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Seventh Circuit Decertifies Multi-State Class and Suggests Caution in Class Certification

Areas of Interest

Consumer Litigation & Class Actions

On October 28, 2008, the Seventh Circuit decertified a multi-state class action in *Thorogood v. Sears, Roebuck & Co.*, No. 08-1590. The opinion is important to those businesses that routinely face the threat of class actions, as well as to practitioners who defend against such lawsuits.

In *Thorogood*, the plaintiff had sought to represent purchasers in 29 jurisdictions of clothing dryers imprinted with the words "stainless steel." Thorogood alleged that the use of those words implied that the drum within the dryer was made "*entirely* of stainless steel," and that because part of the drum was made of "mild" steel, its use would risk causing rust stains on clothes.

The Seventh Circuit held that class certification was improper. Writing for the court, Judge Posner noted that class actions are accompanied by serious "downsides," and that those concerns "suggest caution in class certification generally." The court further concluded that Thorogood's class action was "notably weak" because it was based on an "idiosyncratic" theory and thus involved "*no* common issues of law or fact."

Both aspects of Judge Posner's opinion are important. First, the "downsides" of class actions that the court identified apply to virtually any consumer class action. Because defendants are exposed to the risk of aggregated claims in class actions, the "trial becomes a roll of the dice" in which "a single throw will determine the outcome of a large number of separate claims." This concentrated risk can pressure defendants "to settle even if the merits of the case are slight," especially when the stakes are so high that they threaten a company's very survival: because "corporate mangers . . . are not indifferent to bankruptcy," "they are unwilling to bet their company on the outcome of a trial."

In addition, there is a "greater conflict of interest" between class members and their counsel because, while "class members are interested in relief for the class," "the lawyers are interested in their fees," and the "stakes" are "too small" to motivate class members "to make sure that the lawyers will act in their best interests." At the same time, defendants "are interested in minimizing the sum of the damages they pay the class and the fees they pay the class counsel, and so they are willing to trade small damages for high attorneys' fees." Under such circumstances, judges have difficulty "preventing the class lawyers from selling out the class"—further diminishing the relative desirability of class actions.

The court also explained that multi-state class actions involving state-law claims tend to "undermine federalism" by producing "an amalgam" of state substantive laws and by ignoring "procedural rules by which particular jurisdictions expand or contract relief."

The second aspect of the Seventh Circuit's holding underscores the principle that consumer class actions cannot go forward without evidence demonstrating the existence of common issues. The court concluded that defendant's advertising only stated that the drum "resists rust"—not that it would prevent stains because it was "100 percent stainless steel." Because there was no evidence that rust stains caused by dryers were "a common concern," and because common sense suggested otherwise, the court found no

"reason to believe that there is a single understanding of the significance of labeling" the drum as stainless steel. As such, "the proposition that the other half million buyers . . . shared [the named plaintiff's] understanding" was "to put it mildly, implausible, and so would require individual hearings to verify." Under such circumstances, the court concluded, class treatment was improper.

The court also concluded that although differences in pricing and consumer preferences meant that damages would "vary from consumer to consumer," that variation, standing alone, did not necessarily defeat class certification. Judge Posner acknowledged that the problem of varying damages is "serious," but nonetheless that "a settlement" based on estimating the average damages that class members might have sustained "would be . . . sensible and legally permissible." Rather, the "deal breaker" for class certification was the lack of a shared understanding concerning the labeling and advertising of the clothes dryers.

Thorogood therefore suggests that defendants should consider whether individualized issues about each consumer's understanding should preclude certification.

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