Glazer: A Big Defense Victory, but Everyone Lost

Skadden

January 2015

This article is from Skadden's *2015 Insights* and is available at skadden.com/insights.

Contributing Partners

John H. Beisner
Washington, D.C.

Jessica D. Miller
Washington, D.C.

Contributing Associate

Nina R. Rose
Washington, D.C.

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

The most watched class action of the past year was the *Glazer* case — a rare occurrence of a consumer class action trial — which resulted in a defense victory. See *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig. (Glazer v. Whirlpool Corp.)*, No. 1:08-wp-65001-CAB (N.D. Ohio Oct. 31, 2014), ECF No. 491. In some ways, the jury's decision was unsurprising: Only a very small percentage of users reported mold problems with the energy-efficient front-load washing machines. But the fact that the case even reached a class trial raises critical concerns about overly broad classes, overcompensation of class members and the propriety of so-called "issues" trials — questions that are likely to dominate the class action landscape in the coming year.

Consumer class action trials are exceedingly uncommon because of the significant settlement pressure that comes with class certification, regardless of whether the plaintiffs' claims have any merit. Once a class is certified, the defendant faces a scenario in which a single jury can declare it liable to hundreds, thousands or even millions of plaintiffs, and potentially grant an astronomical damages award that could be ruinous to the company. As a result, class trials are often bet-the-company propositions. 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 real 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 means 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.

Whirlpool may have been emboldened to go to trial because *Glazer* was certified as an issues class solely to determine whether the machines had a defect that made them more prone to mold; the court explicitly reserved damages for a second phase in the event of a plaintiff verdict. Issues trials are one of the most controversial open questions in class action practice today. The Sixth Circuit has embraced the concept, both in *Glazer* and other recent cases, as a means to facilitate class certification even where certain elements of the plaintiffs' claims — such as causation and/or injury — are inherently individualized. By contrast, other circuits have expressed skepticism regarding the use of issues classes. As these courts have noted, there is a serious risk that issues classes will result in multiple juries examining the same questions in violation of the Seventh Amendment. In addition, resolving a single issue on a classwide basis has little, if any, efficiency benefit in most cases.

Going forward, some consumer 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 argue that courts therefore should liberally grant class certification, even where the proposed classes include uninjured claimants, because juries will reject bogus class action claims. There are many problems with such an argument. 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 tens of millions of dollars in classwide damages can sometimes be enough to

scare defendants into settling even the most spurious class claims. This is particularly true for class action defendants that are much smaller than Whirlpool and for which a class trial carries a risk of bankruptcy. Perhaps most importantly, liberal certification of class claims imposes a significant and completely unnecessary cost on both the parties and the 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, an investment that is often far disproportionate to the limited number of class members who had any complaint with the product or service. This is all the more true with respect to issues classes like *Glazer* because, even if plaintiffs had prevailed at trial, the proceedings would not have been over. Instead, a new phase would have begun to determine damages.

While *Glazer* ended well for Whirlpool, plaintiffs' lawyers will continue to use the *Glazer* model to seek certification of overbroad classes, including bids for issues classes, in the hopes that the next major class action trial will go their way. Class action defendants should be prepared to fight back against such attempts to carve out allegedly "common" issues for class treatment and convince other courts that the Sixth Circuit simply got it wrong. An important part of that fight will be explaining to federal and appellate court judges that the outcome of the *Glazer* trial demonstrates that when overly broad classes are certified, no one wins.