Bloomberg BNA

Class Action Litigation Report®

CERTIFICATION

SUPREME COURT

The Sixth Circuit decision in *Whirlpool v. Glazer* and the Seventh Circuit ruling in *Butler v. Sears, Roebuck and Co.*—the former remanded by the U.S. Supreme Court in light of *Comcast v. Behrend*, and the latter a likely candidate for remand—are teetering because the 2012 appellate court decisions failed to rigorously analyze whether plaintiffs' product liability class action claims satisfy Rule 23's predominance requirement, attorneys John H. Beisner, Jessica D. Miller, and Geoffrey M. Wyatt say in this BNA Insight. The authors offer their perspective on the rapidly evolving influence of *Comcast* on class action litigation.

From Cable TV to Washing Machines: The Supreme Court Cracks Down on Class Actions



By John H. Beisner, Jessica D. Miller, and Geoffrey M. Wyatt

John H. Beisner, an Advisory Board member on the Class Action Litigation Report, and Jessica D. Miller are partners with Skadden in Washington D.C., focusing on mass torts and insurance litigation. Geoffrey M. Wyatt is an associate in Washington D.C. The authors can be reached at john.beisner@skadden.com, jessica.miller@skadden.com, and geoffrey.wyatt@skadden.com, respectively.

The U.S. Supreme Court on April 1 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 BL 80435 (U.S. Mar. 27, 2013) (*Comcast*). *See Whirlpool Corp. v. Glazer*, No. 12-322, 2013 BL 85653 (U.S. Apr. 1, 2013). Whirlpool subsequently filed a motion before the Sixth Circuit seeking remand of the case to the Northern District of Ohio so that the trial court can consider the impact of *Comcast* on the case.

Glazer is one of two closely watched class actions before the Supreme Court, both involving allegations that front-load washers are prone to mold. So what do anti-

 ISSN 1529-0115

trust claims against a cable provider have to do with washing machines? The answer may not be immediately apparent, but at bottom, all of these class certification rulings suffered from the same flaw: a failure to rigorously analyze whether plaintiffs' claims satisfy Rule 23's predominance requirement.

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)).

Glazer was soon followed by *Butler v. Sears, Roebuck and Co.*, 702 F.3d 359 (7th Cir. 2012), which involved two classes of washing machine consumers who alleged violations of multiple states' warranty laws: (1) a class of individuals with allegedly mold-producing washers just like the one at issue in *Glazer*; and (2) a class of individuals whose washers had central control units (''CCUs'') that allegedly produced erroneous ''false'' error codes and caused the machines to shut down while in use. The Seventh Circuit held that both putative classes were amenable to classwide treatment, declaring that the predominance standard was satisfied because it would be more efficient to resolve the question whether the machines were defective in a single class trial than in individual proceedings. *Id.* at 362.

The court did so despite the fact that the proposed mold class implicated 27 different machines, and even though the vast majority of individuals in each class had never experienced the alleged mold or CCU problems with their washers. *Id.* at 361-62. In reaching its decision, the Seventh Circuit relied on *Glazer*, explaining that ''[f]or us to uphold the district court's refusal to certify [] a [mold] class would be to create an intercircuit conflict—and a gratuitous one, because . . . we agree with the Sixth Circuit's decision.'' *Id.* at 363. *Butler* is currently pending before the U.S. Supreme Court and may well receive the same treatment.

Comcast in Tension With *Glazer*

The Supreme Court's decision to vacate and remand *Glazer* is not surprising. *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 BL 80435. 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 plaintiffs must put forth a method sufficient to calculate damages on a classwide basis in Rule 23(b)(3) class actions.

Indeed, courts have already begun to apply these lessons from *Comcast* in other cases. In *Roach v. T.L. Cannon Corp.*, for example, the U.S. District Court for the Northern District of New York rejected the recommendation of a magistrate judge that certain wage-and-hour claims under New York law were fit for class treatment. The court expressly relied on *Comcast*, explaining that the decision had clarified (after the magistrate's recommendation) that Rule 23(b)(3) ''requires a demanding and rigorous analysis'' of all issues, including damages. No. 10-cv-0591, 2013 BL 83767, at *3 (N.D.N.Y. Mar. 29, 2013).

The court found the ruling dispositive, as the ''Plaintiffs have not offered a damages model susceptible of measurement across the entire class,'' and rejected the plaintiffs' argument that ''damages need not be considered for Rule 23.'' *Id.; see also Phillips v. Asset Acceptance, LLC*, No. 09 C 7993, 2013 BL 98286, at *3 (N.D. Ill. Apr. 12, 2013) (explaining that *Comcast* ''may portend a tightening of class certification standards more generally, particularly as to the circumstances under which the task of measuring damages sustained by absent class members destroys predominance under Rule 23(b)(3)'').

Comcast holds clear lessons for *Glazer* on remand as well. 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 also could 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. In short, if lower courts read between the lines of the Supreme Court's ruling, the *Glazer* class action may soon be history. And that could portend the end of *Butler* too.

  CLASS ISSN 1529-0115