Taking Issue With Issues Classes Post-Comcast

Law360, New York (March 31, 2014, 5:49 PM ET) -- Since the U.S. Supreme Court's 2013 ruling in Comcast Corp. v. Behrend, rejecting class certification where the expert damages evidence proffered by the plaintiffs in support of certification could not logically prove classwide damages, courts and commentators have sought to understand the full implications of the Comcast case, particularly whether it means classwide damages evidence is a prerequisite to class treatment.

That debate took on particular significance a few weeks ago when the Supreme Court denied certiorari in Butler v. Sears Roebuck & Co. and In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation (2014). In those two well-publicized front-load washer cases, the courts of appeals essentially relied on issues-class approach to skirt the implications of Comcast for class actions in which the defendants argued that large numbers of consumers never experienced mold in their washers and therefore could not collect any damages. But, while it may be tempting for plaintiffs' lawyers to interpret these denials as implicitly approving issues classes as a way to avoid demonstrating predominance with respect to damages, such a litigation strategy would be fraught with risks.

First, as a strictly doctrinal matter, the Supreme Court's decision to deny review did not actually decide anything on the merits; nor does it imply the high court will not take future action on the question of issues classes. See, e.g., United States v. Carver (1923) ("The denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times."). A broad range of considerations bear on the discretionary decision whether to grant review in a particular case, see, e.g., Maryland v. Baltimore Radio Show (1950); for example, the fact that the Supreme Court already had another major class action case pending on its docket in Halliburton Co. v. Erica P. John Fund Inc., could have led some of the court's justices to decide that the controversial question of issues classes should be pocketed for future consideration.

Second, even after the Supreme Court's denial of review in the washing machine cases, the reality is that Comcast has made damages issues a bigger obstacle to class treatment. For one thing, courts outside the Sixth and Seventh Circuits remain free to disagree with those two circuits' glosses on Comcast and to conclude the case rejects class treatment in cases involving individualized damages issues.

Notably, the lead Comcast dissent expressly proposed resolving the damages problem in that case by way of individualized damages hearings, but that did not stop the majority from holding class treatment improper. See Comcast (Ginsburg & Breyer, JJ., dissenting). Particularly, in view of this failed effort to find common ground, other courts may well read Comcast as rejecting the use of issues classes. See Jacob v. Duane Reade Inc. (2013) (noting that some courts "have interpreted Comcast more broadly, as requiring" that plaintiffs "offer 'a damages model susceptible of measurement across the entire class'" and collecting cases). This is particularly so because outside the Seventh Circuit, many courts have held that issues classes are only proper, where predominance is satisfied over the entire cause of action and other courts have warned that issues classes almost always threaten Seventh Amendment

rights.

Third, even if the pool of cases seeking issues-class treatment of liability issues expands as a result of the Glazer and Butler rulings, it remains to be seen whether certification rates actually go up. After all, the proponent of class treatment still carries the burden of proving this piecemeal approach to litigation would produce an efficiency benefit, even under an issues trial approach. See, e.g., Jacob, 293 F.R.D. at 589 ("Of course, courts should use Rule 23(c)(4) only where resolution of the particular common issues would materially advance the disposition of the litigation as a whole."). This burden may prove too difficult to carry in most cases.

While Butler and Glazer were closely watched at the appellate and Supreme Court levels, what may be even more illuminating for class action practice in the long run is what happens when they are tried. Even under plaintiffs' most optimistic assessment in those cases, less than half of washing machine owners experienced any odor problems; and the defendants' estimates in those cases were much lower. Thus, there is a very real likelihood that by aggregating their claims, plaintiffs would lose on the liability issue with respect to the entire class, even though some class members might have presented stronger cases for liability in individual trials.

Moreover, while plaintiffs claim the owners of any machine — smelly or not — are "injured" in a technical sense because they spent too much money for machines that came with a risk of odor, a jury may well reject that speculative theory. If that were to happen, the class members would be left with nothing to show for themselves. And, even if a jury found for the class on liability, class members would have to go on to individualized damages hearings and prove damages — perhaps by bringing in their dirty laundry baskets one-by-one — and having juries decide what if any losses each class member sustained as a result of mold or odor problems. In all likelihood, the cost of litigating each of these individual proceedings would greatly exceed any recovery and the entire exercise of litigating the common liability phase will have been a wasted effort.

In the end, the inevitable effect of Comcast is that fewer classes will be certified as to all issues, since courts are now being called upon to apply greater scrutiny to evidence that purports to calculate damages on a classwide basis. See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litigation (2013) (explaining that, before Comcast, "the case law was far more accommodating to class certification" with respect to classwide damages models).

Thus, even if Glazer and Butler spur more issues class proposals, it will only be because plaintiffs who cannot develop plausible classwide damages evidence will be forced to flee to issue-class proposals in order to advocate class treatment. It remains to be seen whether these proposals will be embraced by courts outside the Sixth and Seventh Circuits and outside the realm of front-load washing machines.

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