No. 16-56666

In the United States Court of Appeals for the Ninth Circuit

STEVE CHAMBERS, ET AL.,
Plaintiffs–Appellees,

v.

CHRISTINE KNOTT,
Objector–Appellant,

v.

WHIRLPOOL CORPORATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of California, No. 8:11-cv-01733-FMO-JCG

BRIEF OF NINE STATE ATTORNEYS GENERAL AS *AMICI CURIAE* IN SUPPORT OF NO PARTY AND REMAND

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STATEMENT OF *AMICI CURIAE*

The Attorneys General of Arizona, Idaho, Louisiana, Missouri, Nevada, North Dakota, Oklahoma, Oregon and Texas are their respective States' chief law enforcement officers. Their interest here arises from two responsibilities. *First*, the Attorneys General have an overarching responsibility to protect their States' consumers in their roles as chief law enforcement officers. *Second*, the undersigned have a responsibility to protect consumer class members under CAFA, which envisions a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 6 (requirement "that notice of class action settlements be sent to appropriate state and federal officials" exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *id.* at 34 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

The Attorneys General make this submission to further these interests, speaking on behalf of consumers who will be harmed if CAFA's strictures under 28 U.S.C. § 1712 and *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013), are not fully applied here.[1]

SUMMARY OF ARGUMENT

The Attorneys General, in a bipartisan coalition, urge the Court to remand with instructions that to be fair, adequate, and reasonable pursuant to F.R.C.P. 23(e) the settlement must comply with the strictures of the Class Action Fairness Act of 2005, 28 U.S.C. § 1711 *et seq.* ("CAFA"), including Section 1712's coupon limits and this Court's prior panel opinion in *In re HP Inkjet*. Put simply, CAFA's coupon-settlement strictures apply here. And the failure to require full CAFA compliance, including with *In re HP Inkjet*, puts consumers at risk.

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[1] The Attorneys General submit this brief as *amici curiae* only as to the overarching issue of what strictures and precedent should apply. The Attorneys General take no position on the merits of the underlying claims or the ultimate proper division of money between Plaintiffs, Objectors, and Defendants. And this submission is without prejudice to any State's ability to enforce its consumer protection laws or otherwise investigate claims related to this dispute. The Attorneys General certify that no parties' counsel authored this brief, and no person or party other than named *amici* or their offices made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO APPLY IN FULL CAFA AND *IN RE HP INKJET*

By failing to require full CAFA compliance, including with 28 U.S.C. § 1712's strictures and this Court's binding interpretation from *In re HP Inkjet*, the District Court failed to make a proper inquiry under Rule 23(e) and left class members with precisely the type of imbalanced settlement Congress sought to stamp out through CAFA.

A. The District Court Disregarded The Specific Limitations CAFA Imposes On Coupon-based Class Action Settlements

Section 1712 of CAFA codifies Congress's regulation of coupon settlements, setting a mandate of heightened scrutiny for such settlements as well as specific rules that must be satisfied prior to judicial approval of any proposed coupon settlement. *See* 28 U.S.C. § 1712; *In re HP Inkjet*, 716 F.3d at 1178.

First, CAFA directs courts to apply enhanced scrutiny to coupon settlements. *See* 28 U.S.C. § 1712(e); *see also In re HP Inkjet,* 716 F.3d at 1178. A court may approve a proposed coupon settlement only after conducting a hearing and issuing a written opinion concluding that the settlement is fair, adequate, and reasonable for class members

(including being proportionally fair when considering the difference between the class recovery and class counsel's fee award). *See* 28 U.S.C. § 1712(e).

Second, CAFA imposes a series of specific rules that govern proposed coupon settlements. *See* 28 U.S.C. § 1712(a)-(d); *see also In re HP Inkjet,* 716 F.3d at 1178. A touchstone of these rules is ensuring that class action settlements properly align the interests of class counsel and the absent class members, *i.e.* that class counsel do not negotiate a settlement that provides only illusory value to the class. Indeed, as this Court has explained, "if the legislative history of CAFA clarifies one thing, it is this: the attorneys' fees provisions of § 1712 are intended to put an end to the 'inequities' that arise when class counsel receive attorneys' fees that are grossly disproportionate to the actual value of the coupon relief obtained for the class." *In re HP Inkjet,* 716 F.3d at 1179 (citing S. Rep. No. 109–14, at 29-32).

The District Court failed to properly apply CAFA's mandates. The District Court avoided applying CAFA's rules, stating that "the court is not convinced that CAFA governs attorney's fees in this case" and relying on the erroneous legal conclusion that "[i]n diversity actions

such as this one, the Ninth Circuit applies state law to determine the right to fees and the method for calculating fees." Dkt. 351 at 18. The District Court then went on to interpret CAFA's mandates incorrectly, concluding that Section 1712 left the discretion to select a fee calculation method, notwithstanding that CAFA has precise methods for calculating fees in coupon settlements such as this one. *See id.* ("But even assuming CAFA did apply, the court would still have discretion in choosing the method of determining attorney's fees.").

Relying on this erroneous conclusion of law, the District Court decided that it was able to choose the lodestar method in calculating attorneys' fees for the entirety of the settlement because the settlement includes coupons as well as a small portion of monetary relief. The court then assigned a lodestar of ~$9M with a 1.68 multiplier, awarding attorneys' fees of ~$15M. *Id.* at 34. Put simply, the District Court refused to apply CAFA's coupon mandates to a settlement composed almost entirely of coupon relief.

B. *In re HP Inkjet* Squarely Rejected And Foreclosed The District Court's Approach

This Court in *In re HP Inkjet* thoroughly reviewed and unpacked Section 1712 and its fee calculation provisions, leaving no confusion as

to how attorneys' fees are to be calculated in this circuit. Per *In re HP Inkjet*, Section 1712(c) applies here, as this case involves a settlement that provides both coupon and equitable relief; as *In re HP Inkjet* explains, "[i]f a settlement gives coupon and equitable relief and the district court sets attorneys' fees based on the value of the entire settlement, and not solely on the basis of injunctive relief, then the district court must use the value of coupons redeemed when determining the value of the coupons part of the settlement." *In re HP Inkjet*, 716 F.3d at 1184.

The court in *In re HP Inkjet* considered and rejected the precise approach selected by the District Court. As the court explained in *In re HP Inkjet*, under Section 1712(c), the proper calculation in a case like this involves two separate calculations using Sections 1712(a) and (b). Under Section 1712(a) "the court must determine a reasonable contingency fee based on the actual redemption value of the coupons awarded." *Id.* Then, under Section 1712(b) "the court must determine a reasonable lodestar amount to compensate class counsel for any non-coupon relief obtained." *Id.* at 1185.

C. The Court Should Remand With Instructions To Properly Apply *In Re HP Inkjet*

The District Court ignored *In re HP Inkjet*, and CAFA more generally, and this constitutes reversible error. The settlement here consists primarily of coupons: a rebate on a new dishwasher.[2] The other chief settlement component is reimbursement of costs spent on repairs, and $200-300 in cash for class members who already replaced their dishwasher. Dkt. 351 at 4.[3] The District Court should have applied *In re HP Inkjet* and calculated the rebates redeemed (awarding fees as an appropriate percentage of that) and then separately calculated a reasonable lodestar for the monetary or reimbursement component of the settlement (and any value attributed to meaningful injunctive relief that would benefit the class). *See, e.g.*, *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) ("'[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the

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[2] As noted in the Final Approval Order, as of July 7, 2016, there were 133,040 claims—106,331 rebate, 15,963 rebate and reimbursement, and 10,417 reimbursement only. Dkt. 351 at 5.

[3] The settlement also contains a provision for enhanced safety warnings. Dkt. 351 at 4; Dkt. 254-2 at 1.

law of the circuit...'" (quoting *United States v. Johnson,* 256 F.3d 895, 914 (9th Cir. 2001) (en banc))). The Court should remand to the District Court with instructions to properly apply and calculate fees within the strictures of *In re HP Inkjet* and CAFA.

II. NOT CORRECTING THE DISTRICT COURT'S ERROR WOULD THREATEN THE INTERESTS OF CONSUMERS, WHO ARE INHERENTLY DISADVANTAGED IN THE CLASS ACTION SETTLEMENT PROCESS

A. The District Court's Rejection Of *In Re HP Inkjet* And CAFA Puts Class Members In Jeopardy Because CAFA Is Specifically Designed To Address The Risks Class Members Face In The Class Action Settlement Process

Should the erroneous holding below, which sidesteps the consumer protections set out in CAFA and *In re HP Inkjet*, be left to stand, future classes of consumers will be put in jeopardy. As this Court has noted, "Congress passed CAFA 'primarily to curb perceived abuses of the class action device.'" *In re HP Inkjet*, 716 F.3d 1177 (quoting *Tanoh v. Dow Chem. Co.,* 561 F.3d 945, 952 (9th Cir. 2009). And one of the key abuses CAFA targeted was "coupon settlement[s], where defendants pay aggrieved class members in coupons or vouchers but pay class counsel in cash." *Id.*; Class Action Fairness Act of 2005, Pub. L. No. 109–2, February 18, 2005, 119 Stat. 4 ("Class members often receive little or no benefit from class actions, and are sometimes

harmed, such as where ... counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value[.]").

Coupon settlements present particularly severe risks to the class. As this Court has explained, "Congress was rightfully concerned with [coupon] settlements: by decoupling the interests of the class and its counsel, coupon settlements may incentivize lawyers to 'negotiate settlements under which class members receive nothing but essentially valueless coupons, while the class counsel receive substantial attorney's fees.'" *In re HP Inkjet*, 716 F.3d 1177–78 (quoting S. Rep. No. 109–14, at 29–30). "There are good reasons for imposing [] additional restrictions on coupon settlements." *Tyler v. Michaels Stores, Inc.*, 150 F. Supp. 3d 53, 58 n.11 (D. Mass. 2015). And it is no surprise that "[b]oth the courts and Congress generally disfavor coupon settlements." *Hofmann v. Dutch LLC*, 317 F.R.D. 566, 575 (S.D. Cal. 2016).

The District Court has robbed the class here of CAFA's protections, putting their interests back into jeopardy. The District Court's error has not gone unchallenged thanks to vigorous advocacy by Defendants and the lack of a clear sailing agreement. But that is not the standard case. And the District Court's erroneous rationale

provides a path for future cases to circumvent CAFA and produce improperly outsized fee awards through the creation of coupon-dependent settlements that include other additional relief along the lines seen here. This would be tragic; outsized fee awards, like the one here, improperly divert money into the hands of class counsel that could and should be going to class members. *See, e.g.*, *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015); *see also* William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 820 (2003).

* * *

The District Court's avoidance of CAFA's coupon strictures was error. *In re HP Inkjet* clearly holds that attorneys' fees in a coupon settlement must be based on coupons redeemed. The District Court failed to do so. This warrants remand.

CONCLUSION

For the forgoing reasons, the undersigned Attorneys General, acting in a bipartisan coalition, request that this Court vacate the District Court's settlement approval and remand with instructions to

conduct a proper inquiry under CAFA, including applying the limits of Section 1712 and *In re HP Inkjet*.

September 13, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

1. This brief is 2,074 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type, which complies with Fed. R. App. P. 32 (a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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