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Stay Ahead Of Curve With 'Voluntary Cure'

Combat consumer class actions with a premptive defensive strategy

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A consumer class action lawsuit often presents a serious threat to a defendant business, exclusive of the substantive merits of the class claims. If a threatened nationwide class action proceeds to litigation, that business is exposed to the risk of a judgment that may include significant monetary and injunctive components.

Inevitably, and, again, regardless of the substantive merits of the claim, the business incurs considerable attorneys' fees in the course of defending itself. Typically, the bulk of these fees relate to discovery and motion practice because class actions routinely settle short of trial.

Not surprisingly, businesses facing a class action have turned to creative approaches to preempt the lawsuits at an early stage. These techniques include settling the named plaintiff's case alone or offering the named plaintiff full relief under an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. To discourage short-changing the absent class members, the U.S. Supreme Court established a rule in *Deposit Guaranty National Bank, Jackson, Miss. v. Roper,* 445 U.S. 326, 339 (1980), that a defendant's unilateral satisfaction of the named plaintiff's claims through voluntary action or a Rule 68 offer of judgment after a decision on class certification does not moot the class action. The Supreme Court expressed public policy concerns that allowing individual plaintiff's claims to be "picked off" after class certification frustrates the purpose of class actions and encourages the waste of judicial resources. Circuits have differed regarding the application of this rule to putative class actions prior to any motion on class certification.

Another creative approach gaining traction in consumer product cases is the "voluntary cure program." These programs can take a variety of forms. One example, in the context of an alleged product defect, might involve a program, in which the targeted business (1) establishes a rebate program regarding the product or products at issue, (2) provides notice to consumers of that program that is consistent with class action notice expectations or requirements, and (3) engages in other measures designed to address the alleged deficiencies, such as modifying the advertising and packaging of the products at issue.

Rather than only affording the named plaintiff relief, a well-crafted voluntary rebate program provides all potential class members with the opportunity to obtain some or all of the relief they are likely to receive should the class action settle or result in a plaintiff's verdict. The intent is to voluntarily provide relief that is appropriate to the class members, and, thus, precludes or resolves the class claims on terms that may be more favorable and cost-effective for the business than litigation.

California has codified this approach to class action preclusion. California's Consumer Legal Remedies Act (CLRA), Cal. Civ. Code § 1782, includes a provision that requires plaintiffs to notify potential defendants of their intention to file a class action lawsuit asserting a CLRA claim at least 30 days prior to filing that suit. Potential defendants then have 30 days to submit a written response in which

they may advise the plaintiffs that they intend to provide an appropriate remedy for the plaintiff and class members within a reasonable time. If a plaintiff files the threatened suit after a defendant implements the cure program, then the defendant may file a motion to dismiss the putative class members' CLRA claims. Resolution of that motion hinges on whether the court believes the remedy is appropriate.

Toy Story

A number of courts outside of California have relied upon voluntary cure programs to bar class actions. For example, in *In re Aqua Dots Products Liability Litigation,* 654 F.3d 748 (7th Cir. 2010), after a toy manufacturer was advised of a potentially dangerous defect in its product, it immediately issued a recall and offered to either (1) exchange the toy for a non-defective one, (2) exchange the toy for another similarly priced product, or (3) refund the price of the toy.

After a class action was filed, based on that alleged defect, the defendant cited to its cure program. The district court held that this program was sufficient to bar class certification. In fact, the court held that the rebate program was a better remedy than class members could achieve in court because a class action would divert some of the class members' recovery fund to pay attorney fees.

Likewise, in *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 214 F.R.D. 614 (W.D. Wash. 2003), the court found that the defendant's existing rebate program was sufficient to preclude certification of a class for products liability claims. "To this day, defendants maintain refund and product replacement programs for individuals still in possession of PPA-containing products. It makes little sense to certify a class where a class mechanism is unnecessary to afford the class members redress." See also *Chin v. Chrysler Corp*. 182 F.R.D. 448, 462-65 (D.N.J. 1998) (finding lack of superiority where reimbursement is available through a recall program and through administrative remedy).

Simultaneously with creating a potential bar to class claims, the cure program may allow a business to demonstrate that it is a good corporate citizen because it heeded the perceived concerns of at least some of its customers. Unlike publicity concerning class action litigation or settlement, the publicity concerning the rebate program is entirely within the control of the company and may be used to enhance consumer goodwill while the business continues to dispute any liability or wrongdoing.

While the costs of the cure measures may be significant, the business may realize greater overall cost savings from them. Removing products from the stream of commerce on a national scale, as well as modifying existing packaging and advertising, are rarely inexpensive. These steps, however, may be required as part of any court-approved settlement, in addition to substantial attorney fees. Many consumer class actions are settled with a financial component consisting of a settlement fund used to pay claims submitted by class members. The claims rate is often well below 10 percent, leaving a significant balance. Although sometimes the remaining balance reverts to the defendant, frequently the remaining balance of the settlement fund is given to claimants as a pro rata bonus or to charity under the cy pres doctrine.

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In a voluntary cure program, payments are made as claims are received, so a defendant is able to recover any remaining balance in the fund. Should the case proceed to litigation, courts should view evidence of a voluntary cure program as a subsequent remedial measure and thus inadmissible, although there is limited authority on that issue.

While by no means a guarantee of class preclusion, a voluntary cure program is an approach that any business threatened with a consumer class action would be wise to consider.