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# Money-Back Guarantees Unlikely To Satisfy 'Superiority'

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In an attempt to quash consumer class actions at the class certification stage, product manufacturers defending against such suits have recently stepped-up arguments that their own money-back guarantee refund policies provide consumers with a superior method for obtaining financial redress and that class certification is therefore inappropriate pursuant to Fed. R. Civ. P. 23(b)(3).[1] Specifically, defendants have argued that because they already offer to provide dissatisfied customers with a refund, a class action cannot be deemed "superior to other available methods for fairly and efficiently adjudicating the controversy" as required for certification under Fed. R. Civ. P. 23(b)(3). While some courts have been receptive to this argument, two federal judges in California recently rejected such reasoning, finding that the plain language of Rule 23(b)(3) prohibits consideration of out-of-court remedial procedures that do not fall squarely within the meaning of "adjudication."[2]

In Forcellati v. Hyland's Inc., CV 12-1983-GHK (MRWx), 2014 U.S. Dist. LEXIS 50600 (C.D. Cal. Apr. 9, 2014), plaintiffs successfully moved for certification of a nationwide class of purchasers of homeopathic children's cold products. In opposing class certification, defendants argued that plaintiffs failed to satisfy the superiority requirement of Rule 23(b)(3) because defendants "have a refund program in place that would serve the needs of dissatisfied customers without needless judicial intervention, lawyer's fees or delay."[3] Chief Judge George H. King rejected defendants' argument, reasoning that their position "does not comport with the plain language of Rule 23, which directs courts to consider other available methods of *adjudication*."[4] In reaching his conclusion, Chief Judge King relied on similar reasoning employed by the Seventh Circuit Court of Appeals in In re Aqua Dots Products Liability Litigation, 654 F.3d 748 (Seventh Circuit 2011). In Aqua Dots, the court specifically held that it was prohibited from considering out-of-court remedial procedures as part of the superiority analysis, noting that "the advisory committee's notes demonstrate that Rule 23(b)(3) was drafted with the legal understanding of 'adjudication' in mind: the subsection poses the question whether a single suit would handle the dispute better than multiple suits."[5] With this in mind, the Hyland's Court concluded that it was "foreclosed from disregarding the text of Rule 23 simply because we think we have a better idea."[6]

In another recent opinion from a federal court in California, Algarin v. Maybelline LLC, 12cv3000 AJB (DHB), 2014 U.S. Dist. LEXIS 65173 (S.D. Cal. May 12, 2014), plaintiffs sought class certification in a case alleging that the defendant falsely advertised the qualities of one of its makeup product lines. Judge Anthony J. Battaglia found that he was prohibited from considering defendant's refund program while conducting the superiority analysis under Rule 23(b)(3). Specifically, Judge Battaglia reasoned that "[b]ased on the

language of Rule 23(b)(3), which requires a class action to be 'superior to other available methods for adjudicating the controversy,' this determination involves a comparison of the class action as a procedural mechanism to available alternatives. In other words, Rule 23 (b)(3) asks a court to compare the class action to *other types of court action*."[7] Because the court was "wary of stepping outside the text of Rule 23(b)(3)," it declined to find that defendant's refund program provided a superior alternative to a class action for purposes of Rule 23.[8]

The Forcellati and Algarin Courts' refusal to deviate from the plain language of Rule 23 is consistent with well-established canons of statutory interpretation and U.S. Supreme Court precedent, which dictate that a court must "give the Federal Rules of Civil Procedure their plain meaning, and generally with them as with a statute, when it finds the terms unambiguous, judicial inquiry is complete."[9] However, despite this on-point and binding Supreme Court authority, a handful of courts have nonetheless "disregarded the text of Rule 23" by considering a defendant's out-of-court refund program as a part of the superiority analysis. Most recently, in Turcios v. Carma Labs, 296 F.R.D. 638 (C.D. Cal. 2014) the court noted that "[d]efendant already offers consumers a full refund of the amount paid for the product for any reason," and therefore concluded that "the superiority requirement is not met where it makes little sense to certify a class where a class mechanism is unnecessary to afford the class members redress."[10]

In sum, while there is a split of authority among district courts concerning whether they may properly consider a defendant's out-of-court refund program in connection with the Rule 23(b)(3) superiority analysis, the only two appellate court opinions to address the issue clearly state that courts may only compare the class action mechanism to other methods of *adjudication*.[11] Accordingly, the more appropriate and legally sound approach is for courts to follow the plain meaning of Rule 23's text.[12] Indeed, while the Supreme Court has never squarely addressed this issue, the analysis articulated in the high court's influential and oft-cited Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541 (U.S. 2011) opinion clearly suggests that it would support the strict textual reading of Rule 23(b)(3)'s superiority requirement applied by the Forcellati and Algarin courts.[13] Until the Supreme Court decides to tackle this issue head-on however, class action practitioners should be mindful of the cases cited herein.

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***Disclaimer: Faruqi & Faruqi serves as co-lead class counsel in Forcellati v. Hyland's Inc., CV 12-1983-GHK (MRWx).***

[1] See Fed. R. Civ. P. 23(b)(3)("a class action may be maintained if Rule 23(a) is satisfied and if ... the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, *and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy*.")(emphasis added).

[2] Black's Law Dictionary defines "adjudication" as "[t]he legal process of resolving a dispute," or "the process of judicially deciding a case."

[3] Forcellati v. Hyland's Inc., CV 12-1983-GHK (MRWx), 2014 U.S. Dist. LEXIS 50600, at *36 (C.D. Cal. Apr. 9, 2014).

[4] Id. at *37 (emphasis in original).

[5] In re Aqua Dots Products Liability Litig., 654 F.3d 748, 751 (7th Cir. 2011). The Aqua Dots Court's analysis is consistent with the Third Circuit's opinion in Amalgamated Workers Union v. Hess Oil V.I. Corp., 478 F.2d 540 (3d Cir. 1973). There, in declining to consider an out-of-court administrative remedy in connection with Rule 23(b)(3)'s superiority analysis, the court noted that "the advisory committee notes on the requirement focus on the question whether one suit is preferable to several. We find no suggestion in the language of Rule 23, or in the committee notes, that the value of a class action as a superior form of action was to be weighed against the advantages of an administrative remedy." 478 F.2d 540, 543 (3d Cir. 1973)(internal citation omitted).

[6] Forcellati, 2014 U.S. Dist. LEXIS 50600 at *37 (internal quotation marks and citation omitted).

[7] Algarin v. Maybelline LLC, 12cv3000 AJB (DHB), 2014 U.S. Dist. LEXIS 65173, at *40-41 (S.D. Cal. May 12, 2014) (internal citation omitted)(emphasis added).

[8] Id. at *41. However, the court ultimately reasoned that the superiority requirement was not satisfied because the class was unmanageable and common issues did not predominate, and therefore denied class certification. Id. at *41-42.

[9] Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Indus. Corp., 493 U.S. 120, 123 (U.S. 1989).

[10] Turcios v. Carma Labs, 296 F.R.D. 638, 648-49 (C.D. Cal. 2014) (quoting In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 622 (W.D. Wash. 2003)).

[11] See In re Aqua Dots Products Liability Litig., 654 F.3d at 751-52; Amalgamated Workers Union, 478 F.2d at 543.

[12] See In re Aqua Dots Products Liability Litig., 654 F.3d at 751-52 ("A district court is no more entitled to depart from Rule 23 than it would be to depart from one of the Supreme Court's decisions after deeming the court's doctrine counterproductive. Rule 23 establishes a national policy for the judicial branch; individual district judges are not free to prefer their own policies. ... It is not as if the Supreme Court and other participants in the rulemaking process (e.g., the Judicial Conference, the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules) used the word 'adjudication' loosely to mean all ways to redress injuries.").

[13] See Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541, 2559 (U.S. 2011) (rejecting argument that had "no basis in the Rule's text, and that does obvious violence to the Rule's structural features," and noting that Rule 23(b)(3)'s "procedural protections" include "establish[ing] the superiority of *class* adjudication over *individual* adjudication.") (emphasis in original); see also In re Aqua Dots Products Liability Litig., 654 F.3d at 751-52 (noting that the Supreme Court made clear in Dukes that courts are bound to follow the text of Rule 23).