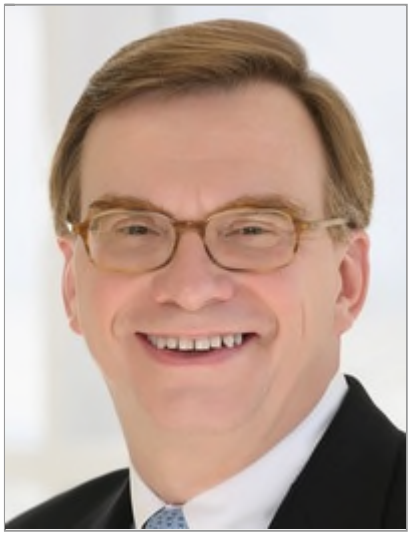
Big Defense Win In Whirlpool, But Everyone Still Loses

Law360, New York (December 04, 2014, 11:14 AM ET) -- Last month, an Ohio federal court jury returned a verdict in favor of Whirlpool after a three-week trial to determine whether it was liable to all Ohio purchasers of its front-load washing machines on a theory that the machines were defective. See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig. (Glazer v. Whirlpool Corp.) (N.D. Ohio Oct. 31, 2014).



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The defense verdict in this rare class action trial is an important reminder of the need to stringently enforce class certification standards in product-defect cases. The jury's decision highlights what many knew from the outset — claims based on the allegation that front-load washing machines are defective lack merit. The fact that the case got to the point of a class trial at all raises critical concerns about overbroad classes, overcompensation of class members who do not have a legally cognizable injury and class action abuse in our legal system.

Glazer involved allegations by Ohio consumers that the design of Whirlpool's front-load washing machines is defective in that it allows formation of odorous mold within the machines. Plaintiffs sought recovery under theories of breach of warranty, negligent design and negligent failure to warn. The evidence presented by Whirlpool at the class certification stage indicated that 97 percent of the class reported no mold problems with their washers to the company. And even by plaintiffs' own estimate, only 35 percent of the proposed class members experienced any mold or odor in their washers at all. Nonetheless, the plaintiffs sought and obtained class certification.

On appeal, the Sixth Circuit approved a proceeding under which all class members would be eligible for compensation despite having never experienced a problem with their machines. It attempted to justify inclusion of these individuals in the class on the ground that "class plaintiffs may be able to show that each class member was injured at the point of sale" by overpayment of a "premium price" for a product prone to mold buildup. It recommended that, "For the purpose of determining damages, class members who were injured at the point of sale and also experienced a mold problem might be placed in one Rule 23(b)(3) subclass, while class members who were injured at the point of sale but have not yet experienced a mold problem might be placed in a separate Rule 23(b)(3) subclass."

The case went to the U.S. Supreme Court, which remanded with instructions that the Sixth Circuit reconsider its ruling in light of the Supreme Court's then-recent decision in Comcast

Corp. v. Behrend, 133 S. Ct. 1426 (2013). On remand, the Sixth Circuit affirmed its ruling certifying the class.

After unsuccessfully seeking summary judgment, Whirlpool did what few defendants choose to do after a class has been certified — it took the case to trial. Class action trials are not common because of the significant settlement pressure that comes along with class certification, regardless of whether the plaintiffs' claims have any merit at all. Once a class is certified, a class action defendant finds itself faced with a scenario in which a single jury has the power to declare it liable to hundreds, thousands or hundreds of thousands of plaintiffs — and potentially grant an astronomical damages award that could, in some cases, be ruinous to the company. In short, a class trial is often a "bet the company" proposition.

Class action defendants' general unwillingness to take that bet stems largely from the fact that, in a class trial, the deck is stacked in favor of the plaintiffs. As some courts have recognized, any trial in which the claims of many different plaintiffs are tried jointly against a defendant poses the risk of serious due process concerns. For one thing, there is a serious risk that the jury will assume that "where there's smoke, there's fire" (i.e., the fact that multiple plaintiffs have made the same allegations against a defendant mean that those allegations are true). In addition, a jury may find in favor of all plaintiffs — even those who cannot prove the required elements of a legal claim individually — based on the facts of a single plaintiff's case.

Going forward, some class action plaintiffs' lawyers may point to the Glazer verdict as evidence that class actions are not as one-sided as defendants paint them to be — and that courts should liberally grant class certification because juries will reject bogus class action claims. There are many problems with such an argument. For one, the fact that one class action defendant was able to overcome the significant prejudice inherent in a class trial is far from proof that such prejudice does not exist. In addition, as discussed above, even a small risk that a jury could award millions — even hundreds of millions — of dollars in classwide damages would be enough to scare most defendants into settling even the most spurious class claims. This is particularly true for class action defendants who are much smaller than Whirlpool and for whom a class trial really would present a "bet the company" scenario.

Perhaps most importantly, liberal certification of class claims, especially in cases where as in Glazer there is evidence at the certification stage that a significant portion of the proposed class has no injury, poses a significant and completely unnecessary cost on both the parties and judicial system. A class trial is an expensive and time-consuming proposition. The parties can potentially spend millions of dollars litigating a case to verdict and the court and its staff are required to give weeks or months to preparing for and holding a trial. In a case like Glazer, the overwhelming amount of resources that went into the class trial were far out of proportion to the limited number of class members who had any complaint at all. Had class certification properly been denied, Whirlpool would not have been forced to spend the substantial amount required to properly defend itself against the claims of uninjured consumers. And it is not just companies who are hurt by unnecessary litigation; these increased trial costs are ultimately passed on to consumers in the form of increased prices for products.

The outcome of the Glazer case reaffirms what class action defendants have long been saying — class certification is a powerful tool that should be used sparingly in only those cases where the proposed class members truly are so similarly situated that their claims can be tried based on common evidence. But, for Whirlpool's decision to risk a classwide plaintiffs' verdict, class certification in Glazer would have resulted in a windfall settlement for plaintiffs' lawyers even though the majority of class members had no injury at all. As it is, and even though it ultimately prevailed at trial, Whirlpool is still out the significant amount it was forced to spend on its class action defense. Further, if anyone in the class

did have a legitimate complaint about a washing machine (due, for example, to a machine-specific manufacturing defect), it is now extinguished as a result of the verdict. Put simply, Glazer demonstrates that when classes are improperly certified, no one wins.

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