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6th Circuit Reaffirms Class Certification in *Whirlpool II*

For those who are regular readers of the Hoosier Litigation Blog, you are likely familiar with my prior post *Is the Supreme Court Needlessly Using Comcast Corp. v. Behrend to Vacate Certified Classes?* In that post I discussed the Supreme Court of the United States' decision in *Comcast Corp. v. Behrend*. The primary thrust of the prior post was the utter amazement at how the Court had used the *Comcast* decision to institute three grant, review, and vacate orders – better known as GVRs. Here is the GVR that was issued in the Court's review of *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*:

> The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Comcast Corp. v. Behrend*, 569 U.S. ___ (2013).

The problem with such an order is that it provides no guidance whatsoever for the application of the *Comcast* decision other than to say that on some theoretical level the decision applies to the case that fell victim to the GVR. Additionally, the three cases that *Comcast* has provided the basis for a GVR have all seemed to be easily distinguishable from application of the *Comcast* decision. The three decisions were: (1) *Ross v. RBS Citizens, N.A.*, (2) *Whirlpool I*, and (3) *Butler v. Sears, Roebuck & Co.* Nevertheless, the Court saw fit to decertify the

classes in each and remand the cases to their respective federal court of appeals for further consideration.

Recently, the Sixth Circuit released its, now second, decision in the *Whirlpool* case, thus earning it the designation as *Whirlpool II*. The decision began by noting "that a GVR order does not necessarily imply that the Supreme Court has in mind a different result in the case, nor does it suggest that [the] prior decision was erroneous." The case then methodically marches through the class certification requirements in substantially the same manner as it had done in *Whirlpool I*.

It was not until the court reached the predominance requirement of Rule 23(b)(3) that it found need to add a substantial discussion of *Comcast*. Despite the fact that a handful of federal district courts have interpreted *Comcast* very broadly to stand for the proposition that damages must be measurable on a classwide basis prior to certification under Rule 23(b)(3), the Sixth Circuit explicitly rejected this proposition. Citing to another recent Supreme Court case – *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds* – the court stated, "[a] plaintiff class need not prove that each element of a claim can be established by classwide proof[.]" And, "Rule 23(b)(3) does not mandate that a plaintiff seeking class certification prove that each element of the claim is susceptible to classwide proof."

Likely the most notable portion of the post-*Comcast* decision is that it distinguishes itself from the *Comcast* case on the grounds that the certified class in *Whirlpool I* was a liability only class. This portion of the decision lends credence to a trend that has arisen among district courts that have distinguished the cases before them from *Comcast* on the grounds that *Comcast* does not apply to the specific type of case before the court.

In light of *Whirlpool II*, I think it is all but a foregone conclusion that the Seventh Circuit will recertify the class in *Ross*. It is less clear whether the court will do the same in *Butler*, but if I were a betting man I'd set the odds at a comfortable 80-20 in favor of Judge Posner distinguishing *Comcast* and recertifying the *Butler* classes.

Join us again next time for further discussion of developments in the law.

Sources

- *Comcast Corp. v. Behrend*, 569 U.S. ---, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013).

- *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), *reh'g and reh'g en banc denied*, *vacated sub nom. Sears, Roebuck & Co. v. Butler*, No. 12-1067, 2013 WL 775366 (U.S. June 3, 2013).

- *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), *vacated sub nom. RBS Citizens, N.A. v. Ross*, 133 S. Ct. 1722 (U.S. 2013).

- *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig. I*, 678 F.3d 409 (6th Cir. 2012), *vacated sub nom. Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (U.S. 2013).

- *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig. II*, --- F.3d ---, No. 10-4188, 2013 WL 3746205 (6th Cir. July 18, 2013).

- *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, -- U.S. --, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013)

- Colin E. Flora, *Is the Supreme Court Needlessly Using Comcast Corp. v. Behrend to Vacate Certified Classes?*, Hoosier Litigation Blog (June 10, 2013), available at http://www.pavlacklawfirm.com/blog/2013/06/10/is-the-supreme-court-needlessly-129538