

## High Court's Whirlpool Snub Casts Doubt On Comcast's Reach

By **Sindhu Sundar**

*Law360, New York (February 26, 2014, 9:13 PM ET)* -- The U.S. Supreme Court's decision Monday to pass up three rulings challenged by Whirlpool Corp. and others allows plaintiffs to continue winning class certification without showing how they would calculate classwide damages, suggesting the high court's landmark Comcast ruling isn't the class action killer many defendants believed.

The high court's March ruling in *Comcast v. Behrend* held for the first time that plaintiffs should show a connection between their theory of liability and theory of damages at the class certification stage rather than later in the proceedings. Many defense attorneys hailed the ruling as a game-changer that universally raised the bar for class certification.

In the Whirlpool cases, the Sixth and Seventh circuits then challenged those expectations by upholding the certification of classes that included even members whose washers did not exhibit the mold defect alleged in the suit. Plaintiffs can be certified even if they have not all suffered the same damages, the Seventh Circuit ruled in one of the cases.

The appeals courts rankled the defendants by standing their ground even after the high court asked them to reconsider their rulings in light of Comcast. And to the surprise of the defendants, the high court declined an opportunity to set those appeals courts straight, tacitly endorsing a narrower interpretation of Comcast.

"I think Comcast's significance is probably positioned where it should've been in the first place — it wasn't as earth-shattering as some people initially thought, nor is it as inconsequential as I think plaintiffs attorneys have made it out to be," said Robert Wise, the co-managing partner of Bowman and Brooke LLP's Richmond, Va., office.

Whirlpool argued in its petition for certiorari that Comcast showed that a plaintiff class cannot be certified if issues of liability and damages need individualized inquiry. The Sixth and Seventh circuits, however, said Comcast would not prevent the certification of a plaintiff class if their damages were not identical.

"I do not believe that Comcast addressed the issue whether, and certainly did not hold that, damages issues in class actions cannot be determined individually," said Gregory Arenson of Kaplan Fox & Kilsheimer LLP, who primarily represents plaintiffs in antitrust actions. "Defendants can still make that

argument after [Monday], and, in my view, it should still be rejected.”

Seventh Circuit Judge Richard A. Posner wrote in the controversial *Butler v. Sears Roebuck* opinion that “It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages,” an argument that plaintiffs will use against defendants attempting to wield Comcast against them, attorneys said.

Defense attorneys also said that the plaintiffs in the washer cases were able to evade the central holding of Comcast — that plaintiffs should show at the certification stage how they will calculate classwide damages — by seeking certification only on liability and not damages.

The high court’s refusal to consider the cases also leaves room for defendants to make the case for their interpretation of Comcast to other circuit courts, attorneys said.

“The battlegrounds remain the same — we have Comcast and some other Supreme Court decisions that are perceived to be favorable to defendants, and [those] perceived to be favorable to plaintiffs,” said Paul Benson, chairman of Michael Best & Friedrich LLP’s product and tort liability litigation focus group. “People will be arguing about what they mean until the next major class action gets before the Supreme Court, and the high court decides to take it.”

--Editing by John Quinn and Christine Chun.

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