Court of Appeals Breathes New Life Into Class Action Prerequisite

August 22, 2011 by Sean Wajert

The Seventh Circuit last week affirmed the trial court's decision not to certify a class of consumers making product liability claims against the makers of Aqua Dots toys. In Re: Aqua Dots Products Liability Litig., No. 10-3847 (7th Cir. Aug. 17, 2011). A tip of the cap to Ted Frank at PointofLaw who wanted to make sure we didn't miss this one, because of the potentially very useful analysis of Rule 23(a)(4).

Defendants made, distributed, or sold, AquaDots, a toy consisting of small, brightly colored beads that can be fused into designs when sprayed with water. A Chinese sub-contractor apparently substituted adhesives. While the substitute adhesive was chemically similar to the specified glue, when ingested, the sub metabolizes into gamma-hydroxybutyric acid (GHB), which can induce nausea, dizziness, drowsiness, agitation, depressed breathing, amnesia, unconsciousness, and even death, depending on the dose. Although the directions told users to spray the beads with water and stick them together, it was possible, given the age of the intended audience, that some would be eaten; children who swallowed a large quantity of the beads could become sick.

After learning of the problem, the manufacturer recalled all Aqua Dots products. The recall notice instructed consumers to take Aqua Dots products away from children and to contact the sellers to exchange them. Consumers got an exchange, or upon request, a refund. The recall was widely publicized, and hundreds of thousands of products were returned.

The plaintiffs were purchasers of Aqua Dots products whose children were not harmed and who did not ask for a refund; they challenged the adequacy of the recall program. The plaintiffs asked for a full refund under federal law plus punitive damages under state law. The Panel on Multidistrict Litigation transferred twelve suits to the Northern District of Illinois for pretrial proceedings. After the district court denied plaintiffs' motion to certify a class, see 270 F.R.D. 377 (N.D. Ill. 2010), the Seventh Circuit authorized an interlocutory appeal under Fed. R. Civ. P. 23(f).

The district court framed the central class question as whether a defendant- administered refund program may be found superior to a class action within the meaning of Rule 23(b)(3). 270 F.R.D. at 381. The court concluded that consumers would be better off returning their products for refund or replacement than pursuing litigation, which the court thought would just require the class members to bear attorneys' fees in order to obtain a remedy that is theirs for the asking already. The record showed that more than 600,000 consumers returned Aqua Dots kits, and that more than 500,000 of these 600,000 received refunds. The district court concluded that the substantial costs of the legal process could make a suit inferior to a recall as a means to set things right.

The Seventh Circuit noted that it "is hard to quarrel with the district court's objective." The lower the transactions costs of dealing with an allegedly defective product, the better. The

transactions costs of a class action include not only lawyers' fees but also giving notice under Rule 23(c). Here, notice might well cost more, per kit, than the kits' retail price—and could be ineffectual at any price, since most purchases were anonymous. The trial court couldn't order that defendants send each buyer a letter; notice presumably would be by publication, yet the recall was already widely publicized. Why bear these costs a second time?

Moreover, the Consumer Products Safety Commission had not expressed dissatisfaction with the recall campaign or its results, and the record did not contain any evidence of injury to children after the recall was announced.

The problem was, however, that a recall is not a form of "adjudication" as described in Rule 23, and a "policy approach" to the superiority analysis could not ignore the Rule's text. Policy about class actions has been made by the Supreme Court through the mechanism of the Rules Enabling Act, and Rule 23 establishes a national policy for the district judges.

Even as it mis-read Rule 23(b), departing from the text of Rule 23(b)(3), the district court could have, said the appeals court, simply relied on the text of Rule 23(a)(4), which says that a court may certify a class action only if the representative parties will fairly and adequately protect the interests of the class. Plaintiffs here wanted relief that duplicated a remedy that most buyers already had received, and that remained available to all members of the putative class. Bottom line: "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."

So, the trial judge cited the wrong subsection of Rule 23. But defendants did not forfeit their arguments by focusing on superiority; they made the essential contentions -- there is something wrong with proceeding as a class under these circumstances.

The panel noted also serious problems of management with the proposed class, including the variability of state law, and the fact that individual notice would be impossible, which would make it hard for class members to opt out. The per-buyer costs of identifying the class members and giving notice could exceed the price of the toys (or any reasonable multiple of that price), leaving nothing to be distributed. "The principal effect of class certification, as the district court recognized, would be to induce the defendants to pay the class's lawyers enough to make them go away."

But, the most interesting aspect of the decision, again, is the analysis of Rule 23(a)(4) and the notion that the adequacy requirement forbids class representatives from bringing socially wasteful litigation for the benefit of the attorneys at the expense of the class they seek to represent. The decision can be seen as part of the trend (including *Dukes*) to put rigor into the Rule 23(a) analysis.