

October 29, 2008

## Eleventh and Seventh Circuits Vacate Certified Consumer Classes

Yesterday saw noteworthy consumer class action decisions from the Eleventh and Seventh Circuits—both wins for defendants.

Vacating a \$22 million class action judgment, the Eleventh Circuit held that the Truth-in-Lending Act (TILA) does not permit a private action for injunctive relief. *Christ v. Beneficial Corp.*, 2008 WL 4716751 (11th Cir. Oct. 28, 2008). The availability of injunctive relief was the predicate for a Fed. R. Civ. P. 23(b)(2) certification of a class of borrowers who were charged a fee for non-filing insurance since 1994 by one of the consumer finance subsidiaries of the Beneficial Corporation. Based on the classwide injunctive relief, the district court had awarded more than \$22 million as restitution or disgorgement of non-filing insurance fees. On appeal, the Eleventh Circuit (Tjoflat, J.) held that TILA's silence about private-party injunctive relief did not mean that such relief was available. Tracing the history of amendments to TILA and noting the comprehensive statutory scheme of remedies, the court declined to read into the statute an implied right to injunctive or other equitable relief such as restitution or disgorgement. The court also rejected the plaintiff's argument that the Declaratory Judgment Act itself provided a basis for the restitutionary award.

Meanwhile, the Seventh Circuit vacated the certification of a class of purchasers of Sears Kenmore dryers advertised as containing stainless steel drums. *Thorogood v. Sears, Roebuck & Co.*, 2008 WL 4709500 (7th Cir. Oct. 28, 2008). The plaintiff claimed that the sale of the dryers was deceptive because the drum was not made entirely of stainless steel and could rust and stain clothing. The plaintiff purported to bring the case under the Tennessee Consumer Protection Act and similar state consumer protection statutes in 28 other states. The Seventh Circuit accepted the appeal under Fed. R. Civ. P. 23(f) and acknowledged jurisdiction of the case under the Class Action Fairness Act. In a comprehensive opinion by Judge Richard Posner, the court reviewed the advantages and disadvantages of class certification (which the court said included, in diversity cases, a tendency to "undermine federalism") and concluded that these concerns "suggest caution in class certification generally." The court rejected a defense argument that, since the Tennessee Consumer Protection Act did not authorize class actions, the district court could not certify the class, but went on to vacate class certification on other grounds. Assessing the case as "a notably weak candidate for class treatment," the court found that there were no common issues of law or fact and thus no economies to be gained from class certification. Each class member seeking relief would have to testify as to what he understood to be the meaning of the label or advertisement that identified the clothes dryer as containing a stainless steel drum. The court observed that Sears did not advertise its stainless steel drum as protecting against rust stains on clothes. The district court's conclusion that reliance could be presumed since Sears marketed its dryers on a classwide basis prompted the court to retort "Reliance on what?" The court also pointed out that there would be serious difficulty in proving individual damages, but termed the "deal breaker" to be "the absence of any reason to believe that there is a single understanding of the significance of labeling or advertising clothes dryers as containing a 'stainless steel drum.'" The court's opinion dryly recalled a moment from oral argument: "At argument the plaintiff's lawyer, skeptical that men ever operate clothes dryers—oddly, since his client does—asked us to ask our wives whether they are concerned about rust stains in their dryers. None is."



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