



## The Business Suit

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### Class Action SLG: *Whirlpool* and *Sears*: The Impact of Products Liability Class Actions on the Reinforced Commonality and Predominance Requirements of Rule 23

by Elizabeth L. Moyo



Front-loading washing machines have revolutionized the age-old chore of laundry because of their increased capacity and efficiency. Why, then, are the front-loading washing machines the subject of countless proposed class actions all across the country? As the manufacturers of those washing machines have repeatedly tried to say: what does not *smell* right is that the certified classes include numerous consumers who have not experienced any problems with the washers and have suffered no actual damages. According to the Sixth and Seventh Circuit Courts of Appeal, however, whether those washing machines are defective is a sufficient common question that predominates over individual issues to support class certification under Rule 23(b)(3). *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 852 (6th Cir. 2013); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013).

Not surprisingly, Whirlpool and Sears have petitioned the U.S. Supreme Court for a second time to weigh in on the appropriateness of the certification decisions affirmed by the Sixth and Seventh Circuits. This article explores why Whirlpool and Sears have been unsuccessful in persuading those appellate courts despite recent favorable class action decisions for the defense from the U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, U.S., 131 S.Ct. 2541, 180 L.Ed. 2d 374 (2011) and *Comcast Corp. v. Behrend*, U.S., 133 S.Ct. 1426, 1433, 185 L.Ed.2d 515 (2013). The main distinction identified by those appellate courts is that neither *Wal-Mart*—an employment discrimination case—nor *Comcast*—an anti-trust case—involved damages arising from an allegedly defective product.

#### I. The Sixth and Seventh Circuits Are Unpersuaded by *Wal-Mart* to De-Certify Classes of Consumers Who Purchased Front-Loading Washing Machines

In *Wal-Mart*, the Supreme Court reversed the Ninth Circuit's ruling upholding class certification for employees in a Title VII discrimination suit against the employer. 131 S. Ct. 2541. The Supreme Court found that a rigorous analysis of commonality under Rule 23(a)(2) was required even if such analysis overlapped with the merits of the case. *Id.* at 2551. In *Wal-Mart*, the common factor among putative class members was the alleged disparate treatment, and in order to certify the class, the Supreme Court said the district court needed significant proof that there was a general policy of discrimination applied to the employees by Wal-Mart. *Id.* at 2553. Because the district and appellate courts dodged the discrimination issue as a merits issue that did not need to be resolved for class certification, the Supreme Court reversed certification of the enormous putative class of Wal-Mart employees. *Id.* at 2546.

##### a. Sixth Circuit Affirms Class Certification Despite *Wal-Mart*

While the *Wal-Mart* case was pending before the U.S. Supreme Court, Whirlpool persuaded the Sixth Circuit that the certification decision from the District Court for the Northern District of Ohio presented

questions concerning the appropriate standard for resolving factual disputes under Rule 23 when those disputes also relate to the merits of the alleged claims. *In re Whirlpool Corp.*, 678 F.3d 409 (6th Cir. 2012). In *Whirlpool*, the district court certified a class of approximately 200,000 Ohio consumers who purchased who purchased twenty-one different models of Whirlpool front-loading washers. *In re Whirlpool*, N.D. Ohio No. 1:08-WP-65000, 2010 U.S. Dist. LEXIS 69254, at \*3-4 (July 12, 2010). Those washers allegedly have a common defect that causes the washers to accumulate mold, leading to unpleasant odors and damaged clothing.

Following *Wal-Mart*, Whirlpool argued to the Sixth Circuit that Plaintiffs had to show commonality by more than simply alleging a common question regarding whether the washers were defective. According to Whirlpool, the plaintiffs could not demonstrate a common defect caused a common injury because the class involved twenty-one different models of Whirlpool washers sold since 2001 to consumers with varying levels of injury, if any. Moreover, the majority of purchasers had no mold problem with their washers, so there was no common defect to satisfy the commonality requirement of Rule 23(a)(2). Further, under the predominance requirement of Rule 23(b)(3), the individual issues concerning the different models, consumer laundry habits, and varying levels of injury should have precluded certification.

The Sixth Circuit disagreed and found that even under *Wal-Mart*, the Sixth Circuit's certification decision was appropriate. 678 F.3d at 418. Although the *Wal-Mart* decision requires a rigorous analysis of the facts relevant to class certification, the Supreme Court did not overrule its decision in *Eisen v. Carlisle & Jacquelin*, which held that district courts are not required to resolve *all* factual disputes on the merits before deciding whether class certification is warranted. *Id.* at 417 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)). Based on the factual record before it, the Sixth Circuit found that the alleged defect was a result of a common feature of all of the models of washers purchased by putative class members. The appellate court further reasoned that the alleged common defect and the adequacy of Whirlpool's warnings to consumers were sufficient to satisfy the commonality prerequisite of Rule 23(a)(2). The Sixth Circuit likewise held that those common questions predominate over individual issues related to damages, for example, and that the resolution of those common questions would advance the litigation such that certification under Rule 23(b)(3) was appropriate.

### **b. The Seventh Circuit Ignores *Wal-Mart* and Affirms Certification**

In *Sears*, the Seventh Circuit did not analyze *Wal-Mart*. *Butler v. Sears*, 702 F.3d 359 (7th Cir. 2012). The Supreme Court in *Wal-Mart* focused on the lack of evidence of a common question to satisfy Rule 23(a)(2). 131 S. Ct. at 2553. In contrast, the Seventh Circuit had no problem finding a common question of fact: "were the machines defective in permitting mold to accumulate and generate noxious odors?" *Sears*, 702 F.3d at 362. In addition, the *Sears* case involves a separate class of consumers who claim they were harmed by a defective control unit. The Seventh Circuit likewise found there was a common question regarding whether there was a defect in the control unit.

Unlike *Wal-Mart*, the Seventh Circuit's analysis focused on the predominance requirement of Rule 23(b)(3) because the district court was persuaded the common question regarding the mold problem did not predominate over individual fact issues arising from the different washer models and design changes made to alleviate the mold problem. *Id.* at 362. The Seventh Circuit disagreed despite 27 different models of washers, the diverse laundry habits of consumers, and the varying levels of alleged damages. *Id.* Further, the Seventh Circuit reasoned that if the alleged defect varied by model, subclasses could be created at a later date. Predominance is a question of efficiency, and it is more efficient to resolve the defect issue on a class basis and resolve various damages issues by creating subclasses or on an individual basis, if necessary. Therefore, the Seventh Circuit reversed the district court's decision denying certification of the mold class and affirmed the district court's decision certifying the control unit class.

## **II. Comcast Ruling Provides a Short-Lived Victory for Whirlpool and Sears**

While Whirlpool's and Sears' petitions for certiorari were pending, defendants received another boost from the Supreme Court's decision in *Comcast Corp. v. Behrend* holding that Rule 23(b)(3) requires the same "rigorous analysis" of the facts as does Rule 23(a)(2). 133 S. Ct. at 1432-33. In another 5-4 decision, the Supreme Court reversed class certification for more than two million current and former subscribers with antitrust claims against Defendant Comcast. *Id.* Plaintiffs alleged that Comcast swapped service areas with other cable providers to reduce competition and increase its cost of service. *Id.* at 1430. Plaintiffs further contended that a regression model of damages from all of Comcast's anticompetitive activities indicated that damages could be measured on a class-wide basis. *Id.* But the regression model did not isolate damages for the alleged anticompetitive activities from other theories that were rejected by the lower court. *Id.* at 1431. Because the model could not establish an adequate method for calculating damages for the alleged anticompetitive activities on a class-wide basis, the Supreme Court held that common issues of damages did not predominate in the action under Rule 23(b)(3). *Id.* at 1432-33.

As a result of its *Comcast* decision, the Supreme Court granted Whirlpool's and Sears' petitions, vacated the appellate decisions affirming class certification, and remanded the cases to the Sixth and Seventh Circuits, respectively. *Glazer v. Whirlpool Corp.*, 133 S. Ct. 1722 (2013).

#### **a. Sixth Circuit Affirms Certification Sidestepping Comcast**

Following the vacation and remand order, the same panel of Sixth Circuit judges reaffirmed class certification, finding there were more than sufficient facts in the record to support the district court's certification decision. *Glazer v. Whirlpool Corp.*, 722 F.3d at 852. Whirlpool's documents confirmed that its design engineers knew the mold problems existed despite the varying consumer laundry habits and remedial efforts by service technicians to resolve the mold problems. *Id.* at 854. The evidence also demonstrated that front-loading washers develop mold more readily than other washers because of the lower water levels used and the higher moisture content within the machines, combined with reduced ventilation. *Id.* at 847. Further, Plaintiffs' expert witnesses testified that the washers' failure to clean or rinse their own components to remove soil residues was the "common design defect" in all twenty-one different models that produced moldy odors. *Id.*

The Sixth Circuit again found that there were common issues of fact among the class members and that those common questions predominated over the individual issues. *Id.* at 858-61. According to the court, Plaintiffs presented sufficient evidence of a common design defect, which Whirlpool was aware of and allegedly should have warned consumers about, to support class certification. Resolving those common issues of fact through a class action would advance the litigation as contemplated by Rule 23. To the extent a design defect did not exist and Whirlpool did not fail to provide sufficient warnings to consumers, the court reasoned that such evidence would support a judgment in favor of Whirlpool but did not preclude class certification. *Id.* at 858.

While the majority of the Sixth Circuit's opinion was spent regurgitating and elaborating on the facts that supported its earlier decision affirming class certification, a smaller portion of the opinion distinguished *Whirlpool* from *Comcast*. Mainly, *Comcast* involved certification of a class seeking damages on a class-wide basis while *Whirlpool* involves a class certified based on a question of liability only. According to the Sixth Circuit, whether purchasers of the Whirlpool front-loading washers suffered damages at the point of sale was one of the common factual issues supporting certification. Under the point-of-sale theory, all purchasers were damaged because they received less than what they bargained for due to the alleged design defect in Whirlpool's front-loading washers. In other words, plaintiffs and the Sixth Circuit sidestepped *Comcast* by focusing on the liability issues and leaving the calculation of damages for another day.

The Sixth Circuit also dodged *Comcast* by focusing on *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013). In *Amgen*, the Supreme Court affirmed certification of a securities fraud class action. The *Amgen* court found that plaintiffs did not have to prove the misrepresentation was material for the class to be certified because whether the misrepresentation was material was a sufficient common issue of fact to support class certification. *Id.* at 1191.

As the Sixth Circuit explained, the Supreme Court's decision to vacate and remand *Whirlpool* did not require the lower appellate court to reverse its earlier ruling. *Whirlpool*, 722 F.3d at 845. Because the Sixth Circuit affirmed certification based on an analysis similar to its previous pre-*Comcast* decision, however, it is not at all surprising that Whirlpool again petitioned the Supreme Court for relief.

### **b. The Seventh Circuit Distinguishes Comcast**

The Seventh Circuit also examined the issue: "how does the Supreme Court's *Comcast* decision bear on the rulings . . . in our first decision?" *Butler v. Sears, Roebuck & Co.*, 727 F.3d at 799. The Seventh Circuit explained that *Comcast* was an antitrust class action that sought to recover damages that were not tied to the alleged class-wide injury. In *Comcast*, only one theory of recovery was certified as a class action, and the measure of damages proposed by the putative class did not capture those damages flowing from that theory of recovery.

In contrast, the Seventh Circuit distinguished *Sears* as a products liability class action involving only damages arising from the alleged defects. *Id.* at 800. The court found that the damages sought by the putative mold class purportedly arose from the alleged mold defect and the damages sought by the control-unit class purportedly arose from the alleged control-unit defect. The fact that there may be different levels of injuries incurred by the putative class members did not persuade the Seventh Circuit to change its position in favor of class certification because all of those injuries still were attributed by the class members to the alleged defects. Moreover, unlike in *Comcast*, there was no class-wide measure of damages proposed by the putative class in *Sears*. To the extent class members incurred varying levels of injuries based on the different models of washers, for example, the Seventh Circuit reasoned that the class could be divided into subclasses at a later date to account for those differences.

The Seventh Circuit concluded that the Supreme Court vacated and remanded the case in order for the appellate court to re-examine the predominance requirement to ensure that individual issues would not predominate over common issues. The Seventh Circuit criticized *Sears* as viewing this requirement only quantitatively and not also qualitatively. *Id.* at 801. According to the court, the single qualitative issue of whether a mold defect or a control unit defect exists in the washers predominates over the numerous factual issues identified by *Sears*. Not surprisingly, *Sears* petitioned the Supreme Court for relief from the Seventh Circuit's decision affirming class certification.

### **III. The Supreme Court Must Further Clarify the Reach of Rule 23**

Some cases suggest the recent trend from the U.S. Supreme Court is that the majority of Justices believe class actions should be the exception and not the rule.[1] This is the good news for defendants. Defendants should continue to argue the merits relevant to precluding class certification. District courts cannot ignore those merits issues in determining whether class certification is appropriate under Rule 23 according to *Wal-Mart* and *Comcast*.

With the Sixth and Seventh Circuit decisions reaffirming class certification, however, the commonality and predominance requirements of Rule 23 that were reinforced by the *Wal-Mart* and *Comcast* decisions may be limited and should not inspire confidence in manufacturers or suppliers of products. Putative class claims arising from allegedly defective products will undoubtedly continue to be filed, and it remains to be seen whether the Supreme Court will expand the reach of *Wal-Mart* and *Comcast* to such claims. Moreover, should the Supreme Court affirm the Sixth and Seventh Circuit decisions affirming class certification, the impact of that decision is likely to extend beyond products liability class actions. For example, as the DRI amicus brief explains to the Supreme Court, affirming certification of the consumer classes in *Whirlpool* and *Sears* threatens principles of federalism by undermining state substantive law such as those state products liability laws that prohibit warranty claims based on an unmanifested defect.

**Elizabeth Moyo** is a senior associate with Porter Wright Morris & Arthur in the firm's Columbus, Ohio office. She concentrates her practice primarily on resolving commercial disputes and product liability cases. She can be reached at 614-227-2106 or [emoyo@porterwright.com](mailto:emoyo@porterwright.com).

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[1] See e.g., *Wal-Mart*, 131 S.Ct. 2541; *Comcast*, 133 S.Ct. 1426; *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 186 L. Ed. 417 (2013) (reversing Second Circuit's decision and holding that the Federal Arbitration Act does not allow courts to invalidate contractual waivers for class arbitration); *Std. Fire Ins. Co. v. Knowles, \_U.S.\_*, 133 S. Ct. 1345, 185 L.Ed.2d 439 (2013) (holding that plaintiffs bringing class actions cannot avoid federal jurisdiction under the Class Action Fairness Act by seeking damages less than the amount in controversy required).

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