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Whirlpool Leaves 'Price Premium' Theory Down, But Not Out

By **Sindhu Sundar**

Law360, New York (October 30, 2014, 8:04 PM ET) -- Whirlpool Corp.'s victory Thursday in a closely watched moldy-washer lawsuit dealt a blow to claims that consumers paid more for a product believing it did not have a defect, but attorneys say the so-called price premium theory will continue to be a major front in a variety of consumer litigation.

The named plaintiffs in the dispute, Gina Glazer and Trina Allison, had argued that they and a class of some 150,000 Ohio consumers had suffered economic harm because they had paid “premium prices” for the washers. They claimed that Whirlpool had not sufficiently informed them about the washers’ alleged tendency to gather mold, and that if they had known, they would have paid less for the product, if they would have bought it at all, according to trial briefs.

The jurors on Thursday did not side with the plaintiffs’ design defect and breach of warranty claims, an outcome defense attorneys say could indicate skepticism about the injuries sustained by the class, given Whirlpool’s argument that “a vast majority” of the class members had never experienced the mold allegedly caused by the defect.

“The plaintiffs’ theory in a lot of cases like this is that the consumer paid a premium for the product not knowing about a problem, but proving that can be exceedingly difficult,” said Paul Benson of Michael Best & Friedrich LLP. “If a product is working like it's supposed to, how can you say, ‘I paid too much because someone else had a problem with it’? That's a tough position to take and convince a group of people that you’re right.”

Whirlpool had adopted that argument in its numerous failed attempts at decertifying the class, but the Sixth Circuit ruled that if the jury agrees with the plaintiffs’ defective design claim, “all class members have experienced injury as a result of the decreased value of the product purchased,” according to court documents.

Defense attorneys say Thursday’s outcome indicates that even if the theory might be sound enough to win class certification, convincing jurors could still pose a challenge. In this case, the jury arrived at its verdict within a day after closing arguments on Wednesday, at the end of a three-week trial, which some attorneys say may reflect confidence in its decision.

The plaintiffs have indicated their plans to appeal, while their attorneys stressed Thursday that the

outcome was only the result of a trial that involved Ohio plaintiffs and might not have any bearing on the claims of “millions” of consumers across the U.S.

The plaintiffs in the Sears and Whirlpool suits have claimed that some 20 different models of Whirlpool's high-efficiency, front-loading Duet clothes washers sold since 2001 contain a design defect that causes moldy odors.

The Illinois federal court case Larry Butler et al. v. Sears Roebuck and Co., in which plaintiffs allege that Whirlpool brand Kenmore washers bore the mold defect, could go to trial next year, said Jonathan Shub of Seeger Weiss LLP, a firm on the Glazer plaintiffs' co-counsel team. Shub himself is not on the team.

“On the plaintiffs' side, we believe the price premium theory is alive and well,” Shub said. “The class in Whirlpool was certified, and it withstood appellate review, which I think bodes well for the concept,” he added. “Today, it was a loss on the specific facts of this case, not the law.”

The price premium concept is particularly prevalent in food labeling litigation, in which plaintiffs frequently allege they paid a premium for products that made certain claims about their quality or ingredients and then failed to deliver, attorneys note.

It often comes up in "all natural" litigation, where plaintiffs claim that a product bore the label even though it contained synthetic ingredients and that they would not have paid the price they did had they known about the additives.

The outcomes of class actions like the Whirlpool washer case, which rarely go to trial, could impact a wide swath of such consumer suits, attorneys say.

“This is a theory that plaintiffs have been testing across a wide range of consumer products,” said Jennifer Quinn-Barabanov of Steptoe & Johnson LLP. “The verdict is more important than just as it relates to Whirlpool or washing machines.”

--Editing by Kat Laskowski and Emily Kokoll.
