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Gift cards—“a new way to reduce liability

Paul-Erik Veel is quoted in the Canadian Underwriter article *Gift cards—a new way to reduce liability* on January 26, 2018. This article discusses Loblaw's response to the revelations of bread price-fixing.

The question is currently before the Ontario Superior Court of Justice in *David v. Loblaw*, which has not only drawn attention from the public, but also from businesses and the antitrust class actions bar, as noted by Paul-Erik Veel of Lenczner Slaght on *CanLii Connects*.

“For organizations that have engaged in misconduct looking to make a public response, Loblaw's actions highlight both the potential benefits and risks of such voluntary remediation,” Veel writes.

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The courts have not yet passed judgment on whether such a release would be enforceable — or whether gift cards constitute a valid set-off against any ultimate damage award, Veel notes.

“[T]here has been some academic and judicial criticism of ‘coupon settlements’ of class actions—namely, settlements where consumers are provided with payments that can only be used to purchase products or services from the settling party,” Veel writes.

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But is the strategy is risky, says Veel. He offers alternative strategies for companies wishing to pursue the gift card option while it is still under court review. Clear releases are essential, he said, and gift card offers should maximize the likelihood that the courts will subsequently agree that releases are effective and that gift cards will offset awards.

“For example, instead of simply giving gift cards, companies can consider giving consumers the option to elect between receiving gift cards or funds useable elsewhere, such as a prepaid credit card,” Veel said. “Alternatively, if a company wanted to provide gift cards, it could discount the scope of the release: for example, it could provide a \$25 gift card that could only be used at the company's stores, in exchange for which a consumer would agree to release its claim to only the first \$10

of any settlement or damages.

“Each of those options would entail higher costs of the program for the firm, but would increase the likelihood that such voluntary restitution would be an effective release and set-off.”

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