SUPREME COURT

Passes Up Opportunity to Further Chip Away at Class Relief

by *Diana L. Martin, Theodore J. Leopold & Leslie M. Kroeger*

In what was a surprise to many who have come to believe the agenda of the *Roberts* Court is to completely eviscerate the class action as a vehicle for obtaining relief for consumers on a large scale, the United States Supreme Court has passed up the opportunity to further chip away at the viability of class actions by denying certiorari in *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), and *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013). The Court's inaction is being viewed as a signal that consumer class actions based on product defects are still viable in this ever-narrowing field of law.

In *Whirlpool*, consumers brought a products liability class action, alleging design defects in several model Whirlpool washing machines "allow mold and mildew to grow in the machines, leading to ruined laundry and malodorous homes." 722 F.3d at 844. Although the class, as defined by plaintiffs, included owners of washing machines that had never experienced a mold problem, upon its first review of the case, the Sixth Circuit Court of Appeals held the class definition was not overly broad, reasoning: "Class certification is appropriate 'if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate.'" *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 678 F.3d 409, 420 (6th Cir. 2012) (quoting *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012)). "Additionally, [the court determined] the class plaintiffs may be able to show that each class member was injured at the point of sale upon paying a premium price for the [product] as designed, even if the washing machines purchased by some class members have not developed the mold problem." *Id*.

In *Butler*, the Seventh Circuit Court of Appeals reached a similar decision. There, consumers brought a class action based on design

defects in Kenmore-brand Sears washing machines that allowed mold growth within the machines, resulting in the emission of bad odors. *Butler*, 727 F.3d at 798. Although the class definition covered 27 different type machines, the court reasoned, "The basic question in the litigation — were the machines defective in permitting mold to accumulate and generate noxious odors? — is common to the entire mold class, although the answer may vary with the differences in design." *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 361 (7th Cir. 2012). The court rejected the argument that the class should not be certified because most members of the class did not experience a mold problem — instead, it found that was a reason for certification because a single judgment could exonerate Sears with regard to those members of the class. *Id*. at 362.

Petitions for writ of certiorari filed by the defendants in both *Glazer* and *Butler* were granted by the United States Supreme Court, which vacated the judgments and remanded for further consideration in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1429 (2013). In *Comcast*, the high court had recently found certification of a class improper because the plaintiffs failed to establish that the damages sought could be measured on a class-wide basis. *Id*. at 1431 n.4. It held that because the damage methodology presented by the plaintiffs was not capable of measuring damages class-wide, the plaintiffs could not demonstrate predominance under Federal Rule of Civil Procedure 23(b)(3) because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id*. at 1433.

In reconsidering their decisions, both the Sixth and Seventh Circuits held firm. The Sixth explained that *Comcast* disapproved of a district court decision that certified both a liability and damages class because the method proposed to determine class-wide damages could not be applied on a class-wide basis. *Whirlpool*, 722 F.3d at 859. It held that *Comcast* did not prohibit certification of only a liability class, while leaving all issues regarding damages to be decided on an individual basis. *Id*. And it found that *Comcast* did not change the landscape of class action law:

> When adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate. A class may be divided into subclasses, or, as happened in this case, a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings. Because recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal, in the mine run of cases, it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.

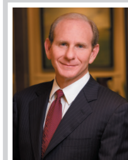
Id. at 860-61 (internal citations and quotations omitted). The Seventh strongly opposed the idea that differentiation in damages would prevent certification of a liability class:

> 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. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits.

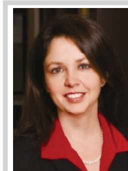
Butler, 727 F.3d at 801. Thus, neither appellate court changed its decision that the product liability consumer class actions were properly certified despite the class definitions including putative class members that had not suffered the alleged injuries.

Although many expected the United States Supreme Court to again accept jurisdiction to consider the Sixth and Seventh Circuit's opinions to decide whether a liability class that necessarily contains members who suffered no injury can ever properly be certified, the Court denied the petitions for writ of certiorari filed by *Whirlpool* and *Sears*. *See Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014); *Sears, Roebuck & Co. v. Butler*, 134 S. Ct. 1277 (2014). This turn of events has left a glimmer of hope that class actions can still be used to obtain relief for consumers of defective products. ■

Diana L. Martin
Ms. Martin is an attorney at Cohen Milstein Sellers & Toll PLLC, in Palm Beach Gardens, where she handles civil appeals in state and federal courts and provides litigation support. Ms. Martin is a 2002 high-honors graduate of the University of Florida Levin College of Law. Before entering private practice, she was a law clerk to the Honorable Martha Warner at the Fourth District Court of Appeal.



Theodore J. Leopold
Mr. Leopold is a managing partner of Leopold Law, P.A. has a national practice specializing in consumer justice litigation with a focus on complex products liability, managed care, catastrophic injury, automotive crashworthiness, wrongful death and class action litigation. For many consecutive years, Mr. Leopold has been profiled in The Best Lawyers in America.



Leslie M. Kroeger
Ms. Kroeger, a partner at Cohen Milstein Sellers & Toll PLLC, is a successful civil trial attorney with a practice focused on complex civil litigation matters, including products liability, automotive crashworthiness, wrongful death and cases involving managed care abuse. As a dedicated advocate, Ms. Kroeger has been vocal in the Florida Legislature lobbying on behalf of consumers and promoting vehicle safety.