Skadden

Complex Mass Tort Product Liability Alert

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Supreme Court Punts on Twin No-Injury Washing Machine Class Actions

Earlier today, the U.S. Supreme Court declined to review decisions upholding class certification in two cases that have garnered increasing scrutiny by the legal community — *Butler v. Sears, Roebuck & Co.* and *Whirlpool Corp. v. Glazer*. Both cases are based on allegations that defendants manufactured or sold front-load washing machines with a design defect that makes them prone to accumulate mold. The decision marks a retreat from two Supreme Court orders last year vacating and remanding two of these cases to the Sixth and Seventh Circuits for further consideration in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, which was also decided last year. *See Butler v. Sears, Roebuck & Co.*, No. 12-1067 (U.S. June 3, 2013); *Whirlpool Corp. v. Glazer*, No. 12-322 (U.S. Apr. 1, 2013). And some lower courts may see the ruling as a green light for certifying consumer classes involving allegedly defective products that contain large numbers of class members who have not encountered any problems with their products.

The central issue in these cases is that the vast majority of washing machines never develop mold. Based on this essentially undisputed fact, the defendants in all three cases have argued that class treatment is improper because most class members have no cognizable injury. The defendants have also raised other objections, for example that the classes cover a range of different washing-machine models and that varying consumer habits affect the development of mold.

But lower courts have not been receptive to these arguments. When *Glazer and Butler* were first appealed to the Sixth and Seventh Circuits, both appellate courts brushed aside arguments that the proposed classes were overbroad based on the rarity of the mold problem. The Sixth Circuit rejected the argument that injury did not pervade the classes, asserting that the presence of a defect might be a compensable injury even if it never manifested, though the plaintiffs had not advanced that theory and the Sixth Circuit cited no law from the relevant states that supported it. *Glazer v. Whirlpool*, 678 F.3d 409, 420-21 (6th Cir. 2012). And in an opinion authored by Judge Posner, the Seventh Circuit concluded that the overbreadth argument *favored* class certification because "[p]redominance is a question of efficiency" and, if the overbreadth argument had merit, the most efficient outcome would be to certify the class "and then enter[] a judgment that will largely exonerate Sears." *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012).

The defendants in *Glazer* and *Butler* petitioned for review by the Supreme Court, which summarily vacated and remanded the cases based on its intervening decision in *Comcast*. In *Comcast*, the Supreme Court reversed certification of a class alleging federal antitrust claims on the ground that the plaintiffs' damages theory was broader than their theory of liability. Specifically, the damages theory had been developed based on an assumption that class members had sustained four distinct antitrust injuries, but the class-certification ruling determined that only one of these theories of injury applied on a classwide basis and certified a class on that injury only. The Court concluded that class treatment was improper because the proffered damages evidence included damages for the three injury theories that were not common to the class and that any attempt to tailor damages to the one remaining injury theory would require "individual damage calculations [that would] inevitably overwhelm questions common to the class." 133 S. Ct. at 1433. The implication of the ruling was clear: a class cannot be certified on a theory that would result in compensation for class members who have no injury.

But on remand the Sixth and Seventh Circuits found *Comcast* irrelevant and reinstated their rulings. Both courts construed *Comcast* narrowly as applying only to the classwide adjudication of damages. They concluded that *Comcast* had no application in cases where the plaintiffs propose a classwide trial for liability, followed by individual trials for damages. In *Glazer*, 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. *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 860 (6th Cir. 2013). This sentiment was echoed in *Butler*, where Judge 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." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013).

The latest *Glazer* and *Butler* rulings gave *Comcast* an unduly narrow construction. Under their reasoning, overbreadth is essentially never a barrier to class treatment in product-defect cases because the problem of over-inclusion can be resolved in individualized damages proceedings. This approach overlooks the inefficiencies of such an approach, in which the cost of litigating the individualized proceedings might well exceed any possible recovery. Not surprisingly, other courts have read *Comcast* more broadly in analogous cases. For example, in one recent district court case, the court rejected class treatment of claims that certain car axles were prone to corrosion. *Martin v. Ford Motor Co.*, 292 F.R.D. 252, 274-75 (E.D. Pa. 2013). According to the court, "the calculation of damages for Express Warranty Class members is 'nearly impossible . . . without individualized inquiries into each claim,'" since the vehicles differed in age and usage, and "the rear axles on approximately 83.2% of the Windstars at issue have not malfunctioned." *Id.* (citation omitted).

The Supreme Court's decision not to grant certiorari in the washing-machine cases is a missed opportunity to provide needed clarity about overbroad classes in product-defect cases. Because today's order leaves the decisions in the washing-machine cases undisturbed, other courts may be encouraged to apply more lenient class-certification standards in product-defect cases, in which it may suffice that an alleged effect manifests in only a tiny sliver of the product line. This approach threatens litigation costs for manufacturers that are well out of proportion to idiosyncratic defects in their products and may return little benefit to consumers or even their lawyers who, under the logic of these cases, would still have to litigate individualized damages trials in order to see any relief or recovery of fees.