Nothing for Something

Monday, August 22, 2011

You've probably heard of getting "something for nothing." We all want that, though we're skeptical that it's really possible. After all, there is no such thing as a free lunch. The late, great University of Chicago economist Milton Friedman was famous for saying that. And he was right. If a restaurant is offering free food, it is probably making it up with the drink prices. If we take a client out for lunch, they won't pay for the sandwiches but they are paying by lending us their time and ears. And as the Boss said, "the door's open/but the ride - it ain't free."

How about the opposite? Have you ever heard of getting nothing for something? That doesn't sound good, does it? Why would you pay for something that you could get for free? It doesn't take a University of Chicago scholar to figure out that getting nothing for something is dumb. But it apparently takes a University of Chicago graduate, professor, and Seventh Circuit judge to explain why getting nothing for something means that a class shouldn't be certified.

In *Aqua Dots Products Liability Litigation*, No. 10-3847 (7th Cir. August 17, 2011), the Seventh Circuit held that class certification was not appropriate for consumers seeking their money back for a defective product when the manufacturer already agreed to give them their money back. The author of the opinion is Judge Frank Easterbrook. For those of us who took Corporations and Securities classes from Professor Easterbrook at the University of Chicago Law School, the opinion offers everything we would expect. Professor Easterbrook was a notoriously tough grader. If you could regurgitate all the black-letter law accurately, that merely brought you up to a C (or at least the equivalent of that in U. of C's crazy grading system). To earn more points, you had to demonstrate a higher understanding of core principles and had to demonstrate depth and creativity. The *Aqua Dots* opinion displays depth and creativity.

The product at issue was a toy consisting of "colored beads that can be fused into designs when sprayed with water." Unfortunately, the manufacturer used an adhesive that, when ingested, can induce nausea or worse. Given the nature of

the product, it was "inevitable" that some of the beads would be eaten by kids. Two kids fell into comas. The manufacturer recalled the product. Money-back requests were honored.

The purported class included purchasers "whose children were not harmed and who did not ask for a refund." The plaintiffs sought a full refund plus punitive damages. The defendant argued that the plaintiffs lacked standing because none of the plaintiffs or their children were physically injured. Nice try, but financial injury creates standing. So the court must address the key issue in this case: class certification.

The district court denied class certification under Fed. R. Civ. P. 23(b)(3), because the class action was not "superior to other available methods for fairly and efficiently adjudicating the controversy." In the eyes of the district court, the defendant's refund program wasn't exactly a form of "adjudication," but the better "policy approach" was to treat it as such and send the plaintiffs to the refund program rather than continue litigation that would needlessly leak money on attorney fees.

The Seventh Circuit granted interlocutory review and affirmed, though on different grounds. Judge Easterbrook agreed with the district court's attempt to "lower the transaction costs of dealing with a defective product." But the text of Rule 23 cannot be mangled in the process. It's clear that Rule 23(b)(3) was drafted with the legal understanding of "adjudication" in mind, and a refund process does not fit the bill.

Then Judge Easterbrook does what brilliant lawyers and judges do: he keeps thinking. After answering the black-letter issue in the negative (refund does not equal "adjudication"), he considers whether another basis exists for denying class certification. And it turns out there is, and it turns out to be a reason that goes to the heart of why the purported class in this case is ridiculous. The plaintiff lawyers were offering their clients nothing for something. The clients (a bit of a fiction for all those absent class members) didn't need no stinkin' class action. They could get their money back without losing a percentage of their recovery to the lawyers.

Rule 23(a)(4) says that a court may certify a class action only if "the representative parties will fairly and adequately protect the interests of the class." But a "representative who proposes that high transaction costs (notice and attorneys' fees) can 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 fact, the class representatives and their lawyers harbored interests that were antagonistic to the absent class members.

Too many courts dodge the reality of what is really going on in aggregated litigation, and how it is all too often a vehicle for plaintiff lawyers to impose disproportionate settlement pressure on defendants, extract absurd attorneys' fees, and render almost no value to their 'clients.' But Judge Easterbrook (like his colleague Judge Posner) actually seems connected to litigation reality. "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; effectual relief for consumers is unlikely."

That really does sound like nothing for something. You might ask, what about those punitive damages? Isn't that worth something above and beyond the refund program? But different states will have different laws about the availability of punitive damages in this case. Consequently, a nationwide class action is simply unmanageable. Even apart from variability of state laws, "individual notice would be impossible." No one knows who bought the toys or who had problems with them. The per-buyer costs of notice would easily outstrip the values of the toys. Again, the consumers would end up with nothing. Only the plaintiff lawyers would get something.

Judge Easterbrook's opinion makes sense in concluding that class certification in this case makes no sense. Nor is this judicial policy-making; the words of Rule 23 itself make clear that a class that pursues nothing for something should not be certified. And if we read the opinion with the same creativity with which it was written, we will likely conceive of many other circumstances where 23(a)(4) can be invoked against class certification.