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# Plaintiffs' Case A Wash In Verdict

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DESPITE CLAIMS of moldy drums and a musty stench in their washing machines, a federal jury gave Whirlpool a big victory in a class action on Oct. 30.

However, lingering questions regarding standards of class certification may not be so easily flushed.

After a three-week trial and a two-hour deliberation, the jury decided that the appliance company was not liable for claims from plaintiffs seeking a total $66 million in damages. The class included more than 150,000 plaintiffs alleging defects in 20 different models of front-loading washing machines manufactured between 2001 and 2009 that allowed residue to build up and caused mold growth and noxious odors.

"There's a lot of history here," Whirlpool defense counsel and Wheeler Trigg O'Donnell partner Michael Williams said, referencing similar ongoing litigation with Maytag front-loaders before the company merged with Whirlpool in 2006. "As early as 2003, we knew cases like this were going to be brought by the plaintiffs bar."

Earlier Maytag models did tend to collect standing water, and Whirlpool designed a new door and door drain for its front-loading washing machines to avoid that issue, Williams said. Maytag issued a recall on the door seals and settled its litigation over the issue, but the plaintiffs bar took those allegations and "essentially minted them against every manufacturer of front-loading washing machines," according to Williams.

Williams likened the evolving design process of the washing machines to emerging smartphone technology. A consumer's desire to upgrade to the latest model doesn't mean former iterations are suddenly defective, he said.

Lawyers at Wheeler Trigg O'Donnel have led trial preparations since the complaint was first filed in 2008.

The U.S. 6th Circuit Court of Appeals case, Glazer v. Whirlpool, is what the firm called "the bellwether trial" of a multi-jurisdictional legal wrangle. Counsel for Whirlpool challenged the class-action certification, which led to two petitions for writ to the U.S. Supreme Court. The high court took on the case and vacated the first ruling before remanding it.

MIKE WILLIAMS

The 6th Circuit reinstated the opinion and the Supreme Court denied a second petition from Whirlpool. Despite the setback, Wheeler Trigg O'Donnell narrowed the case to two tort counts of negligent design and tortious breach of implied warranty.

"While other companies might have opted to settle this case out of court, Whirlpool firmly believed in the rule of law and that the facts were in our corner," Eric Sharon, Whirlpool's chief litigation counsel, said in a press release.

When the class certification was granted, the case was open to any consumers who had purchased the machine, not just those with the issues associated with the allegations. The traditional tort negligence test weighs risk against benefit, and though the machines require some preventative maintenance such as running a self-cleaning cycle with bleach and cleaning the door seal, the cost- and energy-saving benefits of front-loaders versus more traditional washing machines outweighs the risk of odor development, Williams said.

"The reason the other side wants the big class is because the pressure to settle is so great," Williams said. "To Whirlpool's credit, it saw the settlement pressure and said, 'we're still right on the facts, so we're going to stick to it.' And that's what they did."

Wheeler Trigg O'Donnell has been Whirlpool's national class action defense counsel since 2001 and litigated the Glazer case in collaboration with Philip Beck of Bartlit Beck Herman Palenchar & Scott's Chicago office. Williams was joined at trial by Joel Neckers, Allison McLaughlin and Theresa Wardon from Wheeler Trigg O'Donnell as well as other lawyers from Bartlit Beck and Nelson Mullins Riley & Scarborough.

A request to plaintiff's counsel Jonathan Selbin for comment was not returned at press time.

## Questions about certification

The defense victory came after the Supreme Court denied appeals to three lawsuits against Whirlpool Corp., Sears Holdings Corp. and BSH Home Appliance Corp. in February, in which defendants challenged the certifications of classes of washing machine owners in lower courts in the 6th, 7th and 9th circuits.

Originally, appeals to the high court were successful when class certifications for consumers in cases against Whirlpool and Sears were thrown out under the 2013 ruling in Comcast v. Behrend, which involved allegations that the cable company violated anti-trust laws and overcharged customers. The court held that a class action was improperly granted under Federal Rule of Civil Procedure Rule 23(b)(3), which instructs courts to find "questions of law or fact common to class members predominate over any questions affecting only individual members," because the damages claimed within the class were too various.

"The permutations involving four theories of liability and 2 million subscribers located in 16 counties are nearly endless," Justice Antonin Scalia wrote for the majority.

The Whirlpool case as a class action is unique in a historical context and has generated questions about the standards of such certifications. While lawyers and laymen may differ on their perceptions of representative actions, classes can span industries and issues from employment to finance to product defects; they all carry the implication of some level of common harm to the class seeking damages.

By the time Williams started with Wheeler Trigg O'Donnell in 2001, Whirlpool had no class-action complaints regarding product defects. Since then, the firm has represented the company in more than 100 class actions, Williams said.

While most class action allegations typically involve some form of measurable harm, such as property damage or personal injury, the case against Whirlpool was centered on a nuisance complaint, Williams said. To come up with a proxy for the defect claim, the plaintiffs attempted to measure the price differential between what they considered a nondefective product and Whirlpool's product with a survey from the point of sale, asking respondents what they would be willing to pay for a machine that did not require the same maintenance as a front-loading machine. The average was more than $400, Williams said

"The problem that we saw was that it's great in theory but terrible in (regard to) fact," Williams said. "You have people who have had these machines for 12 years and love the product, and you want to give those people $419? I think it's hard to convince one person that that should be the outcome, much less get 12 people to agree on that."

Despite the victory, there is still litigation in other cases with similar claims, Williams said. Long term, he said he would not be surprised to see a continued trend of similar claims of product defects and evolving ideas on the metrics of harm. There are three cases pending against Sears, the first of which is scheduled for trial on July 6, and eight pending against Whirlpool.

"These are very clever and creative (plaintiffs') lawyers, and I can't even begin to predict what they might come up with," Williams said. •

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