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Class Action ADVISORY ■

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Be Aware, Do Prepare, Don't Despair: Lessons from the Supreme Court's Recent Certiorari Denials in *Whirlpool*, *Sears* and *BSH Home Appliances*

The U.S. Supreme Court recently denied certiorari petitions in three class actions—*Whirlpool Corp. v. Glazer; Sears, Roebuck & Co. v. Butler*; and *BSH Home Appliances Corp. v. Cobb*—where district courts certified Rule 23(b)(3) classes after the Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). The defendants' petitions for certiorari raised a number of key issues, including (1) whether a class may be certified when most members of the class were not injured; (2) whether Rule 23(b)(3)'s predominance requirement is satisfied simply if a central issue can be resolved efficiently, even when a host of individual issues lurk in the proposed class; and (3) whether a district court, at the class certification stage, must decide whether expert testimony is admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

With *Comcast*'s one-year anniversary falling this week, it is worth considering what may follow in year two of the *Comcast* opinion given the Supreme Court's decision not to review the *Whirlpool, Sears* and *BSH Home* decisions. Reflecting on these decisions can help corporate defendants prepare their class action defense strategies.

Be Aware

The *Whirlpool* case first made it to the Sixth Circuit in 2010 when a class of consumers sued Whirlpool for alleged mold growth in their washing machines. The circuit court held that class certification was appropriate even though the putative class included washing machine owners who had not experienced a mold problem. The Supreme Court granted certiorari, vacated the Sixth Circuit's decision and remanded the case to the circuit court in light of the *Comcast* decision. On remand, the Sixth Circuit affirmed the certification order and distinguished *Comcast*, reasoning that the district court had certified only a liability class and had reserved damages for individual determinations. According to the Sixth Circuit, "[w]here determinations on liability and damages have been bifurcated, the decision in *Comcast*—to reject certification of a liability and damages class because plaintiffs failed to establish that damages

could be measured on a classwide basis—has limited application." *Glazer v. Whirlpool Corp.* (*In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*), 722 F.3d 838, 860 (6th Cir. 2013) (citations omitted), *cert. denied*, No. 13-431, 2014 WL 684065 (U.S. Feb. 24, 2014). The Sixth Circuit did not consider whether injury-in-fact and causation—two elements of the asserted causes of actions—could be established through classwide proof.

In the *Sears* case, the Supreme Court also granted certiorari, vacated the Seventh Circuit's decision and remanded the case in light of *Comcast*. Like the Sixth Circuit in *Whirlpool*, the Seventh Circuit (Judge Posner writing) distinguished *Comcast* and certified the class even though most of the class members had suffered no injury. The Seventh Circuit focused on what it perceived to be a single, common liability issue—whether the Sears washing machine was defective—and ruled that class treatment was justified because that issue could be resolved "in one stroke." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013), *cert. denied*, No. 13-430, 2014 WL 684064 (U.S. Feb. 24, 2014). Of course, other liability-determinative issues (injury, causation) could not be resolved "in one stroke," but Judge Posner believed that the efficiencies gained through class proceedings on the defect question outweighed any countervailing concerns about individualized issues of injury and causation.

In *BSH Home*, the U.S. District Court for the Central District of California certified a class of washing machine purchasers over the defendants' objections that the proposed class did not satisfy Rule 23(b)(3)'s predominance requirement. The defendants argued that individualized inquiries were necessary to determine causation, injury and other elements of the purchasers' claims. The district court also ruled that *Daubert* does not apply at the class certification stage, rejecting *American Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) (holding that court must perform full *Daubert* analysis before certifying class where expert's report or testimony is critical to class certification) and adopting instead the Eighth Circuit's decision in *Cox v. Zurn Pex, Inc.* (*In re Zurn Pex Plumbing Products Liab. Litig.*), 644 F.3d 604 (8th Cir. 2011) (adopting a tailored approach, described as a middle course between a "full and conclusive *Daubert* inquiry" and the "fatally flawed" approach advocated by the "lower *Daubert*" courts).

Corporate defendants should be aware of these decisions—but there is no reason to despair. Rather, companies should start preparing now for the potential wave of class litigation involving theories and arguments similar to those in *Whirlpool*, *Sears* and *BSH Home*.

Do Prepare

Whirlpool, *Sears* and *BSH Home* signal that the class action plaintiffs' bar may focus more heavily on so-called liability-only classes and Rule 23(c)(4) classes. With those new tactics in mind, corporations should prepare to combat plaintiffs' efforts. Here are some steps that companies can take to get ahead of the issues.

***First*, prepare to defeat class action certification by attempting to moot the class action before it is filed.**

In some cases, recalls, refunds and other similar actions might stop a class action before it starts. A company should consider those strategies as soon as it detects a problem.

Prudential mootness can be a winning argument in a class action because plaintiffs often seek a remedy that the company is already providing under an existing recall or refund program. *See, e.g., Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1215 (10th Cir. 2012) (dismissing case on prudential mootness grounds because the defendant filed documents with governmental agency notifying it of defect, began a recall process and assumed the responsibility of remedying the defect); *Cheng v. BMW of N. Am., LLC*, No. CV 12-09262 GAF (SHx), 2013 WL 3940815 (C.D. Cal. July 26, 2013) (dismissing case on grounds of prudential mootness because a recall had already been announced, the defendant was offering repair or replacement at no cost and the defendant subjected itself to continual oversight); *In re Aqua Dots Products Liab. Litig.*, 270 F.R.D. 377, 383 (N.D. Ill. 2010) (denying class certification and noting that "[w]here available refunds afford class members a comparable or even better remedy than they could hope to achieve in court, a class action would merely divert a substantial percentage of the refunds' aggregate value to the class lawyers"). A mootness argument will not always be available, but defendants should always consider whether the argument is available and whether pressing it makes sense as a business decision.

***Second*, prepare to defeat class certification on the facts.**

The plaintiffs' bar will likely choose as class representatives those consumers whose products have manifested the alleged defect. They will compile complaint data (notwithstanding the fact that the data has not been investigated or verified) and present that information as "proof" of a large number of manifested defects. A plaintiff's cherry-picked consumers will sing the same song in their testimony about key class issues like exposure, reliance, materiality, causation and injury.

Corporate defendants need to understand what evidence they have, what evidence they can develop internally and what evidence they can obtain from third parties or absent class members to demonstrate the truth about their products or market dynamics. Defendants must also give context to any documents or information that at first blush might seem inconsistent with their theory of the care. Developing a factual record through witnesses, documents and third-party information is critical at the class certification stage, not only to bolster the legal and factual arguments against certification but also to support expert testimony regarding key issues such as failure rate, causation and injury. Companies should work to develop a robust record of facts to support their affirmative story because class certification is defeated on the facts, not simply on the law.

***Third*, prepare to defeat class certification through experts.**

Hire the best experts that you can to support your class arguments and to attack plaintiffs' experts. *BSH Home* aside, many circuits apply *Daubert* (or its equivalent) at the class certification stage, and *Comcast* remains an effective tool for combating class experts. Defendants should develop a robust factual record and empirical data to support their experts' analyses and conclusions, and to rebut liability theories grounded in legal constructs like "presumed" reliance.

***Fourth*, prepare to defeat class certification by advancing constitutional arguments.**

The efficiencies achieved by resolving a common issue or two in one trial followed by later proceedings to address multiple individual issues cannot come at the price of defendants' constitutional and statutory rights. Defendants have a due process right to present every available defense to putative class members' claims. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). Similarly, the Rules Enabling Act prevents a court from certifying a class if it would deprive a defendant of their right to challenge individual class member's claims. *See* 28 U.S.C. § 2072; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("[N]o reading of . . . Rule [23] can ignore the [Rules Enabling] Act's mandate that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'") (internal quotation marks omitted). Defendants facing class litigation should press those arguments as a matter of course.

Beyond that, the Seventh Amendment's Reexamination Clause prohibits multiple juries hearing the same testimonial or documentary evidence in the same case. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996). Two jury trials may not be used for the same case "unless it clearly appears that [each] issue . . . is so distinct and separable from the other that a trial of it alone may be had without injustice." *Gasoline Prods. Co., Inc. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931). Bifurcation of liability and damages risks a second jury (or several mini-tribunals) re-examining and reconsidering issues that were "decided" during the "common issues" trial—a result that is neither fair nor just.

Isolating and resolving "common issues" through a bifurcated trial plan can relieve class plaintiffs of their burden to prove all the elements of their claims through common evidence. The *Dukes* Court rejected that type of "Trial by Formula." *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) ("[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims.").

***Fifth*, prepare to defeat class certification by challenging the use of Rule 23(c)(4) to circumvent Rule 23(b)(3)'s predominance requirements.**

Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Some courts—like those in *Whirlpool*, *Sears* and *BSH Home*—have isolated common issues under Rule 23(c)(4) and proceeded with class treatment of those particular issues, even though the class otherwise could not satisfy Rule 23(b)(3)'s predominance requirement. Other courts have viewed Rule 23(c)(4) as a "housekeeping rule," permitting issue certification only when the proposed class otherwise satisfies Rule 23. Corporate defendants should be prepared to argue that Rule 23(c)(4) does not render Rule 23(b)(3) a nullity.

The Fifth Circuit first characterized Rule 23(c)(4) as a "housekeeping rule that allows courts to sever … common issues for a class trial." *Castano*, 84 F.3d at 746 n.21. Under that view, Rule 23(c)(4) does not provide an independent basis for certifying a class; the proposed class still must satisfy Rule 23(a) and (b). "Reading Rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of Rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended." *Id.* Just this month, a Missouri federal court refused to

certify a Rule 23(c)(4) class, concluding that "Rule 23(c)(4) should not be used as a separate avenue for certification." *Henke v. Arco Midcon, L.L.C.*, No. 4:10CV86 HEA, 2014 WL 982777, at *22 (E.D. Mo. Mar. 12, 2014). Under that view, "Rule 23(c)(4) issue certification is allowed only if the Rule 23(b) requirements are first met as to the claim and the court has done a searching analysis of plaintiffs' cause of action as a whole, particularly as to the predominance and superiority components." *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2007 WL 2363135, at *1 (E.D. La. Aug. 16, 2007). "The [predominance] inquiry's constancy serves as an important limitation on the use of bifurcation by preventing a district court from manufacturing predominance through the 'nimble use' of rule 23(c)(4)." *Id.* When appropriate, corporate defendants can argue that Rule 23(c)(4) exists simply to provide guidance on managing a class action *after* the court has determined that the case meets the other Rule 23 requirements, not as a mechanism for avoiding Rule 23's requirements.

Don't Despair

The year 2013 was, in many respects, an excellent year for defendants facing class action litigation. The U.S. Supreme Court issued a number of decisions that corporate defendants can use to defeat class certification. Of course, the certification question lies within the district court's discretion, so how courts interpret and apply the new Supreme Court precedent will vary across the country. We expect that corporate defendants will have ample opportunity in the circuit courts to continue to test the legitimacy of proposed classes full of uninjured people.

We hope that the suggestions outlined in this advisory will assist you as you work to defeat class litigation.

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