

PROTECTING CONSUMER INTERESTS IN CLASS ACTIONS

A Workshop Sponsored by
the Federal Trade Commission and
the Georgetown Journal of Legal Ethics

AGENDA

SEPTEMBER 13-14, 2004

MONDAY, SEPTEMBER 13

8:00 Registration

9:00 Opening Remarks — FTC Chairman, **Deborah Platt Majoras**

9:15 Panel 1: The Use of “Coupon” Compensation and Other Non-Pecuniary Redress

TOPICS TO BE COVERED INCLUDE:

- i. when and under what conditions are non-pecuniary settlements appropriate and adequate to redress consumer harm;
- ii. coupon settlements — redemption rates and empirical data (*e.g.*, what data on redemption rates is currently available? if there is a lack of good data, what institutions/sources are likely to have better data? given its unique focus and information-gathering resources, what data should the FTC be seeking?);
- iii. injunctive only relief;
- iv. issues attendant to use of discounts, rebates and free product vouchers;
- v. *cy pres* payments; and
- vi. role of third-party market makers.

Moderator:

John T. Delacourt, Chief Antitrust Counsel, Office of Policy Planning, Federal Trade Commission

Panelists:

The Honorable D. Brock Hornby, United States District Judge, District of Maine

Christopher Leslie, Professor of Law, Chicago-Kent College of Law

Lisa M. Mezzetti, Partner, Cohen, Milstein, Hausfeld & Toll, P.L.L.C.

Phillip A. Proger, Partner, Jones Day

Paul D. Kamenar, Senior Executive Counsel, Washington Legal Foundation

Steven Hantler, Assistant General Counsel, DaimlerChrysler

10:45 Break

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11:00 Panel 2: Tools for Ensuring that Settlements Are “Fair, Reasonable, and Adequate”

TOPICS TO BE COVERED INCLUDE:

- i. role of third-party objectors/*amicus* — do they add value or simply increase cost?; what, if any, effect will *Devlin* have?;
- ii. do bad cases lead to bad settlements? has Rule 23(f) served as an effective safety valve? second opt-out — ultimate fairness or threat to global peace? what else can be done?; and
- iii. is the increasingly common practice of creating a common fund and then requiring defendants to pay class counsel fees separate and apart from the common fund (as opposed to some percentage of the common fund) a positive or negative development for consumers?

Moderator:

Robert M. Frisby, Assistant Director, Bureau of Consumer Protection, Federal Trade Commission

Panelists:

The Honorable Diane Wood, United States Court of Appeals for the Seventh Circuit

The Honorable Ann C. Yahner, Administrative Law Judge, District of Columbia Office of Administrative Hearing

Samuel Issacharoff, Harold R. Medina Professor in Procedural Jurisprudence, Columbia Law School

Brian C. Anderson, Partner, O’Melveny & Myers, L.L.P.

Neil M. Gorsuch, Partner, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.

Arthur H. Bryant, Executive Director, Trial Lawyers for Public Justice

12:15 Lunch

1:45 Panel 3: Clear Notices, Claims Administration and Market Makers

TOPICS TO BE COVERED INCLUDE:

- i. use of plain English, the Internet, email and other devices to ensure meaningful notice and encourage class participation;
- ii. role of advocacy groups in getting the word out, supplementing notice, encouraging and discouraging class participation;
- iii. do third party market makers actually bring cash value to the class, how do market makers value coupon settlements and to whom do they report or are they responsible?; and



- iv. do claims filing services increase the value of the settlement due to higher response rate or do they add to the costs of consumer recovery?

Moderator:

Adam B. Fine, Attorney, Bureau of Consumer Protection, Federal Trade Commission

Panelists:

Todd Hilsee, President, Hilsoft Notifications

Robert J. Niemic, Senior Researcher, Federal Judicial Center

Deborah Zuckerman, Senior Litigation Attorney, AARP Foundation

Howard Yellen, CEO, Settlement Recovery Center

James Tharin, CEO, Chicago Clearing Corp.

2:45 Break

3:00 Panel 4: Class Action Attorneys' Fees: Compensating Lawyers While Protecting Consumers

TOPICS TO BE COVERED INCLUDE:

- i. empirical studies on class action attorneys' fees — what does the data show?;
- ii. the special challenges in determining reasonable attorneys' fees presented by non-pecuniary settlements and settlements where the total payment to the class depends on the number of class members who file a claim;
- iii. Amended Rule 23 as it relates to attorneys' fees — will it make a difference?;
- iv. can innovative approaches to appointing and compensating class counsel, such as increasing competition for the position of class counsel (e.g., through the use of judicially-run auctions) or tying attorney compensation to the number of coupons redeemed, help prevent unreasonable fee awards?; and
- v. are blockbuster attorneys' fees a form of consumer harm in and of themselves?

Moderator:

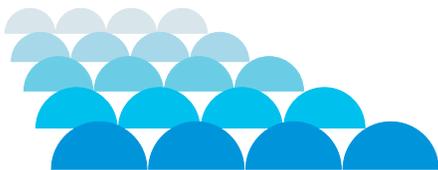
Patricia F. Bak, Attorney, Bureau of Consumer Protection, Federal Trade Commission

Panelists:

The Honorable Vaughn Walker, United States District Judge, Northern District California

Geoffrey P. Miller, William T. and Stuyvesant P. Comfort Professor of Law, New York University School of Law

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Deborah Hensler, Judge John W. Ford Professor of Dispute Resolution, Stanford University Law School

Michael L. Denger, Partner, Gibson, Dunn & Crutcher, L.L.P.

Howard I. Langer, Partner, Langer & Grogan, P.C.

Lloyd Constantine, Partner, Constantine & Partners

4:30 Panel 5: Special Ethics Concerns in Class Action Litigation

TOPICS TO BE COVERED INCLUDE:

- i. Ethical issues arise frequently in class action litigation, including with respect to conflicts of interest, solicitation, application of no-contact rule, the reasonableness of attorneys' fees, the attorney-witness rule, etc. But some contend that the ethics rules were not crafted with the unique aspects of the class action attorney-client relationship in mind. Is it time for a new ethics paradigm, or does it make sense to leave these issues to be resolved under class action law, i.e., the adequacy of representation requirement of Rule 23?

Moderator:

Michael S. Frisch, Adjunct Professor, Georgetown University Law Center

Panelists:

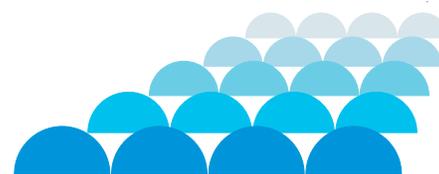
Geoffrey P. Miller, William T. and Stuyvesant P. Comfort Professor of Law, New York University School of Law

Brian Wolfman, Director, Litigation Group, Public Citizen

Lewis H. Goldfarb, Partner, Hogan & Hartson L.L.P.

Roberta D. Liebenberg, Partner, Fine Kaplan & Black, R.P.C.

Dr. John H. Johnson, IV, Senior Consultant, NERA Economic Consulting



TUESDAY, SEPTEMBER 14

8:00 Registration

9:00 Opening Remarks — FTC Commissioner, **Pamela Jones Harbour**

9:15 Panel 6: Empirical Analysis of Class Action Trends: Current Knowledge and Future Research Agendas

TOPICS TO BE COVERED INCLUDE:

- i. valuation of class action settlements, including the role of response rates and reverter clauses vs. *cy pres* arrangements;
- ii. studies on patterns of class action attorneys' fees;
- iii. post-judgment administrative reporting requirements, and transparency of information regarding the administration of redress programs (*e.g.*, coupon redemption rates);
- iv. the FTC's experience with redress settlements;
- v. how can the FTC best use the research tools at its disposal — including § 6(b) studies — to fill the knowledge gaps?; and
- vi. promising future research agendas.

Moderator:

Todd J. Zywicki, Visiting Professor, Georgetown University Law Center

Panelists:

The Honorable Lee Rosenthal, United States District Judge, Southern District of Texas

Theodore Eisenberg, Henry Allen Marsh Professor of Law, Cornell Law School

Thomas E. Willging, Senior Researcher, Federal Judicial Center

Nicholas M. Pace, Institute for Civil Justice, RAND Corporation

Joseph P. Mulholland, Economist, Bureau of Economics, Federal Trade Commission

James Wootton, Partner, Mayer, Brown, Rowe & Maw, L.L.P.

10:15 Break

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**10:30** Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits

TOPICS TO BE COVERED INCLUDE:

- i. the appropriate roles and interplay between government enforcement actions, private class actions, and private attorney general suits (such as the California 17200 actions);
- ii. class actions as a way to enforce consumer protection and antitrust laws (e.g., under what circumstances do they succeed, and where do they fail?);
- iii. minimizing duplicative efforts by federal enforcers, state enforcers, and private counsel;
- iv. calculating fair and reasonable fees for private counsel in follow-on cases;
- v. the challenges of global settlements and release issues; and
- vi. providing adequate redress to consumers.

Moderator:

Lucy Morris, Senior Attorney, Bureau of Consumer Protection, Federal Trade Commission

Panelists:

Patricia Connors, Assistant Attorney General, State of Florida

Bruce Hoffman, Deputy Director, Bureau of Competition, Federal Trade Commission

Michael Greve, John G. Searle Scholar, American Enterprise Institute

Linda Willett, Deputy General Counsel, Bristol-Myers Squibb

Kenneth Gallo, Partner, Paul, Weiss, Rifkind, Wharton & Garrison, L.L.P.

Kevin Roddy, Partner, Hagens Berman, L.L.P.

12:00 Closing Remarks — FTC Commissioner, **Thomas B. Leary**