University of Colorado Law School

Colorado Law Scholarly Commons

Articles | Colorado Law Faculty Scholarship

1996

Note, In-Kind Class Action Settlements

Scott R. Peppet
University of Colorado Law School

Follow this and additional works at: https://scholar.law.colorado.edu/articles

Part of the Civil Procedure Commons, Courts Commons, Law and Economics Commons, Legal Profession Commons, Legal Remedies Commons, and the Litigation Commons

Citation Information

Scott R. Peppet, *Note, In-Kind Class Action Settlements*, 109 HARV. L. REV. 810 (1996), *available at* https://scholar.law.colorado.edu/articles/688.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact lauren.seney@colorado.edu.

HEINONLINE

Citation: 109 Harv. L. Rev. 810 1995-1996
Provided by:
William A. Wise Law Library

Content downloaded/printed from HeinOnline

Tue Jun 13 17:23:01 2017

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

Copyright Information

The use of in-kind payments in combination with or in place of pecuniary payments has become increasingly common in the settlement of class action litigation.[1] In-kind payments are noncash compensation from the defendant to the plaintiff class, usually in the form of a coupon or scrip that class members can apply toward the purchase of the defendant's products in the future.[2] For example, class members in one case recovered coupons valid for a discount on the purchase of new food processors.[3] Other class action plaintiffs have secured discounts on transatlantic air travel,[4] groceries,[5] homesite purchases,[6] bar review courses and legal texts,[7] and brokerage fees.[8] Although in-kind payments may facilitate settlement, these noncash agreements create unique difficulties for reviewing courts.

Under Federal Rule of Civil Procedure 23(e),[9] a court reviewing a class action settlement plan assumes a general duty to assure the proposal's adequacy.[10] Although class action law favors settlement,[11] courts have interpreted the Rule 23(e) inquiry as requiring a determination that the settlement is "fair, reasonable, and adequate."[12] Courts

---

[1] *See* Buchet v. ITT Consumer Fin. Corp., 845 F. Supp. 684, 691–92 n.5 (D. Minn. 1994) (citing various in-kind cases); Cuisinart Food Processor Antitrust Litig., 1983-2 Trade Cas. (CCH) ¶ 65,473, at 69,473–74 (D. Conn. Oct. 24, 1983); *see also* Fred Gramlich, *Scrip Damages in Antitrust Cases*, 31 ANTITRUST BULL. 261, 262 & n.2 (1986) (discussing 20 scrip settlements between 1976 and 1986).

[2] *See* 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 12.05, at 12-17 to 12-18 (3d ed. 1992).

[3] *See Cuisinart*, 1983-2 Trade Cas. (CCH) at 69,467. For a general discussion of the *Cuisinart* case, see Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1, 13–16 (1993).

[4] *See* Adams v. Pan Am. World Airways, Inc., 640 F. Supp. 683, 684 & n.5 (D.D.C. 1986) (discussing the settlement in *In re* Atlantic Air Travel Antitrust Litig., No. 84-1013 (D.D.C. 1986)).

[5] *See* Ohio Pub. Interest Campaign v. Fisher Foods, 546 F. Supp. 1, 5 (N.D. Ohio 1982).

[6] *See* Tornabene v. General Dev. Corp., 88 F.R.D. 53, 56–57 (E.D.N.Y. 1980).

[7] *See* Bonnie Phemister v. Harcourt Brace Jovanovich, Inc., 1984-2 Trade Cas. (CCH) ¶ 66,234, at 66,987–88 (N.D. Ill. Sept. 14, 1984).

[8] *See In re* Montgomery County Real Estate Antitrust Litig., 83 F.R.D. 305, 312 (D. Md. 1979).

[9] Rule 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court . . . ." FED. R. CIV. P. 23(e).

[10] The court's duty is to ensure that the interests of absent class members are adequately represented in any settlement of the suit. *See In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 805 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995); 2 NEWBERG & CONTE, *supra* note 2, § 11.46, at 11-105 to 11-106; CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, 7B FEDERAL PRACTICE AND PROCEDURE § 1797, at 340–41 (1986).

[11] *See* FED. R. CIV. P. 16(c) advisory committee's notes (directing courts to encourage settlement); 2 NEWBERG & CONTE, *supra* note 2, § 11.41, at 11-85 n.218; Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 498 n.2 (1991).

[12] 2 NEWBERG & CONTE, *supra* note 2, § 11.41, at 11-91; *see In re General Motors*, 55 F.3d at 805; 7B WRIGHT, MILLER & KANE, *supra* note 10, § 1797.1, at 378; Sylvia R. Lazos, *Abuse in*

applying this standard cannot evaluate with certainty the likelihood and potential amount of recovery at trial. The complex and speculative nature of valuation of in-kind payments compounds that difficulty by adding uncertainty to the settlement approval process.[13]

Although some courts and commentators support in-kind payments,[14] others have called them "a joke,"[15] and "a scam and hypocrisy";[16] one in-kind payment plan was labelled one of "the more dubious settlements on record."[17] One court succinctly summarized the sentiment against nonpecuniary class relief: "the defendants . . . get off cheaply, the . . . lawyers get the only real money that changes hands and the court, which approves the settlement, clears its docket of troublesome litigation."[18] Despite such concerns, in-kind settlements have yet to receive adequate academic attention.[19] This silence suggests an implicit assumption that in-kind payments pose courts and practitioners no greater difficulties than other class action settlements. Similarly, by reviewing in-kind payments in the same manner as review of other class actions, courts have tacitly suggested that in-kind settlements pose only marginally greater complications under Rule 23 than other class action plans.

In-kind settlements create a troubling situation in which reviewing courts must act as blindfolded fiduciaries. Although courts may suggest otherwise,[20] they often lack the information necessary to make traditional Rule 23 review effective in the in-kind context. In fact, close review of in-kind case law reveals signs of doctrinal chafing as the difficulties of reviewing in-kind settlements under the "fair, reasonable and adequate" test force courts to innovate at the margins. Ex-

---

Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations, 84 MICH. L. REV. 308, 320 (1985).

[13] Commentators have noted that, in most class actions, settlement approval is perfunctory, notice is often defective, settlement review is cursory, and appellate review is rare. *See, e.g.*, Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 682–83 (1994).

[14] *See, e.g.*, Buchet v. ITT Consumer Fin. Corp., 845 F. Supp. 684, 691–92 & nn.5–6 (D. Minn. 1994) (declining to reject the legitimacy of scrip settlements generally, noting the widespread use and increasing popularity of scrip settlements in class actions, and citing numerous court decisions and newspaper articles in support of such settlements).

[15] Barry Meier, *Fistfuls of Coupons: Millions for Class-Action Lawyers, Scrip for Plaintiffs*, N.Y. TIMES, May 26, 1995, at D1 (quoting a public interest attorney).

[16] *Id.* at D5 (quoting the editor of a publication on class actions).

[17] Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 45 n.131 (1991) (discussing the *In re Cuisinart* litigation).

[18] *In re* Oracle Sec. Litig., 132 F.R.D. 538, 544–45 (N.D. Cal. 1990) (discussing injunctive relief).

[19] For two notable exceptions, see Gramlich, cited above in note 1 at 261, and Morawetz, cited above in note 3, at 13–18.

[20] *See, e.g.*, *In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 308 (N.D. Ga. 1993) ("An analysis of the compromise reached in a class action entails a complete understanding of the terms of the settlement and the negotiations leading up to the settlement.").

amination of the negotiation dynamics that drive such settlements, and of the review process itself, suggests that courts often look to factors outside the scope of the traditional Rule 23 inquiry.

This Note's purpose is twofold: first, to isolate what characteristics of in-kind payments create problems for reviewing courts; and second, to identify prescriptive policy approaches for attorneys and judges as they propose or evaluate in-kind settlement plans. The focus throughout is on the unique dilemmas that in-kind payment creates for attorneys and reviewing courts. This Note argues that courts and attorneys should explicitly consider these unique dilemmas and should structure in-kind settlements to minimize their adverse effects.

Part I briefly describes the traditional analysis of class action settlements under Rule 23 and reviews several in-kind settlement proposals in detail. Part II discusses the unique dilemmas that in-kind settlements create for reviewing courts. Part III discusses the concept of value-creation in negotiation and suggests several additional complexities that the possibility of value-creation poses to reviewing courts. Finally, Part IV analyzes evidence that courts innovate in this area, and suggests several prescriptive steps to facilitate the review process and increase the likelihood of approval of in-kind settlements.

I. IN-KIND CLASS ACTION SETTLEMENTS

Rule 23 imposes several potentially constraining requirements on courts reviewing settlement proposals. First, Rule 23(a) requires inquiries into the numerosity of the class, the commonality of class members' claims, the typicality of the class representatives, and the "adequacy of representation" of the class as a whole.[21] These four elements are intended to guide the court in determining whether the named class members and their representatives adequately represent the interests of the entire class, and whether the case is appropriate for class disposition. In addition, Rule 23(e) permits court approval of a class action settlement only after a judicial determination that such settlement is "fair, reasonable, and adequate."[22] This test has two related prongs. First, courts engage in "a substantive inquiry into the terms of the settlement relative to the likely rewards of litigation."[23] Second, courts inquire into the negotiation process itself, focusing on the question "whether negotiations were conducted at arms' length by experienced counsel after adequate discovery."[24]

---

[21] FED. R. CIV. P. 23(a).

[22] *See supra* p. 810.

[23] *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 796 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

[24] *Id.* The Third Circuit distinguished between the Rule 23(a)(4) inquiry into "adequacy of representation" and the "fair, reasonable, and adequate" inquiry focused on the process used by the negotiating attorneys: "Although the procedural focus on the fairness determination yields information pertinent to the adequacy of representation inquiry, it cannot fully satisfy the inquiry."

Several recent settlements illustrate how reviewing courts apply this two-pronged approach to in-kind plans. In 1993, a district court approved a $458 million settlement in a price-fixing suit against a group of domestic air carriers.[25] The settlement included $50 million in cash, $408 million in discount certificates applicable toward future air travel, and $14 million in attorneys' fees.[26] The court approved the plan, despite its finding that the scrip's economic value to the class was substantially less than the face value of $408 million.[27] Noting that "[b]y far the most important factor in evaluating the fairness and adequacy of a settlement is the likelihood and extent of any recovery from the defendants absent the settlement,"[28] the court found that the settlement adequately compensated the plaintiff class in light of the uncertainties and costs of proceeding to trial and judgment.[29] The court also emphasized its finding that there was no evidence of fraud or collusion between plaintiffs' attorneys and the airline defendants.[30] According to the court, "the settlement was achieved . . . only after extensive and sometimes contentious arms' length negotiations."[31]

Similarly, in 1991, the district court in *New York v. Nintendo of America, Inc.*[32] approved a settlement plan in which Nintendo agreed to pay approximately $25 million in $5 coupons to the approximately five million purchasers allegedly injured by a scheme that fixed the prices of video game consoles and game cartridges.[33] In addition, Nintendo agreed that, if fewer than one million purchasers redeemed their coupons, it would pay a guaranteed minimum of up to $5 million to various state attorneys general.[34] Finally, Nintendo agreed to pay attorneys' fees and administrative costs of $1.75 million.[35] The court noted that the plaintiffs had "express[ed] doubts as to the evidentiary standard they would have to meet and to their ability to prove damages,"[36] and accordingly found that "[t]he coupons, while not an ideal

Id. Whereas the Rule 23(a)(4) test concerns whether the plaintiffs' representatives adequately represented the *whole* class, the fairness test measures the degree to which the attorneys negotiated in good faith and at arm's length. *See id.* at 797; *see also* 2 NEWBERG & CONTE, *supra* note 2, § 11.28, at 11-59 ("[T]he adequate representation requirement is satisfied when the court determines that the settlement was negotiated at arm's length and was not collusive in favoring the class representative or class counsel at the expense of the class.").

[25] *See In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 304–06 (N.D. Ga. 1993).

[26] *See id.* at 305–06.

[27] *See id.*

[28] *Id.* at 314.

[29] *See id.* at 315 ("[T]he novelty of plaintiffs' claims and the evidence . . . make success uncertain . . . . In short, plaintiffs' slim chance of success on the merits . . . weighs in favor of approval of the settlement.").

[30] *See id.* at 313, 348.

[31] *Id.* at 313.

[32] 775 F. Supp. 676 (S.D.N.Y. 1991).

[33] *See id.* at 679, 681–82.

[34] *See id.*

[35] *See id.*

[36] *Id.* at 681.

form of compensation, are adequate."[37] Turning to the procedural prong of the Rule 23 test, the court stressed that the presence of several attorneys general as representatives of the plaintiff class alleviated the court's fears of collusion.[38]

Not all in-kind settlements, however, have survived Rule 23 review. In a 1994 class action alleging fraudulent loan deferral practices, a district court rejected an offer by ITT Consumer Financial Corporation (ITT) to settle the suit by issuing plaintiffs transferable scrip for the purchase of noncredit life insurance policies.[39] The face value of the certificates was $47,215,400, and ITT agreed to pay an additional $26,000,000 in cash to plaintiffs' counsel for costs and fees.[40] The court "reluctantly" rejected the settlement and decertified the class on the substantive ground that the value of the scrip was "simply too tenuous and speculative in nature."[41] Regarding the second prong of the "fair, reasonable and adequate" test, the *ITT* court stressed that it "d[id] not presume to second-guess counsel's evaluation of the merits of this action or to challenge the integrity of the negotiations leading up to this proposed settlement."[42] Instead, the court focused on the uncertain value of the coupons, the fact that the certificates would be of no value to at least half the class, and ITT's refusal to guarantee some minimum cash payment were the plaintiffs to fail to redeem their certificates.[43]

Finally, the Third Circuit recently rejected an in-kind settlement plan proposed to end litigation over General Motors (GM)'s liability for fuel tank defects in its pick-up trucks.[44] The settlement plan proposed to grant class members a $1000 coupon applicable toward the purchase of a new truck[45] or to allow class members to designate a third party transferee to receive a $500 coupon.[46] According to the district court, which approved the settlement, the total economic value

---

[37] *Id.*; *see also* 2 NEWBERG & CONTE, *supra* note 2, § 11.46, at 11-110 to 11-112 ("The settlement does not have to be a brilliant one in order to secure judicial approval.").

[38] *See Nintendo*, 775 F. Supp. at 680–81.

[39] *See* Buchet v. ITT Consumer Fin. Corp., 845 F. Supp. 684, 686–87 (D. Minn. 1994). The coupons also included certain annual thrift club memberships or reduced prices on new loans. *See id.*

[40] *See id.* at 687–88.

[41] *Id.* at 691–92.

[42] *Id.* at 691.

[43] *See id.* at 692, 694, 696. *Cf.* New York v. Nintendo of Am., Inc., 775 F. Supp. 676, 679 (S.D.N.Y. 1991) (approving a settlement under which the defendant agreed to a guaranteed minimum value of $5 million out of a potential $25 million settlement).

[44] *See In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 777–79 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

[45] The $1000 coupon was transferable only to either an immediate family member (subject to restrictions) or a purchaser of the class member's existing vehicle. *See id.* at 780.

[46] *See id.*

of the plan was "between $1.98 billion and $2.18 billion."[47] In addition, GM agreed to pay $9.5 million in attorneys' fees.[48]

The Third Circuit found that the settlement plan failed to satisfy Rule 23(a) on several grounds. First, it created intraclass conflict between individual truck owners and fleet owners, for whom the intrahousehold transfer option was essentially worthless.[49] The court also found reason to doubt that the Rule 23(a) requirement of adequacy of representation was satisfied, and noted that the large fee of $9.5 million "would yield very substantial rewards to [the attorneys] after what, in comparison . . . was little work."[50] Finally, the court rejected the settlement under the "fair, reasonable, and adequate" test on both substantive and procedural grounds. The court questioned the plaintiffs' valuation of the coupons in light of the fact that no procedure had been designed to ensure that *all* class members received at least *some* value from the settlement, the lack or inadequacy of a secondary transfer market for the coupons, and the fact that the settlement seemed to be a sophisticated GM marketing plan.[51] The court also expressed concern that the settlement occurred too quickly, after insufficient discovery.[52]

These four cases suggest several preliminary observations concerning the efficacy of the Rule 23(e) "fair, reasonable, and adequate" approach to review of in-kind settlement proposals. First, as *Domestic Air* and *Nintendo* demonstrate, in the face of uncertain recovery through continued litigation and absent evidence of attorney collusion, courts approve in-kind settlements even if actual settlement value is questionable.[53] Second, even in such circumstances, courts may reject an in-kind plan if they have access to reliable information that suggests a low incidence of coupon redemption.[54] Finally, courts facing truly hard cases — such as the *General Motors* case — in which there is some threat of collusion and little reliable information about the plan's value, may reject the settlement and emphasize the uncertain value of the in-kind plan. Part II attempts to explain why courts reach these varied outcomes.

---

[47] *Id.* at 782.

[48] *See id.*

[49] *See id.* at 801.

[50] *Id.* at 803.

[51] *See id.* at 807–10.

[52] *See id.* at 814.

[53] In the *ITT* case, for example, the court noted that it "approache[d] its evaluation of the proposed settlement mindful of the factors that favor compromise," because it had no reason to doubt that both parties properly weighed the strengths and weaknesses of the litigation. Buchet v. ITT Consumer Fin. Corp., 845 F. Supp. 684, 693 (D. Minn. 1994).

[54] Despite its compromise-oriented approach, the *ITT* court rejected the settlement proposal, partly because a previous ITT in-kind settlement plan had solicited few certificate redemptions. *See id.* at 695–96.

II. THE DILEMMA FOR REVIEWING COURTS

Review under the "fair, reasonable, and adequate" standard is essentially an "economic valuation of the proposed settlement"[55] by which courts attempt to analyze "the value of the settlement itself to determine whether the decision to settle represents a good value for a relatively weak case or a sell-out of an otherwise strong case."[56] Courts ask whether the plaintiff class will receive benefits substantially comparable to those available through proceeding with the litigation. In simple economic terms, a court attempts to compare the settlement's value to the expected value of proceeding to trial, adjusted for costs and risk.[57]

Determining the value of the expected trial outcome poses certain well explored problems. Courts may not engage in a pretrial mini-trial on the merits but nevertheless must evaluate the strength of each side's case, estimate the costs of trial, and discount for the possibility that any award will be nonrecoverable.[58] Although difficult, the evaluation of this half of the substantive equation is well within the court's traditional purview[59] and presents no dilemmas unique to the in-kind context.

In-kind payments introduce acute problems, however, in the analysis of the settlement value. Although courts attempt to monetize an in-kind settlement's present value to facilitate comparison to the likely trial outcome,[60] such valuation places a heavy burden on the reviewing court. For example, valuation of scrip settlements requires a court to hear and weigh evidence on the number of coupons that experts predict consumers will redeem, the effect of transferability provisions, and the present value of the certificates.[61]

In some cases, such analysis is relatively easy. In the *ITT* litigation, for example, the defendant's expert witness admitted that approximately half of the class members would not qualify for new loans because of poor credit histories and thus would be unable to use the discount coupons offered as part of the settlement.[62] In addition, the court drew on the experience of an earlier ITT scrip settlement in

---

[55] *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 806 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995). Some commentators have approached the problem at a substantive level and attempted to define for courts the bounds of a "fair and adequate" settlement. *See* Morawetz, *supra* note 3, *passim*; *cf.* Peter T. Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 5–7 (offering a valuation model for lawyers and clients).

[56] *General Motors*, 55 F.3d at 806.

[57] *See* 2 NEWBERG & CONTE, *supra* note 2, § 11.41, at 11-90.

[58] *See, e.g.*, WRIGHT, MILLER & KANE, *supra* note 10, § 1797, at 356.

[59] For a useful discussion of case evaluation, see generally Hoffman, cited above in note 55, at 3–7.

[60] *See* 2 NEWBERG & CONTE, *supra* note 2, § 11.41, at 11-90, § 11.46, at 11-110.

[61] *See In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 320–21 (N.D. Ga. 1993).

[62] *See* Buchet v. ITT Consumer Fin. Corp., 845 F. Supp. 684, 694 (D. Minn. 1994).

which only approximately three percent of the plaintiff class redeemed their coupons.[63] Not surprisingly, the court found the value of the scrip too tenuous to accept.

More often, however, valuation of in-kind payments is extremely difficult.[64] Courts rarely have the benefit of analogous, let alone direct, precedent as in *ITT*.[65] In addition, although courts are generally adept at complex factual findings, judges normally base their conclusions on a solid foundation of evidence amassed and tested through adversarial allegation and discovery. When reviewing class settlements, however, a court may have little reliable evidence with which to work because the attorneys for both parties have abandoned their adversarial stance.[66] Although this problem is common to all class settlement approval hearings, its effects are exacerbated in the in-kind context because the court must depend upon presented evidence not only for the valuation of the likely trial outcome, but also for the valuation of the settlement package.

Courts thus face great uncertainty in applying both substantive components — the settlement value and the likely trial outcome — of the Rule 23(e) test. To complicate matters further, this uncertainty both derives from and stimulates courts' suspicion of attorneys' motives for agreeing to in-kind payments. Commentators often question whether class action counsel have colluded with a defendant and thereby deprived the plaintiff class of value.[67] Many fear that class attorneys will accept a suspect in-kind settlement in exchange for the defendant's commitment, implicit or explicit, to pay higher attorneys' fees.[68] The use of scrip only heightens this fear. Particularly if a de-

---

[63] *See id.* at 695.

[64] *See, e.g.*, Downs, *supra* note 13, at 696 ("Under the current settlement procedure, courts generally do not have access to information that may be essential for purposes of evaluating fairness, such as the options that were considered and rejected in settlement negotiations, the issues that were discussed, the class opponent's reactions to various proposals, and the amount of compromise necessary to obtain resolution through settlement.").

[65] *See, e.g.*, *Domestic Air*, 148 F.R.D. at 322 ("[N]o comparable certificate program exists from which to obtain reliable data and estimate the use of the certificates with certainty . . . .").

[66] *See, e.g.*, 2 NEWBERG & CONTE, *supra* note 2, § 11.42, at 11-95 (noting that, at the approval stage, "both the plaintiffs and the settling defendants are the proponents of the settlement and are no longer in an adversarial position with respect to requesting court approval"); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2066 (1995) ("Trial judges are not well situated to evaluate the parties' joint presentation at settlement hearings . . . .").

[67] Agency theory suggests that contingent fee attorneys have incentives to settle actions early and with little personal investment of time or resources. *See, e.g.*, Downs, *supra* note 13, at 665; Macey & Miller, *supra* note 17, at 23–24; Weiss & Beckerman, *supra* note 66, at 2074 ("[T]he potential for opportunism in class actions is so pervasive, and evidence that plaintiffs' attorneys sometimes act opportunistically so substantial, that it seems clear plaintiffs' attorneys often do not act as [the plaintiffs'] 'faithful champion.'").

[68] *See, e.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883 (1987) (describing "sweetheart settlement[s]" in which "the plaintiff's attorney trades a high fee award for a low recovery"); Mary K. Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*,

fendant believes that the class members ultimately will not redeem a large amount of the issued scrip, the defendant may be willing to settle for a high face value in certificates, along with a correspondingly high cash fee to the plaintiffs' attorneys, secure in the expectation that, in the end, the defendant will pay only the fee plus some nominal amount.[69] With respect to scrip settlements, as the *General Motors* court noted, there can be the "sense that counsel may have pursued a deal with the defendants separate from, and perhaps competing for the defendant's resources with, the deal negotiated on behalf of the class."[70]

Courts can, of course, hope that Rule 23 review and approval will prevent agency conflict. Even unscrupulous attorneys know that they bargain in the shadow of Rule 23.[71] Given the severe consequences for plaintiffs' lawyers of a Rule 23 class decertification should the reviewing court refuse to approve a scrip settlement, courts may look to Rule 23 to deter class attorneys considering a side deal with a willing defendant. Moreover, the importance of maintaining a good professional reputation may deter attorneys from unscrupulous behavior.[72] Firms that represent class-action plaintiffs must jockey before courts for the right to represent lucrative classes; thus, their reputations before the judiciary are vitally important in this context. Reputational effects create incentives for plaintiffs' attorneys to accept only those scrip settlements that appear worthwhile for the plaintiff class.

Nevertheless, agency costs seem excessive in this context. The complex and speculative nature of in-kind plans can blindfold courts and force them to act in the absence of reliable information on which

---

66 TEX. L. REV. 385, 389 (1987); Andrew Rosenfield, *An Empirical Test of Class-Action Settlement*, 5 J. LEGAL STUD. 113, 115 (1976) ("Incentives exist for offers by the defendant of a greater attorney's fee in exchange for the acceptance of a smaller award to the class."). *But see* Morawetz, *supra* note 3, at 14 n.40 ("[T]here is reason to think that there is more going on in the selection of non-cash remedies than merely an effort to trade in good claims for attorney fees."). For a summary of agency theory, see JOHN W. PRATT & RICHARD J. ZECKHAUSER, PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 1–36 (1991).

[69] *See* Gramlich, *supra* note 1, at 265–66 (discussing a hypothetical example of such collusion and suggesting that "[s]crip . . . obscures the small size of the damages defendants actually pay to plaintiffs").

[70] *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 803 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995). The inability of the plaintiff class to monitor its representatives leads to agency problems. In this context, not only will the plaintiff class usually lack information about its attorneys' incentives and effort, but the class will also be unable to ascertain what *nonscrip* settlements the defendant would have accepted had no scrip plan been available.

[71] *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 *passim* (1979) (discussing the relationship between the formal legal system and informal bargaining behavior).

[72] Only recently have legal scholars systematically considered the importance of maintaining a professional reputation in the legal domain. *See, e.g.*, Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 525–27, 557–61 (1994) (describing the importance to litigators and law firms of reputations as either "cooperators" or "gladiators").

to base their decisionmaking. Given these difficulties, attorneys are likely to press courts to relax the degree of parity required under Rule 23(e) between the expected trial outcome and the settlement value. Some courts do accommodate uncertainty and do not require that the plaintiff class receive exactly the same benefit as the present value of the outcome of actually going to trial.[73] Instead, courts have held that the fact "[t]hat the proposed settlement amounts to a fraction of potential recovery does not render the proposed settlement inadequate and unfair. 'In fact, there is no reason . . . why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.'"[74] In addition, some courts accept imprecision when estimating the value of in-kind settlements. In *Domestic Air*, for example, the court acknowledged that "a precise dollar valuation cannot be given," and instead entertained a range of possible values.[75]

Relaxing the extent to which the parties must demonstrate a settlement's value or the degree to which the settlement must approximate the expected trial outcome amplifies the threat of attorney collusion in this context. Plaintiffs' attorneys and defense counsel may propose in-kind settlements precisely because of the courts' extreme dependence on submitted evidence for the economic valuation of such plans. To the extent that courts fail to evaluate proposed settlements rigorously, attorneys stand a better chance of succeeding in collusion and are thus more likely to propose such settlements.

Thus, "fair, reasonable and adequate" analysis of in-kind settlements presents unique methodological difficulties for courts. In the in-kind context, courts have little reliable information on which to base decisions to approve or deny settlement proposals, and few ways by which to determine whether a settlement creates value for the plaintiff class or merely constitutes a collusive distributive scheme between plaintiffs' counsel and the defendant.

III. VALUE CREATION AND THE ATTORNEY'S DILEMMA

As discussed above, courts fear that unscrupulous plaintiffs' attorneys may collude with their opponents and thereby provide inadequate representation for the class.[76] This Part explores the possibility that

---

[73] *See* 2 NEWBERG & CONTE, *supra* note 2, § 11.46, at 11-110.

[74] *In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 325 (N.D. Ga. 1993) (quoting Detroit v. Grinnell Corp., 495 F.2d 448, 455 n.2 (2d Cir. 1974)) (approving a settlement valued at approximately 12.7% to 15.3% of the minimum possible court recovery).

[75] *Id.* at 323. The *General Motors* court, however, rejected the district court's finding that the settlement was worth between $1.9 and $2.2 billion on the ground that the figures were produced by experts who "clearly lacked a sound methodological basis." *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 818–19, 822 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

[76] *See supra* pp. 817–18.

even *honorable* attorneys — with no collusive intentions — may feel pressure to behave in ways that appear similar to collusion. In-kind payments present this additional problem because such settlements potentially involve value-creating negotiations. This Part discusses the concept of value creation and explores why value creation complicates Rule 23(e) review.

A. *Value Creation*

Negotiations involve more than the distributive allocation of finite resources between competing parties. Rather, negotiators can reach integrative or value-creating settlements.[77] Such settlements are economically efficient, or "pareto optimal," because they waste less and capture more of the potential surplus in the parties' transaction.[78] Efficiency gains occur because the parties find and exploit trades that offer incremental benefits to one that exceed the incremental costs to the other.

The parties' different relative valuations are often the most important source of value in integrative bargains.[79] If the parties' relative

---

[77] *See, e.g.*, MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 72 (1992) (discussing distributive and integrative bargaining); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 33 (1982) (dividing two-party bargaining into two types — distributive and integrative — and describing the latter as a process by which the parties cooperate for joint gains); James White, *The Pros and Cons of "Getting to YES,"* 34 J. LEGAL EDUC. 115, 116 (1984) ("[S]ome would describe a typical negotiation as one in which the parties initially begin by cooperative or efficiency bargaining, in which each gains something with each new adjustment without the other losing any significant benefit."). *But cf.* ROY J. LEWICKI, JOSEPH A. LITTERER, JOHN W. MINTON & DAVID M. SAUNDERS, NEGOTIATION 107 (2d ed. 1994) ("Most situations are mixed-motive, containing some elements that require distributive bargaining processes, and others that require integrative negotiation.").

Insufficient attention has been given to the value-creating role that *lawyers* can play in both dispute resolution and deal-making negotiation. For examples of work in this area, see Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 *passim* (1984); Ronald J. Gilson & Robert H. Mnookin, *Foreword* to *Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1, 7–14 (1995); and Robert H. Mnookin, *Creating Value Through Process Design*, 11 J. INT'L ARB. 125 *passim* (1994).

[78] *See, e.g.*, ROGER FISHER & WILLIAM URY, GETTING TO YES 58–83 (Bruce Patton ed., 2d ed. 1991); DEAN G. PRUITT, NEGOTIATION BEHAVIOR 137–62 (1981). Although classical economists often assume that rational actors will always seek to maximize gains by exploiting all available value, negotiation analysts have long argued that negotiating parties often "leave value on the table" notwithstanding the possibility of further cooperative gain. *See, e.g.*, James K. Sebenius, *Negotiation Analysis: A Characterization and Review*, 38 MGMT. SCI. 18, 21 & n.6 (1992); Kathryn E. Spier, *The Dynamics of Pretrial Negotiation*, 59 REV. ECON. STUD. 93, 94 (1992).

[79] Negotiating parties can exploit four basic sources of value: the parties' differences, shared interests, economies of scale, and opportunities to dampen strategic opportunism. *See* DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 88–116 (1986); *see also* BAZERMAN & NEALE, *supra* note 77, at 94–101 (discussing the use of differences in expectations and in time and risk preferences to create value). Differences in resources, relative valuations, forecasts about the future, risk preferences, and time preferences can all create value. *See* BAZERMAN & NEALE, *supra* note 77, at 17 ("If you clearly identify your priorities before a negotiation, you can find effective trade-offs by conceding less

valuations of a given exchange differ, the trade may benefit one more than it harms the other. For example, if an aggrieved plaintiff believes that a defendant has damaged the plaintiff's house, it may be cheaper for a defendant who is a carpenter to repair the damage *and* to contribute some additional new construction than to compensate the plaintiff in cash for the cost of third-party repairs. The carpenter can trade what is cheap to her for what is valuable to the other party.

In-kind payments may similarly evidence a creative use of the different relative valuations of defendants and class plaintiffs. A greater amount of scrip may serve as a substitute for a lesser amount of cash, just as carpentry repairs can take the place of cash compensation.[80] Thus, if a defendant is willing to offer more total value in coupons than in cash, and if, dollar for dollar, the coupons are worth the same to the plaintiffs, a scrip settlement may be economically optimal.[81] Even if the plaintiffs do not value the coupons on a par with cash, an in-kind settlement can be value-creating as long as the defendants pay sufficient extra scrip to compensate for the plaintiffs' difference in valuation.

In some situations this opportunity for value creation may advance settlement discussions and make possible an otherwise foreclosed negotiated agreement. Without scrip there may be no zone of possible agreement between the defendants and the plaintiffs because the defendants cannot offer enough to make settlement worthwhile for the plaintiffs, and vice versa.[82] In *Domestic Air*, for example, the court noted that in-kind payments seemed necessary because of the defendants' dire financial circumstances; a cash compensation plan could have bankrupted the airlines.[83] By creating value through a scrip offer, the parties facilitated pretrial settlement.

B. *The Attorney's Dilemma*

The potential for value creation in in-kind settlements places attorneys in a dilemma that compounds the courts' problems. Sophisticated practitioners know that exploiting opportunities for value creation may facilitate settlement and benefit the plaintiff class. Value

---

important issues to gain on more important ones.") LAX & SEBENIUS, *supra*, at 90–106; *cf.* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 787 (1984) ("[A]t the core of the zero-sum conception is an assumption that parties value [a] fixed resource equally.").

[80] *Cf.* Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 J. DISP. RESOL. 25, 33 ("[M]ost negotiations, like most lawsuits, are converted into linear, zero-sum games about money, where money serves as the proxy for a host of other needs and potential solutions such as . . . substitute goods.").

[81] Class members are unlikely to value an in-kind dollar equally to an actual dollar. Whereas a cash settlement plan allows a given plaintiff to determine how to spend her payment, coupons are by nature restricted and thus less valuable for some.

[82] *See* LAX & SEBENIUS, *supra* note 79, at 48–50.

[83] *See In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 324 (N.D. Ga. 1993).

creation, however, is not easy; "[a]n essential tension in negotiation exists between cooperative moves to create value and competitive moves to claim it."[84] This tension arises because, although distributive bargaining requires that negotiators guard valuable information carefully, value creation generally requires negotiators to share information in order to trade on differences and complementarities.[85] Thus, for a value-creating negotiation to occur in the above carpenter example, the homeowner must disclose that she would accept in-kind repairs rather than cash, but doing so might prevent her from extracting a higher cash settlement from the carpenter by bluffing or exaggerating her demands. In distribution, unreciprocated disclosure can be dangerous; in value-creation, it is often essential.

The Rule 23 review process compounds this dilemma. Not only must negotiating attorneys face the inevitable tension created by the threat of exploitation, but plaintiffs' attorneys may also hesitate to engage in cooperative behavior, such as sharing information, for fear of signaling to a reviewing court that the negotiation was not conducted at arm's length and in good faith. In short, the cooperation necessary to generate value-creating scrip settlements may necessarily raise the inference of collusion.

Plaintiffs' attorneys often respond to this dilemma by exaggerating the benefits that the scrip plan will confer on the plaintiff class. For example, in *Domestic Air*, plaintiffs' counsel argued that the certificates' aggregate value was "penny for penny and dollar for dollar the face amount of the certificate[s]" — totaling $458 million.[86] Similarly, in the *ITT* case, the settlement proponents originally claimed that the settlement was worth the full face value of the scrip package.[87]

Not surprisingly, courts have rejected such claims. Moreover, class attorneys risk that their exaggeration of the benefits to the class may be taken as evidence of a stronger allegiance to the settlement plan — or to the defendants — than to their clients. Again, plaintiffs' attorneys face a quandary: although they feel pressure to argue the settle-

---

[84] LAX & SEBENIUS, *supra* note 79, at 33.

[85] As one commentator has noted:

> What complicates matters is that, while lying may be the watchword in distributive bargaining, full and truthful disclosure is the key to identifying and exploiting opportunities for integrative bargaining. Thus certain kinds of lies, told to secure distributive (pie-splitting) advantages, may make it impossible for the parties to discover and exploit the integrative (pie-expanding) opportunities that may be available.

Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1228 (1990); *see also* G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts*, 44 VAND. L. REV. 221, 253 (1991) ("Scholars have long recognized that most negotiations present bargainers with mixed incentives that make cooperation extremely difficult. Negotiators want to receive the benefit of cooperation, but also seek to minimize their exposure to risk of exploitation.").

[86] *Domestic Air*, 148 F.R.D. at 320.

[87] *See* Buchet v. ITT Consumer Fin. Corp., 845 F. Supp. 684, 693 (D. Minn. 1994).

ment's adequacy in order to secure approval, such advocacy can, of itself, create the appearance of collusion.

IV. What Should a Court Do?

Parts II and III have suggested that in-kind settlements present unique difficulties for both courts and attorneys. If these dilemmas occur in practice, innovative judicial responses might be expected as courts cope with the requirements of Rule 23(e) review in the face of uncertainty.

Most commentators have suggested that courts should respond to the problems of Rule 23 review by bolstering the quality and scope of information available about settlement value. Some have recommended that courts appoint special guardians to monitor pretrial class action negotiations.[88] Others have suggested mandatory disclosure rules regarding conflicts of interest between the class and its attorney,[89] or special attorney-client privilege rules granting absent class members full access to communications between class counsel and the named plaintiffs.[90] Although such approaches would ideally eliminate information asymmetries between the court and the attorneys regarding settlement value, they do not address the possibility of collusion.

Assuming that perfect information will never be available because of the structure of the Rule 23 process and the difficult substantive valuation problems that in-kind payments introduce, how should courts proceed? This Part describes several examples of innovative settlement provisions that have at least partially alleviated courts' concerns about the valuation of in-kind payments. It then explains why these innovations do not fit precisely within the confines of the two-pronged Rule 23(e) test, and argues for further extensions of the approaches they exemplify.

A. *Example One: Market Discipline*

Scrip settlements incorporate a variety of market provisions. At one extreme, some offer plaintiffs a choice between a premium value coupon or a discounted cash payment — for example, a $1000 coupon or $500 in cash[91] — that constitutes a direct translation of coupon value into a predetermined cash amount. At the other extreme, in-kind settlements can restrict or deny transferability. In the *General Motors* litigation, for example, the defendants stipulated that, in order to sell a coupon, a class member first had to find a willing buyer and then exchange the class member's $1000 original certificate for a $500

---

[88] *See, e.g.*, Lazos, *supra* note 12, at 326–29.

[89] *See* Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1186–91 (1982) (discussing such a solution in the context of Rule 23(b)(2) class actions).

[90] *See* Note, *The Attorney-Client Privilege in Class Actions: Fashioning an Exception to Promote Adequacy of Representation*, 97 HARV. L. REV. 947, 956 (1984).

[91] *See, e.g.*, *In re* Mid-Atlantic Toyota Antitrust Litig., 564 F. Supp. 1379, 1382 (D. Md. 1983).

transferable coupon issued in the buyer's name.[92] In addition, the settlement permitted only one such transfer per coupon.[93] In rejecting the settlement proposal, the reviewing court noted that "the one-time transfer restriction . . . precludes the development of a market-making clearing house mechanism."[94] Other settlements merely permit transferability without explicitly creating a market mechanism.[95]

In analyzing such provisions, courts generally focus on several issues: whether all class members will be able to use the scrip; whether the settlement plan erects formidable procedural hurdles to scrip use; whether the coupons are transferable; and, if so, whether a secondary market for the coupons is likely to provide an active outlet for those class members seeking to trade or sell their scrip.[96] On its face, this focus on secondary transfer markets merely appears to be one factor in the difficult calculus of in-kind valuation. Although consideration of market mechanisms does facilitate such valuation, it is also justified at a more fundamental level. Given the uncertainty that courts face in reviewing in-kind settlements, market forces are likely to be the only real discipline on the parties. The existence of a secondary market is of particular significance when a settlement proposes to offer coupons valid toward the purchase of expensive goods. If the typical class member will only infrequently purchase the good in question, that individual's scrip will rarely be of much value absent an efficient transfer mechanism. Open marketability disciplines the settlement by ensuring that payment in-kind will ultimately amount to payment in cash, instead of no payment at all.

Nevertheless, although transferability diminishes the likelihood that a low redemption rate will shrink the benefit to the plaintiff class and confer a windfall on the defendant, a market mechanism does not quell all doubts regarding a settlement's value. Class members will necessarily receive less than face value for even a freely transferable certificate, given that transfer entails some transaction costs. Although class members may receive adequate compensation relative to the likely trial outcome if given sufficient scrip, the fact remains that courts reviewing a proposed settlement will have little information about what price the market will ultimately sustain for the coupons. Only if a court can anticipate the scrip's future market price can it determine the quantity of scrip that would satisfy the class claims. On

---

[92] *See In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 809 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

[93] *See id.*

[94] *Id.* The Third Circuit found that the district court erred "when it presumed development of a liquid market for these transfer certificates with very little support in the record for it." *Id.*

[95] *See, e.g.*, *In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 309, 321 (N.D. Ga. 1993) (discussing the importance of transferability); Cuisinart Food Processor Antitrust Litig., 1983-2 Trade Cas. (CCH) ¶ 65,473, at 69,471 (D. Conn. Oct. 24, 1983) (noting the relevance of transferability).

[96] *See, e.g.*, *General Motors*, 55 F.3d at 809.

balance, however, an in-kind settlement that incorporates transfer provisions and market mechanisms alleviates some of a court's uncertainty in determining whether a settlement's value is fair and reasonable under Rule 23.

B. *Example Two: Minimum Guaranteed Payments*

In addition to ascertaining whether an in-kind settlement allows for development of a secondary market, courts often consider whether the settlement plan guarantees at least some minimum payment by the defendant. In determining the adequacy under Rule 23 of a proposed settlement, courts are required to adopt the perspective of the absent class members.[97] Accordingly, the distributive consequences borne by the defendant need not correspond to the adequacy of the settlement. Nevertheless, some courts have sought to determine whether a proposed settlement guarantees that the defendant will bear some minimum burden. In the *General Motors* litigation, for example, the Third Circuit explained that "although the degree to which a settlement hurts a defendant is not ordinarily a measure of the settlement's adequacy, the fact that this settlement might actually benefit GM . . . certainly does little to allay the concern that the settlement did not advance the interests of the class as much as it might have."[98]

The difficulties of Rule 23 review discussed in Part II may explain judicial interest in whether costs are borne by defendants. Although a court may be uncertain about a settlement's value, such uncertainty will be partially alleviated if the settlement provides that the defendant will bear some minimum burden. Thus, again, the settlement's terms may create mechanisms that discipline the parties even if the judiciary cannot.

Some settlements have stipulated a minimum cash contribution in the event that the class fails to redeem a set number or percentage of the issued coupons.[99] In the *Nintendo* settlement, for example, the defendant agreed that if fewer than one million purchasers redeemed the $5 coupons, Nintendo would pay the difference — up to $5 million — into a fund for use in antitrust enforcement.[100] In the *ITT* case, how-

---

[97] *See supra* note 10.

[98] *General Motors*, 55 F.3d at 803. This characterization of the purpose of settlement comports with the classic image of negotiation as a zero-sum situation in which each party tries to dominate the other strategically. *See, e.g.*, Melvin A. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 638 (1976) ("Negotiation . . . is conventionally perceived as a relatively norm-free process centered on the transmutation of underlying bargaining strength into an agreement by the exercise of power, horse-trading, threat, and bluff."); Menkel-Meadow, *supra* note 79, at 764–67 (describing the traditional model of adversarial or "maximizing victory" negotiation).

[99] *See, e.g.*, *In re* Mid-Atlantic Toyota Antitrust Litig., 564 F. Supp. 1379, 1382 (D. Md. 1983); Ohio Pub. Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1, 5 (N.D. Ohio 1982) (providing for payments to charities if certificates were not redeemed).

[100] *See* New York v. Nintendo of Am., Inc., 775 F. Supp. 676, 679 (S.D.N.Y. 1991).

ever, the defendant refused to guarantee a minimum cash contribution.[101] In rejecting the settlement, the court noted that "ITT asks the Court to find that the certificates have a significant value to the class members but is unwilling to establish a bottom line."[102]

As discussed in Part II, estimation of the "bottom line" is the central problem facing courts in their review of in-kind settlements. Even if they are contingent on a failure by the class members to redeem their certificates, minimum cash contributions can thus reduce the uncertainty that courts face as they attempt to compare the settlement value to the expected trial outcome.

C. *Example Three: Mixed Attorney Compensation*

In most scrip settlements, attorneys seek pure cash compensation. Occasionally, however, settlements incorporate a third type of guarantee that the attorneys have negotiated at arm's length: attorney compensation that mixes cash and scrip. At least one court has required plaintiffs' attorneys to accept partial payment in-kind, explaining that "because they have expressed faith and confidence in the value of the settlement for their clients, it is not unreasonable to require them, to some extent, to stand equally with plaintiffs in sharing in the distribution in kind."[103] Such mixed fee arrangements increase a court's certainty about a settlement's value by reducing the likelihood that plaintiffs' counsel has exaggerated the coupons' value. By aligning the incentives of class and counsel, the settlement diminishes the advantages of such exaggeration.

Various mixed compensation systems could serve to increase confidence in the value of in-kind settlements. At one extreme, attorneys might accept full compensation in coupons and thereby demonstrate their belief that a secondary market will permit the transfer of scrip to cash. Needless to say, even full in-kind compensation cannot eliminate the possibility of collusion by the plaintiffs' attorneys and the defendants; the plaintiffs' attorneys could receive an elevated quantity of scrip value on the implicit understanding that each coupon would be heavily discounted when traded. If class members then received only an allocation calculated according to face value, the class would thereby be defrauded of value. To mitigate this risk, attorneys could accept a cash fee contingent upon the ultimate redemption rate by class members: if few coupons were redeemed, the plaintiffs' attorneys would receive less cash. Regardless of the specifics of these mixed or contingent compensation schemes, however, each demonstrates that, by more closely aligning the incentives of the attorneys and the class, a settlement can impose discipline upon the parties and thereby diminish a reviewing court's uncertainty.

---

[101] *See* Buchet v. ITT Consumer Fin. Corp., 845 F. Supp. 684, 696 (D. Minn. 1994).

[102] *Id.* at 696.

[103] Brown Co. Sec. Litig. v. Gulf & W. Indus., 355 F. Supp. 574, 593 (S.D.N.Y. 1973).

V. Conclusion

In each of the above examples — market discipline, minimum guaranteed payments, and mixed attorney compensation — courts require some demonstration, rather than mere assertion, that a scrip settlement has value. In each, a settlement includes a mechanism to assure the court that the agreement's terms will be substantively fair. Despite the valuation difficulties that the use of scrip poses, such innovations assist a reviewing court in determining the adequacy of a settlement under Rule 23. Instead of exaggerating the benefits of a scrip settlement, or minimizing the difficulties of Rule 23 review, attorneys and courts can consider whether such mechanisms will impose discipline on the parties.

From a policy perspective, extending such innovations creates a final dilemma. On the one hand, these disciplinary innovations partially alleviate the pressure that in-kind settlements place on reviewing courts; to the extent that parties propose or courts insist upon such terms, these innovations may enable courts to ensure the continued viability of traditional Rule 23(e) review in this context. The innovations may assuage the fears of courts and commentators and reduce the call for reform. On the other hand, such innovations may generate momentum for more fundamental change in the class action review process. Ideally, a court could insist upon or fashion such settlement provisions and tailor them to provide the appropriate level of discipline in the case at bar. To make such disciplinary innovations truly effective, a court would require the power to approve a settlement contingent upon later reapproval if, for example, a secondary market ultimately set a fair price for the plaintiffs' coupons. The current approach to class action review, however, forbids such ongoing management of a settlement; a court must approve or reject, but cannot meddle.[104] Thus, taken to their extreme, these innovations, and the in-kind payments that give rise to them, suggest a need for basic changes in the Federal Rules of Civil Procedure.

---

[104] *See* 2 NEWBERG & CONTE, *supra* note 2, § 11.41, at 11-94.