

Using Promised Out-of-Court Relief To Defeat Class Actions: The 10th Circuit Reinforces Courts' Discretion To Dismiss, on Prudential Mootness Grounds, Putative Class Suits Seeking Already-Promised Remedies

12 July 2012

Authors: James C. Martin, Colin E. Wrabley

Previously, we advised of the U.S. Court of Appeals for the 7th Circuit's decision in *In re Aqua Dots Products Liability Litigation*, 654 F.3d 748 (7th Cir. 2011). (Jim Martin & Colin Wrabley, Reed Smith Class Action Alert 12-017, "Seventh Circuit Holds That Voluntary Product Refund Programs Can Defeat Class Certification on Adequacy Grounds Under Rule 23(a)(4)" (Jan. 23, 2012).) In that case, the 7th Circuit held that the district court properly declined to certify the class because class representatives were not "adequate" where the defendant had implemented a product refund and replacement program providing a comparable remedy to what the putative class might recover in court.

Recently, and echoing some of the 7th Circuit's reasoning in *Aqua Dots*, the 10th Circuit dismissed a putative class action against Toyota where Toyota's recall of certain automobiles, subject to federal oversight, promised the class representative "exactly the relief sought in her complaint": notice of the defect to all owners and repair of the defect at no cost. *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208 (10th Cir. 2012). The court held that such a "remedial promise," although it "may not be enough to kill a case constitutionally, ... can be enough to bring it to an end all the same" under the little-used doctrine of prudential mootness. Class action litigators should be aware of this decision and its implications for putative class actions across a broad range of cases.

***Winzler* and Prudential Mootness**

In *Winzler*, Arrienne Mae Winzler, a Toyota car owner, brought a putative class action under state law on behalf of a nationwide class of certain Toyota car owners and lessees, alleging that the cars had defective "Engine Control Modules" (ECMs). She sought "an order requiring Toyota to notify all relevant owners of the defect and then to create and coordinate an equitable fund to

pay for repairs.” The district court dismissed Winzler’s complaint for failure to state a claim. After she filed her appeal, Toyota announced its nationwide recall of the defective cars and, pursuant to federal law, notified owners that it would fix or replace the defective ECMs at no cost. Because Toyota was required by federal law to carry out this promise and give Ms. Winzler the exact relief she requested, Toyota argued on appeal that her case should be dismissed as moot.

The 10th Circuit agreed. It first confirmed courts’ “remedial discretion” to deny equitable relief where it is not “needed.” This discretion is implicated, the court continued, where the dispute has become “prudentially moot” because “events [have] so overtake[n] a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits....” And prudential mootness can exist even where a case has a “flicker of life” in it and meets the constitutional requirement under Article III of a live “case or controversy.”

Prudential mootness compelled dismissal here, the 10th Circuit held, because of Toyota’s recall program, backed by the federal government’s statutory and regulatory duties to ensure that Toyota would carry it out. And, given the statutory and regulatory framework implicated by Toyota’s recall, including government oversight of and penalties for non-compliance, the court found that there was “not enough value left for the courts to add in this case to warrant carrying on with the business of deciding its merits.

The court also stressed that because plaintiff had a commitment in hand for “precisely the relief she seeks[,]” judicial involvement could result in a “waste [of] public resources” and, echoing the 7th Circuit in *Aqua Dots*, would “surely add new transaction costs for Toyota and perhaps reduce the incentive manufacturers have to initiate recalls (as Toyota did here), all while offering not even a sliver of additional relief” for plaintiff or the putative class. See *Aqua Dots*, 654 F.3d at 751 (noting that the “lower the transaction costs of dealing with a defective product, the better”). Indeed, the 10th Circuit continued, “[p]erhaps the lawyers would benefit if this would-be class action labored on through certification, summary judgment, and beyond[, b]ut it’s hard to see how anyone else could”—again echoing the 7th Circuit in *Aqua Dots*. *Id.* (referring scornfully to the fact that the “principal effect of class certification...would be to induce the defendants to pay the class’s lawyers enough to make them go away; effectual relief for consumers is unlikely”).

The court found no “cognizable danger” that Ms. Winzler would be denied a remedy because the recall was nearly complete. And it rejected her argument that the federal agency charged with

overseeing the recall, the National Highway Transportation Safety Administration, might fall down on the job, and that she would be unable to ensure otherwise in court. In the court's view, the coordinate branches of the federal government that were overseeing the recall "should enjoy no less (concerns for comity would suggest even more) latitude than our district courts when it comes to selecting what they believe to be the most appropriate path to their stated remedial objective."

Analysis

At the heart of *Winzler* is the core principle that drove the 7th Circuit's decision rejecting class certification in *Aqua Dots*—that the judicial system should not be deployed where the same (or superior) relief can or will be obtained without the courts' involvement. While the court in *Aqua Dots* relied on this principle in its application of the class certification requirements of Rule 23 of the Federal Rules of Civil Procedure, the 10th Circuit in *Winzler* invoked it in its application of the largely dormant doctrine of prudential mootness as a basis for dismissal on the pleadings. In both instances, however, the lesson from these two decisions is clear enough—if remedies for product defects or analogous conduct can and likely will be provided privately in the absence of a judicial decree, this may provide a powerful defense to a class action.

Winzler specifically could have a substantial influence on courts in cases involving government-backed "remedial promises," and litigators should be aware of possible prudential mootness arguments that might be available in such cases. The 10th Circuit's decision rests in part on the role of the legislative and executive branches in certain instances of product recalls, and the need to avoid inter-branch conflict. As noted, however, it also rests in significant part on the likelihood that the class plaintiff, and the putative class she seeks to represent, will be made whole through a non-judicial remedy.

For this reason, *Winzler* also creates the possibility that courts might apply the prudential mootness doctrine in cases of purely private-party promises, without the overlay of government oversight. The government's backing of Toyota's promises in *Winzler* surely was material to the 10th Circuit's decision, but the court did not rule out the possibility that it might reach the same conclusion in the absence of government involvement. And, the 3rd Circuit previously has applied prudential mootness in affirming the dismissal of class claims for declaratory and injunctive relief, where that relief had "already been supplied by virtue of a settlement

agreement” with third parties, even though there was no conceivable government involvement. *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 700 (3d Cir. 1996); *cf. S-1 v. Spangler*, 832 F.2d 294, 297 (4th Cir. 1987) (same in non-class action context).

Accordingly, class action litigators should consider advising their clients on the import of *Winzler* and *Aqua Dots*, and how those cases might strengthen defenses to a wide range of possible lawsuits. Clients in a variety of industries who routinely face product defect claims and the prospect of recalls should consider whether a pro-active recall and repair program might negate class certification or prudentially moot a lawsuit. Or, for those clients who face unlawful labeling, advertising or similar claims, corrective action that addresses the problem for purchasers and changes the practice going forward could also be considered. In addition to providing grounds for a possible defense to a consumer class action, such affirmative steps could prove more efficient and less costly than waiting for the government or the inevitable string of class lawsuits. Indeed, such steps could forestall the filing of suit in the first instance.

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