Litigation

Will the Supreme Court Take a Stand on Standing in BP Case?

Abby L. Sacunas and Michael Melusky, The Legal Intelligencer

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It is axiomatic that to certify a class, plaintiffs must show all members satisfy Article III standing and Rule 23 requirements. While federal courts "do not require each member of a class to submit evidence of personal standing, a class cannot be certified if it contains members who lack standing" to pursue the claim(s) asserted, according to *Halvorson v. Auto Owners Insurance*, 718 F.2d 773 (8th Cir. 2013).

By way of illustration, a claim for strict products liability typically requires a plaintiff to demonstrate (1) that the product is defective; (2) that the defect existed at the time the product left the manufacturer's hands; and (3) that the defect was the proximate cause of the plaintiff's injuries. (See *Reese v. Ford Motor*, 499 Fed. Appx. 163 (3d Cir. Pa. 2012) (applying Restatement (Second) of Torts Section 402(A)).) It should a fortiori follow that regardless of whether a design defect, manufacturing defect or warning claim is asserted, a class of plaintiffs who purchased a particular product is not certifiable if it contains members who are unable to establish each of these three basic elements. A design-defect class, for instance, should not be certified if it contains class participants who are unable to demonstrate the element of proximate cause.

This line of reasoning is precisely why the recent decision in the *Whirlpool* litigation pending in the Northern District of Ohio caused such an uproar. In that case, plaintiffs allege a design defect exists in Whirlpool Corp.'s front-loading washing machines, which causes the machines to develop mold. The district court granted class certification, and the U.S. Court of Appeals for the Sixth Circuit, in *In re Whirlpool Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, 844 (6th Cir. 2013), affirmed, even though many consumers in the class never experienced mold. Whirlpool petitioned the Supreme Court for review, which granted cert. The U.S. Supreme Court vacated the Sixth Circuit's ruling, and remanded the case for reconsideration in light of its recent decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013) (on appeal from the Third Circuit).

In *Comcast*, the plaintiffs brought an antitrust class action suit based upon four theories of liability, three of which were ultimately dismissed. The plaintiffs' damages model, however, contemplated all four theories of liability. Their expert could not segregate out those damages that pertained only to the one remaining theory of liability. The Supreme Court accordingly held that the class lacked predominance under Rule 23(b)(3) because there was an insufficient nexus between plaintiffs' remaining theory of liability and their damages case. Reversing the Third Circuit's class certification decision, the Supreme Court stated that "a model purporting to serve as evidence of damages in a class action must measure only those damages attributable to that theory."

Refusing to reverse its decision on remand from the Supreme Court in *Whirlpool*, the Sixth Circuit determined that the *Comcast* decision was factually inapposite because that case dealt with the certification of a liability and damages class, while the *Whirlpool* litigation only dealt with certification of a liability class. Interestingly, the Sixth Circuit separately found that each member of the class satisfied the standing requirement not because they each suffered a growth of mold as a result of

the claimed defect (they did not), but because they each potentially paid a premium price for a defective machine. This judicially altered definition of the claimed harm enabled plaintiffs to side-step the standing ordinarily required to assert a design-defect claim, sending shudders through the products defense bar.

The question of standing is somewhat inextricably intertwined with that of predominance in class certification decisions. This is because the focus of the predominance inquiry is on whether a defendant's conduct was common as to all class members, and whether all of the class members were harmed by the defendant's conduct, according to *Sullivan v. DB Investments*, 667 F.3d 273, 305 (3d Cir. 2011). Rule 23(b)(3) requires questions of law or fact common to class members to predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. (See*Amgen v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1191 (2013).)

Courts have accordingly struggled with standing and predominance determinations where a nexus between the theory of liability and damages is lacking in that some members of the proposed class did not suffer the alleged harms. Courts in the Second, Eighth, Eleventh and D.C. circuits have refused to certify classes where not all the plaintiffs experienced injury. For example, the Eighth Circuit held just last year in *Halvorson* that in order to certify a class, it must be shown that each member's "injury in fact is traceable to the defendant." The Eleventh Circuit similarly rejected a class that included purchasers with "no complaints" about the allegedly defective product in *Walewski v. Zenimax Media*, 502 F. App'x 857, 861 (11th Cir. 2012). In the same vein, the D.C. Circuit recently required putative class members to show "that all class members were in fact injured by the alleged [harm]," in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 252 (D.C. Cir. 2013).

On the other hand, the Fifth, Seventh and Ninth circuits certified classes where it was evident that not all members suffered from the harm alleged. For example, the Seventh Circuit certified a class and held that the argument that some plaintiffs had not experienced the alleged defect was a merits issue and not a reason to deny certification. (See *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013).) The Ninth Circuit similarly rejected an argument that class certification was improper because most absent class members had not been harmed, and unlike other courts on the subject, held that only one named plaintiff needed to show standing. (See *Stearns v. Ticketmaster*, 655 F.3d 1013, 1021 (9th Cir. 2011); and *Stiller v. Costco Wholesale*, 298 F.R.D. 611, 627 (S.D. Cal. 2014) (suggesting *Comcast* abrogated this part of *Stearns* by making clear that individualized damages determinations can defeat Rule 23(b)(3)'s predominance requirement).)

Most recently, the Fifth Circuit affirmed the lower court's decision to certify the class despite the presence of individuals whose damages were not traceable to the defendant's alleged misconduct in the *In re Deepwater Horizon,* 739 F.3d 790, 817 (5th Cir. 2014), litigation. BP entered into a $9.2 billion settlement to resolve claims arising out of the Deepwater Horizon disaster. The district court certified the class, and the Fifth Circuit affirmed the certification despite the presence of plaintiffs who did not suffer damages attributable to the oil spill. The Fifth Circuit rejected BP's arguments that Comcast required all class members' damages to be attributable to the claimed harm. Instead, much like the Sixth Circuit did in the *Whirlpool* litigation, the Fifth Circuit found that *Comcast* was inapplicable because liability was to be established on a classwide basis with damages to be decided on an individual basis.

On Aug. 1, BP petitioned the Supreme Court for certiorari. In its petition, BP argues that the Fifth Circuit's certification of the class improperly sweeps in many members whose alleged losses were not caused by the spill. Ergo, it argues, the class does not satisfy the commonality and adequacy requirements of Rule 23(a), the predominance requirement of Rule 23(b)(3), or the standing requirements of Article III.

BP's petition is the first of potentially many in what is likely to be a long and contentious litigation. Even if the Supreme Court grants certification now, a remand for determination consistent with its

decision in *Comcast* will not address the concerns raised. The Fifth Circuit has already considered, and distinguished, the BP litigation from the *Comcast* ruling in a way that the Supreme Court implicitly deemed acceptable by declining a second petition for certification from the *Whirlpool*defendants this past February. The only way for the Supreme Court to decide an issue that so clearly divides the circuits is to issue a decision on standing. The question is, will the Supreme Court choose this case to take a stand on standing?

Abby L. Sacunas *is a partner in the commercial litigation department at Cozen O'Connor in Philadelphia. As national trial counsel for a leading U.S. home safety and security products company, Sacunas has experience litigating in state and federal forums throughout the United States.*

Michael Melusky *is an associate in the litigation section at the firm in Philadelphia.*