

## High Court Vacates Class Cert. In Washer Suit, Citing Comcast

By **Greg Ryan**

*Law360, New York (June 03, 2013, 6:08 PM ET)* -- For the second time in two months, the U.S. Supreme Court vacated a class certification decision in a washing machine defect action in light of its recent Comcast Corp. v. Behrend ruling, sending a suit against Sears Roebuck & Co. back to the Seventh Circuit.

In a one-paragraph directive, the high court granted a petition for certiorari from Sears, vacated the Seventh Circuit's decision, and remanded it to the appeals court for further consideration. The Seventh Circuit held in November that class proceedings were the most efficient method of litigation in the case.

The Supreme Court instructed the appeals court to look to its Comcast decision from March, in which it held that an antitrust action should not have been certified because the plaintiffs, a class of cable television subscribers, did not demonstrate the predominance of common issues.

The Supreme Court issued the same instruction on April 1 in a class action against Whirlpool Corp. over washing machines allegedly prone to developing moldy odors and stopping suddenly from mechanical malfunctions. The washers in the suit against Sears are also manufactured by Whirlpool and allegedly suffer from similar problems.

An attorney for Sears, Mayer Brown LLP partner Timothy Bishop, said the decision showed the Supreme Court believed the Seventh Circuit's ruling was out of line with Comcast.

"The Supreme Court doesn't GVR [grant, vacate and remand] without good reason," Bishop said. "We do think the GVR is a good indicator of the way the Supreme Court looks at this case on the merits."

However, Jonathan Selbin of Lief Cabraser Heimann & Bernstein LLP, an attorney for the plaintiffs, said he was optimistic that the Seventh Circuit would again back the certification of the class because the Comcast decision didn't relate to the circumstances of the case.

"If you talk to the most recent Supreme Court clerks, they'll tell you a GVR does not mean, 'Go back and reverse yourself,'" Selbin said.

After the Supreme Court remanded its case to the Sixth Circuit, Whirlpool moved for the appeals court to send the dispute back to the district court to review certification in light of Comcast. Bishop told Law360 that he anticipated Sears would file a similar motion.

Whirlpool argued in its motion that the Sixth Circuit itself had often held that district courts are best suited to review a decision in light of a Supreme Court ruling. In addition, since the lower court certified the class in July 2010, there had been a substantial amount of discovery that undermined the certification decision, it said.

Sears contended to the Supreme Court in a brief that the Seventh Circuit ruling conflicted with Comcast because Comcast rejected the view that the need for judicial efficiency sometimes overrides compliance with the predominance requirement.

The majority in Comcast ruled that the "nearly endless" variation of claims in the case precluded class certification, and the variation in the claims against Sears is even greater, according to the company. The action includes hundreds of thousands of consumers from six states who own more than 20 different washer models that may or may not have experienced mold problems or otherwise malfunctioned, it said.

The plaintiffs are represented by New York University professor Samuel Issacharoff, Jason Lichtman, Jonathan Selbin and Mark Chalos of Lieff Cabraser Heimann & Bernstein LLP, Jonathan Shub of Seeger Weiss LLP, and Richard Burke and Julie Miller of Complex Litigation Group LLC.

Sears is represented by Stephen Shapiro, Timothy Bishop, Jeffrey Sarles and Joshua Yount of Mayer Brown LLP and Michael Williams, Galen Bellamy and Allison McLaughlin of Wheeler Trigg O'Donnell LLP.

The case is Sears Roebuck & Co. v. Butler et al., case number 12-1067, in the U.S. Supreme Court.

--Editing by Elizabeth Bowen.

*Correction: A previously published version of this article misquoted Lieff Cabraser Heimann & Bernstein LLP attorney Jonathan Selbin as saying "immerse yourself" instead of "reverse yourself." The error has been corrected.*