Skadden

Complex Mass Tort Product Liability Alert

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Supreme Court Vacates No-Injury Consumer Class Action

Earlier today, the U.S. Supreme Court summarily vacated and remanded the Sixth Circuit's decision in *Whirlpool Corp. v. Glazer*, 678 F.3d 409 (6th Cir. 2012), for further consideration in light of *Comcast Corp. v. Behrend*, No. 11-864, 2013 WL 1222646 (U.S. Mar. 27, 2013) (*Comcast*), which was decided last week. *See Whirlpool Corp. v. Glazer*, No. 12-322 (U.S. Apr. 1, 2013).

In *Glazer*, Ohio purchasers of certain Whirlpool washing machines asserted claims for breach of warranty, negligent design and negligent failure to warn under Ohio law. *Glazer*, 678 F.3d at 412. The district court granted the motion for class certification, and the Sixth Circuit subsequently affirmed. On appeal, the Sixth Circuit acknowledged the existence of individual issues — *i.e.*, "variations in consumer laundry habits" and differences in "remedial efforts undertaken by consumers and service technicians"; however, the appellate court essentially brushed these issues aside by resolving that they were not "the underlying cause of" the mold buildup in the class members' machines. *Id.* at 419. The appellate court also rejected the defendant's argument that the class was overbroad (97 percent of the class members had never complained about any problem with their washers), reasoning that "[e]ven if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." *Id.* at 420 (internal quotation marks and citation omitted). In so doing, the Sixth Circuit approved a proceeding under which vast numbers of individuals would be eligible for compensation despite having no legally cognizable injury. Whirlpool filed a petition for certiorari with the Supreme Court, arguing, among other things, that the certification order violated the Supreme Court's command that Rule 23 not be interpreted to "'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2546 (2011) (quoting 28 U.S.C. § 2072(b)).

It is unclear how the Sixth Circuit will come out when it reconsiders its decision in light of *Comcast*. As we reported last week, the Supreme Court in *Comcast* reversed a sweeping class action encompassing more than two million current and former Comcast subscribers who alleged violations of federal antitrust laws. *See Comcast*, 2013 WL 1222646. The Supreme Court held that the class at issue failed the requirements of Rule 23(b)(3) because the plaintiffs' damages theory did not fit their theory of liability, and "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.* at *5.

The reasoning underpinning the Supreme Court's analysis in *Comcast* is clearly in tension with the Sixth Circuit's ruling. After all, the *Comcast* Court made clear that the "rigorous analysis" requirement elaborated in *Dukes*, which often requires an inquiry into the merits of the claims at issue, applies not only to Rule 23(a) factors like commonality, but also to the Rule 23(b) prerequisites. It also follows from the *Comcast* decision that there must be a method put forth by plaintiffs sufficient to calculate damages on a classwide basis in Rule 23(b)(3) class actions. Both of these holdings have the potential to influence the Sixth Circuit's reconsideration of *Glazer* on remand. Whirlpool has argued, for example, that the district court's and Sixth Circuit's predominance analyses were insufficiently rigorous. The district court refused to consider the merits in analyzing predominance, and the Sixth Circuit's decision dedicated only two sentences of analysis to the predominance requirement. The *Comcast* decision's insistence that the plaintiff proffer evidence that damages could be proven on a classwide basis could also prompt additional scrutiny of the lack of injury for the majority of class members, since any damages evidence would have to take account of differences within the class.