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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Satisfaction Of A Refund, Or Your Class Action Back

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James P. Muehlberger

Companies facing class actions are increasingly relying on the power of a simple principle: Give dissatisfied consumers a refund. By offering consumers a full refund, companies can protect themselves against potential class actions on multiple levels.

If *many* refunds are claimed, a court may find that named plaintiffs are not adequately protecting class interests and that a class action is not the superior method for resolving the dispute. If *few* refunds are claimed, this is evidence that plaintiffs' counsel is creating litigation when none existed, again strengthening superiority arguments. If the *named plaintiffs* receive refunds, this can defeat their standing to bring a lawsuit and end the class action before a motion for class certification. In each circumstance, a refund policy provides valuable preemptive insurance that can help stop a class action in its tracks.

Under Rule 23(a), named plaintiffs must "fairly and adequately protect the interests of the class." A class action brings high transaction costs in the form of notice and attorneys' fees, which often constitute a significant portion of class recovery. If a refund policy already compensates potential class members, named plaintiffs who propose incurring these costs may not be adequately protecting class interests.

Recently, in Imber-Gluck v. Google Inc., No. 5:14-cv-01070-RMW (N.D. Calif. April 3, 2015), plaintiffs claimed Google allowed children to make unauthorized in-app purchases from its Google Play store and brought a purported class action. But Google already instituted a refund offer pursuant to a Federal Trade Commission settlement and provided refunds to thousands of consumers. The court considered these refunds and agreed with Google that the "class representatives are not adequate because they seek to maintain a costly class action when the class is better served" through Google's refund offer. Id. at 3.

Similarly, in In re Aqua Dots Products Liability Litigation, 654 F.3d 748 (7th Circ. 2011), the Seventh Circuit affirmed the denial of class certification when many consumers had already taken advantage of a refund policy. There, the defendant manufactured a children's toy that resembled candy, which some children ate and became ill. The defendant implemented a refund policy that many consumers used. The court found, "Plaintiffs want relief that duplicates a remedy that most buyers already have received, and

that remains available to all members of the putative class." Id. at 752. As such, the named plaintiffs were proposing unnecessary transaction costs and were not "adequately protecting the class members' interest." Id. Because the named plaintiffs were not protecting class interests, the purported class action failed to meet the requirements of Rule 23(a).

If a class action is brought under Rule 23(b)(3), the class action must also be "superior to other available methods" for adjudicating the dispute. With a refund offer in place that fully satisfies putative class members, a class action may not be the superior method. In Imber-Gluck, Google argued that "a class action is not superior because the relief plaintiffs seek … is already available … and pursuing a class action will actually result in reduced recovery due to administrative costs and attorneys' fees." No. 5:14-cv-01070-RMW, at 3 (N.D. Calif. April 3, 2015). The court agreed and granted Google's motion to deny class certification. The court in In re ConAgra Peanut Butter Products Liability Litigation, 251 F.R.D. 689 (N.D. Ga. 2008), followed the same reasoning. ConAgra had responded to complaints of adulterated peanut butter by offering full refunds to consumers. Many consumers took advantage of the refund offer. When plaintiffs filed a purported class action against ConAgra, the court found the refund policy had been effective and that "a class action would not be the superior method to resolve the claims of the proposed purchaser class." Id. at 701. The court then denied plaintiffs' motion for class certification.

While Google and ConAgra successfully pointed to the large quantity of refunds distributed, defendants in putative class actions where few refunds have been distributed have also been able to defeat class certification. In Webb v. Carter's Inc., 272 F.R.D. 489 (C.D. Calif. 2011), plaintiffs brought a putative class action alleging Carter's clothing contained toxic chemicals in its tagless labels. Carter's instituted a refund policy and reimbursed consumers for out-of-pocket medical costs for treating irritation from the labels. The court noted that "only a little over 0.14 percent of garments" had been the subject of refunds, concluded "that the relatively small number of returns most likely indicates that the majority of consumers are satisfied with the garments they bought," and denied class certification. Id. at 505.

Little consumer interest in obtaining refunds also aided the defendant in In re PPA Products Liability Litigation, 214 F.R.D. 614 (W.D. Wash. 2003). There, plaintiffs alleged medications containing phenylpropanolamine increase risk of stroke and brought a class action against the manufacturer. The defendant instituted a refund and product replacement program for the medications. The court denied class certification based on the existence of the refund policy, noting that "[i]t makes little sense to certify a class where a class mechanism is unnecessary to afford the class members redress." Id. at 622. The court found that "[t]he fact that consumers have not sought refunds in large numbers may well demonstrate that *certification of the proposed class would merely serve to create lawsuits where none previously existed.*" Id. (emphasis added).

Finally, even without a public refund policy, highly targeted refunds may stop a purported class action in its tracks. In Luman v. Theismann, No. 2:13-cv-00656-KJM-AC (E.D. Calif. Feb. 4, 2014), plaintiffs alleged defendants falsely advertised the benefits of a drug purported to treat the symptoms of a prostate condition and brought a class action on behalf of all purchasers of the drug. The defendants responded to plaintiffs' demand letters by refunding the plaintiffs' purchase price and shipping costs directly to their credit cards. The court found the refunds mooted the individual claims because each named plaintiff had "received complete restitution for his alleged compensatory damages." Id. at *5. Because the plaintiffs' individual claims were moot, the court dismissed the case for lack of subject matter jurisdiction.

Whether a company's refund policy is widely used by consumers, largely ignored by consumers or only affects the named plaintiffs in a lawsuit, it can provide a valuable tool for combating class actions.

Defendants have used these policies to successfully argue that named plaintiffs lack standing, are not adequately protecting class interests and that class actions are not the superior methods for resolving disputes. In sum, when dealing with a purported class action, satisfying the customer may satisfy the court.

—By James P. Muehlberger and Jeff Lingwall, Shook Hardy & Bacon LLP

James Muehlberger is a partner and Jeff Lingwall is an associate in Shook Hardy & Bacon's Kansas City, Missouri, office. Muehlberger is co-chairman of the firm's class action and complex litigation practice.