Class Action Litigation Update

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New Weapon to Fend off Copycat Class Actions: The Seventh Circuit recently granted an injunction to Sears under the All Writs Act to block a copycat class action filed in federal court in California. The opinion, *Thorogood v. Sears, Roebuck & Co.*, is notable for several reasons. First, it extends relief under the All Writs Act to a defendant faced with a similar class action in another jurisdiction. Second, Judge Posner used biting language in discussing the plaintiff bars' tactic of filing such follow-on actions to leverage a quick settlement. Finally, it allows a defendant to seek an injunction stopping the new action at the outset rather than having to assert collateral estoppel as a defense and possibly having to face discovery in the interim.

The initial case, brought in Illinois federal court, involved consumer fraud allegations that certain Kenmore dryers were falsely represented as having drums that were "100% stainless steel." The plaintiff persuaded the trial court to certify a consumer-fraud class, but the Seventh Circuit reversed it on a Rule 23(f) appeal, finding there were no common issues justifying certification. It later affirmed the denial of attorneys' fees after Sears made an offer of judgment to the named plaintiff.

The plaintiff's attorney, seeking another bite at Sears, filed a copycat class action in California with a new plaintiff. After Sears' pleading challenges were ultimately rejected, the plaintiff's attorney promptly sent Sears' counsel a letter stating in no uncertain terms that Sears must settle now or face extensive discovery.

Instead of capitulating, Sears sought an injunction from the Seventh Circuit. The court granted the request. After noting the *in terrorem* effect of plaintiff's discovery threat, the Court observed that:

[Q]uite apart from the green light that such a ruling would give to extortionate class action practice, a denial of relief would make no sense in a case like this, in which the class (Thorogood's) was certified, albeit later decertified at our direction. Class counsel had and took the opportunity to litigate the certification issue fully—so that to say that a ruling against certification could not be the basis of an injunction would be inconsistent with the doctrine of collateral estoppel itself. There is no denying that a final ruling against certification has collateral estoppel effect. And the basis of the injunction sought in this case is simply the need for enforcing collateral estoppel more effectively than by forcing the defendant to plead it as a defense in case after case.

It remains to be seen whether other circuits will follow this approach, but a defendant faced with a copycat class action has the option to seek an immediate injunction under the All Writs Act rather than wait to tee-up a motion based on collateral estoppel.

Solicitor General Seeks High Court Ruling on Loss Causation: The U.S. Solicitor General has recommended that the Supreme Court review a suit against Halliburton that implicates whether plaintiffs in securities fraud class actions should be required to establish loss causation at the certification stage to trigger the fraud-on-the-market presumption.

In February, the Fifth Circuit affirmed a lower court's decision to deny a Halliburton shareholder's motion to certify securities fraud action on the grounds that the plaintiff had failed to prove the energy giant's alleged misrepresentations actually caused a drop in its stock price. The Solicitor General argued that the Seventh Circuit has expressly rejected the approach adopted by the Fifth Circuit, and that the Second Circuit also has not required the proposed class representative to prove loss causation at that stage.