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PRODUCT LIABILITY UPDATE

Seventh Circuit Holds That Product Recall Precludes Class Certification

Proposed consumer class actions to recover economic losses regularly raise questions of how refunds and other voluntary remedies offered to consumers affect class certification. Defendants often wrestle with questions of whether voluntary remedies offered to plaintiffs and class members will defeat class certification and with how to frame the facts in legal arguments under Rule 23. Variations of these arguments frequently and sometimes successfully have been made in terms of the lack of superiority of a class action, unique defenses affecting typicality, and inadequacy of representation by plaintiffs who have spurned offers of refunds or replacements.

On August 17, 2011, the United States Court of Appeals for the Seventh Circuit provided some clarity about these issues. It held that a manufacturer's recall and refund program that was available to plaintiffs and proposed class members made certification of multiple classes inappropriate by rendering the interests of the plaintiffs and their attorneys antagonistic to those of proposed class members. See *In re Aqua Dots Prods. Liability Litig.*, No. 10-3847, slip op., (7th Cir. Aug. 17, 2011).

The Aqua Dots toy kit consisted of colored beads that could be "fused into designs when sprayed with water." *Id.* at 1. Unfortunately, to young children they might also resemble candy and might cause illness if ingested. After learning of the problem, the manufacturer, Spin Master, recalled all Aqua Dots and offered consumers replacement kits or comparably priced toys. It also gave refunds to all consumers who requested them, although its recall notice did not specifically offer them.

The plaintiffs chose not to accept the remedies offered and instead sued on behalf of various proposed classes and subclasses under federal and state laws. They sought recovery for economic losses as well as punitive damages and declaratory and injunctive relief. Their proposed classes would not have included children injured by Aqua Dots (or the purchasers of those kits).

The District Court denied certification of all the proposed classes because the recall and replacement/refund program offered and widely publicized to consumers by Spin Master already provided more relief to consumers than they were likely to receive in a class action, given the transaction costs of expensive attorney fees and notice to class members. The District Court found that these disadvantages of a class action over the existing recall remedies caused the proposed classes to fail the requirement of Rule 23(b)(3) that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

On appeal, the Seventh Circuit agreed with the District Court's reasoning but not its reliance on Rule 23(b)(3). Noting that a recall campaign is not a method of "adjudicating the controversy," the Court held that the District Court (and Spin Master) should instead have looked to Rule 23(a)(4)'s requirement of adequate representation. In a key passage, the Seventh Circuit concluded:

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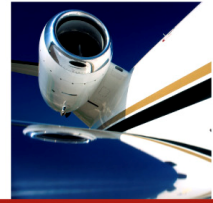
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Plaintiffs want relief that duplicates a remedy that most buyers already have received, and that remains available to all members of the putative class. A representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests. *In re Aqua Dots*, slip op. at 7.

The Court also found that manageability problems would arise from differences in state law regarding punitive damages, difficulties in providing notice, and the impossibility of determining who purchased Aqua Dots as well as who had already used them without problem (thus affecting entitlement to a remedy). The resulting costs would likely exceed the value of the toys, leaving the principal effect of certifying the class simply the inducement of a payment to the class lawyers to "go away." *Id.* at 8.

The Seventh Circuit's opinion in *Aqua Dots* provides both important guidance for manufacturers and suppliers of consumer products and important precedent for defendants in consumer class actions who have provided voluntary remedies to consumers. It not only answers the fundamental question of how voluntary remedy programs can affect certification of proposed consumer classes but gives guidance on the specific legal significance of such measures under Rule 23: they go directly to the adequacy of representation rather than superiority of a class action, although they also affect manageability.

The decision does not address the many other voluntary post-sale remedies that a manufacturer or supplier can undertake and their effects on class certification; answers to those questions must be developed through future cases. What was critical to the result in *Aqua Dots* was that the voluntary remedies offered were complete and available to all consumers. As the Court found, they were not only real and sufficient but were superior to the likely relief in a class action when the costs of litigation were taken into account.

Aqua Dots shows that effective recall, refund, and other voluntarily undertaken consumer remedies may reduce the exposure of a manufacturer or supplier of consumer goods to class actions to recover alleged economic losses. Companies in all consumer industries can benefit from understanding the decision and how it should inform their policies and programs for refunds, recalls, and other voluntary post-sale remedies.

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