coupon, the class member was required to re-mail the voucher, along with a photocopy of an original receipt and an original UPC Code.¹²¹ Finally, the vouchers were good only for particular Microsoft products.¹²² In addition to the disproportionate relationship between the excessive attorney’s fees and the sharply limited dollar value of individual coupons, the complexity and trouble of actually using the coupon corrupts the settlement’s validity.¹²³ Moreover, class attorneys sought hundreds of millions of dollars in fees (actual recovery was undisclosed).¹²⁴ For the class members, the difficulty in realizing any actual value is likely to dissuade many of those who might otherwise use the coupon, and would in any event lessen the real value of the coupon to the small subset of class members who did use it.¹²⁵

In *DeGradi v. KB Holdings, Inc.*,¹²⁶ the plaintiffs asserted that KB Toys engaged in deceptive pricing practices on certain products.

¹¹⁶ No. 03 CHK 817 (Ill. Cir. Ct., Nov. 5, 2003).

¹¹⁷ See *supra* note 88 and accompanying text.

¹¹⁸ Edward D. Murphy et al., *Conflict and Change*, PORTLAND PRESS HERALD, Jan. 4, 2004, at 1F.

¹¹⁹ No. 99 CV 17089 (Kan. Dist. Ct. July 29, 2003).

¹²⁰ Beisner, Shors & Miller, *supra* note 27, at 1448.

¹²¹ *Id.*

¹²² *Id.*

¹²³ See *In re Kansas Microsoft Litigation*, No. 99 CV 17089.

¹²⁴ *Id.*

¹²⁵ See *id.*

¹²⁶ No. 02 CH 15838 (Ill. Cir. Ct. Oct. 1, 2003).

Under the settlement agreement, the toy retailer agreed to reduce certain products by thirty percent over a six-day period. Put more simply, the defendant “held a sale.”¹²⁷ The attorneys received about one million dollars.¹²⁸

In *Chavez v. GameStop Corp.*,¹²⁹ a class of plaintiffs alleged that the defendant video game distributor was not selling new video games as advertised but was selling previously purchased games that had been returned. Under the settlement, any plaintiff who could produce a receipt would receive a coupon for five percent off the price of any one game. Thus, plaintiffs could purchase a new game for \$1.25 less than the \$25 purchase price, but only if they kept their receipts. They could not redeem the coupon over Gamestop’s website, but had to redeem it at a retail store.¹³⁰ Class counsel received \$125,000.¹³¹

In *Ross v. Portillo’s Restaurant Group Inc.*,¹³² aggrieved consumers filed a complaint that a Chicago restaurant chain had fraudulently misrepresented their beer steins’ volume to be twelve ounces, when in fact the containers held only 10.6 ounces. The settlement called for plaintiffs to receive coupons good for one dollar off every subsequent five-dollar purchase at any restaurant in the chain.¹³³

In *Shields v. Bridgestone/Firestone Inc.*,¹³⁴ the class plaintiffs were owners of Firestone tires that had been recalled by the National Highway Traffic Safety Administration for various defects, yet had caused no injury or property damage. Under a settlement ratified by a Texas court, Firestone agreed to redesign certain tires, which it had already planned to do irrespective of the lawsuit, and to develop a

¹²⁷ Beisner, Shors & Miller, *supra* note 27, at 1449.

¹²⁸ Stephanie Zimmermann, *KB Toys Settles Lawsuit over “Low” Prices by Offering Discount*, CHICAGO SUN-TIMES, Oct. 11, 2003, at 3.

¹²⁹ No. CGC-02-406658 (Cal. Super. Ct. Sept. 22, 2003).

¹³⁰ As with the problem with the proposed coupon settlement in *In re Kansas Microsoft Litigation*, No. 99 CV 17089 (Kan. Dist. Ct. July 29, 2003), the proposed settlement in this case offers not only very little in terms of dollars and cents, but also makes it logistically difficult to actually derive any value from the coupons even if one wanted to do so. See *supra* notes 119–25 and accompanying text.

¹³¹ Gamestop.com, Notice of Class Action and Proposed Settlement (Aug. 1, 2003), available at <http://www.gamestop.com/gs/help/classaction.asp>.

¹³² No. 00 CH 13612 (Ill. Cir. Nov. 18, 2003).

¹³³ *Judge Approves Portillo’s Class Action Settlement over Mislabeled Beer*, PR NEWswire, Nov. 26, 2003. The problem with this settlement is emblematic of the general Coupon Settlement Problem—while class members do receive a discount on future purchases of ale, the settlement forces injured customers to expend an additional four dollars to receive one dollar in recovery, increasing the defendants’ revenue stream more than it might have had the settlement never been accepted. See *id.*

¹³⁴ No. E-0167637 (Tex. Dist. Ct. July 31, 2002).

consumer education and awareness campaign. Class members received nothing. The lawyers received nineteen million dollars.¹³⁵

Several other amusing yet disconcerting cases have contributed to the public perception that the American class action system promotes sham resolutions.¹³⁶ For instance, General Mills settled a class action lawsuit over improper pesticides that had come into contact with the oats used to make Cheerios.¹³⁷ Plaintiffs' counsel acknowledged that no physical harm had actually been caused to any class member.¹³⁸ Class members pocketed a coupon good for a free box of Cheerios. The settlement garnered the attorneys almost two million dollars.¹³⁹

In an action against a company that was alleged to be producing unsafe baby cribs, class members received either a crib repair kit or a coupon for fifty-five dollars, which could be used toward the future purchase of any of the defendant's products.¹⁴⁰ Of course, the coupon offering was valuable only for consumers who planned to have another baby and still trusted the very company that produced the faulty cribs.¹⁴¹

Finally, in what could be the most jaw-dropping coupon settlement to date, Acushnet, a Chicago company, during a promotion in which it was giving away golf gloves, exhausted its free inventory and began handing out free sleeves of golf balls instead. On behalf of all "injured" recipients of free golf balls, attorneys filed suit against Acushnet for its "transgressions," and the defendant and class counsel began settlement negotiations. The resulting settlement, certified by

¹³⁵ See Miles Moore, *BFS Settles Nationwide Class Action Suit*, RUBBER & PLASTICS NEWS, Aug. 4, 2003.

¹³⁶ See, e.g., Andrew S. Weinstein, Note, *Avoiding the Race to Res Judicata: Federal Antisuit Injunctions of Competing State Class Actions*, 75 N.Y.U. L. Rev. 1085, 1085 (2000).

¹³⁷ See Ameet Sachdev, *Coupon Awards Reward Whom? Class-Action Settlements that Pay Lawyers Millions of Dollars and Give Plaintiffs Coupons that are Sometimes Useless are Drawing Ire in Congress and Some Courts*, CHI. TRIB., Feb. 29, 2004, at C1; David Zizzo, *Lawsuit Can Mean Big Bucks for Tiny Tort*, DAILY OKLAHOMAN, Sept. 17, 1995, at 1.

¹³⁸ Sachdev, *supra* note 137, at 1.

¹³⁹ *Id.*

¹⁴⁰ *Dorel Juvenile Group Settles Class Action Lawsuits*, PR NEWSWIRE, Oct. 6, 2003, LexisNexis Library, PR Newswire File.

¹⁴¹ *Id.*; see also U.S. Chamber Inst. For Legal Reform, *State Court Class Action Settlements: A Pattern of Abuse and a Proposed Solution*, at 4, available at http://www.ftc.gov/bcp/workshops/classaction/other/inst_legalreform.pdf (last visited Feb. 18, 2007) [hereinafter *A Pattern of Abuse*].

an Illinois judge, granted aggrieved class members another free sleeve of golf balls.¹⁴² Class counsel took home \$100,000 in fees.¹⁴³

In response to the award of wholly inequitable relief to absent class members with legitimate (or at least colorable) claims, Congress passed CAFA to restore the notion of fundamental fairness to the American class action system. Moreover, the goal was to rid class actions of attorney-created cash cows¹⁴⁴ that provided little to no benefit for plaintiffs that were not actually injured, did not care about de minimis relief, or simply did not know that a class action lawsuit had been filed on their behalf.

III. THE CLASS ACTION FAIRNESS ACT OF 2005

The genesis of the Class Action Fairness Act of 2005 dates as far back as the late 1990s. The Act was created in response to exponential growth in the number of class actions,¹⁴⁵ as well as a wave of criticism of the American class action system permeating the country.¹⁴⁶ The bill originally contained only expansions of federal court jurisdiction,¹⁴⁷ but Congress later amended it by adding a wider array of reforms that included the Act's settlement provisions.¹⁴⁸ President Bush signed the bill into law on February 18, 2005,¹⁴⁹ amid a spectacle of legislators, media, advocacy groups, contributors to the bill, and invited guests that had been affected by manipulation of the class ac-

¹⁴² Hantler & Norton, *supra* note 11, at 1358; *see also* Martha Johaneck, *Caddies or Cads? Class-Action Lawyers Find the Green in Errant Golf Balls*, SUN-SENTINEL (Fort Lauderdale, Fla.), Sept. 13, 1999, at 21A.

¹⁴³ Hantler & Norton, *supra* note 11, at 1358.

¹⁴⁴ Beisner, Shors & Miller, *supra* note 27, at 1450.

¹⁴⁵ John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case of It . . . in State Court*, 25 HARV. J. L. & PUB. POL'Y 143, 157 (2001) (summarizing studies that show that the number of class actions tripled during the 1990s).

¹⁴⁶ *See, e.g.*, Editorial, *Actions Without Class*, WASH. POST, Aug. 27, 2001, at A14 (observing that "no portion of the American civil justice system [was in] more of a mess than the world of class actions"); Editorial, *Class-Action Plaintiffs Deserve More Than Coupons*, USA TODAY, Oct. 9, 2002, at 12A; Editorial, *Class Action Showdown*, WALL ST. J., July 8, 2004, at A14; Editorial, *Reforming Class Actions*, WASH. POST, June 15, 2003, at B6.

¹⁴⁷ H.R. 3789, 105th Cong. (1998).

¹⁴⁸ *See, e.g.*, S. 2062, 108th Cong. (2004); S. 274, 108th Cong. (2003); H.R. 1115, 108th Cong. (2003); S. 1712, 107th Cong. (2001); S. 353, 106th Cong. (1999); H.R. 1875, 106th Cong. (1999); S. 2083, 105th Cong. (1998). The bill that was finally signed into law was S. 5, 109th Cong. (2005). The main sponsor of the bill was Senator Charles Grassley. *See id.*

¹⁴⁹ Press Release, Office of the White House Press Sec'y, President Signs Class-Action Fairness Act of 2005 (Feb. 18, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/02/20050218-11.html>.

tion system.¹⁵⁰ Citing the need for class action reform, President Bush stated that the law

helps ensure justice by making two essential reforms. First, it moves most large, interstate class-actions into federal courts. . . . Second, the bill provides new safeguards to ensure that plaintiffs and class-action lawsuits are treated fairly. The bill requires judges to consider the real monetary value of coupons and discounts, so that victims can count on true compensation for their injuries.¹⁵¹

The two relevant segments of the Class Action Fairness Act that are pertinent to this Comment are summarized below: the expansion of federal court jurisdiction over multi-state class actions, and, of particular relevance here, the provision attempting to curb coupon settlement abuses.

A. *Expansion of Federal Court Jurisdiction*

To resolve perceived abusive class action forum shopping,¹⁵² Congress enacted CAFA in part¹⁵³ to greatly expand the jurisdictional powers of the federal courts over class actions involving parties who

¹⁵⁰ *Id.*

¹⁵¹ *Id.* President Bush went on to say that the legislation shows “progress” in the class action arena, and that “there’s more [work] to do.” *Id.* Given the arguments advanced in Part IV, *infra*, along with President Bush’s qualifying statements about the effectiveness of the legislation he signed, one can plausibly argue that even at the time of enactment, the actual substantive effectiveness of CAFA was in doubt.

¹⁵² Whatever the merit behind the argument that class action lawyers abused the class action system by filing interstate class action complaints in so-called “magic jurisdictions,” *see* Hantler & Norton, *supra* note 11, at 1346, that debate far exceeds the scope of this Comment and will be left for another day. CAFA’s jurisdictional expansions are relevant here only insofar as the Act’s potential to dramatically increase the number of coupon settlements proposed in federal court. *See supra* note 26 and accompanying text. For commentary on class action forum shopping, *see Medical Monitoring and Asbestos Litigation—A Discussion with Richard Scruggs and Victor Schwartz*, MEALEY’S LITIG. REP. ASBESTOS, Mar. 1, 2002, at 19.

¹⁵³ The Senate Report of CAFA’s passage sheds further light on the motivation of the sponsors of the bill: “[B]ecause interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in federal court.” S. REP. NO. 109-14 (2005). Along these same lines, a major goal of the bill was to keep American federalism intact. Specifically, a recurring problem with multistate class actions was the preclusive effect a judgment in one state had on class members who filed their own action in a different state. *Id.* In other words, states bound parties from other states to a decision based upon their own view of the law. Congress believed the federal courts were best equipped to balance concerns of efficient multi-jurisdiction litigation and individual due process. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (2005).

are citizens of different states.¹⁵⁴ Under the Act, federal district courts have original jurisdiction over any civil action in which the aggregate amount in controversy is greater than \$5 million,¹⁵⁵ and is a class action¹⁵⁶ in which any plaintiff class member is a citizen of a state or foreign nation different from any defendant.¹⁵⁷ This amended the conventional rule by allowing for minimal diversity,¹⁵⁸ whereas before CAFA all named class representatives must have had distinct citizenship from all defendants.¹⁵⁹ Furthermore, CAFA relaxes the amount in controversy requirement;¹⁶⁰ the traditional rule¹⁶¹ required each class member to meet the specified amount in controversy.¹⁶² While the changes are expansive, the Act limits federal jurisdiction to class actions where the aggregate number of plaintiff class members amounts to at least one hundred.¹⁶³ CAFA also provides for a number of exceptions to the Act's jurisdictional expansion.¹⁶⁴

Another major jurisdictional provision in CAFA is the enhancement of defendants' removal powers when a class action is filed in state court.¹⁶⁵ Conventional removal procedures permit only out-of-state defendants to remove a case to federal court.¹⁶⁶ Furthermore, prior to the passage of CAFA, where the class action was filed against

¹⁵⁴ Class Action Fairness Act of 2005 §§ 4–5, 28 U.S.C.A. §§ 1332(d), 1453 (West 2007). The Act makes no changes to federal question class actions. Rubenstein, *supra* note 13, at 4.

¹⁵⁵ 28 U.S.C.A. § 1332(d)(2).

¹⁵⁶ The Act defines a class action as “any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.” *Id.* § 1332(d)(1)(B).

¹⁵⁷ *Id.* § 1332(d)(2)(A).

¹⁵⁸ *Id.*

¹⁵⁹ Rubenstein, *supra* note 13, at 5.

¹⁶⁰ 28 U.S.C.A. § 1332(d)(6).

¹⁶¹ *See Zahn v. Int'l Paper Co.*, 414 U.S. 291, 294–95 (1973) *superseded by statute*, 28 U.S.C. § 1367 (2006). Section 1367 permits absent class members' claims to be joined via supplemental jurisdiction so long as at least one named plaintiff meets the amount in controversy. *See* Rubenstein, *supra* note 13, at 4.

¹⁶² Currently, the amount in controversy required for diversity jurisdiction is set at \$75,000. 28 U.S.C. § 1332(a)(2006).

¹⁶³ 28 U.S.C.A. § 1332(d)(5)(B).

¹⁶⁴ *Id.* § 1332(d)(4)–(5). These exceptions include: (1) compulsory and permissive local controversy exceptions for truly intra-state disputes, (2) a “Delaware carve-out” designed to keep corporate cases in Delaware chancery courts, and (3) a civil rights exception, allowing states to keep sovereign immunity defenses available for state actors. *Id.*

¹⁶⁵ 28 U.S.C. § 1453.

¹⁶⁶ 28 U.S.C. § 1441(b).

multiple defendants, universal consent to removal was required.¹⁶⁷ Also, defendants were statutorily barred from removing to federal court after one year of the commencement of the action.¹⁶⁸ Finally, decisions by the district court to remand to state court were not reviewable.¹⁶⁹

Under CAFA, these restrictions are relaxed: any defendant, including in-state defendants, may remove to federal court,¹⁷⁰ provided the action fits CAFA's jurisdictional requirement; concurrence of other defendants is unnecessary for a defendant to unilaterally remove the case to federal court;¹⁷¹ the one year removal time limit is erased;¹⁷² and finally, district court decisions to remand to state court are reviewable within seven days.¹⁷³

Congress took a bold step by enacting sweeping reforms to federal court jurisdiction with regard to class actions. Commentators generally agree that these changes give defendants a new procedural weapon to defend collective actions asserted against them.¹⁷⁴ However broad the general scope of CAFA's jurisdiction provisions are, it appears self-evident that the expansion of federal court jurisdiction over multistate class action litigation engenders manifestation of the Coupon Settlement Problem, more than ever before, in federal court. As discussed in Part III, the already burdened dockets of federal district judges will be weighed down, increasing the likelihood of inadequate supervision of coupon settlements, and thereby diminishing the probability that absent class members will be sufficiently compensated for their alleged injuries.

¹⁶⁷ See, e.g., *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533–34 n.3 (6th Cir. 1999) (“[I]n order for a notice of removal to be properly before the court, all defendants who have been served or otherwise properly joined in the action must either join in the removal, or file a written consent to the removal.”).

¹⁶⁸ 28 U.S.C. § 1446(b).

¹⁶⁹ *Id.* § 1447(d).

¹⁷⁰ 28 U.S.C.A. § 1453(b) (2007).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* § 1453(c)(1).

¹⁷⁴ See, e.g., Beisner, Shors & Miller, *supra* note 27, at 1444; C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487, 491–93 (2006) (CAFA significantly expands the scope of original and removal jurisdiction); Rubenstein, *supra* note 13, at 15 (“Those defending state court class actions definitely have a new weapon in their arsenal in the ability to remove [class actions] to federal court.”); Sherman, *supra* note 95, at 1615 (“CAFA is the most significant change in class action practice since the 1966 amendment of Rule 23”); *Id.* at 1608 (“After CAFA, the federal courts are essentially ‘the only game in town’ for multistate and national class actions.”).

B. CAFA's Coupon Settlement Provisions

For all of the excessive abuses surrounding class actions and coupon settlements,¹⁷⁵ the Class Action Consumers Bill of Rights (the major provision of the Class Action Fairness Act designed to inhibit these and other exploitations) is surprisingly straightforward and sharply limited in scope.¹⁷⁶ The “heart”¹⁷⁷ of the Bill of Rights addresses attorney’s fees in the coupon settlement context.¹⁷⁸ Other settlement process-related provisions of CAFA’s Bill of Rights prohibit settlements that result in a net financial loss to individual class members, absent a “written finding that non-monetary benefits to the class member substantially outweigh the monetary loss”;¹⁷⁹ ban all settlements that disproportionately reward in-state class members compared to out-of-state class members;¹⁸⁰ and require notification to “appropriate” government officials of any proposed class action settlement.¹⁸¹

The attorney’s fees provisions, however, are the backbone of the Bill of Rights. CAFA mandates that if a proposed settlement calls 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*.”¹⁸² In other words, prior to CAFA, if the coupon settlement called for the defendant to distribute \$500 million worth of coupons to class members, class counsel could pocket a percentage of this amount (for example, 20%, or \$100 million). However, given that the settlement was likely to be structured to limit individual class member’s ability or desire¹⁸³ to redeem the coupon, the actual value of the settlement would likely be far less than \$500 million (perhaps even less than what class counsel charged for its fee, a particularly odd and inequitable result).

¹⁷⁵ See *supra* Part II.B.

¹⁷⁶ Class Action Fairness Act of 2005 § 3(a), 28 U.S.C.A. §§ 1711–1715 (West 2007).

¹⁷⁷ Rubenstein, *supra* note 13, at 10.

¹⁷⁸ 28 U.S.C.A. §§ 1711–1715.

¹⁷⁹ *Id.* § 1713. This section responded to *Kamilewicz v. Bank of Boston*, 92 F.3d 506 (7th Cir. 1996). See *supra* note 110 and accompanying text; see also Rubenstein, *supra* note 13, at 12.

¹⁸⁰ *Id.* § 1714; see also Rubenstein, *supra* note 13, at 12.

¹⁸¹ *Id.* § 1715; see also Rubenstein, *supra* note 13, at 13. These provisions all seem reasonable, laudable, and efficacious. As such, this Comment does not argue that these provisions are ineffective in any way.

¹⁸² *Id.* § 1712(a) (emphasis added).

¹⁸³ See *supra* Part II.B.

After CAFA, counsel may only receive a fee award in a coupon case based on the value of coupons that class members actually redeem.¹⁸⁴ In the above hypothetical, for example, if only \$100 million worth of coupons are redeemed, counsel will earn only \$20 million (20% of \$100 million), instead of \$100 million (20% of \$500 million).¹⁸⁵ Furthermore, as a necessary consequence of this provision, counsel must wait until it is reasonably evident that all who will redeem the coupons have done so already.¹⁸⁶ This waiting period guarantees that counsel does not run off with the fee before the class members have had a chance to claim their award.¹⁸⁷

If attorney's fees are not calculated based on the coupon redemption percentage, CAFA requires that they be calculated based on the amount of time class counsel reasonably expended working on the action,¹⁸⁸ and such fees must be approved by the court.¹⁸⁹ If there is a mix of coupons and equitable relief, including injunctive remedies, "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),"¹⁹⁰ and "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)."¹⁹¹ In other words, counsel and defendants may structure a settlement in which there is a mix of legal and equitable relief, but the attorney's fees must accurately reflect the actual award absent class members receive.¹⁹² CAFA also allows, but does not require, a district court to "receive expert testimony from a

¹⁸⁴ This method of fee calculation will be occasionally referred to in this Comment as the "percentage method."

¹⁸⁵ See Rubenstein, *supra* note 13, at 11.

¹⁸⁶ Shapiro, *supra* note 69, at 184.

¹⁸⁷ *Id.*

¹⁸⁸ Class Action Fairness Act of 2005 §3(a), 28 U.S.C.A. § 1712(b)(1) (West 2007).

¹⁸⁹ 28 U.S.C.A. § 1712(b)(2). This subsection goes on to state that nothing shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees. *Id.* The lodestar with a multiplier is a method of calculating attorney's fees by "multiplying a reasonable number of hours worked by the prevailing hourly rate in the community for similar work, and often considering such additional factors as the degree of skill and difficulty involved in the case, the degree of its urgency, its novelty, and the like." BLACK'S LAW DICTIONARY 960 (8th ed. 1999). The multiplier has the potential to significantly increase the attorney's fee over a straight lodestar. Stanley M. Grossman, *Statutory Fee Shifting in Civil Rights Class Actions: Incentive or Liability?*, 39 ARIZ. L. REV. 587, 591 (1997).

¹⁹⁰ 28 U.S.C.A. § 1712(c)(1).

¹⁹¹ *Id.* § 1712(c)(2).

¹⁹² Rubenstein, *supra* note 13, at 11.

witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.”¹⁹³

The rationale for the foregoing provisions is simple—by limiting the attorney’s fees to an amount that actually reflects the true value of the aggregate award, attorneys will be induced to ensure that the substantive value accruing to class members is high, thereby justifying a high return for the attorney.¹⁹⁴ The framers of the Act believed this to be preferable to a fee structure based on a theoretical coupon offering that is not indicative of how much benefit actually accrues to class members.¹⁹⁵ Put another way, the Act attempts to force plaintiffs’ attorneys to “share in the success,”¹⁹⁶ or lack thereof, of the offered coupon settlement. Ideally, the attorney’s fees provisions will induce class attorneys to “focus sharply and intently up-front on making the coupons redeemable, and therefore valuable.”¹⁹⁷ Whether this is actually a realistic notion is yet to be seen.¹⁹⁸

Finally, CAFA permits the effectuation of a settlement only when the district judge has certified, via written finding after a fairness hearing, that where the proposed settlement calls for class members to receive coupons, the settlement is “fair, reasonable, and adequate for class members.”¹⁹⁹ This subsection further grants the district court the discretion to require that the settlement provide for the distribution of a portion of the value of unclaimed coupons to charity or to the government,²⁰⁰ and that any such distributions are not to be used in the calculation of counsel fees.²⁰¹

In its report upon passage of the Act, the Senate Judiciary Committee stated that when courts determine whether a proposed coupon settlement is “fair, reasonable and adequate,” district judges should look to “the real monetary value and the likely utilization rate of the coupons provided by the settlement.”²⁰² The text of the subsection, however, gives no guidance on what “fair, reasonable, and

¹⁹³ 28 U.S.C.A. § 1712(d).

¹⁹⁴ S. REP. NO. 109-14, at 30 (2005) (Conf. Rep.).

¹⁹⁵ *See id.*

¹⁹⁶ Tharin & Blockovich, *supra* note 93, at 1451.

¹⁹⁷ *Id.* at 1449.

¹⁹⁸ Indeed, while CAFA’s counsel fees provisions may seem to take care of the Coupon Settlement Problem, this likely is not the case. As Part IV.A, *infra*, argues, attorney’s fees restrictions alone, whether successful or not at achieving the diminution of exorbitant fees, are not sufficient to guarantee substantive relief to absent class members.

¹⁹⁹ Class Action Fairness Act of 2005 § 3(a), 28 U.S.C.A. § 1712(e) (West 2007).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² S. REP. NO. 109-14, at 31 (2005).

adequate” actually means. Commentators have acknowledged that this standard adds nothing substantively to judges’ settlement review hearings; Rule 23(e) already governs under the same standard.²⁰³

Historically lax judicial scrutiny over proposed coupon settlements²⁰⁴ and CAFA’s replication²⁰⁵ of the Rule 23(e) judicial scrutiny standard²⁰⁶ yields an ominous result: CAFA’s admirable goals crumble upon an insufficient judicial oversight mechanism because it will not sufficiently alter the status quo. A thorough analysis of the statutory provisions and practical ramifications of the Act confirms that this is likely the case.

IV. CAFA’S SUBSTANTIVE SHORTCOMINGS

A. *CAFA’s Attorney’s Fees Provisions Will Not Function as Well as Intended*

While many commentators expect CAFA’s limitations on massive attorney’s fees pursuant to a coupon settlement to have a profound effect on class action abuse,²⁰⁷ potential loopholes in the fees provision will allow clever class attorneys and defendants to win the day over CAFA. Careful scrutiny of the Act makes a number of plausible detours around the legislation’s purported protections easily identifiable. These obscure escape hatches are reviewed below.²⁰⁸

First, CAFA does not explicitly mandate that attorney’s fees be based upon a percentage of the aggregate coupon redemption.²⁰⁹ Attorneys may be able to craft coupon settlements similar to those that occurred pre-CAFA, while taking home a sizable fee (though perhaps not as sizable as a percentage of the coupon offering), thus inflicting the same substantive harm on class members. Specifically, while § 1712(a) may seem to mandate that fees must be calculated as a percentage of actually redeemed coupons, the subsection merely commands that fees that are *attributable* to the award of coupons be calcu-

²⁰³ See, e.g., MOORE ET AL., *supra* note 34, ¶ 23.164; Klonoff & Herrman, *supra* note 101, at 1704.

²⁰⁴ See *supra* Part II.B.

²⁰⁵ 28 U.S.C.A. § 1712(e).

²⁰⁶ FED. R. CIV. P. 23(e).

²⁰⁷ See, e.g., Shapiro, *supra* note 69, at 185; Tharin & Blockovich, *supra* note 93, at 1450.

²⁰⁸ The dilemmas raised in this section are largely dependent on the infirmity of the § 1712(e) backstop. In other words, practical problems with CAFA’s fees provision are dependent on the inadequate judicial scrutiny provision, which is discussed in Part IV.B, *infra*.

²⁰⁹ 28 U.S.C.A. § 1712(a); see also Rubenstein, *supra* note 13, at 11, 15.

lated based upon the actual redemption amount.²¹⁰ Nothing in § 1712(a) specifically prevents attorneys from utilizing a lodestar with a multiplier system of fee calculation.²¹¹ In other words, the plain meaning of the Act would seem to allow attorneys to choose between the percentage and lodestar methods.²¹² Alternatively, even if § 1712(a) is interpreted to mandate the percentage method, class attorneys will merely structure the settlement to include some sort of injunctive relief, thereby moving the proposed settlement under the purview of § 1712(b).²¹³ Thus, simply by adding a request for injunctive relief to the complaint, even if such a remedy would not provide an adequate solution, class counsel may well be able to circumvent the percentage method.

The practical implication of class counsel's ability to choose the fee calculation method is fairly evident—while class counsel's fees may be restricted somewhat under the percentage method, nothing holds them to this fee arrangement. Thus, attorneys may be willing to settle on a lower (though sizable) fee, based on the lodestar with a multiplier method, in order to structure a quick settlement with a defendant that calls for unjust coupon relief to absent class members. Supporting this position, Professor Coffee asserts that the “lodestar formula enables collusion to occur on an implicit, rather than explicit, basis.”²¹⁴ Once the time expended on a case justifies a fee that approaches a number likely to be earned under the percentage method, the class counsel has an incentive to accept a settlement offer from the defendant, irrespective of the substantive remedy offered to absent class members.²¹⁵ Because attorney's fees are time-sensitive calculations under the lodestar approach, Coffee argues that collusion is built into the settlement negotiations: “under the lodestar

²¹⁰ *Id.*

²¹¹ See Rubenstein, *supra* note 13, at 11. In his analysis, Professor Rubenstein argues that § 1712 may seem to compel the percentage method whenever coupons are used. *Id.* However, given the language of § 1712(a) (“attributable to the [coupon] award,” as opposed to in all circumstances), as well as the rest of § 1712, Professor Rubenstein argues that the percentage method is only compelled if the award is to be calculated based on the coupon offering. *Id.*

²¹² 28 U.S.C.A. § 1712(a).

²¹³ Indeed, § 1712(b)(2) specifically provides that “nothing in this subsection shall be construed to prohibit the application of a lodestar with a multiplier method of determining attorney's fees.” *Id.* § 1712(b); see also S. REP. NO. 109-14, at 30–31 (2005).

²¹⁴ John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 717 (1986).

²¹⁵ See *supra* notes 48–68 and accompanying text.

formula, actual collusion is replaced by structural collusion.”²¹⁶ Thus, under the lodestar method, the concerns underlying the potential for collusive settlement offerings²¹⁷ remain intact.

On the other hand, use of the post-CAFA percentage method may decrease the incentives for class counsel to put significant time into a case to arrive at a coupon settlement that provides adequate recovery to absent class members. Class counsel might now be inspired to throw together lawsuits and settlements that result in coupons that are in fact beneficial to class members (such that they will be redeemed), but are worth far less than the actual value of the claim. Thus, class counsel can put little time into a case and structure a settlement that provides a real benefit to class members, though far less than the potential value of the case. Consequently, counsel will receive a fairly significant fee (dwarfing the limited time invested), and the settlement will bargain away absent class members’ rights to bring an individual or class claim in the future that would actually fully compensate them for the harm they suffered.

Under either calculation method, CAFA’s fees-limiting provisions do nothing to guarantee sufficient substantive relief to class members, but instead could be the catalyst for unscrupulous attorneys to compose the same inadequate coupon settlements, garnering them a handsome fee (acutely disproportionate to individual class members’ recovery) and providing defendants with a low-cost global solution to their litigation. In essence, CAFA was structured with an ill-advised tunnel vision toward attorney’s fees. The Act’s reforms focus strictly on the means (attorney’s fees) and not the ends (fair relief to class members) of CAFA’s objectives. Because the means do not adequately enforce a substantively just end, the provisions are ineffective.

Another problem that could arise is CAFA’s failure to define the meaning of “coupon.”²¹⁸ This could pose a problem when class attorneys argue that the proposed settlement does not even fall under the realm of § 1712. While the Act clearly applies to non-cash awards that call for specified discounts on the defendant’s products or services,²¹⁹ in-kind settlements could be structured in a variety of ways in an attempt to dodge CAFA’s limitations. For instance, “[w]ould frequent flyer miles in a settlement with an airline[] be a coupon set-

²¹⁶ Coffee, *supra* note 215, at 718.

²¹⁷ See *supra* notes 48–68 and accompanying text.

²¹⁸ Klonoff & Herrman, *supra* note 101, at 1700 & n.22.

²¹⁹ *Id.* at 1700.

tlement?”²²⁰ What about a “fluid recovery” settlement, where a taxi company agrees to reduce fares in the long term?²²¹ Given the open-ended statutory phrasing, it is unclear how much wiggle room class attorneys have to collusively construct settlements with defendants in order to circumvent the statute. If courts begin to construe “coupon” narrowly, then there is a high probability that CAFA will not apply to creative settlements where non-cash, non-coupon awards are offered to class members. Thus, the fees limitations may well prove to be avoidable, opening the door for the same substantive abuses, potentially solidifying absent class members’ historical position as easy targets for abuse.

Lastly, another reason CAFA’s fees provisions are insufficient is that the Act does not unconditionally bar usage restrictions²²² on coupons.²²³ Calculating attorneys and defendants may be able to structure theoretically high-value settlements that are fair enough to pass judicial scrutiny²²⁴ and are appealing enough for class members to redeem them, thus inflating attorney’s fees under CAFA, yet are restrictive enough to prevent class members from actually using or wanting to use the coupon, thus driving the defendant’s actual costs down.²²⁵ By placing limitations on the use of the coupons, attorneys admittedly do increase the risk of the settlement being rejected. However, given the possible return of a facially valuable yet practically unworthy solution, the possibility exists that use restrictions may become a larger part of the coupon settlement debate.

Given these practical concerns surrounding CAFA’s attorney’s fees provisions, the Act should have incorporated a strong and principled judicial standard for review, rather than merely reiterating the same standard that was ineffective in constraining pre-CAFA coupon settlement abuses. However, Congress failed to equip federal district

²²⁰ See *id.*

²²¹ Stan Karasi, *The Role of Fluid Recovery in Consumer Product Litigation*: Kraus v. Trinity Management Service, 90 CAL. L. REV. 959, 970–72 (2002); see also Daar v. Yellow Cab Co., 433 P.2d 732, 746 (Cal. 1967) (discussing a preference for settlements allowing injured parties to recover actual overpayments to taxicabs).

²²² See *supra* notes 101–03 and accompanying text.

²²³ See generally Class Action Fairness Act of 2005 § 3(a), 28 U.S.C.A. §§ 1711–1715 (West 2007). As this Part discusses, § 1712 addresses only the problem of excessive attorney’s fees in proposed settlements, as well as the judicial scrutiny of the proposed settlement overall, but does not specifically address (and therefore does not directly or indirectly prohibit outright) use restrictions on coupons offered in a settlement. See *id.*

²²⁴ As will be discussed in Part IV.B., *infra*, this is a far cry from an impossible proposition.

²²⁵ See *supra* notes 105–08 and accompanying text.

judges with the necessary arsenal to prevent substantively harmful coupon settlements. This detail could prove to have an enormous impact on the class action landscape. While the Act purports to substantively benefit class members by tying attorney's fees to the actual benefit from the settlement derived by class members, the potentially inadequate provisions allow the destruction of a fundamental guarantee of substantive relief for absent class members. CAFA places too much emphasis on the easily avoided market mechanism designed to rein in exploitation. Completely absent from the statute is a backup restriction stated in more flexible terms—a specific directive to judges to apply more exacting scrutiny to coupon settlement proposals.

Furthermore, because of the history of abuse with class actions in general and coupon settlements in particular,²²⁶ even if the attorney's fees provisions are successful in limiting exorbitant legal compensation, the provisions do nothing to protect class members, absent the intuitive presumption that class attorneys will drive up the value (and therefore the redemption rate and attorney's fee) of the coupon offering. However, this is unsupported conjecture. There is no reason to believe that class counsel will now refrain from colluding with defendants to maximize their personal gain while leaving the absent class members hanging by the wayside. CAFA's attorney's fees restrictions erect a modest impediment to that incentive structure, but one that is relatively easy to avoid, absent a meaningful back-end restriction on substitute arrangements with the same practical effect. Therefore, a stronger judicial scrutiny standard should be substituted to provide for the fundamental guarantee of substantive relief to class members.²²⁷

B. CAFA's Judicial Scrutiny Provision Ineffectively Guarantees Substantive Relief

As discussed briefly above,²²⁸ CAFA mandates proposed coupon settlements be approved upon a written finding that the settlement is "fair, reasonable, and adequate to class members."²²⁹ This is substantively identical to the standard in Rule 23(e).²³⁰ Given that the judicial review of proposed coupon settlements was patently insufficient

²²⁶ See *supra* Part II.B.

²²⁷ See *infra* Part IV.B.

²²⁸ See *supra* notes 22–25, 200–05 and accompanying text.

²²⁹ Class Action Fairness Act of 2005 § 3(a), 28 U.S.C. § 1712(e) (West 2007).

²³⁰ FED. R. CIV. P. 23(e)(2).

to prevent abuse before CAFA,²³¹ there is no reason whatsoever to believe that merely reiterating the identical judicial review standard will magically make the provision effective in the post-CAFA world. Congress's mere reincantation of the Rule 23(e) standard that left abuse unchecked creates a gaping hole in the legislation.

Although substantial commentary argues that the fairness inquiry adequately protected absent class members before CAFA and is therefore suitable for judicial review after the passage of the Act,²³² considerable scholarly and empirical evidence suggests that judicial scrutiny of coupon settlements in both state and federal courts was entirely *inadequate*,²³³ given the upsurge of fundamentally unjust settlements being approved prior to CAFA's ratification.²³⁴ While most every scholar would agree that judicial approval of coupon settlements in state courts was the aggravating condition that precipitated CAFA's Class Action Consumer Bill of Rights,²³⁵ a significant debate exists whether federal adjudicators are aptly prepared to protect absent class members in the post-CAFA world. For instance, the U.S. Chamber for Legal Reform argues that because federal judges are appointed for life²³⁶ and do not need to "refill . . . campaign coffers"²³⁷ for re-election bids, federal judges have a greater predisposition for rejecting unfair coupon settlements.²³⁸ The result, the Chamber argues, is that because federal courts are more likely to critically scrutinize proposed coupon settlements, absent class members are more likely to receive relief proportional to the size of their injury (and their attorney's fee).²³⁹

²³¹ See *supra* Part II.B.

²³² See, e.g., S. REP. NO. 109-14, at 14 (2005) (arguing that "state court judges are less careful than their federal court counterparts about applying procedural requirements that govern class actions"); *A Pattern of Abuse*, *supra* note 142, at 5-6.

²³³ See Buckner, *supra* note 25, at 200-01; Leslie, *supra* note 76, at 1070.

²³⁴ See *supra* Part II.B.

²³⁵ See, e.g., Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 4, 5 (2005) (revealing congressional findings that state courts were harming the national class action system).

²³⁶ See U.S. CONST. art. III, § 1.

²³⁷ *A Pattern of Abuse*, *supra* note 141, at 6.

²³⁸ *Id.* at 5.

²³⁹ *Id.* at 6. The Chamber of Legal Reform supports this contention by citing numerous cases in which state courts approved an unfair coupon settlement, as well as several cases in which federal courts rejected substantively inadequate coupon settlement proposals. See *id.* at 6-7 (citing *Levell v. Monsanto Research Corp.*, 191 F.R.D. 543 (S.D. Ohio 2002); *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561 (E.D. Pa. 2001); *Sheppard v. Consol. Edison Co.*, No. 94-CV-403 (JG), 2000 LEXIS 33313540 (E.D.N.Y. 2000); *Polar Int'l Brokerage Corp. v. Reeve*, 187 F.R.D. 108 (S.D.N.Y. 1999)).

The Senate Judiciary Committee echoes this sentiment, asserting that federal judges have access to the resources necessary to provide adequate protection, and thus are more apt to consistently and thoroughly examine proposed settlements.²⁴⁰ This may be true, but it is not a complete answer. Just as the attorney's fees provision provides *some* protection, the greater capacity of the federal courts to police unfair settlements is likely of some help to absent class members—but it is not enough. The Act's echoing of the pre-CAFA settlement standards is a crucial missed opportunity to ratchet up scrutiny of coupon settlements that may evade the relatively crude attorney's fees market mechanism. Congress could have and should have provided more specific guidance to district courts in reviewing coupon settlements so as to provide a far more effective basis to rein in abuse.

Moreover, despite academic and political assertions that judicial review of proposed settlements in federal fora is perfectly sufficient to protect class members,²⁴¹ other scholars paint a more ominous picture. For example, Professor Christopher Leslie argues that on the whole, both federal and state judges are guilty of the same improper approval of inequitable coupon settlements.²⁴² He argues that judicial ratification of unfair settlements crafted by the adversarial parties is caused by a number of systemic and external factors.²⁴³ First, the lack of a well-defined standard for "fair, reasonable, and adequate" encourages inconsistent review.²⁴⁴ Second, proposed coupon settlements are surrounded by "coupon noise,"²⁴⁵ which makes it extremely difficult for judges to accurately determine the true value of the settlement.²⁴⁶ This inherent difficulty makes an approval of an unfair settlement more likely.²⁴⁷ Third, systemic pressures, such as an overwhelming desire to produce a settlement and unnecessary deference

²⁴⁰ S. REP. NO. 109-14, at 14 (2005).

²⁴¹ See *supra* notes 233–41 and accompanying text.

²⁴² Leslie, *supra* note 76, at 1054–55 (discussing Rule 23(e) and judicial presumption of coupon settlement adequacy).

²⁴³ *Id.* at 1053–70.

²⁴⁴ *Id.* at 1054–55. Professor Leslie discusses courts' interpretations of process and substantive review requirements, noting that notwithstanding these construals, courts often simply presume adequacy. *Id.* (discussing *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir. 1995); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 312 (N.D. Ga. 1993)).

²⁴⁵ *Id.* at 1055–56. For example, such coupon noise includes red herrings created by class counsel and the defendant which make the settlement look more valuable. *Id.* at 1059.

²⁴⁶ *Id.* at 1055.

²⁴⁷ See *id.*

to class counsel, leads to judicial trepidation for rejecting unjust settlements.²⁴⁸ Finally, he argues that judges often consider certain case-specific factors, such as a defendant's weak financial position, in justifying approval of the proposed coupon settlement.²⁴⁹ Professor Leslie concludes his analysis by asserting that "[u]ltimately, judicial review of a proposed coupon-based settlement provides insufficient protection to the class against collusion between the defendant and class counsel. Courts generally rubber-stamp proposed settlements, so bad settlements often survive judicial scrutiny."²⁵⁰ There is simply no indication that Professor Leslie's pre-CAFA concerns will not continue to manifest themselves unabated without stronger statutory protection.

Another scholar, Professor Carol Buckner, maintains similar criticisms of judicial review of class action settlements.²⁵¹ She argues that judges in both federal and state fora often give only "perfunctory review" of coupon settlements, resulting in inadequate protection of absent class members.²⁵² Furthermore, in order to clear crowded dockets, the judges ignore self-dealing and approve proposed settlements without any real inquiry into the actual valuation of the coupon settlement.²⁵³ Professor Buckner continues her critique of inadequate settlement review by arguing that judges pay even less attention in the settlement context than they do in certifying a class action.²⁵⁴

Both sides to the current debate seem to be fairly meritorious. However, even conceding the fact that federal judges are more likely than their state court counterparts to closely scrutinize and reject a substantively unfair proposed coupon settlement does not rectify the underlying problem: the standard under § 1712(e) is simply not

²⁴⁸ Leslie, *supra* note 76, at 1060–66.

²⁴⁹ *Id.* at 1067–68.

²⁵⁰ *Id.* at 1070. Professor Leslie discusses *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 818 (3d Cir. 1995). In that case, the district court approved a wholly inequitable coupon settlement that gave class members a coupon toward a future purchase of a GM vehicle. *Id.* Professor Leslie uses this case as a typical example of a situation in which a federal district judge approved an unjust coupon settlement. *Id.* at 1069.

²⁵¹ See Buckner, *supra* note 25, at 201.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 202; see also Mullenix, *supra* note 25, at 1716–17 (“[N]either the parties nor the court has [any] special interest in extensively probing adequacy in the settlement context, even in the shadow of a potential collateral attack” because typically, “the parties are aligned in interest in obtaining the court’s approval of the settlement.”).

strong enough to filter out many inequitable coupon settlements or to provide guidance to federal courts so that they can make a more specific assessment of the propriety of the proposed settlement.²⁵⁵ Given the jurisdictional expansion of CAFA,²⁵⁶ even more interstate class actions will end up in federal court, thereby increasing the likelihood of proposed coupon settlements and clogging federal judges' dockets (more so than the current federal backlog). This will result in added pressure on federal judges to dispose of cases by approving settlements to which the adversaries have already agreed. As a result, even if federal judges were more inclined than state court judges to reject unfair pre-CAFA coupon settlements, they will be much more likely today to approve such settlement proposals. Congress did not have the foresight to prevent this practical reality from occurring. At the very least, it is unclear whether federal judges are likely to ratify unfair coupon settlements, precisely because most of the unfair coupon settlements were being approved in state court before CAFA's passage. Because of this, a stricter scrutiny standard should have been incorporated into the legislation to protect the continued viability of the American class action mechanism.

As an intriguing counterpoint, Professor Coffee believes that "any system that depends upon extraordinary vigilance by judges is inferior to one that by structural redesign minimizes the existing incentives for collusion."²⁵⁷ While this contention is certainly colorable on a theoretical level, his vision for a utopian class action system in which class counsel have minimal countervailing economic incentives²⁵⁸ has yet to come to fruition. As a practical matter, heightened judicial scrutiny is both necessary and appropriate to provide sufficient redress to the current problem. As Coffee acknowledges, "[a]lthough courts have long recognized th[e] danger [of collusive settlement practices] and have developed some procedural safeguards intended to prevent [such] settlements, these reforms are far from adequate to the task."²⁵⁹ Rather than redesigning the entire class action framework, a more sensible solution to the Coupon Settlement Problem would be to devise a procedural safeguard that actually works. As this Comment argues, enacting a more rigorous judicial review provision would do just that.

²⁵⁵ See *supra* notes 69–85 and accompanying text.

²⁵⁶ Class Action Fairness Act of 2005 §§ 4–5, 28 U.S.C.A. §§ 1332(d), 1453 (West 2007); see Part III.A, *supra*.

²⁵⁷ Coffee, *supra* note 48, at 237.

²⁵⁸ See *supra* notes 48–68 and accompanying text.

²⁵⁹ Coffee, *supra* note 214, at 714.

By focusing almost entirely on attorney's fees-based solutions, CAFA does not solve the underlying problem: absent class members with legitimate claims will continue to walk away with coupons that provide little or no benefit to them, while providing large (though CAFA-limited) fees to class counsel. Furthermore, defendants will still retain the ability to easily escape liability, often without the incentive to change wrongful or tortious behavior. Indeed, one commentator maintains that "it is unlikely that anything in CAFA will seriously curtail the use of coupon settlements. . . . The substantive provisions barely change current practice."²⁶⁰ Under the current scrutiny scheme, judges may well continue to rubber stamp proposed coupon settlements, and CAFA will not have lived up to its name. Therefore, the judicial scrutiny standard should be strengthened to guarantee substantive relief to class members.

V. PROPOSAL FOR REFORM

A. *Rebuttable Presumption Against Coupon Settlements*

Given the inadequate provision for proper judicial review of proposed coupon settlements,²⁶¹ CAFA should be amended to reformulate the test for judicial review of proposed coupon settlements. Given the history of abuse²⁶² and unwarranted judicial approval of inequitable coupon settlements, an amendment to CAFA would provide a uniform and efficient solution to the problem.²⁶³ Specifically, CAFA should be amended to provide a two-prong test that presumptively invalidates all coupon settlements, absent a showing of a bona fide rationale for utilizing such a solution, and that the particular settlement proposal does in fact provide adequate relief to absent class members.

The first prong would integrate an initial rebuttable presumption against all coupon settlements. By presumptively invalidating every such proposed settlement, the American class action system will realize two improvements. First, far fewer coupon settlements will be proposed at all, increasing the likelihood that money damages or

²⁶⁰ Rubenstein, *supra* note 13, at 17. Professor Rubenstein does not address the judicial scrutiny provision of CAFA, but merely contends in conclusory terms that parties will continue to construct coupon settlements. *Id.*

²⁶¹ See *supra* Part II.B.

²⁶² See *supra* Part II.B.

²⁶³ While a legislative amendment to CAFA would provide for more certain and uniform outcomes, federal judges could conceivably interpret the already codified terms of the Act to incorporate the test proposed in this Comment. A policy debate about which method is preferable, however, is outside the scope of this Comment.

some tangible benefit will accrue to class members (or that non-meritorious claims will not be brought in the first place). Second, because most often coupon settlements occur in a context in which the claim is either dubious or at least not likely to win at trial,²⁶⁴ the presumption will naturally encourage defendants to litigate claims that they are likely to win. In other words, if because of the presumption against coupon settlements, class counsel and defendants cannot structure such a settlement in an unmeritorious case, defendants will be more likely to contest ill-founded claims, thus dissuading class counsel from bringing such claims.

While not “strict in theory, fatal in fact,”²⁶⁵ overcoming the presumption against coupon settlements should be an exceptionally difficult task. Given the concerns precipitating CAFA’s coupon settlement section,²⁶⁶ only those proposed settlements in which there is a fundamentally sound rationale for instituting coupons in lieu of money damages should judges even consider upholding the settlement. Such instances might include situations where the class members’ injuries are so small that a coupon would actually be more helpful to individual class members than mere pennies in damages, or when a class is so large that economies of scale shrink the costs of producing coupons to an amount that is theoretically beneficial to the collective parties involved. Under this “sound rationale” inquiry, both class counsel and defendant must prove to the court that, in the abstract, a coupon settlement would be more advantageous to both the defendants and the plaintiff class than a simple cash award.

Once the class counsel and defendant have collectively convinced the district judge that the high presumptive hurdle has been overcome, a case-specific substantive prong must be met. This prong would be in line with the current mandate of § 1712(e), but would provide a more specific directive to district judges. Under this component of the test, the parties involved must prove to the judge that the particular coupon settlement proposal is structured in a way that

²⁶⁴ See Hantler & Norton, *supra* note 11, at 1354–56 (discussing that more and more defendants have begun taking a stand against unmeritorious class action lawsuits).

²⁶⁵ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 (1978) (discussing strict scrutiny in the Equal Protection context). This Comment’s proposal does not suggest importation of “strict scrutiny” as an analogue to constitutional review standards, but for descriptive purposes refers to the proposed test as implementing “strict” or “stricter” scrutiny over proposed coupons settlements. See Leslie, *supra* note 76, at 1077–81 (utilizing the phrase “strict scrutiny” in reference to more demanding judicial review of proposed coupon settlements); see also *infra* notes 269–73 and accompanying text.

²⁶⁶ See *supra* Parts III.B, IV.

is actually beneficial to individual class members. Factors to be considered could include the relative benefit to class members compared to the harm alleged; the absolute dollar value (in coupons) that individual class members would receive; the existence of any secondary market for such a coupon offering; the amount of use restrictions on the coupons; and the existence of limitations on redeeming the coupons, among others.²⁶⁷ A district court should approve the settlement only if the parties overcome the presumptive hurdle and demonstrate that (1) the coupon settlement at issue is theoretically a better tool than money damages in this instance and (2) the particular coupon offering actually benefits individual class members.

This strict scrutiny test is grounded in theory. Professor Leslie endorsed stricter judicial scrutiny of proposed coupon settlements prior to the enactment of CAFA.²⁶⁸ By compelling district judges to take a microscopic look at a coupon settlement proposal, the proposed test would manifest three distinct advantages.²⁶⁹ First, “strict scrutiny of coupon terms is a more precise tool than a uniform rejection of coupon settlements.”²⁷⁰ Second, enhanced scrutiny of a coupon settlement would not drastically change what reviewing judges are theoretically supposed to do—that is, take a close look at the fairness of the settlement to the class.²⁷¹ Third, Professor Leslie argued

²⁶⁷ See, e.g., *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). The U.S. Court of Appeals for the Third Circuit has adopted a nine-factor test for reviewing the adequacy of a proposed coupon settlement:

- (1) the complexity and duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings;
- (4) the risks of establishing liability;
- (5) the risks of establishing damages;
- (6) the risks of maintaining a class action;
- (7) the ability of the defendants to withstand a greater judgment;
- (8) the range of reasonableness of the settlement in light of the best recovery;
- and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

Id.; see also *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 806–18 (3d Cir. 1995) (analyzing a district court’s approval of a coupon settlement). A plausible argument can be made that the Third Circuit test is sufficient to ensure adequate review of proposed coupon settlements, thus rendering the presumptive invalidity of coupon settlements suggested by this Comment unnecessary. However, given the concerns of the Coupon Settlement Problem analyzed in Part III.B, *supra*, the Third Circuit’s nine-factor test would be put to better use in conjunction with this Comment’s proposed solution. In other words, the Third Circuit test should only be incorporated once the first prong of the proposed test—presumption of invalidity—has been satisfied.

²⁶⁸ Leslie, *supra* note 76, at 1077–81.

²⁶⁹ *Id.* at 1078–79.

²⁷⁰ *Id.* at 1078.

²⁷¹ *Id.*; see, e.g., *Reynolds v. Benefit Nat’l Bank*, 288 F.3d 277, 279 (7th Cir. 2002) (The “[d]istrict judge in the settlement phase of a class action suit [is] a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fi-

that mandating higher judicial scrutiny would induce judges to take a more proactive approach to the structuring of a fair coupon settlement.²⁷²

This test is not merely the current rule²⁷³ turned on its head. While the second substantive prong of the test reflects a more specific application of the fairness inquiry that is supposed to be utilized in current § 1712(e) fairness hearings, the strong rebuttable presumption against approval in the first prong of the proposed test would create a judicial strainer that will enhance the fundamental fairness of the class action system. The proposed test recognizes that “no one can fairly argue that all coupon settlements are bad.”²⁷⁴ But it also understands that, given the history of the coupon settlement mechanism,²⁷⁵ the majority of coupon settlements inherently work to the disadvantage of the individual class members, particularly absent class members.²⁷⁶

The practicality and efficacy of this Comment’s proposal is best demonstrated by applying it to a real-life case in which a coupon settlement could have been implemented to the advantage of all parties involved in the action. *Shields v. Bridgestone/Firestone, Inc.*²⁷⁷ is such a case. While the Senate Judiciary Committee decried *Shields* as a typical example of abusive coupon settlement practices,²⁷⁸ in fact no coupons were ever proposed or issued.²⁷⁹ However, coupons could plausibly have been offered to absent class members to provide them genuine substantive relief that had not yet caused them harm. Simultaneously, Firestone would have procured global relief and been enticed to repair its quasi-tortious conduct.

duciaries.”). This Comment’s proposed test adds to Professor Leslie’s analysis by providing a more systematic analytical framework for reviewing the merits of a settlement, rather than suggesting “stricter scrutiny” in passing without proposing a concrete process for implementing such scrutiny. See Leslie, *supra* note 76, at 1077–81.

²⁷² Leslie, *supra* note 76, at 1079–80.

²⁷³ See *supra* Part II.B.

²⁷⁴ Lisa M. Mezzetti & Whitney R. Case, *The Use of “Coupon” and Other Non-Monetary Redress in Class Action Settlements*, 18 GEO. J. LEGAL ETHICS 1431, 1437 (2005).

²⁷⁵ See *supra* Part II.B.

²⁷⁶ See Tharin & Blockovich, *supra* note 93, at 1449.

²⁷⁷ No. E-0167637 (Tex. Dist. Ct. 31, 2002); see *supra* notes 135–36 and accompanying text.

²⁷⁸ See *supra* note 135 and accompanying text.

²⁷⁹ See *supra* notes 135–36 and accompanying text. In lieu of coupons, Firestone agreed to revamp its tire designs and to develop a consumer education and awareness campaign.

To overcome the presumption against coupon settlements and satisfy the first prong of this Comment's proposed test, class counsel and Firestone attorneys could have successfully illustrated to the trial judge that there was, in fact, a bona fide rationale for using coupons as relief instead of individual cash awards. First, awarding cash in a case where actual damages were prospective (as opposed to retrospective relief for harm that had already been incurred) would not guarantee that absent class members would actually utilize their award to remedy the problem. In other words, in *Shields*, the problem was faulty tires; awarding cash to plaintiffs that had not yet been injured would not necessarily result in the replacement of that defective product. Coupons, by contrast, would have ensured a solution to the problem that sparked the litigation in the first place by mandating new tires be purchased with coupons, and thus removing the unsafe product from the market. Second, the potentially large substantive value accruing to class members by providing a means to procure replacement tires very well may substantially outweigh any individual cash award. Due to the size of a nationwide class, a cash settlement would likely only provide a few dollars in relief, whereas a coupon could have provided a larger value (both in terms of dollar amount and peace of mind)²⁸⁰ to individual class members. Finally, the economies of scale of producing coupons for a large class could have allowed Firestone to adequately compensate class members while at the same time avoiding a more wallet-damaging cash settlement.²⁸¹ In sum, *Shields* provides an ideal example for a theoretically sound justification for using coupons instead of cash to compensate class members, thus overcoming the presumption against coupon settlements that this Comment suggests.

Once Firestone and class counsel convinced the trial judge that coupons were theoretically more beneficial to class members than a money award, structuring a specific coupon settlement would have been a relatively simple task. For example, suppose a single faulty tire cost sixty dollars. Structuring a coupon worth fifteen dollars off the purchase of a new tire (guaranteed to be safe thanks to Firestone's promise to perform a full review of its tire design)²⁸² may well have provided class members adequate substantive relief in relation to the

²⁸⁰ "Peace of mind" in this context refers to the relief felt when a consumer knows that her faulty tires were replaced with safe tires.

²⁸¹ See *supra* note 95 and accompanying text.

²⁸² Firestone agreed to redesign the tires as part of the actual settlements. *Shields*, No. E-0167637 (Tex. Dist. Ct. July 31, 2002); see *supra* note 135 and accompanying text.

harm alleged. Furthermore, the coupon offering could have been structured so as to allow recipients to aggregate multiple coupons depending on how many faulty tires they had purchased.

Obviously, the attractiveness of any particular coupon settlement under this test would depend on the precise terms and limitations, if any, of the settlement agreement, but the point is simple: in those situations where coupons can help provide fair relief more effectively than a cash settlement, the structuring of the actual settlement is relatively straightforward. Here, where a nationwide class owns a potentially harmful product that has not yet generated any actual damage, coupons that induce those plaintiffs to replace the product at a sufficiently reduced price would provide the most effective solution. Under the right settlement structure, a coupon settlement could provide a more effective solution than a cash settlement because, under the tire hypothetical, the injured class members are now in need of new tires. By forcing the defendant to fix the problem, and by allowing the plaintiffs to get what they wanted in the first place, everyone is better off. Furthermore, allocating a settlement with coupons instead of cash could protect a relatively less culpable defendant from grievous economic harm by allowing for product discounts rather than massive damage awards, yet still compensating plaintiffs for their injuries. The specifics of a settlement would be worked out on a case-by-case basis, and if adequate under the second prong of the test, the reviewing court could certify the settlement under CAFA. Running *Shields* through this Comment's proposed gauntlet shows that CAFA can indeed accomplish its objectives by adjusting the standard of review for proposed coupon settlements.

A congressional amendment to CAFA incorporating this test would best fix the inadequacies of the current Act. Given the historical abuse of the class action system through use of the coupon settlement mechanism,²⁸³ in addition to the predisposition of judges to summarily accept a proposed settlement,²⁸⁴ the text of the Act should expressly mandate that reviewing judges initially presume a coupon settlement to be inadequate, absent a showing that a coupon offering could be more beneficial to the class, and that such a settlement actually achieves fundamental fairness. A congressional amendment would provide consistent and uniform assessment of proposed coupon settlements.²⁸⁵

²⁸³ See *supra* Part II.B.

²⁸⁴ See *supra* Part III.B.

²⁸⁵ While a legislative amendment to correct the Act's deficiencies would provide an effective and uniform result, in the absence of congressional action pursuant to

B. Other Proposed Solutions

Three competing solutions exist to solve inadequate review of coupon settlements. First, CAFA could be amended to ban all coupon settlements outright.²⁸⁶ However, this solution can be rapidly dispelled because such a drastic reform disregards the possibility of a fundamentally fair coupon settlement.²⁸⁷ Second, judges could require a minimum coupon redemption rate.²⁸⁸ However, this proposal is an ineffective tool because

[a]ny solution that relies on manipulating the defendants' incentive to increase redemption rates will run into the problem of countervailing incentive. Defendants still have a baseline incentive to insure that settlement coupons do not confer value to the class at the defendants' expense. High redemption rates are not necessarily synonymous with valuable coupons.²⁸⁹

Finally, an interesting proposal to reform coupon settlement abuse is to mandate attorney's compensation to be in the same form as the relief individual class members receive.²⁹⁰ While this proposal would truly align class counsel's incentives with those of class members, it would likely do so to the point of overkill—even if coupons were valuable to class members, a million coupons would likely not be of value to class counsel. In other words, even if the coupons are of high value and class counsel could conceivably resell them on the open market, this proposed solution does not provide an efficient outcome. In most instances, the limited value of the coupon would render the transaction costs prohibitive—the attorney would lack the ability to realize the full value of the coupon compensation. The test proposed in this Comment more practically provides substantive value to class members in the first instance, instead of an inefficient and likely unworkable market incentive for attorneys to maximize their compensation.

The proposal in this Comment would serve to equip federal district judges reviewing proposed coupon settlements with a practical

this Comment's proposed test, courts could and should develop interpretations of CAFA's "fair, reasonable, and adequate" standard that integrate this Comment's proposal.

²⁸⁶ Leslie, *supra* note 76, at 1075–77.

²⁸⁷ Tharin & Blockovich, *supra* note 93, at 1445. As presented in Part II.A, *supra*, the benefits of a fair coupon settlement include the provision of redress from injury, incentives to correct allegedly wrongful or tortious behavior, and the presentment of global peace avoiding duplicative litigation, among others.

²⁸⁸ Leslie, *supra* note 76, at 1081.

²⁸⁹ *Id.* at 1083.

²⁹⁰ *Id.* at 1086.

tool that would help the Class Action Fairness Act achieve its stated purpose.²⁹¹ By initially mandating a strong rebuttable presumption against coupon settlements, abuse that has enveloped the class action landscape²⁹² will be curtailed by an Act that has the potential to provide actual substantive relief to absent class members.

VI. CONCLUSION

The Class Action Fairness Act of 2005 has laudable intentions. Due to significant abuses of the class action mechanism throughout the 1990s,²⁹³ potential litigants who had been legitimately harmed were denied appropriate relief.²⁹⁴ With the proliferation of the coupon settlement, class counsel and defendants took home all the benefits, leaving the harmed class members with close to nothing, thus diminishing the effectiveness of and appreciation for the American judicial system.²⁹⁵ CAFA was designed to rectify the exploitation of a procedural mechanism that, when used properly, can provide valuable relief to aggrieved individuals that would not otherwise have the opportunity to litigate their claims.²⁹⁶ However, the Act does not go far enough.²⁹⁷ By mere reincantation of the same ineffective pre-CAFA standard, the Act will allow unscrupulous attorneys to weave their way around the Act, and in the end, class members will continue to be left holding the bag (of coupons).²⁹⁸ By amending the Act to presumptively bar all coupon settlements, only the fair and just settlements that provide real substantive value to absent class members will make it through the judicial filter.²⁹⁹ As President Bush acknowledged, the Act has begun to make progress.³⁰⁰ However, "there's still more [work] to do."³⁰¹ This work should come in the form of an overhaul of the judicial fairness inquiry over proposed coupon settlements. As a result, CAFA would provide a more successful funda-

²⁹¹ See *supra* notes 2–8 and accompanying text.

²⁹² See *supra* Part II.B.

²⁹³ See *id.*

²⁹⁴ See *id.*

²⁹⁵ See *id.*

²⁹⁶ See *supra* Part III.

²⁹⁷ See *supra* Part IV.

²⁹⁸ See *supra* Part IV.B.

²⁹⁹ See *supra* Part V.

³⁰⁰ Press Release, Office of the White House Press Sec'y, President Signs Class-Action Fairness Act of 2005 (Feb. 18, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/02/20050218-11.html>.

³⁰¹ *Id.*

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mental guarantee of actual substantive relief to absent class members, thus achieving its commendable objectives.