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CLASS ACTION SETTLEMENT CONSIDERATIONS: TEN TIPS FOR A SUCCESSFUL SETTLEMENT (THE CASE LAW)

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The following article discusses recent, significant decisions on federal class action settlements. While not all inclusive, these cases may help practitioners avoid common (and some not-so-common) pitfalls when trying to reach a successful, lasting class action settlement. This article assumes that the reader is at least generally familiar with the settlement procedures under Fed. R. Civ. P. 23 and the Class Action Fairness Act ("CAFA").

The Seventh and Ninth Circuits have issued most of the notable recent decisions. Further, perhaps not surprisingly, most of the cases below involve fee calculations, but some opinions (particularly in the Seventh Circuit) touch on a host of issues and educate practitioners on how *not* to settle a class action. Finally, "coupon" settlements (already of limited acceptance due to CAFA) have received some recent attention by the Ninth Circuit.

A. Identifying the Right Fee Award Methodology

In re Bluetooth Headset Prod. Liab. Litig., 654 F.3d 935 (9th Cir. 2011)

Bluetooth is perhaps the most significant, and definitely the most cited, class action settlement case from the Ninth Circuit in recent years. The appeal arose out of 26 putative consumer class actions filed against manufacturers of wireless headsets, alleging they failed to disclose the risk of hearing loss. The approved settlement provided: (a) $100,000 in "*cy pres* awards" to hearing loss charities; (b) $0 for economic injury; (c) $1.2 million in notice costs; (d) up to $800,000 for class counsel; and (e) $12,000 to be divided among the nine class representatives. The trial court overruled various objections. Objectors appealed.

Given the lack of any real award to the class, how did the parties justify a fee award of $800,000 for class counsel in this case? Analyzing the question, the Ninth Circuit discussed the two common methodologies ("lodestar" and "percentage of recovery"), and provided guidance to practitioners on the proper use of each. Under the "lodestar" method, fees are determined by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer, plus or minus certain reasonableness multipliers based on various factors. The other acceptable method is the "percentage of recovery" method, where the court—as the name implies—awards a certain percentage of the benefit received by the class, usually from the common fund.

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In *Bluetooth,* the Ninth Circuit held that the lodestar method is more appropriate in class actions brought under fee-shifting statutes and where the relief sought is primarily injunctive in nature. The Court held that the figure calculated using the lodestar method is "presumptively reasonable" but may be adjusted upward or downward based on an appropriate "reasonableness multiplier" (*e.g.,* the quality of the representation, the benefit obtained for the class, the complexity of the case, etc.). Thus, where a plaintiff achieves "only limited success" on a case, counting all hours spent may produce an excessive award. With respect to fees based on a percentage of recovery, the Ninth Circuit noted that 25% was considered the "benchmark" for a reasonable award within that Circuit, but that an adequate explanation of "special circumstances" may justify a departure from the benchmark. As to both methods, the Ninth Circuit ultimately left it to a trial court's discretion to decide which method was more appropriate in order to achieve a reasonable result. As an example, the Court noted that an award of 25% of a "mega fund" might yield windfall profits as compared to the hours spent on the case and, thus, the district court should adjust the benchmark percentage or employ the lodestar method.

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Turning back to the district court's analysis, the Ninth Circuit took issue with various aspects: (a) the judge used the lodestar method, but never announced a lodestar figure; (b) the judge did not compare the fee award to the benefit to the class or the degree of success; and (c) the judge should have compared the lodestar amount against the percentage method to make sure the award was reasonable. The Court also noted that, if the trial judge had performed these calculations, then the court would have immediately realized that the fee award was 83% of the total amount that the defense was willing to spend to settle the case, whereas 25% of the total fund could have yielded a fee award of $240,500. Consequently, the Court vacated the settlement and the fee award, holding that the disparity between the value of the class recovery and the class counsel's compensation raised an inference of unfairness and self-dealing, which inferences were not adequately dispelled by the record in the lower court.

B. Incentive Awards

Radcliffe v. Experian Info. Solutions, Inc., 715 F.3d 1157 (9th Cir. 2013)

The *Radcliffe* case involved alleged violations of the Fair Credit Reporting Act (FRCA) and California state law counterparts by the three major credit reporting agencies. The suits started in 2005 and were consolidated. In 2008, the parties reached a settlement for injunctive relief, which the court approved and no one challenged. However, in 2009, the parties reached a settlement for monetary relief that drew objections.

The essential terms of the settlement for monetary relief were as follows: (a) there was a common fund of $45 million; (b) administrative costs were taken off the top, with the balance being paid first to class members who had "actual damages" (*e.g.,* $750 for those who were denied employment, $500 for those who were denied a mortgage, etc.) and second to the class representatives for their service in prosecuting the suit (e.g., incentive awards not to exceed $5,000); (c) class counsel was to "petition" for a fee/cost award to be paid out of the monetary fund, but there was no set amount; and (d) the remainder was to be paid to the rest of the class as "convenience awards" (presumably for those who could not show actual damages) of about $26. The big sticking point for the objectors was that the payment of incentive awards to class representatives was conditioned on their support for the settlement.

The Ninth Circuit agreed and reversed. In doing so, the Court affirmed its prior holdings that district courts should carefully scrutinize incentive awards "so that they do not undermine the adequacy of the class representatives." As such, it found that the *conditional* incentive awards at bar were improper and made "the settling class representatives inadequate representatives of the class." Moreover, while the conditional nature of the awards was enough to invalidate the settlement, the disparity between the awards (up to $5,000 each) and the payments to the class members at large (between $26 and $750) exacerbated the conflict of interest issue.

Finally, the Court noted that "[a]s soon as the conditional-incentive awards provision divorced the interests of the class representatives from those of the absent class members, class counsel was simultaneously representing clients with conflicting interests." Since counsel made no attempt to get a waiver for or alert the district court of the conflict, class counsel was not adequate and could not settle the case for the absent class members.

C. Valuation of Coupon Settlements

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

The HP Inkjet Printer case was a nationwide class of consumers who purchased certain HP ink jet printers between 2001 and 2010. Plaintiffs pressed unfair business practices claims. The district court approved a settlement that provided "coupons" as well as injunctive relief to the class. Class counsel was awarded $1.5 million in fees and over $500,000 in costs. Objectors appealed, claiming collusion and CAFA violations. The Ninth Circuit agreed that the settlement violated CAFA, but did not reach a decision on collusion.

As part of the settlement, HP agreed to issue "e-credits" redeemable for HP printers and supplies on HP's website. The e-credits, which were merely a euphemism for coupons, would expire six months after issuance, were non-transferable, and could not be used with other discounts. The district court noted that, while the credits were worth "significantly less" than their face value, the injunctive relief would confer "some benefit" on class members (although nowhere near the $16-$41 million plaintiffs claimed). The district court estimated that the "ultimate value" of the settlement was $1.5 million. As to fees, class counsel submitted bills of over $7 million, but requested only the portion of its lodestar that HP agreed to pay ($2.3 million in fees). The district court found it would be "improper to award fees that outstrip the class benefit" and ordered HP to pay a reduced lodestar amount.

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At the outset, the Ninth Circuit noted that courts typically try to ensure faithful representation by tying together the interests of class members and the interests of class counsel (*i.e.,* to "tether the value of an attorneys' fees award to the value of class recovery"). Where class recovery and attorneys' fees are both paid in cash, "this task is fairly effortless." However, when class counsel is paid in cash and the class is not, the task is "substantially more difficult" because there are many variables at play. Recognizing this, the Court noted that Congress enacted the "coupon" provisions of CAFA, 28 U.S.C. § 1712(a)-(c), with the intent of putting an end to the "inequities" that arise when class counsel is awarded fees that are "grossly disproportionate to the actual value of the coupon relief obtained for the class."

Thus, the Court ruled that, pursuant to CAFA, 28 USC § 1712(a), if a settlement, either in whole or in part, provides for "coupon" relief, the attorney's fee "that is attributable to the award of coupons" must be calculated using the "redemption value" of the coupons. The Court interpreted the provision to mean that a fee award is "attributable" to a coupon award where the fee award is "a consequence" of the coupon award. In other words, if a settlement provides *only* for coupon relief, the portion of the fee award that is attributable to the coupon award "must be one hundred percent."

Of course, as noted above, the settlement here did not give only coupon relief , but also offered some injunctive relief. Accordingly, the Ninth Circuit found that Section 1712(b) of CAFA comes into play and points to the lodestar method for calculation attorneys' fees(*i.e.,* if "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 shall be based upon *the amount of time class counsel reasonably expended* working on the action"). However, the Court said that this does not mean a district court can award lodestar fees to compensate class counsel for obtaining *either* coupon *or* non-coupon relief. Instead, Sections 1712(a) and 1712(b) of CAFA must be read together and required the district court to both (1) "determine a reasonable contingency fee based on the *actual redemption value* of the coupons awarded," and then (2) determine "a reasonable lodestar amount to compensate class counsel for any non-coupon relief obtained." Thus, the Ninth Circuit held that a court may not award fees to counsel "attributable" to a coupon award without first considering the redemption value of the coupons; however, a district court may "award lodestar fees … for *any* non-coupon relief they may obtain, such as injunctive relief."

Interestingly, on remand, class counsel dropped the request for fees for the coupon award and sought only fees relating to the injunctive relief. The district court awarded $1.35 million in fees and nearly $600,000 in costs and expenses. *See In re HP Inkjet Printer Litig.*, No. 5:05-CV-03580-JF, 2014 WL 4949584 (N.D. Cal. Sept. 30, 2014).

D. Standing to Object to Settlement

Bhatia v. Piedrahita, 756 F.3d 211 (2d Cir. 2014)

This case was a putative class action by individual and institutional investors against various defendants arising out of the Bernie Madoff scandal. Some of the defendants settled, and the non-settling defendants appealed and tried to overturn a partial final judgment approving the settlement of certain putative class action claims. The defendants/appellants challenged a particular provision in the settlement agreement that allowed investors who filed claims under the settlement to

submit to the district court's jurisdiction only for settlement purposes and no other. The settling plaintiffs argued that the non-settling defendants lacked standing to make the objection. The Second Circuit agreed and dismissed the appeal.

The Court noted the general rule was that a non-settling defendant ordinarily lacks standing to object where it is not affected by the settlement. There is a recognized exception to the general rule, however, where the defendant "can demonstrate that it will sustain some formal legal prejudice as a result of the settlement." The Court found this to be a high hurdle, noting that the "required level of formal legal prejudice" necessary to establish standing "*exists only in those rare circumstances* when, for example, the settlement agreement formally strips a non-settling party of a legal claim or cause of action, …invalidates a non-settling party's contract rights, or [hampers] the right to present relevant evidence at trial." Applying this stringent standard, the Court held the appellants' argument that the challenged provision "*effectively* stripped them of defenses against the settling plaintiffs in other fora, including defenses based on duplicative litigation and preclusion" did not suffice. Therefore, the non-settling defendants did not have standing to object to the settlement.

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E. Reversion Clauses and Assigning Monetary Value to Non-Monetary Relief

Laguna v. Coverall North Am. Inc., 753 F.3d 918 (9th Cir. 2014)

Defendant was a janitorial franchising company. Plaintiffs brought a class action in 2009 alleging that the defendant (1) misclassified its California franchisees as independent contractors to avoid the protections afforded by California labor law to franchisees and (2) breached its franchise agreements and committed fraudulent and unfair practices by removing customer accounts from the franchisees without cause and selling them to other franchisees. The district court approved the settlement, which was reached prior to certification in February 2012, and one objector appealed as to fairness. (The appealing party later reached a settlement and the Court, quite oddly, *vacated* its prior opinion as "moot." *See Laguna v. Coverall North Am. Inc.*, 772 F.3d 608 (9th Cir. 2014).)

The most contested settlement provisions included: (a) defendant's agreement to assign customer accounts to current franchisees which would remain conditional until they paid their franchise fees in full; (b) former franchise owners received $475 each and a $750 "purchase credit" toward a new franchise; and (c) new franchisees had 30 days to rescind their franchise agreement and receive all of the money paid during the franchise period (minus a $75 background check fee). Class counsel received $994,800 in fees.

The Ninth Circuit affirmed. Citing its prior holding in *Bluetooth* with approval, the Court reiterated that the lodestar method is more appropriate for calculating the attorney's fees award where the relief sought is *primarily* injunctive *and* where fee-shifting statute authorizes "the award of fees to ensure compensation for counsel undertaking socially beneficial litigation." Since the relief sought in the case before the Court was "*mostly* injunctive in nature" and there was a fee-shifting statute under California law, the district court correctly used lodestar method. The Court also found the fee award was reasonable because (a) the case had been contentiously litigated for over two years, (b) the district judge found that the report submitted by Plaintiffs' counsel showing over 4,500 hours billed was fair and accurate, and (c) the district judge "prudently cross-checked the award amount against the alternative percentage-of-recovery method," the "most appropriate [method] in common fund settlement cases."

The Court rejected the appellant's apparent argument that the district judge should have assigned monetary value to the non-monetary terms of the settlement. The Court noted that a "[m]onetary valuation of injunctive relief is difficult and imprecise" and, thus, held that a "district court has no obligation to make explicit monetary valuations of injunctive remedies." The Court also rejected appellant's suggestion that a "reversion clause" (which provided that any reduction in the fee award reverted to *the defendant* rather than the class) was a sign of potential collusion. The Court held that (a) although the district judge noted the reversion clause was "not preferable," his analysis properly balanced the reversion clause against the overall strength of the settlement, and (b) "one would expect *primarily* to find collusion where attorneys disproportionately benefitted from the settlement." The chance of collusion narrows to a "slim possibility" where, as was in this case, the fees are "clearly reasonable".

F. Outrage in the Seventh Circuit

Eubank v. Pella Corp., 753 F.3d 718 (7th Cir. 2014)

Sometimes there are just too many red flags to allow a settlement to proceed, which is exactly the scenario presented in this case. Judge Richard Posner of the Seventh Circuit — hardly a fan of class actions — opened

his opinion by briefly touting the virtues of the class action, calling it "an ingenious procedural innovation" and a "worthwhile supplement to conventional litigation procedure." However, before getting to the facts of the case or the meat of his decision, Judge Posner unleashed his ire at class counsel, noting that (a) "control of the class over its lawyers usually is attenuated, often to the point of nonexistence" and (b) "[c]lass actions are the brainchildren of the lawyers who specialize in prosecuting such actions and who, in picking class representatives, have no incentive to select persons capable or desirous of monitoring the lawyers' conduct of the litigation."

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Eubank was a CAFA class action by purchasers of Pella-brand windows. Plaintiffs alleged that Pella's "Proline Series" windows contained a design defect that allowed water to seep through their exterior aluminum shell causing damage to the wood frame and the homes in which they were installed. Plaintiffs claimed the windows' defects violated a variety of product liability and consumer protection laws in the states in which they were sold. Two classes were certified: one for customers that had already replaced their faulty windows and another for those who had not. The former class sought damages and was limited to six states with a separate subclass for each state. The latter class sought declaratory relief and was nationwide. Class counsel negotiated a settlement with Pella in the fall of 2011, and the district judge approved the settlement in 2013. The objectors appealed.

Judge Posner addressed several problems with the settlement and the district court's handling of it. For example, the settlement agreement ignored the two classes and instead combined all owners of the defective product into one nationwide class regardless of whether they had replaced the windows. Posner called this the "first of many red flags that the [district] judge failed to see: 'the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups'" (quoting *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 982 F.2d 721, 743 (2d Cir. 1992)). Posner also took issue with the class representatives and class counsel, noting that: (a) the original named plaintiff was the father-in-law of lead class counsel; (b) lead class counsel had a history of ethics violations and was embroiled in a disciplinary action during settlement negotiations; (c) lead counsel appointed and then removed four other named plaintiffs who opposed the settlement and named new plaintiffs who supported the settlement agreement; and (d) lead counsel's partner "switched sides" and represented four of the six objectors (the "defrocked" plaintiffs).

Posner then turned to the core terms of the settlement, and basically shredded them. Pella had agreed to pay class counsel $11 million in fees based on plaintiffs' claims that the settlement was worth $90 million to the class. Posner suggested that, at first blush, the attorney's fees amount would not raise any eyebrows *per se* for the following reasons: (a) it was equal to 12 percent of the total monetary benefit earmarked for the class members, (b) a long time had passed between filing of the case and final settlement approval, and (c) the case had a multi-state scope. Upon closer examination, however, Posner identified many flaws: (a) the agreement did not specify an amount to be received by class members distinct from counsel; (b) counsel would receive the entire award up front but class members' awards were only contingent claims; (c) only class representatives who supported the settlement would receive "incentive" awards, thus creating another conflict of interest; and (d) the agreement included a reversion clause. Posner also faulted the district judge for not attempting to estimate how many claims would be filed and, as such, "no responsible prediction of the value of the settlement to the members of the class could be made."

Posner ruled that the settlement should have been disapproved on multiple grounds: (a) class counsel and the original named plaintiff (class counsel's father-in-law) should have been disqualified and removed for conflicts of interest and ethics reasons; (b) the settlement was "stacked against the class"; (c) the settlement value was inflated (oddly, even Pella estimated the settlement value to be $22.5 million, which was also an overestimate); (d) Pella retained too many defenses (*e.g.*, statutes of limitation and repose, comparative fault, failure to mitigate, etc.); and (e) some claimants were only entitled to coupons in the form of discounts on future purchases, "a warning sign of a questionable settlement." He also concluded that the claims and notice processes were flawed in that (a) the claims forms were long, even for "simple" claims; (b) "higher ceiling" claims required a "claimant to run the gauntlet of arbitration, doubtless without assistance of counsel or expert witnesses;" (c) the "forms require[d] a claimant to submit a slew of arcane data"; and (d) the notice was too complicated, consisting of "27 sections, some with a number of subsections."

Posner concluded by noting that, "[i]n sum, *almost every danger sign in a class action settlement* that [the Seventh Circuit] and other courts have warned district judges to be on the lookout for was present in this

case." Consequently, he not only reversed and remanded the case, but he also ordered that the four "defrocked" plaintiffs be reinstated and that class counsel and the original class representative be kicked off the case.

G. Disguised Coupons

Redman v. RadioShack Corp., 768 F.3d 622 (7th Cir. 2014)

Decided roughly four months after *Eubank*, the *Redman* case, which was filed in 2011 under CAFA, involved alleged violations of the Fair and Accurate Credit Transactions Act (FACTA). Plaintiffs claimed that RadioShack violated FACTA by "willfully" printing credit card expiration dates on receipts and sought statutory damages of between $100 and $1,000 per class member. The parties reached a settlement in May 2013 "before any substantive motions had been decided." Class members filed timely objections, but the magistrate approved the settlement in February 2014. The objectors appealed.

Posner took issue with several other aspects of the settlement. For example, lead plaintiff worked for lead class counsel's former law firm (which called into question whether there was truly an arm's length relationship here, and the fee motion was filed after the time for objections expired (which handicapped objectors who lacked details as to class counsel's hours and expenses, in violation of Fed.R.Civ.P. 23(h)).

Under the settlement: (a) class members who filed claims received transferrable, combinable "vouchers" for a one-time discount of $10 off future RadioShack purchases (and if the item was less than $10, the class member would not receive change); (b) named class representatives each received $5,000; (c) class counsel received $1 million in fees (based on a "lodestar" calculation) paid out of a separate fund; (d) defendant agreed to a "clear sailing" clause (*i.e.,* an agreement by defendant not to contest class counsel's fees). Class counsel argued the fees were reasonable because they were only about 25% of the total settlement value of $4.1 million, which included fees, $830,000 worth of vouchers based on 83,000 responses, and administrative costs of roughly $2.25 million.

In *Redman,* the Seventh Circuit (again in an opinion authored by Judge Posner) reversed and remanded the case for a *reallocation* of the funds between the class members and class counsel. Judge Posner found the settlement was flawed in several ways: (a) the "vouchers" were really just "coupons" in disguise (and thus the fee award should have been based on the value of the coupons that were redeemed under CAFA); (b) there was no attempt to estimate the actual value of the settlement (i.e., the coupons) to the class; (c) the fee amount was based only on counsel's reported hours; (d) the settlement factored in the administrative costs; and (e) there were a variety of procedural issues, including the "clear sailing" clause, the fact that notice was only sent to approximately one quarter of the 16 million total estimated class members, and there was a very low response rate (about 83,000 of the less than 5 million class members, who received notice). As to the value of the vouchers, Posner found that their actual value was likely far less than the $10 face value (*e.g.*, because there was no change given and the vouchers could expire before use) and that an estimated value should have been made through experts.

In addition to the coupon issue, Posner forwarded other criticisms of the methods used to calculate fees, including the following: (1) fees were guaranteed, but the value of settlement benefit to class members was not; (2) "the amount of the class settlement allocable to class counsel should depend … on the value of the class counsel's work to the class;" (3) by calculating fees based on hours allegedly spent, the fee award necessarily exceeded that value; and (4) class counsel's billing rate and maximum billable hours should have been determined by the district judge. Consequently, Posner found that the proper ratio in determining the reasonableness of a fee award in this instance was "the ratio of (1) the fee to (2) the fee plus what the class members received." Posner also found the fact that administrative costs should not have been factored in to the settlement because they were not part of the value received by the class members (outside of notice costs paid by defendant) and, as such, "shed no light on the fairness of the division of the settlement pie between class counsel and class members."

Finally, Posner took issue with several other aspects of the settlement. For example, lead plaintiff worked for lead class counsel's former law firm (which called into question whether there was truly an arm's length relationship here, and the fee motion was filed after the time for objections expired (which handicapped objectors who lacked details as to class counsel's hours and expenses, in violation of Fed.R.Civ.P. 23(h)). Posner was less critical of the "clear sailing clause," but noted that such clauses should be subject to close scrutiny when dealing with non-cash awards because they give rise to possible collusion between class counsel and defendants.

H. Valuation of Class Settlement

Pearson v. NBTY, Inc., 772 F.3d 778 (7th Cir. 2014)

Decided three months after *Redman,* this case represents yet another example of Judge Posner shooting down a class action settlement in the Seventh Circuit. *Pearson*, which involved six cases filed under

CAFA and consolidated for appeal, involved dietary supplements designed to help people with joint disorders like osteoarthritis (*e.g.*, "Osteo Bi-Flex"). Eight months after filing, class counsel in all six cases reached a nationwide settlement with defendants, and the settlement was approved. Objectors appealed, and other appellants (class counsel firms) argued that the court should not have modified (i.e., lowered) the parties' agreement.

The final settlement, as modified and approved by the district judge, can be broken down as follows: (a) $1.93 million in class counsel fees (but originally, the parties agreed to $4.5 million), (b) an additional $180,000 in expenses, (c) $1.5 million in notice and administrative costs, (d) $1.13 million in a "cy pres" award to charity, (e) $865,000 to be split between the 30,245 class members who responded, and (f) $5,000 to each of the six named class representatives. There settlement agreement also included a "clear sailing" clause and a reversion clause, as well as injunctive relief against the defendants from making certain marketing claims in the future. As indicated, the district judge reduced the class counsel fees, but allowed the reversion clause to remain.

Reversing the lower court's decision, Posner ruled that "the problem with the district judge's decision [was] not that it lean[ed] too far in favor of the objectors as class counsel contend[ed], but that it [did not] lean far enough."

Reversing the lower court's decision, Posner ruled that "the problem with the district judge's decision [was] not that it lean[ed] too far in favor of the objectors as class counsel contend[ed], but that it [did not] lean far enough." For starters, the district judge valued the settlement based upon the maximum *potential* payment the class members could receive at $20.2 million, and the valuation incorrectly included notice and fees which are not benefits that inure to the class (and, thus, should not have been included per *Redman)*. Moreover, while class counsel argued that the fee award was only 9.6% of the total, the fee award did not reflect the *Redman* ratio—*i.e.,* the ratio of (1) the fee to (2) the fee plus what the class members received. Based on this *Redman* ratio, the $1.93 million fee award was "an outlandish 69 percent" of the aggregate value. Posner reiterated that "[b]asing an award of attorneys' fees on th[e *Redman*] ratio … gives class counsel an incentive to design the claims process in such a way that will maximize the settlement benefits actually received by the class."

Posner identified a variety of other problems with the settlement: (1) the claims process could have been simplified, as "notice by publication or via the Internet tends to be ineffectual when the class consists of consumers;" (2) the injunction was superfluous and possibly adverse to consumers in that it had a 30-day clock rather than being perpetual and did not force any substantive changes on the defendants; and (3) the reversion clause was merely a "gimmick for defeating objectors" and should have been invalidated per the *Redman* holding.

Finally, in some pronouncements that border on *dicta*, Posner suggested that: (a) "[i]t *might make sense* for the district judge in a large class action suit … to appoint an independent auditor, on the authority of Fed.R.Evid. 706, to estimate the reasonableness of class counsel's billing rates;" and (b) "in consumer class actions, where the percentage of class members who file claims is often quite low, … the presumption *should* … be that attorneys' fees award to class counsel *should not exceed a third* or *at most a half* of the total amount of money going to class members and their counsel."

I. Limitations on *Cy Pres* Relief

In re BankAmerica Corp. Sec. Litig., 775 F.3d 1060 (8th Cir. 2015)

This case addresses so-called *cy pres* (or "next best") distributions. Here, the plaintiffs (shareholders) filed multiple class actions alleging violations of state and federal securities laws in relation to the 1998 merger of NationsBank and BankAmerica to form the current "Bank of America" entity. The cases were transferred to the Eastern District of Missouri as part of a multi-district litigation ("MDL"), where the court approved a $490 million global settlement over objection.

After a few rounds of distributions to the class members starting in December 2004, there was a $2.4 million surplus in the settlement fund by 2012. Upon motion, the court awarded $98,000 in additional fees to class counsel for work done since December 2004 and a distribution to a local charity (Legal Services of Eastern Missouri, or "LSEM"). An objector appealed, arguing that the LSEM distribution was improper because (a) a further class distribution was feasible and (b) LSEM was not a proper "next best" recipient because it was "unrelated to the class or the litigation." The Eighth Circuit agreed, and vacated the additional fee award and charitable distribution as premature.

In reaching its decision, the Court relied on the American Law Institute's "Principles of Law of Aggregate Litigation" (2010), Section 3.07 in which the ALI recommends that a court consider three things when determining the appropriateness of a *cy pres* award: (a) the settlement funds should be distributed to class members if they "can be identified through reasonable effort" and "the distributions are sufficiently large to make individual distributions economically viable;" (b) if there are funds remaining after distributions because some class members could not be identified or opted out, "the settlement should presumptively

provide for further distributions to participating class members *unless* the amounts involved are too small to make individual distributions economically viable;" and (c) if individual distributions are not viable, then a proper *cy pres* distribution can be made, *provided* that the parties either "identify a recipient whose interest reasonably approximates those being pursued by the class" or, if no such recipient "can be identified after thorough investigation and analysis," the court can approve a worthy recipient whose interests do *not* reasonably approximate those of the class.

The Court also agreed with the Fifth Circuit and held that "[b]ecause the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible *only* when it is not feasible to make further distributions to class members … *except* where an additional distribution would provide a windfall to class members with *liquidated* damages claims that were 100 percent satisfied by the initial distribution" (quoting *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011)).

> In its rejection of Plaintiffs' argument that the gift cards would not "disgorge" Walmart of any "ill-gotten gains" the Court noted that giving "thousands of consumers the ability to purchase $12 in goods from the Walmart website for free w[ould] not be insignificant to the retailer."

Ultimately, the Eighth Circuit held, among other things, that (a) "a further distribution to the class was clearly feasible;" (b) additional class members could be readily identified as evidenced by the claims administrator's cost estimates as to economic viability; (c) a further distribution was appropriate even if it would benefit primarily large institutional investors who were "less worthy" than LSEM; (d) it did not matter that, due to the passage of time and the changing of security ownership, the distribution would not "inure to the benefit of those [who were] actually harmed" by the misconduct; (e) counsel's declaration that "all class members submitting claims ha[d] been satisfied in full" was ineffectual; and (f) while LSEM was certainly "worthy," it was not the "next best" recipient of unclaimed settlement funds in a nationwide class action seeking damages for violations of securities laws.

J. Fees and Gift Cards

In re Online DVD-Rental Antitrust Litig., 779 F.3d 934 (9th Cir. 2015)

In this 2015 ruling by the Ninth Circuit, plaintiffs claimed that Netflix and Walmart had entered into an anti-competitive agreement. Specifically, Netflix agreed to stop selling DVDs outright and Walmart agreed to wind down its online streaming services. Plaintiffs argued that this agreement resulted in unfairly higher monthly subscription prices by Netflix.

Walmart reached a settlement with a class of Netflix subscribers in which Walmart agreed to pay $27.5 million in cash and "gift cards." The cash component covered attorneys' fees and expenses, the costs of notice and administration, and incentive payments to class representatives. The amount remaining after those deductions would comprise the gift card component under which class members would receive gift cards or, at their option, the cash equivalent of the gift card. The card could only be used on Walmart's website and could not be sold, but was otherwise "freely transferable." The class representatives each received $5,000. Class counsel sought 25% of the total settlement for fees and litigation expenses.

Affirming the lower court's decision, the Ninth Circuit quickly dispensed with an argument that the higher amount given to the class representatives as opposed to unnamed members created an impermissible conflict of interest. The Court found that this was not a case of an *ex ante* agreement between the class representatives and counsel, and the case did not involve a settlement which explicitly conditioned the incentive awards on the representatives' support, both of which would have been improper. The Court also found that the amounts awarded to class representatives was not unfair even though the unnamed claimants only received $12 each, and that the district court did not err in using the "claimant fund sharing" approach (e.g., an approach in which each class member receives an equal share of the settlement fund, regardless of the harm he/she suffered)—as this approach was commonly applied even in cases where only a small proportion of the class membership participated.

As to class counsel fees, the Court applied the *Bluetooth* case and ruled that class counsel properly sought and received fees under the "percentage of recovery" method and, thus, were properly awarded $6.8 million. The Court also rejected an argument that the fees should not have been based on the total settlement. Even though the $4.5 million in notice and administrative costs did not inure to the benefit of the class, the Court agreed with the district court's decision that the notice costs made the entire action possible and the administrative costs made it possible to distribute the settlement funds in a meaningful and significant way. The Court reiterated that "the reasonableness of attorneys' fees is not measured by the choice of the denominator."

Citing *HP Inkjet*, the Court also rejected an argument that this was a "coupon" settlement. Although the term "coupon" is undefined in CAFA, Congress' primary concern in enacting Section 1712 of CAFA was to preclude settlements where class members received "nothing

more than promotional coupons to purchase more products from defendants. Although the gift cards in this case were limited to Walmart's website and were worth only $12, they still gave class members considerably more flexibility than promotional coupons because the gift cards could be used for any product, were freely transferrable (although not re-sellable on the secondary market), did not expire, and did not require consumers to spend their own money. The Court further held that its ruling was consistent with CAFA because "gift cards are a fundamentally different concept in American life from coupons" and, in any event, the decision was limited only to the gift cards in the case at bar. In its rejection of Plaintiffs' argument that the gift cards would not "disgorge" Walmart of any "ill-gotten gains" the Court noted that giving "thousands of consumers the ability to purchase $12 in goods from the Walmart website for free w[ould] not be insignificant to the retailer."

K. Other Recent Cases of Note

Klee v. Nissan N. Am., Inc., No. 2:12-CV-08238-AWTPJW, [D.E. 71 at p. 18] (C.D. Cal. 2013)

The lesson here is never try to get a bad class action past a federal judge who is a member of the class. In *Klee*, Ninth Circuit Judge Alex Kozinski issued a hilariously scathing objection to a class action settlement involving the battery life of the rechargeable lithium-ion battery used in the Nissan LEAF (an electric car). Judge Kozinski wrote: "Plaintiffs' Counsel claims that they have obtained a settlement worth 'conservatively' $38 million and as much as $200 million. [] **Say what?!** It is obvious that the $200 million 'estimate' is worthless as it is based on the assumption that every single one of the 18,000+ Nissan LEAFs will have their battery replaced by a new battery. [] Counsel should be ashamed to even mention this number."

***In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013)**

This case was a consumer product class action against a diaper manufacturer. The settlement was deemed unreasonable because (a) the named plaintiffs received incentive payments of $1,000 per child while the class members only received a hodge-podge injunctive relief of negligible value, and (b) the settlement agreement awarded class counsel $2.73 million in attorney's fees even though counsel did not take a single deposition, serve a single request for discovery, or even file a response to the manufacturer's motion to dismiss.

***Vassalle v. Midland Funding, LLC*, 708 F.3d 747 (6th Cir. 2013)**

This case was a nationwide class action involving alleged violations of the Fair Debt Collection Practices Act (FDCPA) and state law. The settlement provided for monetary ($5.2 million) and injunctive relief. In addition, class counsel was to receive fees "of no more than $1.5 million," plus administrative costs. The four named class representatives received $8,000 as an incentive payment, to be divided four ways and erasure of their debts owed to the defendants. The remainder of the class members only received $17.38 per member. In light of the debt exoneration, the Court found that the named plaintiffs received preferential treatment, whereas the other class members received only perfunctory treatment. The Court reversed the lower court's decision, but declined to pass judgment on the amount of the incentive award.

***In re Magsafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560 (9th Cir. 2014)**

This consumer class action involved an allegedly defective product. The Ninth Circuit vacated the district court's order approving the settlement and awarding fees. The Court held that the district court abused its discretion for failing to follow the process set out in the *Bluetooth* case. Specifically, the district court incorrectly accepted the lodestar amount submitted by plaintiffs' counsel without providing any explanation as to why the amount was reasonable or cross check it against the "percentage-of-the-recovery" method. The district court also erred by failing to examine indicia of collusion (particularly, whether class counsel received a disproportionate share of the settlement) and by failing to address other red flags (particularly, a "clear sailing" provision or an "implied" reversion clause).