



---

<sup>1</sup> The Commission takes no position on the Committee's proposal that notice must be provided in (b)(1) and (b)(2) class actions as well as in (b)(3) class actions. We submit only that wherever notice is provided that it be in plain, easily understood language.

---

<sup>4</sup>(...continued)

claims for a dietary supplement purported to treat cellulite); and the settlement of administrative actions against five major music distributors for allegedly anticompetitive cooperative advertising programs – *Sony Music and Entertainment, Inc.* (C-3971); *Time Warner, Inc.* (C-3972); *BMG Music* (C-3973), *Universal Music and Distribution Corp.* (C-3974); *Capitol Records, Inc.* (C-3975) (settlement agreements entered Sept. 6, 2000).

<sup>5</sup> *See, e.g., Blue Coral, Inc.*, 124 F.T.C. 568 (1997); *Sears, Roebuck and Co.*, 125 F.T.C.



---

<sup>8</sup> Note that the Commission's proposal contemplates that the scope of the notice a party is



---

<sup>12</sup>(...continued)

because of effect of Coast Guard's investigation on the risk assumed by counsel and the work they needed to perform).

<sup>13</sup> Government action also may minimize the need for, and value of, skilled and experienced

Comments of the FTC  
on Fed. R. Civ. P. 23



settlement to consumers. “Coupon” settlements complicate this analysis because, unlike monetary settlements, they are difficult to value. Many factors come into play in such valuation, including the likelihood that consumers will actually use the coupon.

A flawed or inflated valuation of such a settlement can harm consumers in two ways. First, a court might approve a settlement that does not adequately compensate consumers for the harm caused by the defendant. Second, the value of this settlement often becomes a factor in determining attorney fee awards (*i.e.*, the fee award is calculated as a percentage of the settlement). Therefore a flawed evaluation may lead to both unsatisfactory settlements and inflated attorney fees. The Commission consequently recommends that Rule 23(e) be modified to include language requiring courts that are reviewing proposed coupon settlements to include in their findings a specific assessment of the realistic value of the coupons to the class. We further recommend that the Committee Note enumerate specific factors that will assist the courts in determining whether a particular coupon settlement constitutes a fair and equitable settlement. Factors a court may wish to consider when evaluating the adequacy of a coupon settlement, including some or all of the following:

- the history of coupon redemption rates in similar situations;
- whether defendants will track and record data on redemption rate of coupons;
- whether all class members will be entitled to use coupons;
- whether the coupons are easily redeemed and are likely to be redeemed (without restrictions on use and without requiring expensive purchases);
- time restrictions on redemption (*i.e.*, how long consumers have to use the coupon);
- product restrictions on redemption (*i.e.*, whether it can be used for variety of products or just one);
- whether the defendant will be required to issue coupons until a minimum redemption level is reached or, in the alternative, to pay a minimum amount if the target redemption level is not reached within a fixed period of time;
-

---

<sup>17</sup> Some commentators have raised concerns about the use of competitive application processes in the appointment of class counsel. *See* Report of Third Circuit Task Force on the Selection of Class Counsel (Jan. 2002) *available at* [www.ca3.uscourts.gov/classcounsel/](http://www.ca3.uscourts.gov/classcounsel/)

consumers.

IV. Conclusion

The Commission commends the Civil Rules Advisory Committee for its thoughtful and useful proposals to amend Rule 23. We hope that the Committee will consider adopting the additional changes suggested above in order to more directly address the issues arising from class actions that parallel or follow on government enforcement efforts, as well as fairness issues arising from coupon settlements.

By direction of the Commission.

Timothy J. Muris  
Chairman