High Court's Message In Recent Class Certification Vacatur

Law360, New York (June 04, 2013, 1:10 PM ET) -- Yesterday, the U.S. Supreme Court vacated a second product liability class certification ruling in light of Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013), the Supreme Court decision earlier this year confirming that the predominance requirement governing class certification rulings under Rule 23(b)(3) is "demanding" and thus requires a "close look" by the presiding court before certification is granted. See Sears, Roebuck & Co. v. Butler, No. 12-1067 (U.S. June 3, 2013).

By coincidence, the two product liability cases vacated and remanded by the court have involved washing machines, but that is not their import. Rather, the two decisions suggest that the court views Comcast as a broad ruling about the importance of predominance that will affect the full gamut of Rule 23(b)(3) class actions, not just antitrust actions.

Of most interest to product manufacturers, the two orders suggest that the Sixth and Seventh Circuits misunderstood the predominance requirement when they approved class treatment in Whirlpool Corp. v. Glazer, 678 F.3d 409 (6th Cir. 2012), and Butler v. Sears, Roebuck & Co., 702 F.3d 359 (7th Cir. 2012), despite evidence suggesting that injury could not be proven on a classwide basis in either matter.

Although it is impossible to know for certain what the court intends when it simply orders remand without an opinion, Comcast's timing supports this reading. For some time, the courts of appeals had been getting it right. At least since the Supreme Court's ruling in Amchem Products v. Windsor in 1997, the courts of appeals had been demanding serious (and if anything, increasing) rigor in the application of the predominance requirement.

As the U.S. Court of Appeals for the Third Circuit explained in In re Hydrogen Peroxide Antitrust Litigation, for example, the district court must examine the issues and even evidence to "formulate some prediction as to how specific issues will play out [at trial] in order to determine whether common or individual issues predominate in a given case" and reject class certification if "proof of the essential elements of the cause of action requires individual treatment." 552 F.3d 305, 311 (3d Cir. 2009).

In other words, each element — including injury — must be "capable of proof at trial through evidence that is common to the class rather than individual to its members." Id. at 311-12. Many other appellate courts had reached similar conclusions. See, e.g., In re New Motor Vehicles Can. Export Antitrust Litig., 522 F.3d 6, 17, 20 (1st Cir. 2008) ("critical[]" analysis of the plaintiffs' evidence is required in order to determine whether their case, including injury, can be proven on a classwide basis); Blades v. Monsanto Co., 400 F.3d 562, 566-67, 573-74 (8th Cir. 2005) (noting that district courts must determine whether "members of a proposed class will need to present evidence that varies from member to member," and concluding class could not be certified where the plaintiffs' evidence could not prove that everyone in the class was injured).

In the last few years, however, some courts of appeals have stepped back from this rigorous analysis of predominance — and suggested that some exception to the predominance requirement exists for individualized issues related to injury. In Wolin v. Jaguar Land Rover North America LLC, for example, the U.S. Court of Appeals for the Ninth Circuit reversed a denial of class certification in a suit alleging that a design defect in the alignment of certain Land Rover vehicles was causing premature tire wear. 617 F.3d 1168, 1170 (9th Cir. 2010).

The defendant had argued — and the district court had agreed — that issues of injury were not amenable to classwide resolution because the alleged defect had only manifested in premature tire wear in a small number of vehicles. Id. at 1171. The Ninth Circuit rejected this view. It held that "manifestation of a defect" — i.e., injury — "is not a prerequisite to class certification." Id. at 1173.

Wolin was followed by appellate approval of the now notorious washing machine class actions — the first by the Sixth Circuit, the second by the Seventh, both involving allegations that front-loading washing machines were prone to developing mold — even though the evidence in both cases suggested that only a small fraction of the class had actually experienced the alleged problem.

According to the U.S. Court of Appeals for the Sixth Circuit in Glazer v. Whirlpool, class certification was appropriate "[e]ven if some" — or, apparently, nearly all — "of the class members have not been injured." 678 F.3d at 420. Thus, the lack of classwide injury was simply immaterial to the predominance inquiry.

The Seventh Circuit went even further, implicitly holding that the lack of classwide injury supported a finding of predominance. See 702 F.3d at 362. The basis for this counterintuitive view was the notion that the entire predominance analysis is about "efficiency" — and if "most members of the plaintiff class did not experience a mold problem," all the better, since the class treatment would be an efficient manner to achieve "a judgment that will largely exonerate" the defendant. Id.

The Supreme Court's vacatur of these rulings in light of Comcast suggests that it thinks they were wrongly decided — which, by extension, would mean that the recent spate of rulings approving class treatment in product cases where an alleged defect does not affect the entire class have likewise misapplied the predominance requirement. Will the lower courts hear Comcast's message? Only time will tell.

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