

# Quarterly Review

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## OHIO ASSOCIATION *of* CIVIL TRIAL ATTORNEYS

**A Quarterly Review of  
Emerging Trends  
in Ohio Case Law  
and Legislative  
Activity...**

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# *Wal-Mart, Comcast, and Now Whirlpool: How Glazer v. Whirlpool Corporation Will Shape Future Product Liability Class Actions*

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In addition to satisfying the numerosity, commonality, typicality, and fair representation prerequisites under Rule 23(a) of the Federal Rules of Civil Procedure, Rule 23(b)(3) requires that common questions of law or fact predominate over individual issues of putative class members such that a class action is

the superior method of resolving the controversy. In the context of product liability class actions, manufacturers and suppliers often defend by pointing to numerous individual issues such as differences in the model of product complained of, the manner in which the product was used, its maintenance history, the cause of the alleged damage, and the level of injury. This strategy is often successful in narrowing the scope of the class certified, if not precluding certification all together. In *Glazer v. Whirlpool*, however, the District Court for the Northern District of Ohio certified a class of consumers who purchased various models of front-loading washing machines. Some of those purchasers experienced a moldy odor while others had experienced no problems with their washers. Despite these differences, the Sixth Circuit twice affirmed the district court's certification decision. Whirlpool already appealed to the Supreme Court once and is poised to do so again.

While Whirlpool was making its way up to the Supreme Court the first time, the highest court issued at least two significant class action decisions: (1) *Wal-Mart Stores, Inc. v. Dukes*, U.S., 131 S.Ct. 2541, 180 L.Ed. 2d 374 (2011) and (2) *Comcast Corp. v. Behrend*, U.S., 133 S.Ct. 1426, 1433, 185 L.Ed.2d 515 (2013). As a result of *Comcast*, the Supreme Court granted Defendant Whirlpool's petition for certiorari, vacated the judgment below, and remanded the case to the Sixth Circuit to reconsider class certification. But on remand, the Sixth Circuit distinguished *Whirlpool*, which involved certification of a liability class, from

*Comcast*, which involved certification of a damages class, and affirmed the district court's certification decision again. This article explores the procedural history behind *Whirlpool* and how it may shape future class action proceedings against manufacturers and suppliers of allegedly defective products.

## **I. Whirlpool is unable to escape class certification in the Northern District of Ohio and the Sixth Circuit.**

### **a. The district court certifies class composed of members with varying injuries.**

In this multi-district litigation concerning an alleged design defect in Defendant Whirlpool's front-loading washers, the District Court for the Northern District of Ohio certified a class of approximately 200,000 consumer plaintiffs from Ohio.<sup>1</sup> Plaintiffs Gina Glazer and Trina Allison claimed on behalf of the putative class members that twenty-one different models of Whirlpool's front-loading washers had a common design defect.<sup>2</sup> Plaintiffs alleged that this defect caused the washers to accumulate mold, leading to unpleasant odors and damaged clothing.<sup>3</sup> They brought several claims in the United States District Court for the Northern District of Ohio for negligent design, negligent failure to warn, tortious breach of warranty, and violation of the Ohio Consumer Sales Practices Act (OCSA).<sup>4</sup> The district court granted class certification under Rule 23 for all but the OCSA claim.<sup>5</sup>

The district court's decision provided very little analysis of the facts giving rise to class certification under Rule 23. In brief, the Court found that there were common questions among the class members regarding whether Whirlpool knew about the alleged design defect and failed to adequately warn consumers.<sup>6</sup> Although the plaintiffs conceded that damages were not common to the class, the court ruled that the presence of a single common question was sufficient for class certification as long as its resolution

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advanced litigation.<sup>7</sup> Without analyzing the impact of all of the individual issues of the class members, the Court certified the class concluding that both Rule 23(a) and Rule 23(b)(3) were satisfied.<sup>8</sup>

**b. Sixth Circuit affirms class certification despite *Wal-Mart*.**

Whirlpool filed a timely petition for permission to appeal the district court's class certification decision.<sup>9</sup> Whirlpool persuaded the Sixth Circuit that the case 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.<sup>10</sup> The Sixth Circuit granted Whirlpool's request for review.<sup>11</sup>

In its merits brief, Whirlpool continued to argue that the district court's certification decision was in error because the court did not resolve certain factual disputes related to class certification because they were intertwined with the merits. Whirlpool opposed class certification under Rule 23(a) because the majority of owners had not had a mold problem with their washers, and consumer laundry habits were diverse among plaintiffs. Whirlpool further argued that had the district court properly analyzed and decided those relevant issues, the district court would have found that individual issues predominated, such that a class could not be certified under Rule 23(b)(3).

After the parties filed their merits briefs and before oral argument, the United States Supreme Court issued its opinion in *Wal-Mart*. In a 5-4 decision, the Supreme Court reversed the Ninth Circuit's ruling upholding class certification for employees in a Title VII discrimination suit against the employer.<sup>12</sup> The Supreme Court found that a rigorous analysis of commonality under Rule 23(a)(2) was required even if the analysis overlapped with the merits of the case.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

Following *Wal-Mart*, Whirlpool argued that plaintiffs had to show commonality by more than simply alleging a

common question regarding whether the washers were defective.<sup>16</sup> Whirlpool further argued that 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.<sup>17</sup>

Unfortunately for Whirlpool, the Sixth Circuit's application of *Wal-Mart* to the defect issue led the appellate court to affirm the district court's decision certifying the class.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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).<sup>21</sup> 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.<sup>22</sup>

Whirlpool filed a timely petition for certiorari to the Supreme Court and argued that certification of a class including uninjured consumers contradicts the Supreme Court's decision in *Wal-Mart*. Further, Whirlpool asserted the Sixth Circuit's "perfunctory" predominance ruling under Rule 23(b)(3) conflicted with Supreme Court precedent and requested further guidance to clarify the scope of Rule 23(b)(3).

**II. Whirlpool GVR'd by Supreme Court: Comcast ruling provides small victory.**

While Whirlpool's petition for certiorari was pending, Whirlpool 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).<sup>23</sup> 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.<sup>24</sup> Plaintiffs alleged that Comcast swapped service areas with other cable providers to reduce

competition and increase its cost of service. 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.<sup>26</sup> But the regression model did not isolate damages for the alleged anticompetitive activities from other theories that were rejected by the lower court.<sup>27</sup> 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).<sup>28</sup>

Immediately following *Comcast*, both Whirlpool and plaintiffs filed supplemental briefs to the Supreme Court addressing the impact of *Comcast*.<sup>29</sup> Whirlpool argued that class certification for Whirlpool consumers was improper under *Comcast* because questions concerning individual injury and damages predominated. But plaintiffs argued that *Comcast* was consistent with the Sixth Circuit's reasoning and holding.

*Comcast* provided Whirlpool with a small victory. The Supreme Court granted Whirlpool's petition, vacated the decision upholding class certification, and remanded—i.e., “GVR’d”<sup>30</sup>—the case to the Sixth Circuit in light of *Comcast*.<sup>31</sup> But the Supreme Court did not address the appropriate standard for Rule 23(b)(3) certification when a class involves members with varying levels of injury.

The *Comcast* decision was significant for Whirlpool at the time because a broad interpretation of *Comcast* requires plaintiffs to show a sufficient method to calculate damages on a class-wide basis before granting certification under Rule 23. Whirlpool has repeatedly argued that individual questions predominate over questions common to the class because only individual inquiries can determine the extent of injury or the amount of damages caused by the allegedly defective washers.<sup>32</sup> In contrast, plaintiffs argued that the common injury in this case is that all class members purchased the defective washers and did not receive the benefit of the bargain.<sup>33</sup>

Although *Comcast* requires a model capable of measuring damages on a class-wide basis and despite the varying levels of injury suffered by the *Whirlpool* class members, the Sixth Circuit suggested when it affirmed class certification for the first time that after resolving the common issues concerning liability, the district court should consider subclasses based on different measures

of damages.<sup>34</sup> Indeed, plaintiffs conceded at the trial level that damages were not common to the class and that class members would have to prove damages individually.<sup>35</sup> In contrast, *Comcast* was unique because plaintiffs' damages expert identified a class-wide measure of damages but that method was not applicable to the class that was ultimately certified.

### III. Sixth Circuit affirms certification again distinguishing *Whirlpool* from *Comcast*.

Following the vacation and remand order, Whirlpool filed a motion to remand the case to the district court.<sup>36</sup> Whirlpool argued the district court was the appropriate court in part because the parties engaged in significant additional discovery relevant to *Comcast*'s Rule 23 analysis.

But 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.<sup>37</sup> Whirlpool's own documents confirmed that its design engineers knew that the mold problems existed despite the varying consumer laundry habits and remedial efforts by service technicians to resolve the mold problems.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> 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 this evidence would support a judgment in favor of Whirlpool but did not preclude class certification.<sup>42</sup>

While the majority of the Sixth Circuit's opinion was spent regurgitating and elaborating on the facts that

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supported its earlier decision affirming class certification, a smaller portion of the opinion distinguished *Whirlpool* from *Comcast*. Mainly, *Comcast* involved certification of a damages class while *Whirlpool* involved only a liability class.<sup>43</sup> 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 of the liability class.<sup>44</sup> 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 class 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*.<sup>45</sup> 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.<sup>46</sup>

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. Because the Sixth Circuit affirmed certification based on an analysis similar to its previous pre-*Comcast* decision, however, Whirlpool may again appeal to the high court. A certification decision involving product liability plaintiffs may be even more likely to reach the high court based on an awaited-for ruling from the Seventh Circuit in a nearly identical class action involving front-loading washing machines that was also vacated and remanded by the Supreme Court in light of *Comcast*.<sup>47</sup> In the meantime, the parties in *Whirlpool* have a new trial judge—Judge Boyko—after Judge Gwin, who originally certified the class, recused himself from presiding over the litigation.<sup>48</sup> As of the date this article was submitted, a trial date had not yet been set by the district court.

#### IV. Practice pointers

Some cases suggest the recent trend from the United States Supreme Court is that the majority of Justices believe class actions should be the exception and not the rule.<sup>49</sup> This is the good news for defendants. With the Sixth Circuit's recent decision reaffirming class certification, however, the application of the reinforced Rule 23

requirements to product liability cases may be limited and should not inspire confidence in manufacturers or suppliers of products.

One practice that may help limit class exposure is to monitor consumer complaints and disclose common identifiable problems to your consumers as early as possible. Proving either a failure-to-warn defect, common injury, or compensatory damages becomes more difficult after public disclosure of the alleged defect. Such disclosure may limit the size of the class and thus the amount of recoverable damages, if any, making prosecution of these claims unattractive to plaintiffs class action lawyers.

Even if those putative class claims arising from alleged product defects continue to be filed (and they undoubtedly will be), manufacturers and suppliers should continue arguing the merits relevant to class certification. One opportunity for arguing the merits relevant to class certification is at the class certification hearing.<sup>50</sup> No longer can trial courts ignore merits issues relevant to class certification or defer their resolution until after merits discovery when certifying a class.

Pursuant to *Wal-Mart* and *Comcast*, the court must rigorously apply the commonality requirement of Rule 23(a), as well as the predominance requirement of Rule 23(b), even if such analysis involves delving into merits issues.<sup>51</sup> Following the Sixth Circuit's recent decision, however, manufacturers and suppliers should be aware that plaintiffs may avoid the issue of proving damages on a class-wide basis by asking the court to certify a liability class only and reserving the issue of damages for individual determination.

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#### Endnotes

- <sup>1</sup> *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, N.D. Ohio No. 1:08-WP-65000, 2010 U.S. Dist. Lexis 69254, at \*3-4 (July 12, 2010).
- <sup>2</sup> *Id.* at 4.
- <sup>3</sup> *Id.*
- <sup>4</sup> *Id.*
- <sup>5</sup> *Id.* at 15,16.
- <sup>6</sup> *Id.* at 11.
- <sup>7</sup> *Id.* at 9, citing *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988).
- <sup>8</sup> *Id.* at 14.
- <sup>9</sup> *In re Whirlpool Corp.*, 6th Cir. No. 10-0312, Petition for Permission to Appeal, Doc. No. 006110689352 (July 26, 2010).
- <sup>10</sup> *Id.*
- <sup>11</sup> *Id.*, Order, Doc. No. 006110744538 (Sept. 28, 2010).
- <sup>12</sup> 131 S.Ct. 2541.

<sup>13</sup> *Id.* at 2551.  
<sup>14</sup> *Id.* at 2553.  
<sup>15</sup> *Id.* at 2546.  
<sup>16</sup> *In re Whirlpool Corp.*, 678 F.3d 409, 418 (6th Cir.2012).  
<sup>17</sup> *Id.*  
<sup>18</sup> *See id.* at 419.  
<sup>19</sup> *Id.* at 417, citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S. Ct. 2140 (1974).  
<sup>20</sup> *Id.* at 417.  
<sup>21</sup> *Id.* at 419.  
<sup>22</sup> *See id.* at 421.  
<sup>23</sup> *Comcast*, 133 S.Ct. at 1432-33.  
<sup>24</sup> *Id.*  
<sup>25</sup> *Id.* at 1430.  
<sup>26</sup> *Id.*  
<sup>27</sup> *Id.* at 1431.  
<sup>28</sup> *Id.* at 1432-33.  
<sup>29</sup> *Glazer v. Whirlpool Corp.*, 6th Cir. No. 10-4188, Motion for Remand, Exhibits B-C, Doc. No. 006111648606 (April 5, 2013).  
<sup>30</sup> *See In re Whirlpool Corp. Front-Loading Washing Prods. Liab. Litig.*, 6th Cir. No. 10-4188, 2013 WL 3746205 at \*1 (July 18, 2013) (explaining that “GVR” is a common acronym for a “grant, vacate, and remand” order).  
<sup>31</sup> *Glazer v. Whirlpool Corp.*, \_U.S.\_, 133 S.Ct. 1722, 185 L.Ed.2d 782 (2013).  
<sup>32</sup> *Glazer v. Whirlpool Corp.*, 6th Cir. No. 10-4188, Motion for Remand, Doc. No. 006111648606 (April 5, 2013).  
<sup>33</sup> *Id.*, Brief in Opposition to Motion for Remand, Doc. No. 006111649118 (April 9, 2013).  
<sup>34</sup> *In re Whirlpool Corp.*, 678 F.3d at 421.  
<sup>35</sup> *In re Whirlpool Corp.*, 2010 U.S. Dist. Lexis 69254, at \*9.  
<sup>36</sup> *In re Whirlpool Corp.*, 6th Cir. No. 10-4188, Motion for Remand, Doc. No. 0061116848606 (April 5, 2013).  
<sup>37</sup> *In re Whirlpool Corp. Front-Loading Washing Prods. Liab. Litig.*, 6th Cir. No. 10-4188, 2013 WL 3746205 (July 18, 2013). Although the same panel that heard the original appeal elected to review the remanded action pursuant to Sixth Circuit Internal Operating Procedure 34(b)(2), one member of the original panel—the Honorable Cornelia G. Kennedy—retired while the case was pending before the Supreme Court. As such, the decision was rendered by a quorum of the panel. *Id.* at \*1.  
<sup>38</sup> *Id.* at \*11  
<sup>39</sup> *Id.* at \*4.  
<sup>40</sup> *Id.*  
<sup>41</sup> *Id.* at \*14, 18.  
<sup>42</sup> *Id.* at \*12, 16.  
<sup>43</sup> *Id.* at \*17.  
<sup>44</sup> *Id.* at \*14.  
<sup>45</sup> 133 S. Ct. 1184 (2013).  
<sup>46</sup> *In re Whirlpool Corp.*, 2013 WL 3746205 at \*15.  
<sup>47</sup> *See Sears, Roebuck & Co. v. Butler*, 133 S.Ct. 2768 (2013) (vacating and remanding Seventh Circuit decision upholding class certification of consumers who purchased allegedly defective washing machines).  
<sup>48</sup> *In re Whirlpool Corp.*, 6th Cir. No. 10-4188, Order, Doc. No. 227 (Dec. 5, 2012).  
<sup>49</sup> *See, e.g., Sears, Roebuck & Co. v. Butler*, 133 S.Ct. 2768 (2013); *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); *Standard 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).  
<sup>50</sup> The Sixth Circuit criticized Whirlpool for obtaining a favorable order to present live testimony at the certification hearing and then failing to exercise that right. *In re Whirlpool Corp.*, 2013 WL 3746205 at \*9.  
<sup>51</sup> In addition to the *Wal-Mart* and *Comcast* decisions from the U.S. Supreme Court, the Ohio Supreme Court recently adopted the Rule 23 analysis from *Wal-Mart* and ruled that a trial court should conduct a rigorous analysis under Ohio Civ.R. 23, even if it involves the merits of plaintiff’s claim, to determine whether class certification is appropriate. *Stammco, LLC v. United Tel. Co. of Ohio*, Slip Opinion No. 2013-Ohio-3019, ¶ 44. The Ohio Supreme Court emphasized that the trial court

should only consider the merits to determine whether class certification is appropriate and should not make any preliminary determination on the merits. *Id.* In *Stammco*, the Ohio Supreme Court found the trial court erred by denying class certification based on the determination that the plaintiffs would ultimately lose on the merits. *Id.* at ¶ 51. Despite this holding, the Ohio Supreme Court reinstated the trial court’s order denying certification of the class because plaintiffs’ amended class definition was overbroad, and individualized issues predominated among the putative class members such that certification under Civ.R. 23(B)(3) was inappropriate. *Id.* at ¶ 3, 67. In other words, the trial court erred by denying class certification based on a preliminary determination on the merits, but denying class certification was the correct result based on the record of individualized issues that would certainly predominate over the common issues of the class members.

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