Skadden

# Complex Mass Tort Product Liability Alert

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## Seventh Circuit Reaffirms Propriety of Overbroad Washing-Machine Classes Despite Supreme Court's Ruling in *Comcast v. Behrend*


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Earlier this year, as noted in a previous Skadden memorandum, the U.S. Supreme Court 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). The Seventh Circuit has now issued a new ruling, once again finding 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 are suitable for class treatment notwithstanding *Comcast*. The Seventh Circuit's ruling comes on the heels of a decision by the U.S. Court of Appeals for the Sixth Circuit, also noted in a previous Skadden memorandum, which similarly held that a front-load washing machine case was properly certified notwithstanding *Comcast*.

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. In yesterday's ruling, the Seventh Circuit distinguished *Butler* from *Comcast*, concluding that "there is no possibility … that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis" because the damages at issue — *i.e.*, mold and problems with the control units of the washers — all resulted from the two common defects alleged in the case. *Butler*, slip op. at 6. Writing for the court, Judge Richard Posner warned that "[i]t would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages." *Id.* at 9. "If the issues of liability are genuinely common issues, and the damages of individuals can be readily determined in individual hearings, in settlement negotiations or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification." *Id.* at 9-10. Therefore, relying on recent Seventh Circuit cases approving issues-only class actions (class actions in which a single issue is certified for class treatment, while other individual issues are adjudicated in subsequent follow-on proceedings), the court reasoned that the question of Sears' liability could be determined on a classwide basis, "with separate hearings to determine … the damages of individual class members." *Id.*

The Seventh Circuit's ruling and the recent decision issued by the Sixth Circuit endorse a new, troubling approach to class certification that would allow plaintiffs to bring class actions seeking money damages even where the alleged injuries at issue are dissimilar. Under this approach, which cannot be reconciled with *Comcast* or *Wal-Mart Stores Inc. v. Dukes,* 131 S. Ct. 2541 (2011), plaintiffs with dissimilar claims could join together for classwide "issues" trials, followed by individual damages proceedings. Whirlpool has already indicated that it plans to seek review of the new *Glazer v. Whirlpool Corp.,* No. 10-4188, 2013 WL 3746205 (6th Cir. July 18, 2013) ruling by the Supreme Court, and it is likely that Sears will do the same in *Butler*. Thus, the Supreme Court may put the brakes on the Seventh Circuit's embrace of "issues" classes. Absent intervention by the Supreme Court, however, it remains to be seen whether plaintiffs' counsel will find such proceedings to be sufficiently remunerative to pursue, how the actual trials will play out and whether individual class members will want to spend the time pursuing their claims for damages in what are generally small-value cases.