Using Privately Provided Out-Of-Court Relief to Defeat Class Certification

James C. Martin

Colin E. Wrabley

Reed Smith LLP

225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
(412) 288-3131
jcmartin@reedsmith.com
cwrabley@reedsmith.com

James C. Martin is a partner in Reed Smith LLP's Appellate Group whose practice emphasizes appeals and complex litigation. He has briefed and argued hundreds of appeals in federal and state courts across the country. He is a fellow and president-elect in the American Academy of Appellate Lawyers, and is a member and former president of the California Academy of Appellate Lawyers. Mr. Martin is a founding member and past president of the Third Circuit Bar Association and the chair of the Federal Bar Association's Appellate Law and Practice Committee. Jim has written widely on appellate and various substantive legal topics, including in the Pennsylvania Bar Institute's Third Circuit Appellate Practice Manual and the Continuing Education of the Bar—California's Civil Appellate Practice Manual and Expert Witness Guide. He regularly consults with trial lawyers and frequently assists in the preparation of post-trial motions, writs, and interlocutory appeals.

Colin E. Wrabley is a partner in Reed Smith LLP's Appellate Group. Mr. Wrabley has a broad trial and appellate practice that focuses on class certification, constitutional litigation, intellectual property disputes, foreign judgment enforcement actions, commercial and business tort lawsuits, and the False Claims Act. He has argued cases in several federal courts of appeals, briefed numerous dispositive and class certification motions in trial courts across the country, and authored briefs in dozens of appeals in the U.S. Supreme Court, the federal courts of appeals, and state supreme courts. Mr. Wrabley also has written extensively on class certification issues, federal appellate decisionmaking, and appellate jurisdiction and procedure.

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I. Introduction

Companies frequently face claims that a product and its labeling are defective and have harmed the product's users. Faced with such claims, they may elect to recall the product. The recalls, in turn, often prompt a series of putative class action lawsuits, asserting claims for product mislabeling, false advertising, breach of warranty, or similar theories. Then comes extensive discovery and the run up to class certification. For these companies and their lawyers, conventional defenses to certification—for example, that common issues of law or fact do not predominate—will be considered and often take center stage. In light of several recent decisions, however, there now are other potential arguments, based on private relief provided as part of a product recall program, that can be resorted to in resisting class certification.

Indeed, with increasing frequency over the past several years, federal courts have considered whether defendants' efforts to privately remedy injuries through recalls, refunds, and similar relief can preclude certification of a class action. Relying on such out-of-court remedies, defendants have successfully challenged class certification under Federal Rule of Civil Procedure 23 on grounds that (1) class litigation was not superior to the privately offered remedies, and (2) the class representative, by pursuing litigation despite the availability of privately offered relief, does not adequately represent the putative class.

Given these developments, companies should consider whether some form of privately offered remedy can be made available to purchasers or consumers in the wake of a product recall or simply as a response to filed class actions. The availability of that remedy then can impact Rule 23's adequacy and superiority requirements and provide a cost-effective defense against a class action lawsuit.

II. Using Privately Provided Out-Of-Court Relief to Displace a Rule 23(b)(3) Class Action as the Superior Means of Resolution

A party seeking to maintain a class action must first "'be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011)). "The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Id.* Rule 23(b)(3) specifically permits certification of a class where two requirements are met—"the questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." (The superiority provision originally said "methods for the fair and efficient adjudication of the controversy." Stylistic changes recently were made to the provision, resulting in its current, substantively identical form.)

Courts have divided into two camps when it comes to the role of privately offered remedies in analyzing the superiority of a class action under Rule 23(b)(3). One camp—the majority view—has adopted a so-called "policy" construction of the superiority provision, concluding that class actions must be superior to both judicial and non-judicial resolution alternatives. *See* Joseph M. McLaughlin, 1 *McLaughlin on Class Actions* §5:63 (2012). The other camp—a minority, but a group that includes two federal circuit courts of appeals—has adopted a so-called "textual" construction of the superiority provision, relying heavily on the

plain meaning of "methods for … adjudicating" and finding no room in that phrase for non-judicial privately offered remedies. *Id.*

A. A policy-based construction of the superiority provision allows available private remedies to influence the class certification analysis

In *Berley v. Dreyfus & Co.*, 43 F.R.D. 397 (S.D.N.Y. 1967), the district court became the first court to consider the effect, if any, of a privately offered remedy on Rule 23(b)'s superiority analysis. *Berley* involved a putative class action filed by purchasers of unregistered securities against a broker (Dreyfus). Dreyfus offered to refund the purchase price of the securities to its customers—including the putative class members—but the class plaintiffs pressed ahead with a motion to certify. The court denied certification because it found that Dreyfus's refund offer was superior to a class action. The court acknowledged that the refund was "not quite 'another method for . . . adjudication'" under Rule 23(b)(3). *Berley*, 43 F.R.D. at 398. But the court rejected a literal interpretation of that provision because, "read as a whole [Rule 23] reflects a broad policy of economy in the use of society's difference-settling machinery[,]'" and "[o]ne method of achieving such economy is to avoid creating lawsuits where none previously existed." *Id.* Allowing a class action to move forward, the court determined, "would needlessly replace a simple, amicable settlement procedure with complicated, protracted litigation." *Id.* at 399.

A majority of courts—all district courts—have adopted this "policy" approach to interpreting the superiority requirement:

- *Pagan v. Abbott Labs., Inc.*, 287 F.R.D. 139, 151 (E.D.N.Y. 2012) (indicating that its finding of no superiority was based in part on its determination that a class action was not superior to defendant's recall and refund program);
- *Daigle v. Ford Motor Co.*, 2012 WL 3113854, at *5-6 (D. Minn. July 31, 2012) (finding that Ford's offer to install new torque converters in allegedly defective automobiles, or refund those who paid to service their vehicle prior to the recall, "weigh[ed] against a finding that a class action is a superior method of adjudication");
- *Webb v. Carter's Inc.*, 272 F.R.D. 489, 504-05 (C.D. Cal. 2011) (denying certification where defendants offered a refund program that permitted purchasers of defective clothing to obtain a refund without proof of purchase—the "very relief that Plaintiffs seek");
- *In re Aqua Dots Prods. Liab. Litig.*, 270 F.R.D. 377, 385 (N.D. Ill. 2010) (denying certification where defendants offered to provide a refund to purchasers of defective children's toys that would avoid "needless judicial intervention, lawyer's fees, or delay"), *aff'd on other grounds*, 654 F.3d 748 (7th Cir. 2011);
- *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 699-700 (N.D. Ga. 2008) (denying certification where defendants offered refunds to purchasers of potentially salmonella-tainted peanut butter that likely would exceed any judicial disgorgement remedy);
- *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D. Wash. 2003) (denying certification based on defendants' refund offer to purchasers of PPA-containing products);
- *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 463 (D.N.J. 1998) (denying certification based on defendant's offer to reimburse repair costs for defective anti-lock brake systems).

The reasoning underlying these decisions is that denying class certification where private remedies are broadly and easily accessible best serves the "animating purpose of the superiority requirement"—"to

ensure that the court's resources are put to efficient use. . . ." *Aqua Dots*, 270 F.R.D. at 382; *see also Berley*, 43 F.R.D. at 398. Denying certification serves this "animating purpose" because "when a defendant is already offering an effective remedy for putative class members through out-of-court channels, a class action threatens to consume substantial judicial resources to no good end." *Aqua Dots*, 270 F.R.D. at 382; *see also Berley*, 43 F.R.D. at 399; 7AA Charles Alan Wright *et al.*, *Federal Practice & Procedure* §1779 ("The court need not confine itself to other available 'judicial' methods of handling the controversy in deciding the superiority of the class action" because a non-judicial alternative may obviate the need for court involvement at all).

Courts that have adopted this policy-driven approach also have concluded that that it better protects the interests of the putative class members, which diverge from those of class counsel. *See Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744 (7th Cir. 2008) (noting conflict between class counsel and class members). As the district court in *Aqua Dots* observed, "[w]here available refunds afford class members a comparable or even better remedy than they could hope to achieve in court, a class action would merely divert a substantial percentage of the refunds' aggregate value to the class lawyers." *Aqua Dots*, 270 F.R.D. at 383; *see also Pagan*, 287 F.R.D. at 151 (same). As a result, "'rational class members would not choose to litigate a multiyear class action just to procure refunds that are readily available here and now.'" *Pagan*, 287 F.R.D. at 151 (quoting *Aqua Dots*, 270 F.R.D. at 383). The "policy" approach protects class members because it "allows the court [to] ensure that a putative class action is grounded in the realistic prospect of a remedy that class members could not otherwise obtain." *Aqua Dots*, 270 F.R.D. at 383. The "textual" approach, on the other hand, "permits (or even requires) the court to certify class actions that, at best, offer no advantage for the class members, and at worst, benefit class counsel at their expense." *Id.*

In sum, these cases establish the potential viability of an argument that a voluntary refund program can bar class certification by providing a superior path for a recovery. Rather than focus on the literal meaning of "methods for … adjudicating" in Rule 23(b)(3), they adopt a practical construction of superiority that aims both to conserve judicial resources and to maximize each class member's recovery where the relief sought already is available, and, accordingly, there is no need to burden the courts and enrich class counsel through class litigation which seeks that already-available relief.

B. A textual construction of the superiority provision rejects reliance on non-judicial methods of resolution to defeat class certification

Those courts that reject the policy-based approach track the language of the superiority provision itself, which requires putative class plaintiffs to show that a class action is superior to "other available methods for … adjudicating the controversy." One could fairly ask how this language can be interpreted to include non-judicial private remedies—in other words, can a privately offered remedy constitute a "method[] for … adjudicating the controversy?" While that textual analysis has some merit, the courts adopting it arguably have not accounted fully for the notes of the superiority provision's drafters, which can be read to suggest that they did not intend to limit "methods for … adjudicating" to judicial resolutions.

The Third Circuit was the first court to endorse the minority view and reject consideration of non-judicial remedies as part of the superiority analysis. *See Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands*, 478 F.2d 540 (3d Cir. 1973). The district court there had dismissed a putative class action seemingly on grounds that a proceeding in the U.S. Department of Labor—and the remedies the Department could dispense—were superior to a class action. The Third Circuit rejected this reasoning based principally on its conclusion that "the advisory committee notes on the [superiority] requirement focus on the question whether one suit is preferable to several." *Hess Oil*, 478 F.2d at 543 (citing Rule 23(b)(3), Notes of Advisory Committee ("Advisory Committee Notes")). The court then observed that it found "no suggestion in the lan-

guage of Rule 23, or in the [drafting] committee notes, that the value of a class suit as a superior form of action was to be weighed against the advantages of an administrative remedy." *Id.* Because the court left this question "for disposition in an appropriate case[,]" however, its superiority reasoning appears to be dicta. *Id.*; *see also Chin*, 182 F.R.D. at 464 (declining to follow *Hess Oil*'s "dicta").

Nearly four decades later, the Seventh Circuit, relying in part on *Hess Oil*, held that the district court erred in its conclusion that a voluntary refund and replacement program could constitute a "method for … adjudication" under Rule 23 (b)(3)'s superiority provision. *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011) (Easterbrook, C.J.). "The district court," the Seventh Circuit remarked, had "concluded that the substantial costs of the legal process make a suit inferior to a recall as a means to set things right." *Id.* at 751. The court of appeals acknowledged it was "hard to quarrel with the district court's objective"—"The lower the transactions costs of dealing with a defective product, the better." *Id.* But "a district court's conclusion that it has a better idea does not justify disregarding the text of Rule 23." *Id.*

The Seventh Circuit further explained that it was "not as if the Supreme Court and other participants in the rulemaking process . . . used the word 'adjudication' loosely to mean all ways to redress injuries." *Id.* at 752. And, relying on *Hess Oil*, the court pointed out that the Advisory Committee drafted Rule 23(b)(3) "with the legal understanding of 'adjudication' in mind. . . ." *Id.* Simply put, "[a] recall campaign is not a form of 'adjudication'" as intended by the Committee or the rule it designed. *Id.*

Judge Brock Hornby has agreed with the Seventh Circuit. *See In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 2013 WL 1182733 (D. Me. March 20, 2013) (holding that defendant grocery stores' refund program for fees related to credit card replacement arising out of the debit and credit card data theft at defendant's stores was not relevant to superiority analysis). In Judge Hornby's view, "Rule 23(b)(3) does not address superiority as a matter of abstract economic choice analysis, but asks if a class action is 'superior to other available methods for fairly and efficiently adjudicating the controversy'—*i.e.*, other possible adjudication methods such as individual lawsuits or a consolidated lawsuit." *Id.* at *11. "Indeed," he continued, "all four enumerated factors in this portion of the Rule deal with adjudication." *Id.* He therefore sided with the Seventh Circuit's decision in *Aqua Dots* and ruled that the stores' refund program was not relevant in assessing superiority. *Id.*; *see also Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 610 (E.D. La. 2006) (rejecting argument that private settlement program for oil spill damages was "superior" because the "argument confuses the superiority standard under Rule 23[,]" which considers "whether the class action format is superior to other methods of adjudication, not whether a class action is superior to an out-of-court, private settlement program"); *cf.* Andrea Joy Parker, Notes, *Dare To Compare: Determining What "Other Available Methods" Can Be Considered Under Federal Rule 23(b)(3)'s Superiority Requirement*, 44 Ga. L. Rev. 581, 591-92 (2010) (citing two decisions that did not decide the specific question of whether non-judicial methods of resolution could be considered, but implied, in dicta, that only available judicial methods could defeat superiority).

As one commentator has pointed out, however, these courts' analyses of the Advisory Committee Notes is arguably incomplete. *See* Eric P. Voigt, *A Company's Voluntary Refund Program For Consumers Can Be A Fair And Efficient Alternative To A Class Action*, 31 Rev. Litig. 617 (2012). None of the courts in the minority camp acknowledged, for example, the Notes' statement that the superiority requirement addresses whether "'another method of handling the litigious situation [is] … available which has greater practical advantages than a class action'"—without specifying that the other method could only be judicial in nature. *Id.* at 625 (quoting Advisory Committee Notes, 39 F.R.D. at 103). Nor do they acknowledge the Notes' directive that courts applying the requirement should broadly "'assess the relative advantages of alternative procedures for handling the total controversy'"—again without limiting "alternative procedures" to court resolutions. *Id.* at 625-26 (quoting Advisory Committee, 39 F.R.D. at 103). And, as Professor Voigt points out, "[n]owhere in its

Notes does the Committee require courts to compare a class action only to another judicial proceeding." *Id.* at 626.

Relevant, too, is that six years after the superiority provision was promulgated, Professor Charles Alan Wright, a member of the Advisory Committee that authored the provision (*see* Voigt, *Voluntary Refund Program*, 31 Rev. Litig. at 626), first opined in his Federal Practice and Procedure treatise precisely what the treatise still provides—that a court "need not confine itself to other 'judicial methods of handling the controversy in deciding the superiority of the class action.'" 7AA Wright *et al.*, *Federal Practice & Procedure* §1779; *accord Kamm v. California City Dev. Co.*, 509 F.2d 205, 211 (9th Cir. 1975). And, other contemporaneous commentators arguably appeared to adopt the same position that private remedies or "settlements" could preclude a superiority finding. *See, e.g.*, Norman Sabbey, Comment, *Rule 23: Categories of Subsection (b)*, 10 B.C. Indus. & Com. L. Rev. 539, 545, 554 (1968-69); (stating that the "new" Rule 23(b)(3) requires class action to be "superior in fairness and efficiency to any other form of settlement," and noting that an "administrative agency could also supply relief"); Ronald E. Young, Note, *Federal Rules of Civil Procedure: Rule 23, The Class Action Device and Its Utilization*, 22 U. Fla. L. Rev. 631, 637 (1970) ("Under (b)(3), the court must specifically find that...a class action is superior to any other form of settlement.").

III. Using Privately Provided Out-of-Court Relief to Establish That a Putative Class Representative Is Not Adequate Under Rule 23(a)

Beginning with the Seventh Circuit's decision in *Aqua Dots*, a few courts have moved beyond superiority and examined whether an available private remedy renders a putative class representative inadequate under Rule 23(a). Class representatives have a duty "to represent the collective interests of the putative class." *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 331 (1980). As some courts have explained, a "'class representative is not an adequate representative when the class representative abandons particular remedies to the detriment of the class.'" *Drimmer v. WD-40 Co.*, 2007 WL 2456003, at *3 (S.D. Cal. Aug. 24, 2007) (quoting *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 550 (D. Minn. 1999)).

Relying on these adequacy principles, the Seventh Circuit in *Aqua Dots* concluded that, rather than "departing from the text of Rule 23(b)(3), the district court should have relied on the text of Rule 23(a)(4)['s]" adequacy requirement to support its denial of class certification. 654 F.3d at 752. In the Seventh Circuit's view, the class representatives in *Aqua Dots*—who "want relief that duplicates a remedy that most buyers already have received, and that remains available to all members of the putative class"—were not adequate: "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." *Id.*; *cf. Z.D. v. Grp. Health Co-op.*, 2012 WL 1977962, at *5-6 (W.D. Wash. June 1, 2012) (accepting the Seventh Circuit's adequacy analysis in *Aqua Dots* but concluding that adequacy requirement was met where plaintiffs did not seek "relief that duplicates a remedy that most buyers already have received" and did not propose that "high transaction costs" be incurred "to obtain a refund that already is on offer") (quoting *Aqua Dots*, 654 F.3d at 752) (internal quotation marks omitted); *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 342 n.4 (3d Cir. 2011) (*en banc*) (Jordan and Smith, JJ., dissenting) (noting that an adequacy argument could be made because the class representatives unnecessarily incurred notice costs and attorneys' fees, and "a class representative who unnecessarily increases the cost of litigating a class action by including improper plaintiffs in the class definition is at risk of being found to not 'adequately protect the interests of the class'") (citing *Aqua Dots*, 654 F.3d at 752).

Although he sided with the Seventh Circuit's superiority determination in *Aqua Dots*, Judge Hornby rejected the court of appeals' adequacy rationale. *See Hannaford Bros.*, 2013 WL 1182733. There, the defend-

ants argued "that the named plaintiffs are not adequate because they have chosen to participate in class litigation rather than apply to Hannaford for refund gift cards[,]" which "needlessly reduces the recovery for the putative class [and] contravenes the representatives' duty to protect the class." *Id.* at *7 (internal quotation marks omitted). But Judge Hornby could "not see how" the argument that "other solutions are preferable to litigation … has a place in the class certification decision under the current Rule." *Id.* "A named plaintiff[,]" he reasoned, "can represent a class *only* by filing a lawsuit; that is what the Federal Rules of Civil Procedure are for." *Id.* And, "[n]amed plaintiffs are hardly adequate representatives of a class by *not* filing a lawsuit, because then they are not class representatives at all!" *Id.* Additionally, he pointed out, class members are free to opt out of the class if they think accepting the refund is preferable. *Id.*

The case law examining the adequacy of a class representative where the defendant has offered substantial relief in the form of a refund is in its nascent stage. But with the Seventh Circuit having endorsed adequacy challenges where private remedies are available, there is reason to believe this argument will be more widely urged and perhaps accepted.

IV. Navigating the Conflicting Case Law and Designing the Optimal Private Refund or Remedial Program

As the preceding analysis reflects, a conflict exists over whether and when a privately offered refund or recall program can defeat certification of a class under Rule 23(b)(3)'s superiority requirement or Rule 23(a)'s adequacy requirement. This conflicted state of the law should not, however, discourage defendants, in appropriate circumstances, from implementing such a program as part of their class action litigation strategy.

To begin with, the weight of authority and commentary currently supports a strong "no superiority" argument based on a private remedial program in the great majority of federal district courts around the country. In addition, while defendants in the Third Circuit should recognize the possibility that courts in that Circuit will follow *Hess Oil*'s dicta and reject a "no superiority" argument in these circumstances, that dicta does not foreclose the argument. *See, e.g., Chin*, 182 F.R.D. at 464 (refusing to follow *Hess Oil*'s dicta and denying certification on superiority grounds). And, although courts in the Seventh Circuit likely will be bound by that court's decision in *Aqua Dots* to reject a "no superiority" argument based on a privately offered remedy, an adequacy challenge based on such a remedy will have especially strong support in those courts given the holding in *Aqua Dots* that a class representative who presses class litigation in the face of an effectual remedy is not adequate. Lastly, with respect to adequacy more generally, because the only federal appeals court to address the issue has ruled that the availability of a privately offered remedy can render a class representative inadequate (*Aqua Dots,* 654 F.3d 748), defendants can make this argument nationwide, unconstrained by appellate precedent.

As for how to design an optimal refund program or private remedy for purposes of a Rule 23 defense strategy, the case law instructs that several features are important in designing a superiority-defeating voluntary refund program. ***First***, the refund or replacement option presented to purchasers must be comparable, if not genuinely superior, to the remedy that could be recovered in court—illusory promises of private redress will not suffice. ***Second***, the offered refund must be widely and readily available to purchasers—barriers to obtaining the refund will undermine its claim of superiority over a judicial remedy (though note that in *PPA Products Liability Litigation*, 214 F.R.D. at 622, the district court was unmoved by plaintiffs' protest that a requirement that they produce proof of purchase was unduly burdensome because such a requirement was an "extraordinarily commonplace practice amongst retailers"). ***Third***, the refund or replacement option must be widely publicized and clearly explained so that putative class member purchasers likely will become aware of

the private remedy and easily understand how to obtain it (though note that the district court in *ConAgra* held that the standard for sufficient notice of a voluntary program was ***not*** the same as the more rigorous standard for notice of a class action suit). ***Fourth***, proof that a significant number of refunds already have been paid out will increase the likelihood that a court will find the program superior to a class action because it will substantiate the effectiveness and publicity of the program. *See also* 1 *McLaughlin on Class Actions* §5:63 ("In order to reach the conclusion that a refund program is a superior method of resolving the claims, the court must evaluate the program and be satisfied it is a good faith offer that is easy to participate in, and will result in refunds that closely approximate the consumer's out-of-pocket loss.").

V. Conclusion

Defense counsel and their clients, particularly those involved in product mislabeling or warranty class actions, should consider whether implementation of a refund or similar remedial program, which offers a comparable remedy to what the putative class might recover in court, can head off the inevitable class action lawsuits. Although the case law is still evolving on the effect of such privately offered remedies on class certification under Rule 23, courts have declined to certify class actions on superiority and adequacy grounds where such a remedy is available. And, while a minority of courts have rejected challenges to superiority and adequacy in these circumstances, those challenges—at least where they are grounded on an effectual, well-publicized, and broadly accessible private remedy—remain viable in virtually every federal jurisdiction in the United States.