

Courts

WHIRLPOOL WINS 'SMELLY WASHER' TEST CASE, WITH MORE TRIALS TO COME

Whirlpool (WHR) has won an important battle in Ohio, part of the nationwide war over consumer class actions. The larger conflict, however, will continue: High-powered plaintiffs' firms vowed to fight on, despite having suffered defeat in the closely watched "smelly washer" trial.

A federal jury in Cleveland made quick work last week of a class action lawsuit alleging that Whirlpool sold millions of front-loading washing machines whose flawed design caused the formation of odoriferous mold. After a three-and-a-half-week trial, jurors took only about two hours to reject the allegations and related demands for \$66 million in damages for Ohio consumers.

Eric Sharon, Whirlpool's chief litigation counsel, told Bloomberg BNA that the verdict "sends a message that this kind of abusive class action litigating, targeting American manufacturing and comprised almost entirely of uninjured people, has no place in the landscape of American jurisprudence." Sharon described the mass suit as a flagrant attempt by plaintiffs' attorneys to enrich themselves. According to Whirlpool, 96 percent of the people who have bought its washers never complained about mold or odor.

"Plaintiffs' lawyers tried the case for themselves rather than on behalf of any consumers who may have had an actual issue with the product," said Eric Olson, a partner with Bartlit Beck Herman Palenchar & Scott and one of Whirlpool's trial counsel. "All three of plaintiffs' damage experts expressly admitted that their damage theories had nothing to do with whether anyone actually experienced mold or odor in their washing machines."

The Ohio trial marked the first time a jury examined the facts in the case, following years of preliminary skirmishing and two trips to the U.S. Supreme Court on procedural questions. In the face of a class action that's allowed to go to trial, most companies run up the white flag and agree to settle. Whirlpool decided to draw a line with the washer cases, in which the dollar value of the alleged harm to individual consumers is modest, but the aggregate cost of remedying the mold claims could reach into the billions. As a result of Whirlpool's refusal to back down, many other corporations are watching the washing machine litigation as a potential model.

Plaintiffs' attorneys vowed they would appeal the Ohio defeat and, more significantly, press ahead with numerous similar lawsuits in other states. "This was a 'bellwether' trial for the Whirlpool case, designed to permit the parties to see how the evidence comes in at a real trial, how each side litigates it, and what a jury thinks," Jonathan Selbin, lead plaintiffs' lawyer, said via e-mail. "We have a much better understanding of all of that now, and it will inform how we try the cases in other states, hopefully with a better outcome."

As for the percentage of Whirlpool customers who have complained about smelly laundry, Selbin said that in future trials, plaintiffs' attorneys would establish that the company's "own internal documents all estimated [the complaint rate] at 35 percent to 50 percent." Whatever the portion of consumers who piped up, he added, "the law does not define 'defect' based on a particular percentage of people for whom the problem manifests." According to the testimony of Whirlpool's

witnesses, he continued, buyers of its washers have to buy an anti-odor product that adds \$235 to the cost of the machine over its useful life.

The theory behind class actions is that with damages of that modest magnitude, individuals and plaintiffs' attorneys don't have enough financial incentive to file separate suits. That's exactly what corporations would prefer: a sharp diminution of consumer litigation.

"One of the things we learned was that Whirlpool does not really defend the design of the washers at issue," added Selbin, a partner based in New York with Lief Cabraser Heimann & Bernstein. The company, he asserted, "spent 90 percent of its time and effort at trial with personal attacks on our clients—literally calling them liars and dirty people—and attacking plaintiffs' lawyers. ... One would think that with the design of some 5.5 million of its washers on trial, and having promised everyone they would come in and defend their product, Whirlpool might have actually done so."

Whirlpool's Sharon disagreed, of course. The company, he said, "firmly believed in the rule of law and that the facts were in our corner." As far as the jury in Cleveland was concerned, the manufacturer was correct, and it wasn't all that close a question.

*By Paul M. Barrett
Barrett is an assistant managing editor and senior writer at Bloomberg Businessweek. His new book, *Law of the Jungle*, tells the story of the Chevron oil pollution case in Ecuador.*