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High Court's Whirlpool Snub Invites More Defect Suits

By **Sindhu Sundar**

Law360, New York (February 24, 2014, 8:43 PM ET) -- The U.S. Supreme Court's surprising refusal Monday to reconsider controversial class certifications in washer defect suits against Whirlpool Corp. and others exposes manufacturers to greater liability in product defect actions, as it allows consumers to join a class even if the product they bought does not exhibit the alleged defect, attorneys say.

The high court denied certiorari petitions by Whirlpool Corp. and Sears Roebuck & Co., which challenged Sixth and Seventh Circuit court rulings certifying the plaintiffs even though a vast majority of them did not have washers that gathered mold, the alleged defect.

The high court was expected to review the petition because it previously vacated the Sixth Circuit's decision with instructions for it to reconsider certification in light of the high court's landmark Comcast v. Behrend ruling. The Sixth Circuit nevertheless upheld class certification, finding that Comcast, which held that an antitrust class action should not have been certified, did not apply.

The court's refusal to weigh in exposes companies to more suits by keeping in place a lower bar for plaintiffs to form a class, attorneys said.

"It treats the questions of whether or not everyone has experienced injury as a question for the merits rather than an issue to resolve at the class certification stage," said Steptoe & Johnson LLP litigation partner Jennifer Quinn-Barabanov. "The notion that everybody who bought a product was somehow harmed economically is just ludicrous."

The high court's silence amid plaintiff-friendly circuit court rulings in these cases opens the door for plaintiffs to bring claims about the alleged "diminished value" of products they have purchased and threatens to turn one-off warranty cases into entire class actions, since plaintiffs do not have to show their product showed the alleged defect, attorneys said.

"We're talking about potentially very high-stakes litigation where a manufacturer often has no choice but to defend to the death," said Robert Wise, the co-managing partner of Bowman and Brooke LLP's Richmond, Va., office.

This leaves companies to pose the issue before various circuit courts, which may reach different conclusions based not only on the class certification standards set by Rule 23 of the Federal Rules of Civil

Procedure, but state law, attorneys said. The Sixth Circuit arrived at its finding in the Whirlpool case partly because of its interpretation that Ohio law allows claims for the diminished value of a product, even when it may not manifest an alleged defect. But other states might not recognize this kind of claim, attorneys said.

On the other side of the bar, plaintiffs attorneys hailed the decision as a major victory for consumers, saying it left intact well-reasoned decisions by circuit courts that supported their view that the issues of liability and damages should be certified separately.

“This is extraordinarily important in product liability cases, because there are times when issues of damages may not be amenable to class treatment,” said Seeger Weiss LLP partner Jonathan Shub, who represents consumers suing Whirlpool over the washers. “We think that the appellate courts were very clear in their rulings and that the Supreme Court did not need to interject into the fray.”

But the high court’s decision not to intervene isn't necessarily an endorsement of the rulings, defense attorneys said, noting that the court may simply be waiting to observe how appeals courts apply its recent landmark rulings that have made it harder for plaintiffs to win class certification.

One of those rulings was the high court's 2011 decision in Wal-Mart Stores Inc. v. Dukes, where it ruled the plaintiffs shouldn't be certified as a class because they hadn't shown they had suffered the same injury.

"The Supreme Court recently rendered two very important landmark decisions on class certification [in Dukes and Comcast], and it may well be that the court wants to let precedent develop under those cases for a while,” said John Beisner, the leader of Skadden Arps Slate Meagher & Flom LLP’s mass torts, insurance and consumer litigation group. “The Supreme Court may well feel it’s spoken its piece for now and that it can dive in, if it needs to, at a later time."

--Editing by John Quinn and Philip Shea.