

Skadden

Complex Mass Tort Product Liability Alert

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Supreme Court Vacates Another No-Injury Washing Machine Class Action

Earlier today, the U.S. Supreme Court summarily vacated and remanded the U.S. Court of Appeals for the Seventh Circuit's decision in *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), for further consideration in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (*Comcast*), which was decided earlier this year. See *Butler v. Sears, Roebuck & Co.*, No. 12-1067 (U.S. June 3, 2013).

In *Butler*, the Seventh Circuit held that a class of consumers of allegedly mold-producing washing machines and a class of consumers with washing machines that allegedly had a manufacturing defect in their central control units were appropriate for class treatment. In an opinion authored by Judge Posner, the court held that the predominance standard was satisfied as to both classes because it would be more efficient to resolve the question whether the machines were defective in a single class trial than in individual proceedings. 702 F.3d at 362. The court did so on the supposed basis that a common defect was alleged, even though the proposed mold class implicated 27 different washing machines. The Seventh Circuit also determined class certification to be proper despite the fact that the vast majority of individuals in each class had never experienced the alleged mold or central control unit problems with their washers — effectively ignoring the well-established principle that the predominance inquiry must take account of whether each element of a claim can be proven with classwide evidence.

The Supreme Court's decision to vacate and remand the *Butler* ruling comes on the heels of its recent order vacating and remanding a similar washing machine class action in *Whirlpool Corp. v. Glazer*, 678 F.3d 409 (6th Cir. 2012). Thus, today's summary order marks the second time in several months that the Supreme Court has asked a federal appeals court to determine whether consumer class actions encompassing substantial numbers of uninjured class members are certifiable in light of *Comcast*. As we reported in a previous [client alert](#), the Supreme Court in *Comcast* reversed a sweeping class action encompassing more than two million current and former Comcast cable subscribers who alleged violations of federal antitrust laws. See *Comcast*, 133 S. Ct. 1426. 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 1433.

While it is unclear how the Seventh Circuit will rule when it reconsiders the *Butler* case, the rationale behind the Supreme Court's analysis in *Comcast* is clearly in tension with the Seventh Circuit's prior ruling. Specifically, Judge Posner ruled that "[p]redominance is a question of efficiency," which is satisfied any time "it [is] more efficient, in terms both of economy of judicial resources and of the expense of litigation to the parties, to decide some issues on a class basis or all issues in separate trials." *Butler*, 702 F.3d. at 362. This reasoning is contrary to *Comcast*'s affirmation that each of the Rule 23 prerequisites for class certification must be subject to a "rigorous analysis," including the predominance requirement of Rule 23(b)(3). The *Comcast* decision also makes clear that a plaintiff must put forth a method sufficient to calculate damages on a classwide basis in Rule 23(b)(3) class actions. Both of these aspects of the *Comcast* ruling have the potential to influence the Seventh Circuit's reconsideration of *Butler* on remand. Sears has argued, for example, that the Seventh Circuit's predominance analysis was insufficiently rigorous, relegating its inquiry to an efficiency-only calculus. The *Comcast* decision's requirement that damages must 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.