TORT TRIAL & INSURANCE PRACTICE

Committee News

Defending Liberty Pursuing Justice

Spring 2014

Products Liability Committee

THE UNSTOPPABLE FORCE MEETS THE IMMOVABLE OBJECT: WHAT WILL BE THE OUTCOME OF THE GMO-LABELING CONTROVERSY?[1]

By: Paul Benson[2]

Vermont Governor Peter Shumlin made his state the first state to legislatively require food makers to label products made with genetically modified organisms, or GMOs. Two other states, Connecticut and Maine, have similar laws already on the books, which will be enacted if a specified number of other states do the same. According to the Center for Food Safety, there are currently 62 active GMO-labeling bills in legislation in 23 states. For those involved in the anti-GMO/pro-GMO-labeling movement, they believe the momentum is building for GMO-labeling bills to become an unstoppable force.

In contrast, on April 9, 2014, U.S. Representative Mike Pompeo (R-KS) introduced a potentially immovable object: the "Safe and Accurate Food Labeling Act." This federal legislation would put an end to state measures like those in Vermont, Connecticut and Maine, to label GMOs in food. The bill prohibits

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1 Originally published with Law360. http://www.law360.com/classaction/articles/533133?nl_pk=638e68e2-2cfd-489a-a152-2114749eafb2&utm_source=newsletter&utm_medium=email&utm_campaign=classaction.

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IN THIS ISSUE:

SUPREME COURT DENIES CERT. IN FRONT-LOADING WASHER CASES

By: Patrick T. Ryan, *Montgomery McCracken*[1]

On February 24, 2014, after re-listing the cases for multiple conferences, the Supreme Court denied *certiorari* in three front-loading washer cases that many felt gave the Court an opportunity to provide guidance on Rule 23(b)(3)'s predominance requirement. The cases also presented the question of how courts should handle proposed class actions in which the named plaintiff seeks to represent a broad class of consumer product owners—but only a small minority of them have actually experienced the problem plaintiff says is caused by a defect that exists in all the products.

In the three cases—*Glazer v. Whirlpool Corp.* from the Sixth Circuit, *Butler v. Sears, Roebuck and Co.* from the Seventh Circuit, and *Cobb v. BSH Home Appliances Corp.* from the Ninth Circuit—the plaintiffs allege that the washing machines do not adequately rinse away soil and detergent residue from their internal components, which promotes the growth of mold and mildew inside the machines and results in odors and stained laundry. All washing machines can develop some mold after being used for a while, but plaintiffs presented expert evidence that the design of defendants' front-loading machines made them more susceptible to mold and odors. The manufacturer defendants made numerous changes in the design of the machines and their instructions to customers on how to address the issue, but plaintiffs' evidence suggested that the changes did not eliminate the problem completely. The parties' evidence conflicted on how many customers experienced the odor problem—with plaintiffs offering evidence that it was as high as 35% and defendants countering with evidence that it was no more than 1-3%.

The *Whirlpool* and *Sears* cases had been before the Supreme Court before—on cert. petitions seeking reversal of similar classes the Sixth and Seventh Circuits each approved. In the spring of 2013, the Supreme Court granted the petitions, vacated the underlying circuit court decisions, and remanded for reconsideration in light of the Court's March 2013 decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Both the Sixth and Seventh Circuits concluded last summer that *Comcast* did not affect their earlier decisions, and issued new opinions approving certification, for liability purposes only, of the various requested statewide classes of washing machine owners in Ohio (*Whirlpool*) and California, Minnesota, Illinois, Indiana, Kentucky, and Texas (*Sears*). *See Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013); *Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013). The *Cobb* case involved the Ninth Circuit's post-*Comcast* denial of a Rule 23(f) petition seeking review of the certification of four statewide classes of washing machine owners in California, Illinois, Maryland, and New York.

All plaintiffs in the three cases asserted breach-of-implied-warranty claims and alleged that they and all product owners suffered economic injury when they purchased the washing machines—either because, in light of the claimed defect, they bought something of diminished value or they paid too much for it. Both the Sixth and Seventh Circuits accepted this theory of classwide injury as cognizable under the respective state laws applicable to the various statewide classes the named plaintiffs proposed. *Whirlpool*, 722 F.3d at 855-57; *Sears*, 727 F.3d at 798-99, 801-2.

The Supreme Court's denial of *certiorari* means the Sixth Circuit's decision in *Whirlpool* and the Seventh Circuit's decision in *Sears* remain as precedents that class action plaintiffs will cite and class action defendants will distinguish in other cases involving different products. Most likely, the cases will stand for the proposition that, at least in some circumstances, plaintiffs who have experienced alleged harm from a claimed defect in a product can—at least for liability purposes—represent persons who bought the same or a materially identical product but have not yet experienced the same harm. Those circumstances will likely include situations when (a) it can plausibly be alleged that a cognizable injury occurred at the time the proposed class member purchased the product, either because the buyer got something with a diminished value or paid a premium price; and (b) the claim permits recovery of economic

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loss incurred at the point of purchase (*e.g.*, breach of implied warranty).

But the continued viability of the *Whirlpool* and *Sears* decisions does not mean that defendants in those types of cases must "throw in the towel" and resign themselves to class certification. Not every such case will or should be certified, and as always the factual circumstances often present valid reasons why trial judges, acting within their discretion, may decide that class treatment is inappropriate.

For example, some allegations of diminished value at the point of purchase are simply too speculative to be cognizable as present injuries. In *Shelton v. Restaurant.com Inc.*, No. 10–2980, 2013 WL 5878902 (3d Cir. Nov. 4, 2013), the Third Circuit affirmed the dismissal of New Jersey Consumer Fraud Act ("NJCFA") claims in a proposed class action by purchasers of restaurant gift certificates. A New Jersey statute provides that gift certificates sold in New Jersey must not expire in less than two years—but these gift certificates said they would expire in one year. Plaintiffs argued that they and all members of the proposed class suffered an "ascertainable loss" (the harm required under the NJCFA) at the moment they purchased the gift certificates, contending each one was less valuable than it should have been. The Third Circuit held that, by itself, this alleged harm was too theoretical to constitute "ascertainable loss" under the NJCFA. 2013 WL 5878902, at *2.

In addition, breach-of-warranty claims—like most all other civil damage claims—require proof of a causal link between the breach and the alleged injury. The causation issue may preclude class certification on a claim alleging diminished value or an inflated price if some class members knew about the potential problem or risk but nevertheless were motivated to make the purchase by other considerations or priorities. In *Marcus v. BMW of N. Amer., LLC*, 687 F.3d 583 (3d Cir. 2012), the Third Circuit vacated class certification of a class of car owners/lessees who had experienced a "flat" tire in cars equipped with "run-flat" tires ("RFTs") because, among other reasons, the district court abused its discretion in finding that the causation element of plaintiff's claims could be established with common proof. 687 F.3d at 603-12. On plaintiff's NJCFA claim alleging class-wide injury when each class member purchased or leased the car with RFTs, the court noted:

> The evidence might suggest that a significant number of class members could have known of the alleged "defects," but decided to purchase or lease their cars at the same price anyway. This may be so because other class members may consider the features of Bridgestone RFTs and BMWs that Marcus styles as "defects" [i.e., high susceptibility to punctures, cannot be repaired, expensive to replace] to be simply trade-offs. Some purchasers or lessees may have found that the significant safety and convenience benefits RFTs offer in the event of a "flat" tire outweighed their downsides.

Id. at 611. Thus, depending on the facts, even a claim of point-of-purchase-economic-loss may involve predominately individual evidence on causation.

There are several types of evidence that could support an argument that some purchasers might not care as much about what the named plaintiff is calling a defect or might have different priorities. In the *Marcus* case, the Third Circuit noted that a *Consumer Reports* article discussed the pros and cons of RFTs and concluded that the benefits outweighed the detriments. 687 F.3d at 611-12. A defendant could also present expert testimony explaining the advantages and disadvantages of the product. And, of course, the named plaintiff in the case might even acknowledge at his or her deposition that there are pros and cons to the product.

The Supreme Court's denial of cert. in the front-loading washer cases leaves for another day further guidance from the high court on Rule 23(b)(3)'s predominance requirement. But it neither opens the floodgates for more "diminished value" or "price inflation" cases nor signals that all such cases will now inevitably be certified as class actions. ⚖