

Litigation Advisory

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Seventh Circuit Affirms Denial of Class Certification in Case of Available Refund/Replacement Remedy

By Christopher J. Dalton

Finding the proposed class representative inadequate because he sought to obtain through a class action a remedy that was already available, the Seventh Circuit, on August 17, 2011, affirmed the decision of the Northern District of Illinois denying class certification in *IMO Aqua Dots Products Liability Litigation* (Appeal No. 10-3847). The Seventh Circuit's decision is important to businesses that manufacture, distribute and sell consumer products.

The product at issue was a children's toy where kids sprayed the "Aqua Dots" with water to create 3D pictures; the Chinese manufacturer substituted a different adhesive for the one which was specified. The substituted adhesive had the unfortunate side effect of metabolizing into GHB (also known as the "date rape drug") if accidentally ingested (and, as a kid's toy, that was highly possible). The US distributor issued a recall notice when the error was detected. Nearly 600,000 of 1 million affected units were returned for exchange with a non-defective toy or, if consumers requested, for a full refund.

The District Court denied certification under Federal Rule of Civil Procedure 23(b)(3), which requires that a class action be superior to individual adjudications. The court found that a class action was not superior because the recall/refund program provided consumers with a very adequate remedy, whereas a class action would only benefit the attorneys, particularly since a cost-free remedy was readily available.

The Seventh Circuit granted interlocutory appeal of the class certification denial, and similarly determined that certification was inappropriate. The Circuit Court found it "hard to quarrel with the district court's objective," agreeing that the transaction costs of a class include not only lawyers' fees but also giving notice under Rule 23(c)(2)(B). Notice may well cost more, per kit, than the kits' retail price -- and could be ineffectual at any price, since most purchases were anonymous. The court can't send each buyer a letter. Notice would be by publication, yet the recall was widely publicized. Why bear these costs a second time?

But the Circuit Court disapproved of the District Court's use of a "policy" justification for denying certification: "a district court's conclusion that it has a better idea does not justify disregarding the text of Rule 23." Simply put, district courts are not permitted to substitute their policy judgments for the Supreme Court's policy judgments contained in the Rules.

Nonetheless, the Seventh Circuit held that certification should have been denied under Rule 23(b)(4), adequacy:

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.

The Court also found that plaintiffs' demand for punitive damages rendered a nationwide class action inappropriate under Rule 23(b)(3)(D), as the variations in the states' consumer protection laws would make the matter unmanageable.

Many businesses today face consumer class actions over allegedly "defective" products, especially those which cause no physical harm, just economic loss. But most responsible businesses, like the defendants in Aqua Dots, respond to consumer complaints and, where the product is defective, provide a remedy. Yet such conscientious actions have in many cases failed to prevent class action plaintiffs' lawyers from seizing upon the alleged "defect" – and even using the product recall as an "admission" – and filing lawsuits which largely benefit only the attorneys prosecuting them. The Seventh Circuit's decision may help stem that tide.

The attorneys at Buchanan Ingersoll & Rooney have extensive experience in defending consumer and other class actions. We have represented clients in state and federal courts across the country, and stand ready to assist you should the need arise.

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