
**V. NEW RULES FOR CLASS ACTION
SETTLEMENTS: THE CONSUMER CLASS
ACTION BILL OF RIGHTS**

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A. Introduction

Many observers have characterized the Class Action Fairness Act of 2005 (“CAFA”) as decidedly pro-defendant.¹ Yet, supporters of the legislation assert that at least one section—the Consumer Class Action Bill of Rights²—will serve primarily to protect the interests of class action plaintiffs.³ According to these groups, the Consumer Bill of Rights will make class action settlements fairer for class members and will help to ensure that class members, not just their attorneys, receive benefits from settlement agreements.⁴

Support for the Consumer Bill of Rights is not, however, universal. Some critics believe that the legislation does not do enough to improve settlements for plaintiffs.⁵ Many of its provisions, they contend, do little more than reiterate existing practices.⁶ Other groups argue that CAFA goes too far in regulating coupon settlements, creating unnecessary burdens for defendants, and effectively eliminating coupons altogether, rather than just preventing abusive settlements.⁷

1. E.g., Stephanie Fiereck, *Class Action Reform: Be Prepared to Address New Notification Requirements*, 6 CLASS ACTION LITIG. REP. 333, 333 (2005) (noting that CAFA was “promoted as a business-backed initiative”); Scott Nelson & Brian Wolfman, *A Section-by-Section Analysis of the Class Action “Fairness” Act*, 6 CLASS ACTION LITIG. REP. 365, 372 (2005) (“The Class Action Fairness Act marks the first major success of the Bush administration’s efforts to enact pro-defendant civil justice legislation.”).

2. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 3, 119 Stat. 4, 5–9 (codified at 28 U.S.C. §§ 1711–1715 (2006)). For brevity, the Consumer Class Action Bill of Rights is hereafter referred to as the Consumer Bill of Rights.

3. John Beisner & Jessica Davidson Miller, *The Class Action Fairness Act: Cleaning Up the Class Action Mess*, 6 CLASS ACTION LITIG. REP. 104, 104 (2005).

4. *See id.*

5. *See* Nelson & Wolfman, *supra* note 1, at 365.

6. *Id.*

7. Ralph Lindeman, *Class Action Lawyers Doubt Provisions in Legislation Aimed at Curbing Abuses*, 5 CLASS ACTION LITIG. REP. 265, 265 (2005) [hereinafter Lindeman, *Class Action Lawyers Doubt Provisions*]; Ralph Lindeman, *Class Action Bar Girds for Years of Litigation to Interpret Changes Imposed by Reform Law*, 6 CLASS ACTION LITIG. REP. 177, 178 (2005)

Several provisions in the Consumer Bill of Rights regulate settlements in which the defendant gives the class coupons in lieu of, or in addition to, a cash award.⁸ Lawmakers passed these regulations in response to critics' complaints that such settlements often overcompensate plaintiffs' attorneys, while doing little to benefit the class.⁹ One reason for this perceived problem is that many courts calculate attorneys' fees using the value of all the coupons a defendant offers, even if the class is unlikely to use them.¹⁰ To address this concern, CAFA requires courts to base such fees on the value of the coupons that the class will actually redeem.¹¹ The provisions also require courts to make written findings that individual coupon settlements are fair before approving them.¹²

In addition to the regulations aimed specifically at coupon settlements, CAFA has a number of regulations intended to ensure that class action settlements in general are fair.¹³ For example, it requires each defendant participating in a class action settlement to notify various public officials about the settlement so that the officials may intervene if the settlement is unfair.¹⁴ In addition, CAFA encourages closer examination of settlements that might cause any class member to lose money, and it prohibits distributing settlement funds based on class members' proximity to the court.¹⁵

These provisions have raised a number of issues for litigants to consider. The following hypothetical helps to illustrate a few of them:

The Widget Shop, a small California corporation, sells widgets nationwide over the Internet. A group of Widget Shop customers in Arizona has brought a lawsuit against the corporation and its sole shareholder, Donna Williams.

[hereinafter Lindeman, *Class Action Bar Girds*]; *Plaintiffs' Attorney Predicts Defense Bar Will Reconsider Federal Class Action Reforms*, 6 CLASS ACTION LITIG. REP. 676, 676 (2005).

8. See 28 U.S.C. § 1712 (2006).

9. S. REP. NO. 109-14, at 29 (2004), as reprinted in 2005 U.S.C.C.A.N. 3, 29.

10. *O'Keefe v. Mercedes-Benz USA, L.L.C.*, 214 F.R.D. 266, 305 (E.D. Pa. 2003).

11. § 1712(a); S. REP. NO. 109-14, at 30.

12. § 1712(e).

13. See *id.*; S. REP. NO. 109-14, at 30.

14. § 1715(b); S. REP. NO. 109-14, at 32.

15. §§ 1713-1714.

They claim that, although The Widget Shop displays type A widgets on its website, it has been shipping type B widgets to consumers who order them. They are seeking over \$5 million dollars in compensatory and punitive damages on behalf of all Widget Shop customers.

Williams asserts that there is no difference between type A and type B widgets, and, after consulting her attorney, believes that she would probably win if the case went to trial. Unfortunately, The Widget Shop has been struggling recently, and Williams is not sure the company can afford to defend a class action suit. The Widget Shop may also have to declare bankruptcy if it loses at trial. To settle the case, The Widget Shop offers to stop displaying type A widgets on its Website, pay class counsel's fees up to \$250,000, and give each class member a code they can use to order a free type B widget from the company's Website. Williams hopes that only a few class members will actually claim a widget. In addition, Williams agrees to settle any personal liability she may have for a small nuisance value.

Peter Smith, counsel for the plaintiffs, believes that his clients' claims are valid, but knows there is a substantial likelihood they will lose at trial. The class representatives, none of them having a large stake in the litigation, say that they will do whatever Smith thinks is best. The rest of the class is largely unaware of the litigation.

This hypothetical raises a number of questions related to the Consumer Bill of Rights. For example, does The Widget Shop's proposal constitute a "coupon" settlement under the Act? If so, how will the court assess its fairness, and how will it calculate Smith's fees? In addition, if Smith declines the settlement (believing his fees would be too low or too uncertain), how will the parties resolve the case considering that The Widget Shop is unlikely to be able to pay a large monetary settlement?

The notification requirements raise additional issues. For example, under CAFA, The Widget Shop will need to notify various officials about the settlement.¹⁶ Some of them may intervene. If

16. See § 1715.

they do, they may help protect the class' interests, but they are also likely to increase the parties' litigation costs. If The Widget Shop notifies all of these officials, will Williams need to notify them about her settlement in the class as well? Doing so may be a large burden relative to the amount she has agreed to pay. Williams may want to consider these issues before deciding to remove the action to federal court.

Because CAFA became effective only a short time ago,¹⁷ courts have not yet had a chance to clarify these issues through litigation. Critics contend that they will give rise to a plethora of needless litigation.¹⁸ In addition, many observers maintain that the Consumer Class Action Bill of Rights will do little to further class members' interests.¹⁹ Despite these preliminary uncertainties, proponents nevertheless contend that the Bill of Rights will provide important protections for plaintiffs and will help to ensure that class action settlements are fair.²⁰

This Article explores some of the issues surrounding CAFA. Part B examines the provisions relating to coupon settlements. It discusses the meaning of "coupon" under the Act and looks at the way courts will calculate attorneys' fees under the new rules. It includes a discussion of the new requirement that courts base fees on the number of coupons redeemed rather than the number offered. Finally, it looks at how courts will assess the fairness of class action settlements.

Part C examines the notification provisions, explaining the different requirements and the various issues associated with each of them. Part D analyzes the provision calling for increased examination of settlements in which class members lose money and the provision prohibiting geographical discrimination against class members. Finally, the article concludes that, while commentators are likely to argue over both the merits of the Act and the meanings of its provisions, only litigation and experience will determine how

17. CAFA became law on February 18, 2005. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 4, 14.

18. Lindeman, *Class Action Bar Girds*, *supra* note 7, at 177.

19. See John Beisner & Jessica Davidson Miller, *Litigating in the New Class Action World: A Guide to CAFA's Legislative History*, 6 CLASS ACTION LITIG. REP. 403, 412-13 (2005).

20. See, e.g., S. REP. NO. 109-14, at 33-35 (2004), as reprinted in 2005 U.S.C.C.A.N. 3, 32-34.

beneficial, detrimental, or ineffective the Bill of Rights will be.

B. Coupon Settlement Provisions

CAFA contains several provisions relating to so-called “coupon settlements.”²¹ Although CAFA does not define precisely what a coupon settlement is,²² legislators aimed these provisions at class action settlements in which class members receive vouchers, redeemable for discounts off future purchases, rather than cash.²³ Many observers have criticized such settlements in recent years, arguing that they often provide little or no benefit to class members but reward class counsel with large fees.²⁴

CAFA addresses these concerns in two principal ways. First, it creates standards for calculating attorneys’ fees in coupon settlements.²⁵ More specifically, it requires courts to base fees in such settlements on either the value of the coupons the class redeems or the amount of work the attorneys have performed.²⁶ Proponents intended this requirement to prevent situations in which class action attorneys collect large fees, but class members receive “essentially valueless coupons” they do not want and will not use.²⁷ By tying contingency fees to coupon redemption, lawmakers hoped CAFA would encourage plaintiffs’ lawyers to avoid settlements involving unwanted coupons and to negotiate settlements involving either cash or coupons with actual value.²⁸

The second principal way in which CAFA regulates coupon settlements is by requiring courts to scrutinize any proposed

21. See § 1712.

22. See *id.*

23. See S. REP. NO. 109-14, at 30. For further discussion of the definition of a coupon settlement, see *infra* Part V.B.1.

24. E.g., Ameet Sachdev, *Coupon Awards Reward Whom?*, CHI. TRIB., Feb. 29, 2004, at C1. For an example of the types of settlements observers have criticized, see *Schneider v. Citicorp Mortgage, Inc.*, 324 F. Supp. 2d 372 (E.D.N.Y. 2004). In *Schneider*, the plaintiffs in a class action suit against a mortgage company received coupons for \$100 off the closing costs of a new mortgage from the defendant. *Id.* at 375. The coupons were nontransferable, were not combinable with any other offers, and were good for only two years. *Id.* at 376. Meanwhile, their attorneys received an award of \$500,000 in fees. *Id.* at 379.

25. § 1712(a)–(c).

26. *Id.*

27. S. REP. NO. 109-14, at 30.

28. See *id.*

settlement in which the class will receive coupons, before the court may approve it.²⁹ Specifically, it requires courts to hold a hearing and make a written finding that the settlement is “fair, reasonable, and adequate” before it can approve any coupon settlement.³⁰ Proponents intended this provision to ensure that courts would carefully examine proposed coupon settlements and thereby provide further protection against unfair settlements.³¹ As critics have pointed out, however, Federal Rule of Civil Procedure 23 already requires courts to determine whether a proposed settlement is “fair, reasonable, and adequate” before approving any class action settlement.³²

1. What Is a Coupon?

The coupon-settlement provisions in the Consumer Bill of Rights³³ raise the question: what exactly is a coupon? Does the definition of “coupon” include all vouchers or only those that are good for discounts on future purchases? Does it include other benefits that consumers may not need a voucher to receive? Because the coupon-settlement provisions apply only to settlements in which class members receive “coupons,”³⁴ the answer to this question will determine which settlements are subject to the settlement provisions.³⁵

29. § 1712(e).

30. *Id.*

31. *See, e.g.*, 151 CONG. REC. S1008–09 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch) (“The bill provides that a Federal judge cannot approve a proposed coupon settlement until conducting a hearing with a written finding that the terms of the settlement are fair, reasonable, and equitable to the class members. You would think that would be something every court in the land would want to do, but, unfortunately, we have had far too many of these class actions where that hasn’t been the case Our courts will no longer be used as a rubberstamp for proposed settlements. This provision ensures that the true beneficiaries of a settlement are the class members and not the lawyers who drew up the settlement.”).

32. FED. R. CIV. P. 23(e)(1)(C). For further discussion on this point, see *infra* Part V.B.3.

33. § 1712.

34. *Id.*

35. The definition may also help class action attorneys determine what benefits to offer in a settlement. For example, if the definition of “coupon” included only vouchers redeemable for discounts, and the parties did not want to be subject to the new settlement provisions, they could offer vouchers

CAFA itself does not define the term “coupon.”³⁶ The definition presumably includes vouchers redeemable for discounts off future purchases from the defendant.³⁷ Indeed, settlements offering these types of certificates were the prime targets of the legislation.³⁸

It is less clear, however, whether the term includes other types of non-cash relief.³⁹ For example, the term “coupon” could include any form of relief that requires class members to take affirmative action to receive the benefit.⁴⁰ This would include certificates that are directly redeemable for cash or that cover the full cost of a replacement item.⁴¹ It might also include stocks and warrants.⁴²

“Coupon” could also include other non-cash relief that would provide similar benefits without the need for affirmative action.⁴³ For example, a settlement could give cell phone users free minutes,⁴⁴ it could give insurance customers additional coverage at no charge,⁴⁵ or it could give car owners an extended warranty.⁴⁶ To expand the definition even further, it might cover cases where the proposed benefit is available to the public at large. For example, in *Yong Soon*

redeemable for cash instead.

36. § 1712.

37. See S. REP. NO. 109-14, at 15–20 (2004), as reprinted in 2005 U.S.C.C.A.N. 3, 15–20 (citing numerous cases that include vouchers, discounts, and coupons as within the provisions of coupon settlements); Mark Herrmann & Pearson Bownas, *The Likely Impact of the Class Action Fairness Act*, FOR THE DEFENSE, Apr. 2005, at 26, 31.

38. S. REP. NO. 109-14, at 15–20.

39. A previous version of the bill applied to all settlements “under which the class members would receive noncash benefits or would otherwise be required to expend funds in order to obtain part or all of the proposed benefits.” Class Action Fairness Act of 2003, S. 274, 108th Cong. § 3(a) (2003).

40. Herrmann & Bownas, *supra* note 37, at 31.

41. *Id.*

42. *In re Lucent Techs., Inc., Sec. Litig.*, 327 F. Supp. 2d 426, 433 (D.N.J. 2004).

43. Herrmann & Bownas, *supra* note 37, at 31.

44. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, No. 4:03-md-01559, 2004 U.S. Dist. LEXIS 23342, at *11–13 (W.D. Mo. Apr. 20, 2004).

45. *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 221 (D.N.J. 2005).

46. *O’Keefe v. Mercedes-Benz USA, L.L.C.*, 214 F.R.D. 266, 272 (E.D. Pa. 2003).

Oh v. AT&T Corp.,⁴⁷ a telephone company offered to provide a toll-free telephone number for one weekend, from which callers could obtain free directory assistance.⁴⁸

Finally, if a class action arose from the defendant's failure to honor coupons, the parties could agree to settle the case with injunctive relief that would require the defendant to honor the coupons. The act does not explain whether such a settlement would be a coupon settlement.⁴⁹

The precise definition of the term "coupon" will not be clear until the courts define it through litigation.⁵⁰ If the courts define it broadly, it may greatly increase the impact of the legislation by increasing the number of cases to which it applies.⁵¹ Conversely, a narrow definition may give litigants the ability to avoid the application of CAFA by offering non-cash items or services that do not fit the definition of "coupon."⁵²

2. Calculating Attorneys' Fees Under CAFA

Courts typically calculate attorneys' fees in class actions using two principal methods.⁵³ The first is the percentage-of-recovery method, in which the court grants counsel a fraction of the settlement's overall value as fees.⁵⁴ The second is the lodestar-with-multiplier method, in which the court calculates fees by multiplying the number of hours the attorneys worked by a multiplier the court chooses.⁵⁵ When courts use one of these methods, they often use the

47. 225 F.R.D. 142, 144 (D.N.J. 2004).

48. *Id.*

49. *See* 28 U.S.C. §§ 1711–1712 (2006).

50. *See* David R. Koch, *Clipping Coupons*, ORANGE COUNTY LAW., July 2005, at 46, 49.

51. BINGHAM MCCUTCHEN, THE 2005 CLASS ACTION FAIRNESS ACT: WHAT IT DOES, WHAT IT DOESN'T DO, AND WHAT IT MEANS FOR THE FUTURE 5 (2005), available at <http://www.bingham.com/bingham/webadmin/documents/radD413c.pdf> (“[T]o the extent the provision extends to all non-cash consideration (as opposed to just traditional ‘coupons,’ . . .), the provision may have a drastic impact on class action settlement practice.”).

52. Koch, *supra* note 50, at 49.

53. *E.g.*, *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 (3d Cir. 2005).

54. *E.g.*, *id.*

55. *Varcallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 248 (D.N.J. 2005); *see, e.g.*, *Schneider v. Citicorp Mortgage, Inc.*, 324 F. Supp. 2d 372, 379 (E.D.N.Y. 2004) (using the lodestar-with-multiplier method); *O’Keefe v. Mercedes-Benz USA, L.L.C.*, 214 F.R.D. 266, 304 (E.D. Pa. 2003) (using the

other method as a crosscheck.⁵⁶ If the lodestar method produces a very different number than the percentage-of-recovery method, the court may adjust the fees accordingly.⁵⁷ Courts have used both of these methods to calculate fees for coupon settlements,⁵⁸ and, under CAFA, they will be able to continue to rely on them.⁵⁹

a. The percentage-of-recovery method

Under the percentage-of-recovery method, courts must first “value the proposed settlement and then decide what percentage of the settlement should be awarded as fees.”⁶⁰ To do this in a settlement that includes coupons, courts must first determine the coupons’ value.⁶¹ Some courts rely on expert testimony to determine each coupon’s *actual value* to the user.⁶² Others simply value coupons at their *face value*.⁶³

percentage-of-recovery method and cross checking the result with the lodestar-with-multiplier method).

56. *E.g.*, *Varacallo*, 226 F.R.D. at 249; *see, e.g.*, *In re Lloyd’s Am. Trust Fund Litig.*, No. 96 Civ. 1262 (RWS), 2002 U.S. Dist. LEXIS 22663, at *78 (S.D.N.Y. Nov. 26, 2002) (finding that the “requested fee award is also reasonable based on a cross-check of the percentage award against counsel’s lodestar”).

57. *See, e.g.*, *Varacallo*, 226 F.R.D. at 249.

58. *See supra* notes 54–57. Some courts choose the method they will use according to the type of case. *See, e.g.*, *Varacallo*, 226 F.R.D. at 248–49 (stating that the lodestar method is appropriate for “statutory fee shifting cases,” while the percentage-of-recovery method is appropriate for “common fund cases.”).

59. CAFA does not prevent courts from using either of the standard methods for calculating fees. *See* 28 U.S.C. § 1712(a)–(b) (2006). Thus, it is likely that courts will continue to use these methods.

60. *Varacallo*, 226 F.R.D. at 249 (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995)).

61. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184, 190 (D. Me. 2003) (delaying the payment of attorneys’ fees because the judge was not confident in the redemption rate and, therefore, could not determine the settlement’s total value).

62. *E.g.*, *In re Auction Houses Antitrust Litig.*, No. 00 Civ. 0648 (LAK), 2001 U.S. Dist. LEXIS 1713, at *22 (S.D.N.Y. Feb. 22, 2001).

63. *E.g.*, *O’Keefe v. Mercedes-Benz USA, L.L.C.*, 214 F.R.D. 266, 305 (E.D. Pa. 2003). Thus, if a coupon entitles the bearer to ten dollars off a product or service, the court would find that the coupon is worth ten dollars. By contrast, if the court uses experts to determine the coupon’s actual value, it may find that the coupon is worth less than its face value. *E.g.*, *In re Auction Houses*, 2001 U.S. Dist. LEXIS 1713, at *22. To use a simple example, suppose a defendant generally gives its customers a ten-dollar discount on a

Regardless of which method a court uses to determine an individual coupon's value, it must then multiply that value by the total number of coupons to determine the settlement's *overall* value.⁶⁴ Before CAFA, some courts used the number of coupons distributed in the settlement as the total number of coupons for this calculation.⁶⁵ Others used the number of coupons that class members were likely to redeem as the actual value.⁶⁶ These latter courts used expert witnesses to predict redemption rates.⁶⁷ Some courts even waited until after the class members had redeemed the coupons before calculating their value, so they could base their calculations on the *actual* number of coupons redeemed.⁶⁸

Once the court has valued the settlement, it need only determine what percentage of the value to award as fees.⁶⁹ The court has some discretion over this percentage, and the percentage varies from case to case.⁷⁰ In determining the appropriate percentage, courts may consider a variety of factors, such as:

- (1) the size of the fund and the number of persons

particular item. A coupon for twenty dollars off that item would be worth only ten dollars if the bearer could not use it in conjunction with the existing discount.

64. See *O'Keefe*, 214 F.R.D. at 305.

65. See, e.g., *Hanrahan v. Britt*, 174 F.R.D. 356, 368 (E.D. Pa. 1997). CAFA prohibits courts from doing this. See 28 U.S.C. § 1712(a) (2006). It requires courts to base fees on the value of redeemed coupons. *Id.* For further discussion on this point, see *infra* Part V.B.2.c.

66. See, e.g., *In re Mex. Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1018 (N.D. Ill. 2000), *aff'd*, 267 F.3d 743 (7th Cir. 2001); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 322 (N.D. Ga. 1993).

67. See, e.g., *In re Mex. Money Transfer Litig.*, 164 F. Supp. 2d at 1018.

68. See, e.g., *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 370 F. Supp. 2d 320, 321 (D. Me. 2005); *In re Excess Value Ins. Coverage Litig.*, No. M-21-84 (RMB), 2004 U.S. Dist. LEXIS 14822, at *58 (S.D.N.Y. July 30, 2004).

69. See, e.g., *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 249 (D.N.J. 2005) (“[T]he court must ‘determine a precise valuation of the settlement on which to base its award.’” (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995))).

70. *Id.* at 249–50 (approving fees that amounted to 7.58% of the settlement, but also noting that “the percentage of recovery . . . generally ranges from nineteen to forty-five percent”); Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 73 (2004) (finding that the mean percentage of recovery varies from 17.6% for recoveries over \$190 million to 30.9% for recoveries under \$1.4 million).

benefited; (2) the presence or absence of substantial objections by class members to the fee amount; (3) the skill and efficiency of counsel; (4) the complexity and duration of the action; (5) the risk of nonpayment; (6) the amount of time that counsel spent on the case; and (7) awards in similar cases.⁷¹

b. The lodestar method

The second principal method courts use to calculate attorneys' fees is the lodestar-with-multiplier method.⁷² Under this approach, the court first multiplies the number of hours the attorney worked on the case by a fair hourly rate.⁷³ To determine an appropriate hourly rate, the court may consider factors such as "the geographical area, the nature of the services provided, and the experience of the lawyer."⁷⁴ The result of this calculation is the "lodestar."⁷⁵

Once the court has determined the lodestar, it then multiplies it by a court-chosen multiplier,⁷⁶ generally a number in the low single digits.⁷⁷ In determining the appropriate multiplier, courts may consider various factors, including risk and importance of the litigation, counsel's performance, and the degree to which the

71. *Varacallo*, 226 F.R.D. at 250. The court also noted that, "[c]ourts typically decrease the percentage of the fee as the size of the fund increases." *Id.* at 249 (quoting *In re Alloy, Inc.*, Sec. Litig., No. 03 Civ. 1597 (WHP), 2004 U.S. Dist. LEXIS 24129, at *8 (S.D.N.Y. Dec. 2, 2004)); *see also* *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (explaining that courts should consider: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations").

72. *E.g.*, *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 (3d Cir. 2005).

73. *Id.*; *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000).

74. *Gunter*, 223 F.3d at 195 n.1; *see also In re Sulzer Orthopedics, Inc.*, 398 F.3d 778, 780 (6th Cir. 2005) (affirming an award of attorneys' fees that correlated hourly rates to the attorney's level of experience); *Mathur v. Bd. of Trs. of S. Ill. Univ.*, 317 F.3d 738, 743 (7th Cir. 2003) (affirming an award of attorneys' fees that determined hourly rates according to the geographic location of the firm).

75. *Gunter*, 223 F.3d at 195 n.1.

76. *Varacallo*, 226 F.R.D. at 256.

77. *O'Keefe v. Mercedes Benz USA, L.L.C.*, 214 F.R.D. 266, 311 (E.D. Pa. 2003) (stating that "multipliers in the range of one to four" are common and noting criticism of a multiplier in the seven to ten range).

settlement benefits the class.⁷⁸

c. The coupon redemption requirement

Under CAFA, the methods courts use to calculate attorneys' fees will remain substantially the same.⁷⁹ Nevertheless, CAFA does make some modifications to the courts' existing methods. For example, CAFA requires that, in a coupon settlement, "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."⁸⁰ Although this allows courts to continue to use the percentage-of-recovery method, they must now base their calculations on the coupons the class redeems rather than all of the coupons the defendant offers.⁸¹ Some courts already base attorneys' fees on the number of coupons redeemed.⁸² Many courts, however, base fees on the number of coupons issued.⁸³ Even critics who have called other provisions in CAFA useless seem to agree that this provision will affect the way courts calculate fees.⁸⁴

The provision's purpose is to prevent "inequities" in which class members receive "essentially valueless coupons," while their attorneys receive substantial cash fees.⁸⁵ If the class members do not value the coupons, they will not use them, and the attorneys' fees

78. See *Varacallo*, 226 F.R.D. at 254–55; see also *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) ("Courts . . . may increase the . . . multiplier based on factors such as the riskiness of the litigation and the quality of the attorneys."); *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003) (explaining that the multiplier varies according to factors such as "the risk involved and the length of the proceedings"); *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1126 (9th Cir. 2002) (stating that appropriate factors include the nature of work, its level of difficulty, and the level of success).

79. The provisions of the act allow courts to use either of the principal methods described above. See 28 U.S.C. § 1712(a)–(c) (2006). In fact, § 1712(b) specifically states that CAFA does not prohibit the lodestar method. *Id.*

80. § 1712 (a).

81. *Id.*

82. See *supra* notes 66–68 and accompanying text.

83. See *supra* note 65 and accompanying text.

84. Nelson & Wolfman, *supra* note 1, at 370. The provision may also change the practices of those courts that use experts to predict redemption rates. See *supra* Part V.B.2.c.

85. S. REP. NO. 109-14, at 30 (2004), as reprinted in 2005 U.S.C.C.A.N. 3, 29–30.

will be lower. Thus, by tying attorneys' fees to the number of coupons actually redeemed, CAFA helps to ensure that the attorneys' interests are more closely aligned with the class'.

The coupon-redemption provision raises an issue about the timing of the calculations: must courts delay calculating the fees until after the class has redeemed the coupons?⁸⁶ This would be necessary for courts to determine the *actual* number of coupons the class will redeem.⁸⁷ Another option would be to use expert testimony to predict in advance the number of coupons the class will redeem.⁸⁸ CAFA does provide that a court may "receive expert testimony . . . on the actual value to the class members of the coupons that are redeemed."⁸⁹ It does not specify, however, whether such testimony is limited to an analysis of the coupons' actual value (versus their face value) or whether it may also include an analysis of likely redemption rates.⁹⁰

The majority of CAFA's critics and supporters seem to adhere to the interpretation that attorneys must wait until after the class has redeemed the coupons to collect their fees.⁹¹ Indeed, although the legislative history is not conclusive on this point, it does seem to support that interpretation.⁹²

86. See Bingham McCutchen, *supra* note 52, at 5 ("CAFA affirms the existing practice of utilizing expert testimony on the value of coupon settlements—which includes an analysis of the benefit to plaintiffs who redeem the coupons as well as the likelihood of redemption But judicial consideration of the likelihood of redemption is not the same as a statutory provision pegging fees to actual redemption rates . . .").

87. MCCUTCHEN, *supra* note 51, at 5 ("[P]laintiffs' attorneys may need to wait until after the redemption period to submit their fee petitions.").

88. *Webcast: The Class Action Fairness Act: Tort Reform or a Detour?*, FD WIRE, June 23, 2005, <http://www.acca.com> (follow "webcasts" hyperlink; follow "archived webcasts" hyperlink; then follow "Trial: . . ." hyperlink) [hereinafter *Webcast*] ("[T]he court is now allowed to hear expert testimony on the actual value of redeemed coupons so there is going to be, potentially, a battle of experts going in who will say, you know, I estimate 22% of these coupons will be redeemed, or I estimate 10% of these coupons will be redeemed." (statement of Bruce Copeland, Partner, Nixon Peabody)).

89. 28 U.S.C. § 1712(d) (2006).

90. See MCCUTCHEN, *supra* note 51, at 5.

91. See, e.g., Rob Gaudet, *Tying Lawyers' Fees to Final Coupon Redemption Takes Class Action Bill from "Stupid" to "Stupider,"* 5 CLASS ACTION LITIG. REP. 103, 103 (2004); Lindeman, *Class Action Bar Girds*, *supra* note 7, at 177, 178; Herrmann & Bownas, *supra* note 37, at 31.

92. See S. REP. NO. 109-14, at 30 (2004), as reprinted in 2005

d. Other attorneys' fees provisions

Although the coupon redemption requirement is the main thrust of CAFA's regulation of attorneys' fees, CAFA has other provisions regulating this area.⁹³ CAFA specifically provides that, if a court does not calculate fees based on the number of coupons redeemed, it must calculate them based on the reasonable number of hours the attorneys spent on the case.⁹⁴ This essentially gives courts the option to use the lodestar-with-multiplier method instead of the percentage-of-recovery method.⁹⁵ Because most courts already had the option to use this method,⁹⁶ this subsection is unlikely to significantly affect the calculation of attorneys' fees.⁹⁷ However, since the subsection specifically states that it does not prohibit the lodestar method, it may encourage courts to use that method more often. In the past, courts often used the lodestar method in coupon-settlement cases only as a crosscheck for the percentage-of-recovery method.⁹⁸

CAFA also contains provisions relating to mixed settlements, those with both coupons and equitable relief.⁹⁹ These provisions reiterate that, in such settlements, courts must base any fees attributable to coupons on the value of the coupons redeemed.¹⁰⁰ The provisions also state that the court may base any fees not calculated in this way on the amount of time the attorneys spent on the case.¹⁰¹ Finally, the provisions specify that the calculation should also include a fee for obtaining the equitable relief, if applicable.¹⁰²

Again, these provisions seem unlikely to significantly affect the

U.S.C.C.A.N. 3, 30 (stating that fees will be based on the "coupons *actually* redeemed" (emphasis added)).

93. See § 1712.

94. See § 1712(b).

95. *Id.*

96. See *supra* notes 54–59 and accompanying text.

97. CAFA also requires that a court approve any fee under this subsection. § 1712(b)(2). Nevertheless, because Federal Rule of Civil Procedure 23 already requires courts to approve all class action settlements, FED. R. CIV. P. 23(e)(1)(A), the provision requiring approval of any fee is also unlikely to have any real affect on the calculation of attorneys' fees.

98. See, e.g., *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 370 F. Supp. 2d 320, 322 (D. Me. 2005); *O'Keefe v. Mercedes-Benz USA, L.L.C.*, 214 F.R.D. 266, 304 (E.D. Pa. 2003).

99. § 1712(c).

100. *Id.*

101. *Id.*

102. *Id.*

calculation of attorneys' fees. Rather, they appear to simply clarify the procedure for calculating fees when a coupon settlement also provides equitable relief. CAFA fails, however, to set forth a separate procedure for calculating fees when a coupon settlement includes both equitable relief and cash.¹⁰³ Thus, such a settlement would seem to fall under the same provisions as mixed settlements. If courts interpret CAFA this way, the mixed-settlement provisions would seem to require that courts calculate attorneys' fees for the cash portion of the settlement using the lodestar method, given that such fees would not be "based upon . . . the recovery of the coupons."¹⁰⁴ Because courts usually calculate fees for cash settlements using the percentage-of-recovery method, this new method would be a "substantial departure from current practice."¹⁰⁵

e. The ramifications of coupon settlements

Although many of the provisions discussed above are unlikely to significantly affect the calculation of attorneys' fees,¹⁰⁶ the redemption requirement is likely to do so.¹⁰⁷ Class attorneys will have a financial incentive to ensure that any coupons included in a settlement are valuable to the class.¹⁰⁸ Otherwise, class members will be less likely to redeem them, and attorneys' fees will be lower.¹⁰⁹ Similarly, if attorneys cannot collect their fees until after the class actually redeems the coupons, they will have an incentive to ensure that class members are aware of the coupons and that they understand the settlement.

The most significant affect the redemption requirement will have, however, is to reduce the number of coupon settlements. Although the redemption requirement does not ban coupon

103. *Id.*

104. GEORGENE M. VAIRO, CLASS ACTION FAIRNESS ACT OF 2005: A REVIEW AND PRELIMINARY ANALYSIS 19 (2005).

105. *Id.*

106. *See supra* Part V.B.2.d.

107. *See* Stanton D. Anderson et al., McDermott, Will & Emery, *Trial: What the Class Action Fairness Act Means for Your Business*, MONDAQ BUS. BRIEFING, Mar. 1, 2005, <http://www.mandaq.com/article.asp?articleid=31209/searchresults=1&print=1>.

108. *Webcast, supra* note 88 (statement of Joe Catalano, Senior Vice President and Chief Litigation Counsel, Union Bank of California).

109. *Id.*

settlements,¹¹⁰ it strongly discourages them.¹¹¹ Indeed, some observers predict that it may virtually eliminate such settlements altogether.¹¹²

One reason for this prediction is that the redemption requirement will reduce class counsel's main incentive to enter into such a settlement: large attorneys' fees.¹¹³ Traditionally, defendants favored coupon settlements, because such settlements did not require large cash payments, and the class was unlikely to redeem all of the coupons.¹¹⁴ Meanwhile, plaintiffs' attorneys were willing to agree to such settlements, because they typically had higher face values than cash settlements.¹¹⁵ Because courts generally calculated fees using the value of the coupons offered, rather than the value of the coupons redeemed, coupon settlements consequently came with larger attorneys' fees.¹¹⁶

CAFA has eliminated this larger fee incentive.¹¹⁷ Courts will base the fees on redemption rates rather than the face value of the coupons.¹¹⁸ Consequently, redemption rates are generally low,¹¹⁹ and fees in coupon settlements will be much lower under this method of calculation.

Another reason the redemption requirement will discourage coupon settlements is that it will increase the difficulty and uncertainty of calculating attorneys' fees.¹²⁰ Attorneys will need to

110. 28 U.S.C. § 1712(a) (2006).

111. Anderson et al., *supra* note 107.

112. *See id.*; Lindeman, *Class Action Bar Girds*, *supra* note 7, at 178.

113. *See* Anderson et al., *supra* note 107.

114. *Id.*; Nelson & Wolfman, *supra* note 1, at 370.

115. *See* Anderson et al., *supra* note 107 (stating that "[s]ettling parties sought approval of coupon settlements by highlighting the total value offered to class members").

116. *See id.*

117. *Id.*

118. 28 U.S.C. § 1712(a) (2006).

119. MCCUTCHEN, *supra* note 51, at 5 ("[S]ome recent studies indicate that only about 25% of coupons offered in any class action are ever redeemed, with the redemption rate falling to only 13% in cases involving consumer plaintiffs. Anecdotal evidence suggests that even these low redemption rates are decreasing over time."); *see also In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 370 F. Supp. 2d 320, 321 (D. Me. 2005) (stating that only two percent of the coupons offered in a settlement were actually redeemed).

120. *See* Lindeman, *Class Action Bar Girds*, *supra* note 7, at 178.

consult experts to determine likely redemption rates before they will be able to estimate their expected fees. Moreover, if courts defer calculating fees until after the class has redeemed the coupons, they may not be able to determine or collect their fees until long after the settlement.¹²¹ Thus, the redemption requirement increases the risks associated with the settlement for class counsel.

*In re Compact Disc Minimum Advertised Price Antitrust Litigation*¹²² illustrates these problems. In that case, the defendant sent the class 8.1 million coupons, which the court valued at \$4.28 each.¹²³ Before CAFA, many courts would have evaluated the settlement, for the purposes of calculating attorneys' fees, by multiplying the number of coupons offered by the value of each coupon, and would have arrived at a value of nearly \$34.7 million.

Under CAFA, however, courts will evaluate the settlement using predicted or actual redemption rates.¹²⁴ In *In re Compact Disc*, experts predicted redemption rates of between 15 and 20%.¹²⁵ Using these rates, the settlement would be worth between \$5.2 and \$6.9 million. The court, however, deferred calculating the attorneys' fees until the class had actually redeemed the coupons.¹²⁶ When it finally did calculate fees, it found that only 2% of the class members had actually redeemed coupons.¹²⁷ Thus, the court determined that the settlement was worth only \$1.5 million.¹²⁸ Applying the percentage of recovery method, the court awarded the attorneys \$451,100 in fees, 30% of the value of the settlement.¹²⁹ This covered only 30% of their litigation costs, however.¹³⁰ While the court's calculation of fees in this case was consistent with the interpretation of CAFA's redemption requirement that most observers seem to support,¹³¹ it resulted in fees that were much lower and less predictable than they would have been under the percentage-of-coupons-offered method

121. *Id.*

122. 370 F. Supp. 2d 320.

123. *Id.* at 321.

124. See 28 U.S.C § 1712(a) (2006).

125. *In re Compact Disc*, 292 F. Supp. 2d 184, 187 (D. Me. 2003).

126. *Id.* at 190.

127. *In re Compact Disc*, 370 F. Supp. 2d at 321.

128. *Id.*

129. *Id.* at 322.

130. *Id.* at 323.

131. See *supra* note 91 and accompanying text.

many courts used before CAFA.

f. Settling weak claims

Proponents of the coupon-settlement provisions will likely be pleased if CAFA eliminates most coupon settlements. There will probably be far fewer coupon settlements, and the few that remain will be more likely to provide real value to the class. Some analysts nevertheless argue that this virtual elimination of coupon settlements may have some unintended and negative effects.¹³²

For example, some observers predict it will eliminate an important tool for avoiding litigation and resolving weak class action claims.¹³³ Because class actions often involve large sums of money,¹³⁴ defendants are often disinclined to litigate even weak claims.¹³⁵ Even when the likelihood that the defendant will lose is low, the costs of litigation and the potential adverse judgment could be quite high.¹³⁶ For some corporate defendants, losing a class action could mean bankruptcy.¹³⁷ Indeed, for defendants who cannot raise enough cash to pay for a large cash settlement, non-cash settlements such as coupons are the only viable way to settle the case.¹³⁸

Coupon settlements allow defendants to settle cases they believe to be weak without resorting to litigation¹³⁹ and without putting up a large amount of cash.¹⁴⁰ Under CAFA, however, class counsel will be far less likely to negotiate coupon settlements.¹⁴¹ As a result, defendants may no longer have the option to use coupons to settle

132. *E.g.*, Aashish Y. Desai, *The Class Action Fairness Act*, ORANGE COUNTY LAW., July 2005, at 20, 23. For an in-depth discussion of the unintended consequences of the Class Action Fairness Act, see *supra* Part V.

133. Lindeman, *Class Action Bar Girds*, *supra* note 7, at 178.

134. According to one study of class action cases between 1993 and 2002, the mean gross recovery in the 370 cases studied was \$100 million. Eisenberg & Miller, *supra* note 70, at 74.

135. S. REP. NO. 109-14, at 20 (2004), *as reprinted in* 2005 U.S.C.C.A.N. 3, 21.

136. *Id.* at 21.

137. *Id.*

138. *See* Desai, *supra* note 132, at 22.

139. Lindeman, *Class Action Bar Girds*, *supra* note 7, at 178.

140. Anderson et al., *supra* note 107.

141. *Id.*

claims they believe to be weak.¹⁴² This may have two effects. It may discourage some plaintiffs' attorneys from bringing weak cases, because they know defendants will be unable or unwilling to offer settlements that would bring them large fees. Conversely, however, it may force defendants who do find themselves subjected to lawsuits they believe to be unmeritorious to make a tough decision: overpay for a weak claim or go to trial despite the associated risks and costs.

3. Obtaining Court Approval

In addition to regulating attorneys' fees, CAFA regulates how courts review and approve coupon settlements.¹⁴³ Before Congress passed CAFA, Federal Rule of Civil Procedure 23(e) governed court approval of class actions.¹⁴⁴ Under CAFA, the procedure for obtaining court approval will essentially remain the same.¹⁴⁵

a. Rule 23(e)

Federal Rule of Civil Procedure 23(e) requires the court to approve all class action settlements.¹⁴⁶ Before the court may do this, however, it must first hold a hearing and find that the settlement is fair, reasonable, and adequate.¹⁴⁷ To determine whether a settlement meets these criteria, courts consider several factors, such as: "(1) comparison of the proposed settlement with the likely result of litigation; (2) reaction of the class to the settlement; (3) stage of the litigation and the amount of discovery completed; (4) quality of counsel; (5) conduct of the negotiations; and (6) prospects of the case, including risk, complexity, expense and duration."¹⁴⁸ In addition, if the defendant and class counsel reached the settlement

142. *Id.*

143. 28 U.S.C. § 1712(e) (2006).

144. *See* FED. R. CIV. P. 23(e).

145. *See infra* Parts V.B.3.

146. FED. R. CIV. P. 23(e)(1)(A).

147. *Id.* at 23(e)(1)(C).

148. *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 206 (D. Me. 2003) (citing *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Litig., 55 F.3d 768, 785 (3d Cir. 1995) ("[A]ppellate courts consider some or all of [these] . . . factors . . ."); *Gottlieb v. Wiles*, 11 F.3d 1004, 1014 (10th Cir. 1993); *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d Cir. 1992); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 465, 468–70 (2d Cir. 1974)).

after “sufficient discovery and genuine arm’s-length negotiation,” many courts will presume that it is fair.¹⁴⁹

b. Changes under CAFA

Under CAFA, courts may only approve coupon settlements after holding a hearing and making a written finding that the settlement is fair, reasonable, and adequate.¹⁵⁰ Thus, the procedure for obtaining court approval under the new act is quite similar to the procedure for obtaining court approval under the Federal Rules of Civil Procedure.¹⁵¹ The only way in which CAFA differs from the rule is by requiring that the court write out its findings.¹⁵²

By requiring courts to put their findings into writing and by reaffirming their responsibility to scrutinize settlements, CAFA may encourage courts to be more thorough when inspecting proposed settlements.¹⁵³ Beyond this, however, the provision is unlikely to significantly affect the way courts approve coupon settlements.

c. Donations to charity

CAFA specifically authorizes courts to distribute any coupons the class has not claimed to charity or government organizations.¹⁵⁴ It also specifies, however, that the court may not consider the redemption of those coupons when it calculates attorneys’ fees.¹⁵⁵

Even before CAFA, settlements sometimes included distributions to charity or government entities.¹⁵⁶ Parties often

149. *Id.*, 216 F.R.D. at 207 (citing *City P’ship Co. v. Atl. Acquisition Ltd. P’ship*, 100 F.3d 1041, 1043 (1st Cir. 1996); *New York v. Reebok Int’l Ltd.*, 903 F. Supp. 532, 535 (S.D.N.Y. 1995), *aff’d*, 96 F.3d 44 (2d Cir. 1996)).

150. 28 U.S.C. § 1712(e) (2006).

151. *Compare* FED. R. CIV. P. 23(e)(1)(C) (“The court may approve a settlement . . . only after a hearing and on finding that the settlement . . . is fair, reasonable, and adequate.”) *with* § 1712(e) (“[T]he court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate . . .”).

152. § 1712(e).

153. Koch, *supra* note 50, at 48.

154. § 1712(e).

155. *Id.*

156. *E.g.*, *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 746 (7th Cir. 2001) (distributing “\$4.6 million to organizations that assist the Mexican-American community”); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 208–09 (D. Me. 2003) (distributing CD’s to states for further distribution to schools and libraries); *In re Motorsports*

negotiated settlements that included such distributions when it was not possible to locate a large portion of the class,¹⁵⁷ or when there were excess settlement funds.¹⁵⁸ Courts additionally had the power to distribute the portions of the settlement the class members did not claim.¹⁵⁹

CAFA merely reaffirms the courts' power to make such distributions in the context of coupon settlements.¹⁶⁰ Thus, while this provision may encourage courts to make charitable donations of unclaimed coupons by specifically authorizing them to do so, it does not expand the power courts already have.¹⁶¹ The only significant change this provision makes is to prohibit basing attorneys' fees on charitable distributions.¹⁶²

C. Notification Requirements

Class representatives seldom have a substantial stake in class action litigation.¹⁶³ They are therefore unlikely to closely monitor the attorneys representing them.¹⁶⁴ Some observers contend that this "clientless litigation" has led to abuses.¹⁶⁵ They maintain that, without significant client input and oversight, some attorneys may not be able to fully represent the class' interests; some may even enter into collusive settlements.¹⁶⁶

Merchandise Antitrust Litig., 160 F. Supp. 2d 1392, 1399 (N.D. Ga. 2001) (distributing excess settlement funds to ten different charities).

157. *In re Mex. Money Transfer*, 267 F.3d at 746; *In re Compact Disc*, 216 F.R.D. at 208.

158. *In re Motorsports Merchandise*, 160 F. Supp. 2d at 1395.

159. *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 576 (E.D. Pa. 2005); *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002).

160. *See* 28 U.S.C. § 1712(e) (2006); *Schwartz*, 362 F. Supp. 2d at 576.

161. *See In re Airline Ticket Comm'n*, 307 F.3d at 682–83 (stating that courts have applied *cy pres* principles in the context of class action lawsuits since 1997); § 1712(e).

162. § 1712(e). Before the Act, some courts did base fees on charitable distributions. *See, e.g., In re Compact Disc*, 216 F.R.D at 208, 216–17 (basing attorneys' fees, in part, on the distribution of \$75.7 million in CD's to libraries and schools).

163. Beisner & Miller, *supra* note 3, at 105.

164. *Id.*

165. *E.g., S. REP. NO. 109-14*, at 33 (2004), *as reprinted in* 2005 U.S.C.C.A.N. 3, 32; Fiereck, *supra* note 1, at 333–34.

166. *See, e.g., S. REP. NO. 109-14*, at 33; Beisner & Miller, *supra* note 3, at 105; Fiereck, *supra* note 1, at 333–34.

CAFA responds to these concerns by requiring defendants in class actions to notify certain officials about pending settlements.¹⁶⁷ This allows government officials the opportunity to intervene if they believe a settlement is unfair.¹⁶⁸ Proponents intended these provisions to provide additional oversight for class action litigation.¹⁶⁹ Many observers, however, have criticized the provisions, claiming they will waste time and increase litigation costs with no assurance they will provide any real benefits.¹⁷⁰

1. Timing

CAFA requires each defendant participating in a settlement to notify the “appropriate” state and federal officials about pending settlements.¹⁷¹ Defendants must serve these notifications within ten days after filing a proposed settlement with the court.¹⁷² Because this does not give defendants much time to deliver the notifications, defendants may wish to identify the appropriate officials and prepare the notification papers before filing the settlement.¹⁷³

The court may not approve the settlement until ninety days after the parties have filed it.¹⁷⁴ This gives the appropriate officials time to review the notification documents and to intervene if they choose to do so.¹⁷⁵ There is, however, no *requirement* that the officials do anything with the information they receive.¹⁷⁶ This has prompted some observers to speculate that, despite the burdens the notification provisions will impose on defendants, the provisions may not elicit the additional oversight lawmakers intended.¹⁷⁷

167. § 1715(b); S. REP. NO. 109-14, at 32.

168. S. REP. NO. 109-14, at 32.

169. *See id.* at 34.

170. *See, e.g., Nelson & Wolfman, supra* note 1, at 371 (“Whether the huge volume of paperwork that these provisions entail will benefit anyone is not entirely clear. Perhaps the authors of the Act took the view that the U.S. Attorney General does not receive enough junk mail.”).

171. § 1712(b). For a discussion of the meaning of “appropriate,” see *infra* Part V.C.3.

172. § 1715(b).

173. Fiereck, *supra* note 1, at 335.

174. § 1715(d).

175. S. REP. NO. 109-14, at 33 (2004), *as reprinted in* 2005 U.S.C.C.A.N. 3, 32.

176. § 1715(f).

177. *See Nelson & Wolfman, supra* note 1, at 371.

2. The Contents of the Notifications

CAFA specifies that defendants should send certain materials to each official they notify.¹⁷⁸ The notifications should include:

- a copy of the complaint, any materials filed with it, and any amended complaints;
- notice of any scheduled hearings;
- the proposed settlement;
- any other concurrent agreements between the defendants and class counsel;
- any notifications directed at class members regarding the proposed settlement or their right to request exclusion from the class;
- any final judgment in the case or notice of dismissal;
- any written judicial opinion about:
 - the class notifications;
 - the proposed settlement;
 - any other concurrent agreements between the defendant and class counsel; or
 - any final judgment or notice of dismissal; and
- for notifications to state officials:
 - a list of the class members who reside in the official's state and their proportionate shares of the settlement; or
 - if it is not feasible to make such a list, a reasonable estimate of the people in the state and their proportionate shares of the settlement.¹⁷⁹

Some observers contend that the last requirement will be the most burdensome.¹⁸⁰ It requires defendants, when “feasible,” to compile a list of the class members in each state and their proportionate shares of the settlement.¹⁸¹ It is doubtful, however, that defendants will have updated addresses for all of the class members.¹⁸² Indeed, it is likely that many class members will have

178. § 1715(b).

179. *Id.*

180. *E.g.*, Lindeman, *Class Action Lawyers Doubt Provisions*, *supra* note 7, at 265; *Plaintiffs' Attorney Predicts Defense Bar Will Reconsider Federal Class Action Reforms*, *supra* note 7, at 676.

181. § 1715(b)(7)(A)–(B).

182. *See* Fiereck, *supra* note 1, at 335 (“Defense counsel will need to decide

moved during the litigation.¹⁸³ In a large class, it may be quite burdensome to identify and verify where each class member lives.

Defendants may instead wish to establish that it is not feasible to do so. This, however, presents additional problems. CAFA does not specify what a party must do to show infeasibility.¹⁸⁴ Indeed, it does not even specify which party would carry the burden of proof with respect to this issue.¹⁸⁵ According to the Senate Committee on the Judiciary's report on CAFA, *class counsel* should carry the burden of proving infeasibility.¹⁸⁶ Though some have questioned whether this was a mistake,¹⁸⁷ defendants will need to rely on class counsel to establish infeasibility if courts adhere to this suggestion.

Furthermore, even if a defendant does establish that it is not feasible to provide a list of class members, the defendant will still need to estimate the number of class members in each state and the proportion of the settlement each state's residents will receive.¹⁸⁸ This will become more complicated if the state officials disagree with the amounts their respective states would receive under the settlement.¹⁸⁹ If the officials choose to intervene, the parties will face further litigation, which will delay the settlement and increase costs.

Some critics contend that these notifications will be overly burdensome in light of the benefits they are likely to render.¹⁹⁰ Under CAFA, defense counsel must determine the appropriate officials to notify, compile the necessary information, make state-by-state calculations of plaintiffs' recoveries, and prepare numerous

if it will be satisfactory to rely on potentially outdated address data.”).

183. According to a U.S. Census study, an average of 15.5% of the population moved each year between 1993 and 2003. See JASON P. SCHACHTER, *GEOGRAPHICAL MOBILITY: 2002 TO 2003*, at 2 (2004), available at <http://www.census.gov/prod/2004pubs/p20-549.pdf>. During that time period, an average of 2.7% of the population moved to another state each year. *Id.* Thus, if a case takes years to settle, a significant portion of the class will have moved to different states.

184. See § 1715(b)(7)(B).

185. *Id.*

186. S. REP. NO. 109-14, at 34 (2004), as reprinted in 2005 U.S.C.C.A.N. 3, 33.

187. Fioreck, *supra* note 1, at 335.

188. § 1715(b)(7)(B).

189. *Plaintiffs' Attorney Predicts Defense Bar Will Reconsider Federal Class Action Reforms*, *supra* note 7, at 676.

190. Nelson & Wolfman, *supra* note 1, at 371.

reports.¹⁹¹ Opponents grumble that this will increase defendants' litigation costs.¹⁹² Some also fear that the notifications will become more difficult in the future if individual states and agencies adopt additional regulations for submitting the notifications.¹⁹³

3. Determining Whom to Notify

According to CAFA, defendants must notify the "appropriate" officials about pending settlements.¹⁹⁴ These officials consist of one federal official and one official from "each State in which a class member resides."¹⁹⁵ The appropriate federal official is generally the Attorney General of the United States.¹⁹⁶ Meanwhile, the appropriate official for a given state is the person "who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State"¹⁹⁷ If, however, there is no official with such authority, or if the person with such authority does not regulate the matters at issue, "then the appropriate official [is] the State attorney general."¹⁹⁸

Some observers warn that determining which state officials to notify may be problematic.¹⁹⁹ Because defendants are unlikely to have updated addresses for class members,²⁰⁰ it may be difficult to identify each of the states "in which a class member resides."²⁰¹ This may leave defendants unsure about which states' officials to notify.²⁰² Yet, if they fail to notify the proper officials, they risk undermining the settlement.²⁰³ To avoid this prospect, defendants in

191. See § 1715.

192. *E.g.*, Desai, *supra* note 132, at 23; Lynda Grant, *CAFA: Is the Remedy Worse than the Disease?*, CLASS ACTION & DERIVATIVE SUITS, Spring 2005, at 7, 11 ("Even an individual settling defendant will be required to send [these] notices In a nationwide class, this could impose a staggering burden on an individual defendant.").

193. Fiereck, *supra* note 1, at 335.

194. § 1715.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. See, *e.g.*, Fiereck, *supra* note 1, at 335.

200. See *supra* note 182–83 and accompanying text.

201. See § 1715(b); Fiereck, *supra* note 1, at 335.

202. See § 1715(e).

203. If a defendant fails to fulfill the notification requirements, class

large class actions may choose to notify officials in every state.²⁰⁴

Once a defendant has determined which states to notify, it must determine which official in each of those states is the “appropriate” official.²⁰⁵ If a defendant notifies the wrong officials, class members may be able to avoid the settlement, thus exposing the defendant to further litigation.²⁰⁶ In cases where the appropriate official is not obvious, defendants therefore may wish to submit a list of officials to the court for approval before filing the settlement with the court and serving the notifications.²⁰⁷

4. Depository Institutions

State and federal depository institutions, depository institution holding companies, foreign banks, and the subsidiaries of these institutions have slightly different notification requirements.²⁰⁸ For these defendants, the “appropriate” federal official is generally the person with primary regulatory authority over the defendant.²⁰⁹ If, however, that official does not supervise or regulate the matters in the allegations, then the Attorney General of the United States is the appropriate federal official.²¹⁰

In addition, *federal* depository institutions may satisfy the notification requirements simply by notifying the federal official with primary regulatory authority over them (unless that official does not supervise or regulate the matters in the allegations).²¹¹ Thus, a federal depository institution would not have to notify any state officials.²¹²

Moreover, if the defendant is a *state* depository institution, it may satisfy the notification requirements by notifying the appropriate federal official and the bank supervisor of the state in which it is incorporated or chartered (unless the state bank supervisor does not

members may be able to avoid the settlement. *See infra* Part V.C.5.

204. Fioreck, *supra* note 1, at 335.

205. § 1715(a)(2).

206. *Id.*; *see infra* Part V.C.5.

207. *See* Herrmann & Pearson, *supra* note 37, at 66.

208. § 1715.

209. *Id.*

210. *Id.*

211. *Id.*

212. *See id.*

regulate or supervise the matters in the allegations).²¹³ Thus, a state depository institution would only need to notify two officials.²¹⁴

5. The Consequences of Failing to Meet the Notification Requirements

If a defendant fails to meet the notification requirements, class members may choose to avoid the settlement.²¹⁵ Any class member seeking to do so, however, will have the burden of proving noncompliance.²¹⁶ Still, a class member may *not* seek exemption from a settlement if the defendant provided notice to the appropriate federal official and either the state attorney general or the official with primary regulatory authority over the defendant.²¹⁷

Class members' ability to avoid a settlement in certain circumstances may make some defendants nervous about entering into a class action settlement.²¹⁸ Such settlements generally protect defendants from future litigation by preventing all class members who do not opt out of the class from bringing the same suit against the defendant in the future.²¹⁹ Under CAFA, however, if a defendant fails to fulfill the notification requirements, there may then be risk for further litigation over the same matters.²²⁰

6. Privacy Considerations

Some observers warn that the provisions may threaten the privacy of certain settlements and other agreements.²²¹ For example, CAFA requires defendants to notify government officials about any agreements between the defendants and class counsel made contemporaneously with the settlement.²²² There is no requirement, however, that these officials keep the agreements confidential.²²³

CAFA also requires defendants to notify regulatory authorities

213. *Id.*

214. *See id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. Fioreck, *supra* note 1, at 334.

219. *Id.*

220. *See* 28 U.S.C. § 1715(e) (2006).

221. *E.g.*, Desai, *supra* note 132, at 23.

222. § 1715(b)(5).

223. *See id.*

about class action settlements.²²⁴ Some observers note that when a defendant notifies these authorities, the authorities may conduct their own investigations into the underlying matters or into the defendant's industry in general.²²⁵ This may have the unintended effect of discouraging settlements, because it reduces the incentive to settle and thereby avoid the publicity of trial. Proponents of the notification provisions may argue, however, that this benefits the public by alerting regulatory authorities about potential violations.

D. Other Provisions

The Consumer Class Action Bill of Rights contains two other provisions aimed at protecting class members.²²⁶ Critics have nonetheless questioned whether either of these provisions will actually benefit class members.²²⁷

1. Protection Against Loss by Class Members

Lawmakers aimed the first of these provisions at settlements in which a class member would have to pay class counsel money, such that the class member would actually lose money in the litigation.²²⁸ Under CAFA, a court must make "a written finding that non-monetary benefits to the class member substantially outweigh the monetary loss" before approving any such settlement.²²⁹

Lawmakers included this provision in the Act in response to a particular case: *Kamilewicz v. Bank of Boston Corp.*²³⁰ In that case, many of the class members paid more in attorneys' fees than they collected from the suit.²³¹ Dexter Kamilewicz, for example, paid \$91.33 in attorneys' fees but collected only \$2.19 from the

224. § 1715(c)(1).

225. Desai, *supra* note 132, at 23 ("For example, if the Department of Insurance learns about one insurance company's settlement for paying independent brokers for selling 'vanishing premium' life insurance policies to a certain segment of the population, it may begin its own investigation into the policies of the life insurance industry in general . . .").

226. §§ 1713–1714.

227. *E.g.*, Nelson & Wolfman, *supra* note 1, at 371 ("These provisions are, to put it mildly, inconsequential.").

228. § 1713.

229. *Id.*

230. 92 F.3d 506 (7th Cir. 1996); *see* S. REP. NO. 109-14, at 14, 32 (2004), *as reprinted in* 2005 U.S.C.C.A.N. 3, 15, 31.

231. *Kamilewicz*, 192 F.3d at 508.

settlement.²³² By the time these class members realized that they had to pay more in attorney's fees than they would collect, it was too late to opt out of the class.²³³

Critics counter, however, that these types of cases are very unusual.²³⁴ Thus, the provision may be unlikely to affect many lawsuits.²³⁵ Moreover, even if it does apply to a particular case, it will not provide much more protection than Federal Rule of Civil Procedure 23 provided before CAFA.²³⁶ It is unlikely that a court would find that a settlement was "fair, reasonable, and adequate," as required by Rule 23,²³⁷ and, at the same time, that the benefits to the class did not outweigh the monetary loss.²³⁸ Some fear that, by expressly authorizing such suits, the provision may even encourage them.²³⁹

2. Protection Against Geographical Discrimination

Another provision in CAFA prohibits courts from approving a proposed settlement that would pay some class members more than it would pay others solely on the basis that those class members live closer to the court.²⁴⁰ The Senate Committee on the Judiciary stressed that this provision would only apply to cases in which proximity to the courthouse was the *only* basis for the increased payments.²⁴¹ Thus, if a case involved injuries resulting from a chemical spill, and some class members sustained more injuries because they lived closer to the site of the accident, the court could approve a settlement that awarded more money to the plaintiffs who

232. *Id.*

233. *See id.* Indeed, the defendant in the underlying case, Bank of Boston, objected to notifying the class, because it had failed to advise the class members that they might pay more in attorneys' fees than they would collect. *Id.* Nevertheless, the court approved the notifications. *Id.*

234. Nelson & Wolfman, *supra* note 1, at 371.

235. *Id.*

236. *Id.* ("Settlements that put class members out-of-pocket to pay class counsel . . . under Rule 23 would likely be approved by a court as fair only if the class received significant nonmonetary benefits even without this new statute.").

237. FED. R. CIV. P. 23(e)(1)(C).

238. 28 U.S.C. § 1713 (2006).

239. Nelson & Wolfman, *supra* note 1, at 371.

240. § 1714.

241. S. REP. NO. 109-14, at 32 (2004), *as reprinted in* 2005 U.S.C.C.A.N. 3, 31.

lived closer to the site.²⁴² As critics point out, however, it is difficult to imagine a case in which a court would approve a settlement under Rule 23 as “fair, reasonable, and adequate”²⁴³ if proximity to the courthouse were the sole basis for distributing the settlement funds.²⁴⁴

E. Conclusion

The Consumer Class Action Bill of Rights, like many of CAFA’s sections of the Class Action Fairness Act, has given rise to a multitude of questions. Because CAFA is so young, few, if any, of these questions yet have answers. Both CAFA’s critics and proponents are likely to continue debating the possibilities until a court, Congress, or experience decides the issues. Even then it is likely that new questions and debates will arise.

242. *Id.*

243. FED. R. CIV. P. 23(e)(1)(C).

244. Nelson & Wolfman, *supra* note 1, at 371 (“[A] settlement that accorded benefits solely on that basis could not conceivably pass muster under Rule 23.”).

