Skadden

Complex Mass Tort Product Liability Alert

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Ordered by SCOTUS to Reconsider, Sixth Circuit Again Upholds Certification Ruling in *Glazer*

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Earlier this year, as noted in a previous client alert, the U.S. Supreme Court 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*, 133 S. Ct. 1426 (2013) (*Comcast*). The Sixth Circuit has now issued a new ruling, finding that the front-load washing machine case was properly certified notwithstanding *Comcast*. *See* Slip op., *Glazer v. Whirlpool Corp.,* No. 10-4188 (6th Cir. July 18, 2013).

In *Comcast*, the Supreme Court reversed certification of a class alleging federal antitrust claims on the ground that 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." 133 S. Ct. at 1433. The Sixth Circuit viewed the *Comcast* decision as limited to the question of whether *damages* could be resolved on a classwide basis — a rule it found irrelevant in *Glazer* because the district court "certified only a liability class and reserved all issues concerning damages for individual determination." *Glazer,* slip op. at 27. The Sixth Circuit justified this narrow view of *Comcast* based on its belief that *Comcast* merely "reaffirms" the settled rule that "liability issues relating to injury must be susceptible to proof on a classwide basis" to establish predominance. *Id.* Quoting the *dissent* in *Comcast*, the Sixth Circuit was satisfied that when "'adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate.'" *Id.* at 28 (quoting *Comcast*, 133 S. Ct. at 1437 (Ginsburg, J., dissenting)). In further support of this proposition, the Sixth Circuit cited the Seventh Circuit's decision in *Butler v. Sears, Roebuck & Co.,* 702 F.3d 359, 361 (7th Cir. 2012), another case alleging mold and odor problems with front-loading washing machines. *Butler* likewise had held that individualized issues of damages do not preclude class treatment, *see Glazer*, slip op. at 17-18, but the Supreme Court subsequently vacated *Butler* and remanded it (along with *Glazer* and one other case) for further consideration in light of *Comcast*, a fact the new *Glazer* decision acknowledges in a footnote but does not otherwise attempt to address.

The Sixth Circuit's ruling overlooks the implications of *Comcast* for variations in injury within a putative class. In *Glazer*, the defendant pointed out that the alleged defect — an odor problem — had manifested in only a small percentage of the putative class members' washing machines. The defendant argued that those without manifest defects had no injury. Although this problem relates to injury rather than damages, it is analogous to the one in *Comcast*. The plaintiffs seek to use the class device to expand ultimate recovery — *i.e.*, to proceed as though the entire class is injured when in fact only a small portion has allegedly experienced a problem.

The Sixth Circuit sensed these problems but did not solve them. Instead, it attempted to resolve the injury problem by concluding that the governing state law would recognize a "premium price" theory of injury, under which even those who had no manifestation of defect nevertheless could claim some legal injury. *Id.* at 21. But it cited nothing for this proposition, asserting only that the cases allow consumers to "recover damages for economic injury only," *id.* — a broad proposition that begs the question of whether they may do so specifically when a problem only affects a handful of proposed class members.

Even assuming the law recognizes such injuries, the predominance problems are by no means resolved, since any putative class member whose washing machine actually developed mold and odor problems would have a materially different injury from class members whose washing machines had not manifested any problems. *See, e.g., Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (class members must "suffer the same injury"). Here, too, the Sixth Circuit appeared to sense a problem, as evidenced by its assertion that a class action plaintiff "need not prove that each element of a claim can be established by classwide proof" but instead need only establish that "common questions" predominate. *Glazer,* slip op. at 24 (citing *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013)). But absent commonality on either injury or damages, there is little to be gained from a common proceeding on other issues, which the Sixth Circuit thought included the questions of "whether the alleged design defects in the [washers] proximately caused mold to grow in the machines and whether Whirlpool adequately warned consumers about the propensity for mold growth." *Id.* at 25. Answers of "yes" to these questions would establish nothing by themselves because the liability determination is incomplete without resolving whether each class member was actually injured. And answering that question in individual follow-on proceedings would offer no efficiency benefits and would probably violate the defendant's Seventh Amendment right against re-examination of facts, because the juries would have to familiarize themselves with the ostensibly common failure-to-warn and causation questions already decided by the first jury.

In short, the Sixth Circuit seems to have given short shrift to the Supreme Court's order that it reconsider the case in light of *Comcast*. In the Sixth Circuit's view, *Comcast* is simply a "different" case that has no bearing on the issues presented in *Glazer*. That view seems implausible in light of the Supreme Court's decision to vacate the prior ruling in *Glazer* rather than to deny Whirlpool's petition for review outright. It remains to be seen whether the reasoning of the Sixth Circuit will withstand further scrutiny by the Supreme Court.