



An Article by Peter H. Gunst

### **Class Actions, Coupons and Phantom Fees**

Recently, a notice was published concerning the proposed settlement of a class action lawsuit brought against Jiffy Lube International on behalf of a nation-wide consumer class, other than residents of New York, in the District Court for Cherokee County, Oklahoma. The notice highlights some troubling issues that surround consumer class action litigation.

According to the notice, Jiffy Lube was accused of charging consumers unjustified “environmental surcharges” ranging from 80 cents to \$1.25 per oil change. Under the proposed settlement, consumers who fill out and submit claim forms will receive \$5.00 coupons good for one year against the cost of an oil change at any Jiffy Lube location. Subject to court approval, the attorneys representing the consumer class will receive \$2,750,000. And, as an afterthought (although this isn’t in the notice), the two named plaintiffs will receive a bonus of \$500 each.

The whole thing seems a little Kafkaesque. The alleged injury suffered by any consumer is extremely trivial, slightly less than a dollar to slightly over a dollar. The “recovery” to the consumer class is an invitation to participate in what Jiffy Lube could well view to be a promotional campaign because the coupons can only be used toward the purchase of Jiffy Lube services. The plaintiffs’ lawyers are the only clear winners with their projected \$2,750,000 in

fees. Small wonder such lawsuits and the lawyers who bring them are often excoriated for supposedly fomenting unnecessary litigation by those seeking litigation reform.

But there is another side to the coin. In its standards and guidelines, the National Association of Consumer Advocates sets forth the rationale it uses to justify such lawsuits:

Frequently, many consumers are harmed by the same wrongful practice, yet individual actions are usually impracticable because the individual recovery would be insufficient to justify the expense of bringing a separate lawsuit. Without class actions, wrong-doing businesses would be able to profit from their misconduct and retain their ill-gotten gains. Class actions by consumers aggregate their power, enable them to take on economically-powerful institutions, and make wrongful conduct less profitable.

The Association cites as a positive illustration of consumer class action litigation the resolution of lawsuits brought against two California banks for allegedly overcharging individual account holders. Because individual recoveries would have only ranged from \$3.00 to \$50.00, no practical remedy would have existed other than a class action suit. Total damages of almost \$10,000,000 were recovered, 65% of which was distributed directly to consumers and an additional 33% of which went to consumer organizations. Less than 2% of the settlement fund went to the plaintiffs' attorneys.

Whether detrimental or beneficial, consumer class action suits are not likely to go away. Most states have broadly-worded consumer protection statutes, and class counsel are very adept at locating local courts with a favorable track record for granting class action status and approving class action settlements, no matter where the defendants are located. In Madison County, Illinois, for example, class action filings increased a whopping 1850% between 1998 and 2000. Eighty-one percent of those suits alleged a nation-wide class, and no defendant was actually based in the county.

Many consumer class action cases, like the Jiffy Lube case, revolve around allegedly phony fees or overcharges made to consumers. Fee and overcharge situations are grist for the class action mill because of their uniform application in a multitude of transactions. Individually they may be small, but collectively they add up, creating a tempting target to class action counsel.

Not only large national corporations like Jiffy Lube are vulnerable to suit. Car dealers have been hit for allegedly adding bogus fees to the sales price of new and used cars. Recently, for example, a New Jersey car dealership group agreed to a \$14,000,000 class settlement payable part in cash and part through coupons.

Obviously, there is significant potential risk to retailers who sell any significant volume of product. A local dealer may be small potatoes to a big-time class action lawyer with a national practice. But he has many local brethren who will be attracted not only by the

aggregation of damages afforded by class action treatment, but also by consumer protection statutes that routinely require the defendant to pay a successful plaintiff's attorneys fees.

The bottom line is that consumer class actions can pose a real damage. A merchant of any significant size must ensure that any fees or add-ons that it charges are in compliance with often arcane state consumer protection laws.