

Whirlpool Beats Moldy Washer Class Action in Bellwether Trial

By Julie Triedman

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Two federal appeals courts and the U.S. Supreme Court have all refused to block consumer class actions over allegedly mold-prone Whirlpool Corp. washing machines. Whirlpool's lawyers at Bartlit Beck Herman Palenchar & Scott fared much better at trial, persuading a Cleveland federal jury on Thursday to reject claims that the company is liable for selling the machines.

Thursday's verdict, which followed just two hours of deliberation, came in the first bellwether trial in a dozen statewide class actions against the Benton Harbor, Mich.-based company. Whirlpool sold millions of the front-loading washers across the country. The plaintiffs say the machines are defective, accumulating mold and requiring expensive maintenance to reduce its smelly effects.

U.S. District Judge Christopher Boyko in Cleveland is overseeing multidistrict litigation against Whirlpool, in which the Ohio plaintiffs are seeking about \$66 million in classwide damages under state breach-of-warranty laws. Nationally, the company faces liability "in the single-digit billions," according to Bartlit Beck's Eric Olson, who helped lead the defense at trial.

Bartlit Beck's Philip Beck and Rebecca Bacons also represented the company at trial, along with longtime Whirlpool counsel Michael Williams of Wheeler Trigg O'Donnell. Whirlpool tapped Bartlit Beck in early 2014 after its lead lawyer, Stephen Morrison of Nelson Mullins Riley & Scarborough, passed away last year. Wheeler Trigg led in managing discovery, briefing, and in trial preparations, Olson said. Whirlpool was also represented at trial by James Irvin III and Robert Brunson of Nelson Mullins and Dan Balmert of Vorys Sater.

"For the first time, we had a decision maker—the jury—evaluate the facts," Olson said following the verdict. "I give Whirlpool a ton of credit for believing in their product and in the jury system, and feeling confident that the facts would speak for themselves."

During the three-and-a-half week trial, Olson said, the team undermined the credibility of the plaintiffs' chief expert, a former Whirlpool employee. Equally important, he said, Whirlpool demonstrated a culture of constant improvements to its products, and showed that "just because the company was able to make products better doesn't mean the old one was defective."

Lieff Cabraser Heimann & Bernstein and Haverford, Penn.-based Chicicles & Tikellis led the plaintiffs' case at trial. Lieff Cabraser's trial team included Richard Heimann, Mark Chalos and Jason Lichtman. Chicicles' Alison Gushue and Steven Schwartz were cocounsel along with Robert Glickman of McCarthy, Lebit, Crystal & Liffman.



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Lieff Cabraser's Jonathan Selbin is court-appointed lead counsel for the class. He said Thursday that the firm will appeal on the grounds that the judge improperly barred jurors from learning about Whirlpool internal communications in which executives voiced concerns about the health risks of mold in the washers.

"We're very disappointed that we lost," Selbin said. "But we've been in this litigation for six years and up to the Supreme Court twice. ... We're confident none of the jury's findings apply to cases involving other states."

Meanwhile, Lieff Cabraser is looking ahead to a trial next July in federal district court in Chicago in another consumer class action against Sears Holdings Corporation. That case involves allegedly mold-prone Kenmore washers that were also manufactured by Whirlpool.

Whether more of the Whirlpool state class actions are now certified is up to Judge Boyko, who has handled the Ohio case since the complaint was filed in 2008. Boyko certified an Ohio consumer class two years later, and the U.S. Court of Appeals for the Sixth Circuit upheld the decision in July 2013. Sears, meanwhile, struck out in a parallel appeal to the Seventh Circuit the following month. In each of the cases, the defendants have argued that the plaintiffs' claims are too individualized for class treatment, especially since most customers never complained about mold in their machines.

The companies took their losing arguments to the Supreme Court last year, but in February the justices declined to hear either case.