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EXPERT ANALYSIS

How To Defend Against Multi-Model Product Class Actions

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Class counsel has always had incentives to maximize the size of their proposed classes. In the product liability context, class counsel has increasingly sought certification of classes that include all purchasers of a product, without respect to whether putative class members actually had a problem with it. These are the so-called "no injury" classes.[1]

Under the plaintiffs' theory in these cases, the mere possibility of a manifested defect reduces (or eliminates) the value of the product, resulting in an economic injury to every class member.[2]

Some class counsel have gone a step further by proposing classes that include not just every purchaser of a particular product, but purchasers of several different products or models, grouped together for purposes of the case. These multi-model class actions are by themselves not a new phenomenon — in particular, automakers have faced them for decades.[3] But the strategy of combining them with no-injury claims is relatively new to consumer product litigation.

These multi-model, no-injury class actions pose serious risks for defendants, because the size of the putative class can make the potential exposure ruinous — despite the fact that in some cases, very few of the products at issue have actually failed. In recent years the U.S. Supreme Court seemed poised to erect some roadblocks to these and other broad concepts of Federal Rule of Civil Procedure 23 through heightened scrutiny of commonality and predominance.[4] But in light of some of the high court's recent decisions, that wave may have already crested.

Under current Supreme Court doctrine, defendants have multiple strategies available to pare down the scope of the case and fight certification. At the outset, they can challenge the named plaintiffs' standing to represent purchasers of products that the named plaintiffs never bought.

"Courts are split as to whether plaintiffs have standing to assert claims relating to products they themselves did not purchase, but which are substantially similar."[5]

The defendant typically raises this issue by way of a Rule 12(b)(1) motion to dismiss claims relating to the unpurchased products. Some courts have held that "as a matter of law ... a plaintiff lacks standing to assert such claims."[6]

The more common approach is to "deny motions to dismiss so long as the products purchased by plaintiffs were sufficiently similar" and to find that "any concerns regarding the differences can be addressed at the class certification stage."[7]

With that approach, a district court essentially gives class counsel enough rope to hang themselves. They can expand the putative class by alleging that the multiple products are "sufficiently similar" to one another — but they must actually make that showing at the class certification stage and later at trial.[8]

That, in a nutshell, is class counsel's dilemma. How many products or models can they add to a class definition before it will become impossible to show that common questions predominate? How

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many products is too many to show that they all not only suffer from the same defect, but also are sufficiently similar that the evidence used to prove the defect is the same for all of them? The challenge for defense attorneys at the class certification stage is to show that the case has passed that tipping point.

FRONT-LOADING WASHING MACHINES

The most prominent multi-model class action of recent years is the litigation over in which plaintiffs alleged that front-loading washers have a propensity to develop mold. Two of those cases have made multiple trips between district courts, the federal appeals courts and the U.S. Supreme Court.

In *Glazer v. Whirlpool Corp.*, the 6th U.S. Circuit Court of Appeals affirmed certification of a class that included Ohio purchasers of 21 different washer models.[9] The plaintiffs convinced the courts that there were really only "two different platforms" at issue and that "most of the differences in models were related to aesthetics, not design."

In *Butler v. Sears, Roebuck & Co.*, a parallel case involving Illinois purchasers of Whirlpool washers, the 7th Circuit took a similar approach. It held that while the defendants "contend[ed] that ... different models [we]re differently defective ... [t]he basic question presented by the mold claim — are the machines defective in permitting mold to accumulate and generate noxious odors? — is common to the entire mold class."[10]

Judge Richard Posner noted that "if it turned out as the litigation unfolded that there were large differences in the mold problem among the differently designed washing machines, the district judge might decide to create subclasses ... but that this possibility was not an obstacle to certification of a single mold class at the outset."

With that, the 7th Circuit appears to have reserved for trial the issue of whether variation across models prevents a "common answer" to the question of defective design.

TIRE DEFECTS

When faced with different facts, the 7th Circuit has found multiple models too diverse to permit class certification. In *In re Bridgestone/Firestone Inc. Tires Products Liability Litigation*, the plaintiffs sought certification of a class of owners and lessees of trucks fitted with tires sold under six trade names.[11]

Those six "types" of tire comprised 67 specifications, including different diameters, widths and tread designs. The plaintiffs claimed that they could show that the absence of three particular features rendered all of the 60 million tires at issue defective.

The 7th Circuit disagreed. As Judge Frank Easterbrook explained, "whether a particular feature is required for safe operation depends on *other* attributes of the tires, and as these other attributes varied across the 67 master specifications it would not be possible to make a once-and-for-all decision about whether all 60 million tires were defective."

MICROWAVE OVENS

On behalf of GE, we recently faced one of these motions for certification of a multiple-model class. We represented GE in a putative class action in the U.S. District Court for the Eastern District of Michigan.[12]

The plaintiffs filed the case in 2009, asserting a variety of contract and statutory claims. They sought certification of a class of all individuals, nationwide, who had purchased a GE-branded microwave oven since 2000, plus statewide classes for California, Michigan and Ohio.

According to what the court described as "unverified" complaints to GE, an incredibly small number of those microwave ovens had reportedly experienced problems in the years after purchase — far fewer than 1 percent of all the units sold.[13]

Indeed, the plaintiffs had a damages expert who conceded that large numbers of older microwave ovens had been used for their entire expected useful life without incident. Undeterred, the plaintiffs claimed that because GE-branded microwave ovens supposedly lacked certain safety features, the ones still in service were universally defective and worthless.

The original proposed class period covered over 54 million microwave ovens that included more than 600 models manufactured by seven different suppliers. For some models, there was no evidence that a single unit — manufactured for more than a decade — had experienced the alleged problem forming the basis of the plaintiffs' claim. But the plaintiffs nevertheless sought recovery on behalf of every purchaser of those models.

The plaintiffs attempted to tie the hundreds of models together through expert testimony on the microwave ovens' alleged common design — and common design defect. According to the plaintiffs' experts, the hundreds of models were united by their lack of safety features that the experts deemed adequate.[14] In the plaintiffs' view, those expert opinions were sufficient to establish commonality and predominance at the class certification stage.

So at the same time that GE opposed the plaintiffs' motion for class certification, it moved to exclude the experts that formed the basis for the plaintiffs' motion. That included not only the plaintiffs' engineers, but also their damages expert.

GE advocated deciding the *Daubert* motions before the class certification motion, and the court agreed. That proved crucial: The court struck three of the plaintiffs' four damages models and significant portions of the engineering experts' design and defect opinions. The court also held that the engineers could not merely assume similarity of all models; instead, their testimony would be limited to models as to which they had examined exemplars or manuals.

In April 2016 the District Court denied the plaintiffs' motion for certification of a California class, and held in abeyance the request for certification of Michigan, Ohio and nationwide classes, at their request. There were myriad problems with the plaintiffs' proposed classes, any one of which would have precluded certification. And in its order, the court agreed with most of the arguments that GE advanced.

But perhaps the most obvious problem with the case was that the plaintiffs could not prove with common evidence a defective design across even the 60 models still remaining within their proposed class definition by the time of the court's class certification ruling.

"The court accepts plaintiffs' narrowed focus on inadequate safety mechanisms but ... [t]he question is whether even this narrowed focus as the common question, is sufficient to satisfy the commonality requirement. The court concludes it is not," the District Court said. "Simply stated, there is no evidence that a single design flaw pertaining to safety mechanisms is common across all of the models."

Thus, even with what expert testimony remained after the District Court's *Daubert* rulings, the plaintiffs could not establish that they could prove the claims of the entire class by trying the claims of the named plaintiffs. Answering questions about the named plaintiffs' microwave ovens would not answer questions about the proposed class as a whole.

In response to the court's ruling, the plaintiffs tried to reconceive their case: They proposed new California, Michigan, and "multi-state" classes encompassing just four models.[15] The court rejected the plaintiffs' renewed request for certification.[16] A fundamental problem with the plaintiffs' revised theory was that it would require new expert opinions.

The plaintiffs' experts' reports did not address the four models suddenly at the center of the case. So they asked to "supplement" one expert's report with a declaration "discussing each microwave model's safety features ... as well as the commonality among the [four] models with respect to these specific characteristics."

But as the court explained: "Plaintiffs made a strategic choice to attempt to certify an enormous class and in doing so [their experts'] reports were correspondingly general. They now seek to narrow the class and support it by providing new factual detail and analysis. Under Rule 26(a) they can't."

The fight over whether a class can encompass multiple models may come down to how the common design and common defect are defined.

The court held that what the plaintiffs proposed went "far beyond what is allowed under the supplementation rule." Thus, the plaintiffs were without any evidence to establish that design or design defect might be common issues, precluding class treatment.

Beyond that dispositive issue, the court also walked through several other grounds for denying certification, many of which remained from the April 2016 denial of certification.[17]

From the outset of the case, the plaintiffs had sought certification of the largest class possible. That strategy drove their fact discovery and their expert reports. But the breadth of the putative class, covering hundreds of models, overwhelmed any possible commonalities.

And the court refused to allow the plaintiffs to suddenly pivot to a four-model class after seven years of litigation devoted to a case encompassing millions of microwave ovens, when not only would new expert discovery be necessary, but most of the reasons for denying certification the first time applied with equal or greater force to the most recent attempt.

"The court declines to allow plaintiffs the opportunity for another round of class certification briefing when the underlying issues that precluded certification in the first place have not been adequately addressed," the judge said.[18]

At its core, the fight over whether a class can encompass multiple models may come down to how the common design and common defect are defined. At a high-enough level of generality, any two cars share a common design, as do any two microwave ovens.[19] And if the defect alleged is a lack of some safety feature, then innumerable, disparate products might suddenly be linked.

The key is to drill down, and force the plaintiffs to be as specific as possible, about what design elements they view as common and how those specific design elements contribute to the alleged problem facing consumers.

And throughout, defense counsel should keep trial management at the forefront of the court's mind: What kind of evidence will the parties need to offer to prove or disprove defect allegations as to dozens, or hundreds, of products or models?

Faced with the real prospect of such an unmanageable proceeding, a court might be inclined to refuse certification — or at least keep the class definition reasonably narrow.

NOTES

[1] *See, e.g., Coghlan v. Wellcraft Marine Corp.,* 240 F.3d 449, 455 (5th Cir. 2001) (expressing "concern over the rise of no-injury product liability law suits"); *Briehl v. Gen. Motors Corp.,* 172 F.3d 623 (8th Cir. 1999).

[2] *See, e.g., In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.; Glazer v. Whirlpool Corp.,* 722 F.3d 838, 857 (6th Cir. 2016) (class members properly alleged that they had overpaid for a product with an inherent defect and were injured at the point of sale, even if the defect had not manifested) (citing *Tait v. BSH Home Appliances Corp.,* 289 F.R.D. 466, 479 (C.D. Cal. 2012)).

[3] *See, e.g., In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.,* 174 F.R.D. 332, 342 (D.N.J. 1997) (denying certification on predominance grounds because "the question of defect may be likely to turn in this case on facts particular to each individual plaintiff, or, at the very least, assessments of risk for each of the 158 model/years at issue"); *In re Ford Motor Co. Vehicle Paint Litig.,* 182 F.R.D. 214, 220 (E.D. La. 1998) (denying certification because "[t]his case does not involve a single failure event or a simple, fungible product. Rather, Ford's challenged course of conduct spanned at least seven years and involved different models of vehicles, made of different materials, painted a variety of colors at different plants, using different paint formulae.").

[4] *Wal-Mart Stores Inc. v. Dukes,* 131 S. Ct. 2541 (2011); *Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (2016).

[5] *Quinn v. Walgreen Co.,* 958 F. Supp. 2d 533, 541 (S.D.N.Y. 2016) (citing *Donohue v. Apple Inc.,* 871 F. Supp. 2d 913, 921-22 (N.D. Cal. 2012) (collecting cases)).

[6] *Brown v. Hain Celestial Grp.,* 913 F. Supp. 2d 881, 889 (N.D. Cal. 2012).

[7] *Hart v. BHH LLC,* No. 15-cv-4804, 2016 WL 2642228, at *3 (S.D.N.Y. May 5, 2016) (quoting *Jovel v. i-Health Inc.,* No. 12–cv–5614, 2016 WL 5437065, at *10 (E.D.N.Y. Sept. 27, 2016)).

[8] *Cf. Dukes,* 131 S. Ct. at 2552 n.6 (if plaintiffs rely on evidence of commonality at the certification stage, "they will surely have to prove [that commonality] again at trial in order to make out their case

on the merits"); *Comcast*, 133 S. Ct. at 1430 ("The District Court held, and it is uncontested here, that to meet the predominance requirement respondents had to show (1) that the existence of individual injury resulting from the alleged antitrust violation (referred to as 'antitrust impact') was 'capable of proof at trial through evidence that [was] common to the class rather than individual to its members.'") (quoting *Behrend v. Comcast Corp.*, 264 F.R.D. 150, 154 (E.D. Pa. 2010)); *id.* at 1433 ("at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case") (internal citations omitted).

[9] *Glazer*, 722 F.3d at 854. Unlike most class actions, *Glazer* went to trial. Notwithstanding the earlier predominance finding, the District Court required the plaintiffs to put on evidence regarding each model at trial — a burden they could not meet. The jury returned a verdict for Whirlpool. The case is now once again before the 6th Circuit.

[10] *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798 (7th Cir. 2016),

[11] *In re Bridgestone/Firestone Inc. Tires Products Liability Litigation*, 288 F.3d 1012 (7th Cir. 2002),

[12] *Robinson v. Gen. Elec. Co.*, No. 09-cv-11912 (E.D. Mich.).

[13] *Robinson v. Gen. Elec. Co.*, No. 09-cv-11912, 2016 WL 1464983, at *7 (E.D. Mich. Apr. 14, 2016).

[14] The plaintiffs had also advanced a theory that the microwave ovens had a common propensity to malfunction, but they abandoned that proposition in the course of briefing.

[15] The multi-state class would take the place of the nationwide class, though the plaintiffs did not specify which states it would cover.

[16] *Robinson v. Gen. Elec. Co.*, No. 09-cv-11912, 2016 WL 4988013, at *1 (E.D. Mich. Sept. 19, 2016).

[17] *See, e.g., id.* at *4-5 (denying request to renew motion for California class and finding Ohio class abandoned); *id.* at *5 (multi-state class improper because plaintiffs failed to identify the states that would be included or explain how variations in state law would be addressed); *id.* at *7 (plaintiffs failed to establish that proposed Michigan and multi-state class representative was typical of absent class members).

[18] *Id.* at *7-8 (citing *Chapman v. First Index Inc.*, 796 F.3d 783, 785 (7th Cir. 2015)).

[19] *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) ("It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation.").



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