

## NOTES

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# THE COUPON QUANDARY: RESTRUCTURING INCENTIVES IN CAFA COUPON SETTLEMENTS

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### INTRODUCTION

Envision the following scenario:

In one state court class action involving faulty pipes, lawyers for a group of Alabama plaintiffs received more than \$38.4 million in fees, and lawyers for a class of Tennessee plaintiffs received \$45 million, or the equivalent of about \$2,000 an hour. In contrast, the homeowners only received 8 percent rebates toward new plumbing—and to get those rebates, they had to first prove that they had suffered leaks and then go out and buy a new system. The money in the settlement flowed primarily to class counsel.<sup>1</sup>

Consider further that “[t]o settle an Illinois state court class action in which it was accused of improperly including asbestos in its crayons, a manufacturer agreed to issue class members 75-cent coupons toward the purchase of new crayons. The attorneys got \$600,000 in fees.”<sup>2</sup>

These cases are precisely why coupon settlements in class action lawsuits garner attention. Essentially, members of the class receive very little while the attorneys receive large—and, in some instances, surprisingly large—payments to settle the claims. Generally, there is a fear that these settlements will be the result of collusion between the defendants and class counsel. Both have much to gain from a lucrative payout. The class counsel will walk away with a hefty sum, and the defendants will avoid incurring costs associ-

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1 S. REP. NO. 109-14, at 19 (2005) (footnote omitted). For a more in-depth report of the specifics of the lawsuit, see Richard B. Schmitt, *Leaky System: Suits over Plastic Pipe Finally Bring Relief, Especially for Lawyers*, WALL ST. J., Nov. 20, 1995, at A1.

2 S. REP. NO. 109-14, at 18.

ated with litigating the case. The fear is that the plaintiffs will be left powerless to adequately redress their grievances.

Congress addressed these concerns by enacting the Class Action Fairness Act (CAFA),<sup>3</sup> which contained a section on coupon settlements. However, as courts have interpreted CAFA, the following question has arisen: When attorneys' work results in coupons for the class, does CAFA preclude the use of the lodestar method<sup>4</sup> for calculating their fees? Or, conversely, is a contingency fee mandatory?

In answering this question, this Note seeks to accomplish the following goals: (1) examine the precise question whether CAFA precludes the use of the lodestar method to calculate attorneys' fees in cases where the attorneys' work resulted in coupon settlements; and (2) propose a solution that more closely aligns the incentives of class counsel to those of the class. Generally speaking, Congress wrote CAFA to allow for the use of the lodestar method—although it did so in convoluted language—yet evinced a broad legislative intent to disallow the method. For this reason, the case law expounding on the provision has culminated in a circuit split. The Ninth Circuit, in *In re HP Inkjet Printer Litigation*,<sup>5</sup> held that the statute prohibited the use of the lodestar method when coupons were the relief obtained.<sup>6</sup> Conversely, the Seventh Circuit, in *In re Southwest Airlines Voucher Litigation*,<sup>7</sup> held that district courts have the discretion to allow either the lodestar method or a contingency fee, and parties should be accorded the autonomy to negotiate any method subject to other statutory constraints.<sup>8</sup>

This Note argues that, while the Ninth Circuit has a compelling *policy* argument, the Seventh Circuit has the superior *legal* argument. This is so because § 1712(a), when interpreted along with § 1712(b) and § 1712(c), contemplates the existence of a choice between the lodestar method and a contingency fee. The legislative history, although relied upon heavily by the Ninth Circuit, also weighs in favor of the Seventh Circuit.<sup>9</sup> The Ninth Cir-

3 Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

4 To clarify, the lodestar method of calculating attorneys' fees is "the number of hours reasonably expended [on the action] multiplied by the prevailing community rate." THOMAS E. WILLGING & NANCY A. WEEKS, FED. JUDICIAL CTR., ATTORNEY FEE PETITIONS 29 (1985). This was perhaps "best articulated" in the Third Circuit case, *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973). WILLGING & WEEKS, *supra*, at 31.

5 716 F.3d 1173 (9th Cir. 2013).

6 *Id.* at 1184 ("[T]he unambiguous command of § 1712(a) requires that 'any attorney's fee' awarded for obtaining coupon relief be calculated using the redemption value of the coupons.").

7 799 F.3d 701 (7th Cir. 2015).

8 *Id.* at 707 ("[A] broader view of the text and structure of § 1712 . . . persuades us that § 1712 allows a district court discretion to use the lodestar method to calculate attorney fees even when those fees are intended to compensate class counsel for the coupon relief he or she obtained for the class.").

9 To be precise, "[t]he legislative history of a statute is the history of its consideration and enactment." *District of Columbia v. Heller*, 554 U.S. 570, 662 n.28 (2008) (Stevens, J.,

cuit's argument cannot be immediately refuted, however, because Congress clearly evinced an intent to alter the incentives at play in coupon settlements. This conflict between intent and statutory language illuminates yet again how poorly CAFA was drafted.<sup>10</sup>

This Note proceeds in five parts. Part I provides a background of coupon settlements with special attention paid to the incentives of class counsel. Part II outlines CAFA's relevant statutory provisions and examines them in light of the "Purposes" section in the statute and the Senate report accompanying the legislation—the most illuminating indicia of legislative intent. Part III examines the rationale supporting both cases in the circuit split and the implications behind both interpretive regimes. Part IV argues that the Seventh Circuit has the better legal argument for two reasons: (1) its strong textual argument; and (2) its support found in the Senate report. The Seventh Circuit's reasoning makes it difficult to reconcile the Ninth Circuit's opinion with the text and legislative history of the statute. Part V concludes by arguing that coupon settlements under CAFA raise a significant issue that should be addressed by Congress. Congress employed strong language throughout the Senate report indicating that it wanted to closely align the incentives of class counsel with members of the class. Part V continues by suggesting a methodology for courts to follow. This approach aims to accommodate *both* the interests of class counsel and class members to create a reasonable solution.

This Note does not decide whether coupon settlements are per se desirable or undesirable. There is robust scholarly literature describing the incentive structures inherent in coupon settlements and the pros and cons concerning their use. Arguments on both sides have merit, and these arguments are discussed later in the Note.<sup>11</sup> This Note does, however, explain

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dissenting) (quoting *Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring in part)).

10 See, e.g., *Sw. Airlines*, 799 F.3d at 706 ("Identifying abusive coupon settlements, however, was easier than crafting legislation to prevent them."); *HP Inkjet*, 716 F.3d at 1181 ("Both the majority of our panel and our dissenting colleague agree that CAFA is poorly drafted."); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 680–81 (9th Cir. 2006) (per curiam) ("The wording of this [CAFA] subsection is clumsy."). Several courts, when attacking the language of CAFA, invoke the following excerpt from a law review article: "[CAFA], after all, resulted from years of intense lobbying (on both sides of the aisle by interest groups associated with both plaintiffs and defendants), partisan wrangling, and, following two successful filibusters, fragile compromises." Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1441 (2008); see also *Sw. Airlines*, 799 F.3d at 706 (invoking the same portion of the article); *HP Inkjet*, 716 F.3d at 1181 (referencing the article). In his article, Burbank further went on to note the effects of this language, claiming that "some critics regard the compromises [in CAFA] as insufficient and the ultimate legislation as inimical to the interests of numerous groups of potential litigants." Burbank, *supra*, at 1441; see also Scott L. Nelson, *CAFA in the Congress: The Eight-Year Struggle*, in *THE CLASS ACTION FAIRNESS ACT* 23, 23 (Gregory C. Cook ed., 2013) ("The enactment of the Class Action Fairness Act in February of 2005 marked the culmination of eight years of effort by five Congresses.").

11 See *infra* Section I.B.

that the broad purpose evinced in the legislative history—attempting to avoid situations in which attorneys act at the expense of their clients—is not supported by the statutory text. CAFA is all bark with no proverbial bite. This Note provides a remedy to more closely align those incentive structures. If citizens truly do want to limit the availability of the lodestar method to alter class counsel’s incentives, they should attempt to change that through their elected representatives in Congress.

## I. COUPON SETTLEMENTS

### A. *Mechanics of the Coupon Settlement*

First, it is necessary to elaborate on the mechanics of the coupon settlement process to ensure a working understanding of the material at issue. Typically, once a class action suit is certified, settlement is the norm and trial is the exception.<sup>12</sup> In its simplest form, the defendant will offer the class coupons in exchange for the class dropping all claims against the defendant. Coupons have generally been accorded a capacious definition that allows for more than merely a discount on a product. For example, courts have ruled that a voucher falls within the definition of coupon pursuant to CAFA.<sup>13</sup> What constitutes a coupon has more to do with the “nonpecuniary” aspect of the relief than a rigid, generally accepted definition of coupon.<sup>14</sup>

Two scholars elaborated on the intricacies of the coupon settlement process as follows:

Generally, as part of the settlement, the defendant agrees to pay all costs of notice and administration as well as the plaintiffs’ attorneys’ fees. The defendant usually includes a cash component with the nonpecuniary settlement to finance these costs and fees. Typically, the defendant denies all wrongdoing, and the class releases the defendant from any and all liability in connection with the allegations in the complaint.<sup>15</sup>

### B. *Coupon Settlements in the Public Eye*

Coupon settlements have generally been greeted with significant skepticism and hostility in public discourse.<sup>16</sup> Behind these critiques is the fear

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12 See, e.g., Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 652 (2006) (“Certified class actions generally produce[ ] settlements and monetary recoveries.”).

13 See, e.g., *Sw. Airlines*, 799 F.3d at 706 (“We have rejected a narrow definition of ‘coupon’ by rejecting, for purposes of § 1712, a proposed distinction between ‘vouchers’ (good for an entire product) and ‘coupons’ (good for price discounts).” (citing *Redman v. RadioShack Corp.*, 768 F.3d 622, 636–37 (7th Cir. 2014))).

14 Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & CONTEMP. PROBS. 97, 98 (1997).

15 *Id.* at 102 (footnote omitted).

16 See, e.g., Willging & Wheatman, *supra* note 12, at 651 (“Courts and commentators have criticized the use of coupons, particularly nontransferable coupons with no market value, to settle class action lawsuits.”); Daniel Fisher, *Study Shows Consumer Class-Action Law-*

that attorneys will sacrifice their clients' interests (i.e., the best relief possible given the factual and legal circumstances of each case) for the advancement of their personal interests (i.e., obtaining the highest attorney fee award possible). Presumably for this reason, one scholar opined that if the attorneys get paid an exorbitant sum of money, "the reputation of the profession might suffer."<sup>17</sup> That is precisely why—in addition to normative concerns of fundamental fairness—finding the optimal sum is imperative.

This criticism was not confined solely to the public arena, however. Scholars and politicians have also argued that coupon settlements create incentives that work to the detriment of consumers who represent the class.<sup>18</sup> Generally, this opposition has been rather strong and even characterized as "vociferous" in some contexts.<sup>19</sup>

On the other end of the spectrum, however, scholars posit that this criticism is misguided—or at least overstated. In response to Congress's reliance on anecdotal evidence to address attorneys' fees and coupon settlements in CAFA,<sup>20</sup> scholars Thomas E. Willging and Shannon R. Wheatman gathered

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*yers Earn Millions, Clients Little*, FORBES (Dec. 11, 2013), <http://www.forbes.com/sites/danielfisher/2013/12/11/with-consumer-class-actions-lawyers-are-mostly-paid-to-do-nothing/> ("[C]oupon' settlements [are] where clients win the privilege of buying discounted products from the same companies that supposedly ripped them off, while the lawyers are paid in cash."); Jacob Shamsian, Opinion, *A Case Against Southwest Airlines Reveals the Biggest Problem with Consumer Lawsuits in America*, BUS. INSIDER (Aug. 26, 2015), <http://www.businessinsider.com/everything-wrong-with-class-action-lawsuits-in-america-2015-8> ("[C]ases where lawyers receive large cash payouts and consumers receive little to nothing have gotten more and more criticism recently."); Michelle Singletary, Opinion, *Class-Action Coupon Settlements Are a No-Win for Consumers*, WASH. POST (Apr. 27, 2011), [http://www.washingtonpost.com/business/economy/class-action-coupon-settlements-are-a-no-win-for-consumers/2011/04/27/AFJITL1E\\_story.html](http://www.washingtonpost.com/business/economy/class-action-coupon-settlements-are-a-no-win-for-consumers/2011/04/27/AFJITL1E_story.html) ("Except in the cases where a company is forced to end bad practices, consumers don't win in [coupon] settlements.").

17 *Developments in the Law: Class Actions*, 89 HARV. L. REV. 1318, 1611 (1976).

18 See, e.g., S. REP. NO. 109-14, at 16 (2005) (noting that, for the company, coupons are "a promotional opportunity and not a penalty"); Bruce L. Hay, *The Theory of Fee Regulation in Class Action Settlements*, 46 AM. U. L. REV. 1429, 1430 (1997) ("A widely recognized risk [of class action settlements] is that the class counsel may in effect . . . enter into a 'collusive' settlement, thus yielding the class members an amount much smaller than the actual value of their claims." (citing John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1367–75 (1995))); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 994 (2002) ("Coupon-based settlements illustrate how defendants have structured class action settlements to maximize the gains for the corporate defendant while minimizing any compensation to the class."). But see, e.g., Lisa M. Mezzetti & Whitney R. Case, *The Coupon Can Be the Ticket: The Use of "Coupon" and Other Non-Monetary Redress in Class Action Settlements*, 18 GEO. J.L. ETHICS 1431, 1434 (2005) ("[I]t [can be] advantageous to both sides to include non-cash compensation in settlements. In fact, a good coupon may make a settlement more attractive than pure cash to class members." (footnote omitted)).

19 Mezzetti & Case, *supra* note 18, at 1431.

20 See *infra* Section II.B.

empirical evidence concerning the class action legal landscape.<sup>21</sup> Their findings showed that most class action lawsuits did not even survive the certification stage of the class action process.<sup>22</sup> Typically, in lawsuits that *did* settle, members of the class received monetary sums.<sup>23</sup> Only nine percent of the cases in the survey featured a coupon settlement—either transferable or nontransferable.<sup>24</sup>

This evidence supports the notion that coupon settlements are not as prevalent as legal lore might suggest. After all, anecdotal evidence that incites indignation because of seemingly unfair outcomes does not address how frequently an injury occurs. Each injustice is presented on a case-by-case basis.<sup>25</sup> While there are compelling arguments concerning the prevalence and significance of coupon settlements in practice, the fact of the matter is that Congress responded.

## II. CAFA STATUTORY SCHEME AND SENATE REPORT 109-14

### A. *Relevant CAFA Provisions and Purposes*

Congress enacted CAFA in 2005 in part to address the aforementioned concerns.<sup>26</sup> Of particular relevance here are §§ 1711–12, which establish definitions<sup>27</sup> and govern the processes by which the court may calculate and award attorneys’ fees.<sup>28</sup>

The statutory scheme is relatively straightforward. Section 1712 is divided into five sections. The first three provisions guide courts by denoting permissible attorneys’ fees calculations and, in certain circumstances, when to employ them.<sup>29</sup> Section 1712(a) provides guidance for contingent fees (i.e., where the class counsel will recover a specified amount in proportion to the class’s recovery);<sup>30</sup> § 1712(b) covers “[o]ther” attorneys’ fee awards;<sup>31</sup> and § 1712(c) governs procedures where settlement relief comes in the form

21 *See generally* Willging & Wheatman, *supra* note 12.

22 *Id.* at 652.

23 *Id.*

24 *Id.* These findings are consistent with empirical evidence displayed in the Senate report—although the Senate did not cite the name of the source. S. REP. NO. 109-14, at 77 (2005) (“[S]ettlements with coupons account only for about 10 percent of all class-action settlements.”).

25 Imagine, for example, that one thousand class action lawsuits were filed in Year A. If you were presented with the facts of three such lawsuits that resulted in manifest injustice—in this case, plaintiffs recovering virtually worthless coupons while the class counsel receive exorbitant sums of money—you might be outraged. Those three stories *do not* convey, however, that there may have been nine hundred ninety-seven perfectly just outcomes. Just because something happens does *not* mean that it happens frequently.

26 Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

27 28 U.S.C. § 1711 (2012).

28 *Id.* § 1712.

29 *Id.* §§ 1712(a)–(c).

30 *Id.* § 1712(a). Due to the importance of these statutory provisions in this Note, the relevant statutory provisions appear below. Section 1712(a) reads as follows:

of coupons *and* some form of injunctive relief.<sup>32</sup> Section 1712(e) adds extra strength to combat exorbitant attorneys' fees by requiring a hearing to determine whether "the settlement is fair, reasonable, and adequate for class members."<sup>33</sup>

In CAFA, then, there are two important mechanisms by which the court can mitigate attorneys' fees: (1) the court must approve attorneys' fees where (a) coupons were the relief obtained; and (b) the attorneys' fees were calculated by using the lodestar method rather than a contingency fee;<sup>34</sup> and

(a) Contingent Fees in Coupon Settlements.—If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

*Id.*

31 *Id.* § 1712(b). Section 1712(b) reads:

(b) Other Attorney's Fee Awards in Coupon Settlements.—

(1) In General.—If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

(2) Court Approval.—Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

*Id.*

32 *Id.* § 1712(c). Section 1712(c) reads:

(c) Attorney's Fee Awards Calculated on a Mixed Basis in Coupon Settlements.—If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief—

(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

*Id.*

33 *Id.* § 1712(e). Section 1712(e) provides:

(e) Judicial Scrutiny of Coupon Settlements.—In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

*Id.*

34 *Id.* § 1712(b).

(2) the court must hold a hearing to determine whether the proposed settlement is “fair, reasonable, and adequate for class members.”<sup>35</sup>

CAFA also contained a “Findings and Purposes” section that was incorporated into the notes following § 1711.<sup>36</sup> First, Congress found that “[o]ver the past decade, there have been abuses of the class action device that have . . . undermined public respect for our judicial system.”<sup>37</sup> Further, Congress found the following: “[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . [class] counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value . . . .”<sup>38</sup> Using broad language, Congress found that these “[a]buses in class actions undermine the national judicial system.”<sup>39</sup>

### *B. Senate Report 104-19: Attempting to Resolve Ambiguities*

The report that accompanied CAFA shines some light on Congress’s intent when drafting the statute.<sup>40</sup> According to Congress, class actions “were designed to provide a mechanism by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same

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35 *Id.* § 1712(e). Whether this is redundant is an interesting point. When class actions that would bind class members settle, courts must already hold a hearing to determine whether the settlement is “fair, reasonable, and adequate.” FED. R. CIV. P. 23(e)(2). However, the answer to that inquiry is beyond the scope of this Note.

36 28 U.S.C. § 1711 (2012) (Findings and Purposes).

37 *Id.*

38 *Id.*

39 *Id.*

40 S. REP. NO. 109-14 (2005). The utility of this Senate report, however, in discerning Congress’s intent has been subject to debate. See Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1619 n.11 (2006). The report is dated February 28, 2005, while Congress enacted the statute on February 18, 2005. *Id.* Several courts have weighed in on the issue. The United States District Court for the Northern District of California elaborated:

[The CAFA Senate] report is of dubious value as an interpretive aid. It was issued ten days *after* the president signed the bill into law. There is thus no reason to think it played any role in legislators’ interpretation of the bill, their decisions about whether to support it or the president’s conclusion that he should sign it.

Hangarter v. Paul Revere Life Ins. Co., No. C 05-04558 WHA., 2006 WL 213834, at \*2 (N.D. Cal. Jan. 26, 2006). *But see* Estate of Pew v. Cardarelli, 527 F.3d 25, 32–33 (2d Cir. 2008) (noting that it is “appropriate” to examine the report when interpreting “particularly knotty provisions”); Lowery v. Ala. Power Co., 483 F.3d 1184, 1206 n.50 (11th Cir. 2007) (“In interpreting CAFA, courts have taken pains to discuss the fact that S. Rep. 109-14 is dated February 28, 2005, ten days after CAFA was signed into law. While the report was issued ten days following CAFA’s enactment, it was submitted to the Senate on February 3, 2006—while that body was considering the bill.” (citation omitted)). To make explicit what is implicit, the Second and Eleventh Circuits’ analyses are predicated upon the assumption that legislators reviewed the report before voting on CAFA.



harm and seek redress for their injuries.”<sup>41</sup> Class actions, it said, “are only beneficial when the class members are kept a priority throughout the process.”<sup>42</sup>

Turning more specifically to the coupon settlement attorneys’ fees provisions, the drafters of the report noted that Congress added them “to ensure that such fee awards are consistent with the benefits afforded class members *or* the amount of real work that the class counsel have performed in connection with the litigation.”<sup>43</sup> Thus, there were two purposes of the coupon settlement provisions: (1) to ensure that the attorneys were not receiving large sums of money while the class members themselves received worthless remedies; or (2) to ensure that the class counsel were adequately compensated for their real work.<sup>44</sup>

Congress then turned to the factual findings that served as the stimuli for the coupon settlement provisions. In an effort to display some of these findings, Congress listed dozens of instances in which attorneys were awarded exorbitant sums of money while the members of the class obtained minimal relief.<sup>45</sup> The report juxtaposed the non-monetary relief obtained by the class members to the cash received by attorneys,<sup>46</sup> presumably to convey that the lawyers were the real beneficiaries of the litigation.

Speaking more broadly about the purpose of the statute, § 1712, the report said, “is aimed at situations in which plaintiffs’ lawyers negotiate settlements under which class members receive nothing but essentially valueless coupons, while the class counsel receive substantial attorneys’ fees.”<sup>47</sup> The report further elaborated on concerns implicated by such a situation, labeling it as an “inequit[y].”<sup>48</sup>

So, one thing is clear: Congress evinced an intention to stop practices by which attorneys make a huge profit while clients obtain a relatively worthless

41 S. REP. NO. 109-14, at 4; *see also, e.g.*, DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS 68 (2000) (“[I]f [a] loss is small, it is less likely to be recognized by those affected, and it is less likely that anyone will come forward to claim compensation even if many individuals or businesses are affected by it.”).

42 S. REP. NO. 109-14, at 4.

43 *Id.* at 5 (emphasis added). Of extreme importance for our interpretive analysis here is use of the disjunctive (“or”) instead of the conjunctive (“and”). The purpose is *not* to achieve both outcomes, but rather one or the other.

44 Presumably, this is an effort to combat the lawyers’ incentive to exponentially increase billable hours in an effort to reap an enormous profit while expending less effort to accomplish a desirable outcome for the class.

45 S. REP. NO. 109-14, at 15–20. *But see* Willging & Wheatman, *supra* note 12, at 651–52. For a brief discussion of the relevance of anecdotal information in our interpretive analysis, *see supra* note 25.

46 S. REP. NO. 109-14, at 15–20.

47 *Id.* at 30.

48 *Id.* *See also In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1179 (9th Cir. 2013) (“Indeed . . . the legislative history of CAFA clarifies [that] the attorneys’ fees provisions of § 1712 are intended to put an end to the ‘inequities’ that arise when class counsel receive attorneys’ fees that are grossly disproportionate to the actual value of the coupon relief obtained for the class.” (quoting S. REP. NO. 109-14, at 29–32)).

recovery. The rationale underlying such an intention is relatively straightforward: fundamental notions of fairness. If attorneys are supposed to serve their clients, allowing them to receive exorbitant fees while the clients receive virtually nothing is unfair. The possibility of collusion between the attorney and the defendants exacerbates that fear.

This relatively broad purpose raises the following question: Did Congress intend to abandon the lodestar method *entirely* when calculating the attorneys' fees in settlements involving the distribution of coupons to consumers? Such a solution does not seem unreasonable given the broader purpose of the statute. If you prohibit lawyers from using the lodestar method, attorneys likely will not drive up costs at the expense of their clients; their earnings will be based upon a contingency fee calculated as a percentage of the coupons redeemed by the class.

On the other hand, there may be situations in which attorneys will be overcompensated or undercompensated for their work. The theory that people should be adequately compensated for their work is deeply rooted in Anglo-American law.<sup>49</sup> The Third Circuit, in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*<sup>50</sup>—where, as one scholar remarked, the lodestar method was perhaps “best articulated”<sup>51</sup>—posited, “[i]n detailing the standards that should guide the award of fees to attorneys successfully concluding class suits, by judgment or settlement, we must start from the *purpose* of the award: to compensate the attorney for the reasonable value of services benefitting the unrepresented claimant.”<sup>52</sup>

Seeking to balance these competing interests, Congress seemed *not* to completely preclude the lodestar method of calculating attorneys' fees—although we will see that it did so in opaque language.

First—and most importantly—Congress explicitly contemplated situations in which parties to a class action coupon settlement could calculate attorneys' fees on a lodestar basis.<sup>53</sup> The report expounded upon CAFA as follows:

In some cases, the proponents of a class settlement involving coupons may decline to propose that attorney's fees be based on the value of the coupon-based relief provided by the settlement. Instead, the settlement proponents may propose that counsel fees be based upon the amount of time class counsel reasonably expended working on the action. Section 1712(b) confirms the appropriateness of determining attorneys' fees on this basis in connection with a settlement based in part on coupon relief. As is stated on

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49 Cf. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (“The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.”).

50 487 F.2d 161 (3d Cir. 1973).

51 WILLGING & WEEKS, *supra* note 4, at 31.

52 *Lindy Bros.*, 487 F.2d at 167 (emphasis added). Notice, however, that the excerpt does not focus solely on compensating attorneys for their labor. Instead, the court ties in benefits to the claimant(s).

53 S. REP. NO. 109-14, at 30 (clarifying that § 1217(b) allows such a scenario).

its face, nothing in this section should be construed to prohibit using the “lodestar with multiplier” method of calculating attorney’s fees.<sup>54</sup>

This provision attempts to clarify the ambiguity in CAFA. Based on this excerpt, parties have the opportunity to bargain for whatever method of calculating attorneys’ fees that they choose. By saying that the parties may recommend that “counsel fees be based upon the amount of time class counsel reasonably expended working on the action,” Congress indeed embraced the lodestar method.<sup>55</sup> Use of a contingent fee, according to this part of the report, is *discretionary* rather than *mandatory*.

But there are some snippets of the report where Congress was unclear. First, this option to use the lodestar method seems antithetical to the broad purpose of the statute to end the practice of attorneys receiving exorbitant fees at the expense of their clients. Mandating a contingency fee would seem to effectuate that purpose. Making it discretionary, on the other hand, seems to be “all bark” without any bite. Lawyers will still have the incentive to ratchet up their fees.

Second, the report contains language that can be construed to back away from the discretionary approach to calculating attorneys’ fees and instead mandate that the fees be calculated on a contingency basis. While elaborating on § 1712(c), the report said, “[i]f the plaintiffs’ attorneys secure a mixed award, i.e. coupons and an injunction, then part of their fee will be based on the coupons redeemed and part will be based on the reasonable expenditure of time.”<sup>56</sup> This cryptic language suggests that the fee should be based on a contingency basis for work that resulted in coupon relief. The lodestar method would be more appropriate for work expended in the pursuit of injunctive relief.

Such was the legal landscape at the time of the enactment of CAFA. The courts were then left to interpret its ambiguous provisions.

### III. INTERPRETING THE STATUTE: CIRCUIT SPLITS AND METHODS OF INTERPRETATION

#### A. *The Ninth Circuit Approach*

##### 1. The Settlement and Procedural History

In 2013, the Ninth Circuit weighed in on attorneys’ fees in coupon settlements in *In re HP Inkjet Litigation*.<sup>57</sup> The facts of the case are relatively straightforward. The case was an aggregation of three individual class actions, all involving the broad doctrine of “unfair business practices.”<sup>58</sup>

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54 *Id.*

55 *Id.*

56 *Id.* at 91–92.

57 716 F.3d 1173 (9th Cir. 2013).

58 *Id.* at 1176. In the first action, plaintiffs alleged that HP misled consumers into unnecessarily replacing their ink cartridges, depriving them of additional printing. *Id.* n.l. The second action alleged that HP failed to disclose that its colored printers printed black

After broad and “aggressive[ ]” discovery, the parties entered into a global settlement.<sup>59</sup> The terms of the settlement were as follows:

In exchange for the plaintiffs’ release of all claims against it, HP agreed to: (1) provide eligible class members with up to \$5 million in “e-credits” redeemable for printers and printer supplies on HP’s website; (2) make additional disclosures on its website, in its user manuals, or in its software interfaces to explain its business practices to future purchasers of HP printers and ink; (3) pay up to \$950,000 for class notice and settlement administration costs; and (4) pay up to \$2,900,000 in attorneys’ fees and expenses. The “e-credits”—a euphemism for coupons—expire six months after issuance, are non-transferable, and cannot be used with other discounts or coupons.<sup>60</sup>

The class counsel filed over seven million dollars in fees and expenses.<sup>61</sup> The district court opined that the plaintiffs’ claims were not strong.<sup>62</sup> After the parties to the lawsuit negotiated a settlement deal, the district court held a fairness hearing to determine whether the settlement was “fair, reasonable, and adequate” pursuant to Rule 23(e)(2) of the Federal Rules of Civil Procedure.<sup>63</sup>

The district court then issued a separate ruling on the reasonableness of the attorneys’ fees being sought by the class counsel. The lodestar method, according to the district court, is allowable under § 1712(b)(1) of CAFA.<sup>64</sup> According to the court, what is “reasonable” should be read in light of the benefits conferred on the class.<sup>65</sup>

## 2. Majority Opinion

On appeal, the Ninth Circuit confronted the question whether the award of attorneys’ fees violated CAFA because they were calculated using the lodestar method instead of a contingency fee.<sup>66</sup> The court began its discussion by referencing CAFA’s legislative purpose. According to the court, CAFA was passed “primarily to curb perceived abuses of the class action device.”<sup>67</sup> It was very clear from the beginning of the opinion that this pur-

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and white images with colored ink. *Id.* Finally, the third action alleged that HP concealed the fact that its ink cartridges actually had an expiration date and were thus incapable of printing after said date. *Id.*

59 *Id.*

60 *Id.*

61 *Id.* at 1177.

62 *Id.* at 1176–77.

63 FED. R. CIV. P. 23(e)(2).

64 *HP Inkjet*, 716 F.3d at 1177.

65 *Id.*

66 *Id.* at 1178 (“Our sole task on this appeal is to interpret and apply the attorneys’ fees provisions of § 1712.”).

67 *Id.* at 1177 (quoting *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952 (9th Cir. 2009)).

pose was used as a broad interpretive tool for the court as it progressed through its analysis.<sup>68</sup>

The court then began its interpretation of the statute. The first step in its analysis was to determine whether the statutory text is clear. If so, then the analysis was over. If not, however, the court would have to turn to use other interpretive tools to answer the issue presented in the case.<sup>69</sup> The court posited that the language is *not* clear and that it would have to employ different modalities of interpretation to ascertain Congress's true legislative intent.<sup>70</sup>

The court then interpreted the text of § 1712(a)<sup>71</sup>—the provision concerning contingency fees. Specifically, the court sought to define the phrase “attributable to.” After citing multiple dictionary definitions, the court arrived on the following construction: “[A]ttorneys’ fees are ‘attributable to’ an award of coupons where ‘*the* [singular] award of the coupons’ is the condition precedent to the award of attorneys’ fees.”<sup>72</sup> Combining this interpretation of “attributable to” with the mandatory connotations of the word “shall,” the court arrived at the following proposition: if attorneys’ work results in coupon relief, then the attorneys’ fees shall be calculated using a contingency fee.<sup>73</sup>

This argument is predicated on an important assumption: attorneys’ fees should be calculated according to the relief obtained by the class, not just the amount of work expended. To this end, the court elaborated: “An attorney who works incredibly hard, but obtains nothing for the class, is not entitled to

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68 *Id.* at 1179 (noting that the purpose of the statute “cannot be overemphasized”). Whether the use of legislative history or “legislative intent” is a useful tool for interpreting a statute is a question that has been “a classic subject of debate.” NORMAN J. SINGER & J.D. SHAMBLE SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 45:6, at 41 (7th ed. 2007). Scholars say that the intent of the legislature is the “most often recited” criterion for ascertaining the statute’s meaning. *Id.* § 45:5, at 28. These scholars opine: “It has also been stated to show that all rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used and that language must be construed in the light of the intended purpose.” *Id.* § 45:5, at 36. Not all courts and commentators view legislative history as an effective tool, however. *See, e.g.*, FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 30 (2009) (noting that textualists believe that the effort to accurately discern legislative intent is “meaningless” and “incoherent”); *id.* at 61 (“Even when the legislative intent may be discerned, as a theoretical manner, some question the ability of the judiciary to do so.”); JOSEPH L. GERKEN, WHAT GOOD IS LEGISLATIVE HISTORY? 1 (2007) (noting that Justice Scalia rejected using legislative history as an interpretive tool because it can “mislead[ ]” and be “unreliable” to judges). Further, there are inherent difficulties in accurately identifying what a multimember body—such as Congress—intended. *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) (“Intent is elusive for a natural person, fictive for a collective body.”).

69 *HP Inkjet*, 716 F.3d at 1180–81.

70 *Id.* at 1181.

71 *See supra* note 30.

72 *HP Inkjet*, 716 F.3d at 1181 (alteration in original) (quoting 28 U.S.C. § 1712(a) (2012)).

73 *Id.* at 1182–83.

fees calculated by any method. . . . Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results."<sup>74</sup>

Still, § 1712(a) does not exist in a vacuum; the court then had to reconcile it with other provisions in the statute to make the statute function as a whole. The court held that "§ 1712(b) applies in situations where a coupon settlement also provides for non-coupon relief, such as equitable or injunctive relief."<sup>75</sup>

To get to this result, the court used § 1712(a) as its anchor. The entire statute was to be read in harmony with the mandate contained in Section A. The logic of the court is as follows: § 1712(a) requires that any attorneys' fee award that results in coupon relief must be calculated using the lodestar method. Section 1712(b) says that if the contingency fee is not used, then the fee must be calculated using the lodestar method. Since the contingency fee is always used for coupons, the only time you can use the lodestar method is when the settlement provides for injunctive relief in addition to coupon relief.<sup>76</sup>

Finally, the court held that § 1712(c)'s function is to provide a simple formula the courts will use to get the final number of attorneys' fees. As the court posited, "the total amount of fees awarded under subsection (c) will be the sum of the amounts calculated under subsections (a) and (b)."<sup>77</sup> That is the lone function of that subsection.

### 3. Dissenting Opinion

Judge Berzon's dissenting opinion is important for several reasons. First, as with any dissent, it provides compelling legal arguments to counter the majority's analysis. It was also referenced in the Seventh Circuit opinion.

Judge Berzon began her dissent by positing that the majority's interpretation of the statute runs counter to "what the statute says."<sup>78</sup> According to Judge Berzon, the statute allows the parties to choose what method to employ when calculating the fees.<sup>79</sup>

Beginning her rigorous textual analysis, Judge Berzon pointed out that all of § 1712, since it is entitled "Coupon settlements," refers to coupon settlements, regardless of whether they comprise the entire relief award.<sup>80</sup> She provided dictionary definitions of nearly every word in the statute, particularly from Black's Law Dictionary. "[A]ttributable to" for Judge Berzon simply supplied the connection between the value of attorneys' fees and the value of coupons, leading her to conclude that § 1712(a) "is concerned with

74 *Id.* at 1182.

75 *Id.* at 1183.

76 *Id.*

77 *Id.* at 1185.

78 *Id.* at 1187 (Berzon, J., dissenting).

79 *Id.* at 1191 ("[T]he provisions permit *two* methods—not one—of calculating attorney's fees in cases involving coupon settlements: the percentage-of-recovery method . . . and the lodestar, payment-for-reasonable-time-worked method . . .").

80 *Id.* at 1192 (quoting 28 U.S.C. § 1712 (2012)).

those situations in which the *value* of fees, in whole or in part, is derived from the *value* of the coupons provided.”<sup>81</sup> She also cited snippets of legislative history.<sup>82</sup>

Section 1712(a), then, functioned very differently for Judge Berzon than for the majority. Her interpretation was that *if* the parties elect to award attorneys’ fees on a contingency basis, *then* those awards are to be calculated using the value of the coupons actually redeemed by the class. At the end of the day, the choice to employ a contingency fee or the lodestar method remained entirely up to the parties. Conversely, the majority asserted that *if* the attorneys’ work resulted in coupon relief, *then* the court must use a contingency fee—and only a contingency fee.

Turning to § 1712(b), Judge Berzon noted that the subsection governed “other” attorneys’ fees—in this instance, using the lodestar method—“*in coupon settlements*,” countering the majority’s assertion that subsection (b) applied *only* to equitable relief obtained for the class.<sup>83</sup> The fact that Judge Berzon interpreted all of § 1712 to apply to coupon settlements factored heavily into her analysis.<sup>84</sup> If subsection (b) applies in instances in which coupons are the only relief obtained, it would not be logical to follow the majority’s approach, which applied subsection (b) in cases where there is equitable relief.

Judge Berzon concluded that § 1712(c) applies to situations where the methods of calculating attorneys’ fees are mixed (i.e., when the court uses a contingency fee and the lodestar method) instead of when the relief is mixed (i.e., coupon and injunctive relief).<sup>85</sup>

Finally, Judge Berzon included excerpts from the Senate Report accompanying CAFA to bolster her argument, both of which were referenced earlier.<sup>86</sup> These excerpts indicate that Congress’s intent was not as sweeping as the majority would suggest. Congress wanted to accord courts adequate discretion to compensate attorneys appropriately on a case-by-case basis.<sup>87</sup>

### B. *The Seventh Circuit Approach*

Two years after the Ninth Circuit’s decision, in *In re Southwest Airlines Voucher Litigation*,<sup>88</sup> the Seventh Circuit issued an opinion that ran counter to the Ninth Circuit’s interpretation of the statute.

81 *Id.* at 1194.

82 *Id.* (positing that the legislative history invoked by the majority actually supports her argument).

83 *Id.* at 1195 (alteration in original) (quoting 28 U.S.C. § 1712(b)).

84 *Id.* at 1195–96.

85 *Id.* at 1196 (“[W]hat is *mixed* in instances covered by § 1712(c) is the *method* for calculating fees . . .”).

86 *Id.* at 1198–99; *supra* text accompanying notes 43, 54.

87 See *HP Inkjet*, 716 F.3d at 1198–99 (Berzon, J., dissenting).

88 799 F.3d 701 (7th Cir. 2015).

## 1. The Settlement and Procedural History

The litigation at issue arose out of drink vouchers distributed by Southwest Airlines. The company issued these vouchers—good for a “free in-flight alcoholic drink”—to passengers who purchased certain tickets with the airline.<sup>89</sup> These vouchers contained no expiration date and were honored for some time. However, in August of 2010, Southwest stopped honoring them.<sup>90</sup> Two plaintiffs filed a class action lawsuit, and the parties quickly settled. The terms of the settlement were as follows:

First, it requires Southwest to issue replacement coupons to each class member who files a claim form. The coupons are transferable and good for one year on any Southwest flight. Second, the settlement provides injunctive relief to prevent similar controversies over expiration dates if Southwest issues new coupons in the future. Third, the settlement provides for incentive awards to the two lead plaintiffs of \$15,000 each.<sup>91</sup>

In addition, Southwest agreed to pay the attorneys up to three million dollars and thirty thousand dollars worth of expenses.<sup>92</sup>

The district court approved the settlement and opined that it provided virtually complete relief to the class.<sup>93</sup> The district court also determined that the use of the lodestar method for this coupon settlement<sup>94</sup> was permissible under § 1712, and finally settled on attorneys’ fees totaling \$1,649,118.<sup>95</sup>

## 2. Opinion

The court then undertook to determine whether § 1712(a) precludes the use of the lodestar method when calculating attorneys’ fees in a settlement that provides for coupons.

First, the court opined that the language of the statute was the starting point for its analysis. Examining the language of § 1712(a), it drew one initial conclusion: the statute precludes the parties from making a contingency fee a percentage of the coupons *made available* to the class, as this was, according to the court, the “most abusive method for calculating a fee in a coupon settlement.”<sup>96</sup>

Instead of mandating that courts use a contingency calculation when coupons are obtained, the court made the following conclusion: “[I]f any portion of the fee is attributed to the coupon benefits, *then* that portion of

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89 *Id.* at 704.

90 *Id.*

91 *Id.* at 705.

92 *Id.*

93 *Id.*

94 Again, because the term “coupon” has been given a broader definition, these vouchers qualified as coupons.

95 *Sw. Airlines*, 799 F.3d at 705.

96 *Id.* at 708.



the fee must be based on the coupons used.”<sup>97</sup> Directly after asserting that, however, the court conceded that § 1712(a) is ambiguous when read in isolation. Only upon considering the subsection within the broader statutory scheme can one truly discern its meaning.<sup>98</sup> According to the court, it is difficult to reconcile § 1712(b) and (c) with the Ninth Circuit’s interpretation of subsection (a).

Moving to subsection (b)(1), the court posited that it “contemplates and allows the possibility that ‘a portion of the recovery of the coupons’ will *not* be used to determine the fee for class counsel, and that instead the lodestar method will be used.”<sup>99</sup> The language simply allows parties to employ the lodestar method when calculating attorneys’ fees.

Turning then to subsection (c), the court invoked the “canon against surplusage,” which is a canon of statutory interpretation that assumes legislators do not enact two provisions of the same section or subsection of a statute that are superfluous.<sup>100</sup> The unique role each subsection plays in the statute are as follows:

Subsection (a) prohibits basing a percentage-of-recovery fee on the face value of all coupons made available. Subsection (b) says that lodestar is the only permissible alternative to percentage-of-coupons-used. And subsection (c) allows, though does not require, a blend of the two methods when a coupon settlement also provides some equitable or cash relief.<sup>101</sup>

#### IV. EVALUATING THE LEGAL REASONING EMPLOYED IN THE CIRCUIT SPLIT

First—and most importantly—the language of the statute, when read as a whole, is relatively clear. The most important rule of statutory construction is to read the statute according to its plain meaning.<sup>102</sup> Read in a vacuum,

97 *Id.*

98 *Id.* at 708–09 (“The meaning of subsection (a) becomes clearer, however, when we look at how it fits together with the other fee provisions in subsections (b) and (c). . . . In context, the meaning of subsection (a) becomes clearer and the Ninth Circuit’s reading becomes less persuasive.”).

99 *Id.* at 709 (quoting 28 U.S.C. § 1712(b)(1) (2012)).

100 *Id.* at 710.

101 *Id.*

102 *See, e.g.,* YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008) (“The starting point in statutory construction is the language of the statute itself. The Supreme Court often recites the ‘plain meaning rule,’ that, if the language of the statute is clear, there is no need to look outside the statute to its legislative history in order to ascertain the statute’s meaning. . . . More often than before, statutory text is the ending point as well as the starting point for interpretation.”); Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1972 (2007) (“The most obvious interpretive method, typically considered the beginning of the analysis, relies on the words of the text itself. Some argue that reliance on the text should also serve as the end of the analysis . . .”). Judge Friendly, a long-time judge on the United States Court of Appeals for the Second Circuit, wrote that former Supreme Court Justice Felix Frankfurter claimed that there are three “imperatives” of statutory interpretation: “(1) Read the statute; (2) read the statute; (3) read the statute!”

§ 1712(a) can be interpreted according to the Ninth Circuit’s approach. If coupons are the relief obtained, any attorneys’ fee award attributable to the award of coupons shall be calculated according to a contingency fee.

However, the statutory scheme must factor into the analysis; after all, § 1712(a) does not exist in a vacuum. Section 1712(b), entitled “Other Attorney’s Fee Awards in Coupon Settlements,” provides:

If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons [i.e., a contingency fee] is not used to determine the attorney’s fee . . . any attorney’s fee award shall be based upon the amount of time class counsel reasonably expended working on the action.<sup>103</sup>

This section of the statute conveys—albeit convolutedly—that if (1) coupons are the relief obtained, and (2) a contingency fee is not used, then the parties are accorded the autonomy to calculate attorneys’ fees based upon the lodestar method.

Further, the canon against surplusage supports the Seventh Circuit’s approach. In support of its argument, the Ninth Circuit opined that it “must . . . mak[e] every effort not to interpret a provision in a manner that renders other provisions of the same statute . . . superfluous.”<sup>104</sup> Interestingly, that reasoning supports the Seventh Circuit’s approach. Think about it this way: if § 1712(a) governs the award of attorneys’ fees and § 1712(b) is the regime for injunctive relief, § 1712(c) serves no function.<sup>105</sup> That section governs “Attorney’s Fee Awards Calculated on a Mixed Basis in Coupon Settlements,” which would already be governed under the Ninth Circuit’s approach to § 1712(b). If we assume that legislators are sophisticated enough actors to give every section and subsection a function—*especially* in the same section—then the Ninth Circuit’s approach is untenable. Textually and structurally speaking, the Seventh Circuit has the better approach.

Assuming *arguendo* that the court must draw on other interpretive rules to ascertain Congress’s intent, reliance on legislative history yields the same result. The Senate report clearly contemplated a choice between the lodestar method and a contingency fee by (1) claiming that the purpose of the statute was to “ensure that such fee awards are consistent with the benefits

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HENRY J. FRIENDLY, BENCHMARKS 202 (1967). *But see, e.g., id.* (“There are times when adherence to [Frankfurter’s] rule can be not only the first step in the interpretive process but the last. However, this will not usually be so.”).

103 28 U.S.C. § 1712(b)(1).

104 *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1184 (9th Cir. 2013) (alteration in original) (quoting *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991)). In response, the Seventh Circuit pointed out that the Ninth Circuit failed to take § 1712(a)’s prohibition on calculating fees according to the *face* value of the coupons into consideration. *Sw. Airlines*, 799 F.3d at 710 n.2. This gives the subsection a function. For a discussion on the canon against surplusage, see *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013); *id.* at 1181–82 (Sotomayor, J., dissenting).

105 This was echoed by the Seventh Circuit. *Sw. Airlines*, 799 F.3d at 710 (“One basic tool in statutory interpretation is the canon against surplusage. . . . Under [the Ninth Circuit’s approach], subsection (c) seems to become surplusage.”).

afforded class members *or* the amount of real work that the class counsel have performed,”<sup>106</sup> and (2) explicitly describing a scenario where the parties have the discretion to choose.<sup>107</sup> Both the Seventh Circuit and Judge Berzon used at least one of these snippets of legislative history to bolster their arguments.<sup>108</sup>

## V. PROBLEMS WITH CURRENT DOCTRINE AND SUGGESTIONS FOR IMPROVEMENT

As discussed, the Seventh Circuit’s approach is sounder under principles of statutory interpretation.<sup>109</sup> The text—when interpreted in harmony with the entirety of the statute—and legislative history both support its outcome.

When given this reading, however, the coupon settlement provisions of CAFA are underinclusive. In other words, CAFA does not regulate enough of the problems presented by coupon settlements.<sup>110</sup> Congress identified problematic incentive structures (attorneys having the incentive to collect exorbitant fees, often at the expense of clients) and sought to remedy that problem by allowing that conduct at the discretion of the parties.<sup>111</sup> Congress should amend CAFA to adequately address the flawed incentive structures.

Before proceeding with a solution, there are several concerns with the current scenario that cut in favor of amending CAFA. First—as is the case with all circuit splits—this circuit split creates and perpetuates uncertainty. Parties to the litigation must bargain in the midst of uncertainty and have to essentially guess what reading of the statute courts will apply. Further, courts are left without clear and coherent interpretive rules to apply in a given situation. Even though the Seventh Circuit arrived at the opposite conclusion of the Ninth Circuit, it found the Ninth Circuit’s interpretation reasonable.<sup>112</sup>

106 S. REP. NO. 109-14, at 5 (2005) (emphasis added).

107 *Id.* at 30 (noting that parties may decline to propose a contingency fee).

108 *Sw. Airlines*, 799 F.3d at 709 (invoking the report language that explicitly contemplates the discretion to choose); *HP Inkjet*, 716 F.3d at 1198 (Berzon, J., dissenting) (noting the report’s use of the disjunctive rather than the conjunctive); *id.* at 1199 (also invoking the report language that explicitly contemplates the discretion to choose).

109 *See supra* Part IV.

110 This is not to say, however, that CAFA was entirely ineffective. For example, § 1712(a) says that if the settlement *does* include a contingency fee, such a fee must be calculated as a percentage of the coupons *actually redeemed* rather than simply *made available* to the entire class. 28 U.S.C. § 1712(a) (2012). That provision incentivizes an attorney to obtain coupons clients will actually redeem. This, to some extent, does achieve the statute’s stated purpose to compensate attorneys in correlation to the benefits received by the class.

111 *Id.* § 1712(b)(1) (“If a . . . settlement . . . provides for a recovery of coupons . . . and a portion of the recovery of the coupons is not used to determine the attorney’s fee . . . any attorney’s fee award shall be based upon the amount of time . . . reasonably expended . . .”).

112 *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 708 (7th Cir. 2015) (“It can be fairly read as the *HP Inkjet* majority read it, but that is not the only possibility.”). It remains

It will be difficult for courts to expound upon a statute that is susceptible to two reasonable interpretations.

Second, the incentive structures inherent in coupon settlements are problematic when viewed in light of the attorney's role in the adversarial system. In our system, the attorney has a duty to zealously advocate for his client.<sup>113</sup> Several scholars have opined that, more generally, class actions alter these incentives and create troubling concerns.<sup>114</sup> Certainly, coupon settlements go a step further to misalign attorney-client incentives. It is difficult for an attorney to adequately represent his client's interests when those interests may be deliberately in conflict with his own.

Third, several scholars have questioned the adequacy of coupons in redressing plaintiffs' grievances.<sup>115</sup> Scholars posit that defendants use coupons in a way that confers as little of a benefit as possible to plaintiffs (e.g., by imposing non-transferability restrictions and expiration dates).<sup>116</sup> Certain scholars go even further and claim that coupons are actually business opportunities for companies.<sup>117</sup> This seems antithetical to the American system of remedies, which generally views compensatory damages as a means to make plaintiffs whole after suffering an injury at the hands of defendants.<sup>118</sup> If

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unclear what interpretive regime—the Seventh Circuit or the Ninth Circuit—will rule the day.

113 See, e.g., *In re McConnell*, 370 U.S. 230, 236 (1962) (“[A] vigorous, independent bar [is an] indispensable part [ ] of our system of justice.”); STEPHAN LANDSMAN, AM. BAR ASS'N SECTION OF LITIG., READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 179 (1988) (“Zeal and confidentiality have come to be seen as the hallmarks of the adversarial advocate's duty to his client.”); FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 91 (1839) (“[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his *first and only duty* . . . .” (emphasis added) (quoting 2 A FULL REPORT OF THE TRIAL OF HER MAJESTY CAROLINE AMELIA ELIZABETH, QUEEN OF ENGLAND, BEFORE THE PEERS OF GREAT BRITAIN 1194 (1820) (statement of Lord Brougham))); PROFESSIONAL LIABILITY OF LAWYERS 266–68 (Dennis Campbell & Christian T. Campbell eds., 1995) (discussing various duties lawyers owe their clients).

114 See Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1596–1602 (2008) (summarizing critiques of lawyers' roles in class actions); Steven B. Handler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1343 (2005) (“[C]lass actions can provide incentives that pervert the civil justice system . . . .”); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1053 (1996) (characterizing current practices as “[l]awyer self-dealing on a grand scale”); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 441 (1996) (noting that current legal mechanisms are “not effective” for class members when defendants insist that the class should be certified only for settlement).

115 See *supra* note 18.

116 For a more thorough discussion of coupons and their pros and cons, see *supra* text accompanying notes 16–25.

117 See *supra* text accompanying notes 16–25.

118 Douglas Laycock described this basic remedial purpose as the “rightful position” principle. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 14–15 (4th ed. 2010). Specific-

coupons are more of a business opportunity for defendants, encouraging their use may lead to windfalls.<sup>119</sup>

Fourth, clients who have been aggrieved by these practices still suffer harm. Some scholars argue that empirical evidence suggests that these harms are overstated.<sup>120</sup> That argument certainly carries weight given its reliance on empirical data, but it does not capture the entire picture. An injury's infrequency does not necessarily render it insignificant; it does not detract from the fact that an injury is still being suffered.

Keeping these concerns in mind, this Part will propose a solution. As mentioned earlier, coupon settlements implicate two competing interests. First, any reform should attempt to align as closely as possible the incentives of the class and those of class counsel. As one scholar remarked, "courts should not award fees larger than the amounts which are required to fulfill [their] purpose."<sup>121</sup> At the same time, however, the question of attorneys' compensation lurks in the background. Any statute that alters the existing law should generally ensure that attorneys are adequately compensated for their labor. Any legislation should keep in mind these competing interests and accommodate them as much as possible.

In light of these considerations, Congress should amend CAFA to create a statutory presumption that attorneys will be compensated by a contingency fee for all of their efforts that contribute to coupons, both transferrable and non-transferrable. The contingency fee—like § 1712(a) prescribes—will be calculated as an agreed-upon percentage of the coupons *actually redeemed* as opposed to simply made available to the class. This definition of "coupons"

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cally, the rightful position principle is "the position [the plaintiff] rightfully would have come to but for defendant's wrong." *Id.* at 15. Justice Sotomayor claimed that compensatory damages "shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered." *FAA v. Cooper*, 132 S. Ct. 1441, 1457–58 (2012) (Sotomayor, J., dissenting) (quoting *Birdsall v. Coolidge*, 93 U.S. 64, 64 (1876)); *see also, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 263 (1984) (Blackmun, J., dissenting) ("[T]he purpose of compensatory damages is to compensate victims."); *Ciraolo v. City of New York*, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring) ("[T]raditional compensatory damages are assessed to make the individual victim whole . . .").

119 Again, this Note does not take a position on the desirability of coupon relief. As noted earlier, there are benefits to coupons, such as allowing companies to remain solvent. *See Mezzetti & Case, supra* note 18, at 1433–34. Supporters of coupon settlements claim that it is a win-win situation to grant relief to plaintiffs while simultaneously keeping a company solvent. Because of its institutional competence and democratic nature, Congress alone can—and should—determine coupons' remedial role. The assumption here, of course, is that the prerogative to change this lies with Congress. For a discussion of the rationale underlying this assumption, see Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) ("[Courts] are under the constraints imposed by the judicial function in our democratic society. . . . [T]he function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature.").

120 *See supra* text accompanying notes 20–24.

121 *Developments in the Law: Class Actions, supra* note 17, at 1611.

would also be more capacious to encompass vouchers. In circumstances in which it would be unreasonable to compensate attorneys accordingly, however, the court may award attorneys' fees using the lodestar method.

There are two circumstances where the lodestar method may be warranted: (1) when the contingency fee award is significantly greater than the fee calculated by the lodestar method, resulting in a windfall for the plaintiff's attorney;<sup>122</sup> and (2) when the lodestar method is sufficiently greater than the contingency fee that it would be manifestly unjust to compensate the attorney according to the contingency fee. The former situation prevents class counsel from receiving a windfall. On the other end of the spectrum, the latter prevents the attorneys from being grossly undercompensated in certain situations.<sup>123</sup> The burdens to overcome the statutory presumption, however, should be high. Indeed, if they were not, the proposal would be virtually indistinguishable from the current situation, where parties have the autonomy to choose either the lodestar method or a contingency fee. The exception should not swallow the rule.

Finally, attorneys should not be able to recover more than the class itself. This idea is not novel, as courts have effectuated it.<sup>124</sup> Such a rule allows class action proceedings to be client-centered.

This scenario accommodates both interests. It provides several mechanisms to tie the incentive structures of class counsel to those of the class. For example, the statutory presumption of a contingency fee would motivate attorneys to negotiate for the best deal possible for clients. The larger the coupon award—and remember, the amount *actually redeemed* as opposed to merely *made available*—the higher the compensation for the attorney. Intuitively, the provision prohibiting attorneys from collecting more fees than the value to clients further protects the members of the class.

These provisions also allow exceptions where the lodestar method may be employed, a recognition that there may be instances in which it is prefera-

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122 This carve-out adequately responds to concerns voiced by Judge Berzon in her dissent in *In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1197 (9th Cir. 2013) (Berzon, J., dissenting) (“Under the majority’s interpretation, for example, if a coupon settlement were reached after plaintiffs’ attorneys did very little work, the attorneys would nonetheless be statutorily entitled to receive a fee equivalent to up to the benchmark twenty-five percent of the value of the redeemed coupons, instead of a lodestar fee based on hours worked, which could amount to much less. For all the reasons already surveyed, Congress did not intend such unreasonable results . . .”).

123 Imagine, for example, an attorney who expends significant hours defending his client, encountering complex issues of fact and law. However, a contingency fee rate grossly undercompensates him for his work. Such a scenario *may* warrant the lodestar method. However, this would only apply in extraordinary circumstances. The Ninth Circuit had a point when it opined that “[a]n attorney who works incredibly hard, but obtains nothing for the class, is not entitled to fees calculated by any method.” *Id.* at 1182 (majority opinion).

124 See *id.* at 1177 (noting that the district court, in reducing the initial award of attorneys’ fees, recognized that it would be “improper to award fees that outstrip the calculated class benefit”).

ble. This choice seeks to link the award of fees to the hours worked rather than the amount of the coupons. These provisions would avoid a scenario that would either grossly undercompensate or overcompensate attorneys. Keep in mind, however, that the bar to rebut the statutory presumption is high.

#### CONCLUSION

Given the significance of the policy implications presented by coupon settlements—especially when considered in tandem with the attorney’s role in the adversarial system—Congress should amend CAFA. Doing so would provide courts with clear guidance as they adjudicate disputes in a precarious legal landscape.

To that end, Congress should adopt a statutory presumption that attorneys must be compensated on a contingency fee basis when their work yields a coupon settlement. This is an attempt to properly align the incentives of the class counsel to adequately represent the interests of the class. If the attorneys do well for their clients, they will be compensated accordingly.

Still, there may be circumstances where this regime leads to equally unfavorable outcomes. What happens when a contingency fee yields a windfall for the attorneys? If defendants are incentivized to distribute coupons for relief, they may be quick to do so to avoid the arduous burden of litigation against class actions. Accordingly, there should be a mechanism for judges to award fees based on the lodestar method when it is appropriate to do so. However, this calculation should not be awarded liberally.

Such a solution more closely aligns the incentive structures inherent in coupon settlements. As Congress found, “[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.”<sup>125</sup> Congress certainly wanted to remedy these harms but enacted a statute that was ill equipped to do so. This solution would give Congress’s bark the requisite bite.

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125 28 U.S.C. § 1711 (2012) (Findings and Purposes).

