Washington Legal Foundation

September 11, 2015

On the Merits:

ROBERT BROWN, *et al*.,

Plaintiffs-Appellees,

v.

ELECTROLUX HOME PRODUCTS, INC., d/b/a FRIGIDAIRE,

Defendant-Appellant.

No. 15-11455-E

U.S. Court of Appeals for the Eleventh Circuit

Questions Presented: Whether the district court abused its discretion by (1) failing to consider defendant's evidence that proof of consumer fraud would be highly individualized and (2) declining to resolve threshold legal and factual questions when concluding that plaintiffs' claims satisfied Rule 23's predominance requirement.

Summary of the Case: Plaintiffs brought a putative class action against Electrolux Home Products, alleging that certain models of Frigidaire-branded, front-loading washing machines contained a "common defect" that caused the machines to produce mold or odor. The operative complaint asserted claims for consumer fraud, breach of warranty (express and implied), violations of the federal Magnuson-Moss Act, and unjust enrichment. Defendant objected to class certification on the grounds that the class was overbroad, that individualized issues predominated for all of Plaintiffs' claims, and that Plaintiffs could not produce common evidence to prove injury to all class members in one stroke, as required under Rule 23.

Over Defendant's objections, the district court certified all of Plaintiffs' claims for class treatment, stating that "[t]he Court resolves doubts related to class certification in favor of certifying the class." The district court rejected Defendant's argument that the class was overbroad, reasoning that Plaintiffs claimed *all* washing machines were defective, regardless of whether each Plaintiff actually experienced any mold or odor. And the district court certified a claim for fraud even though it recognized that "each proposed class member made individualized assessments for deciding to purchase a machine."

On The Merits:
Judgment for Defendant-Appellant
Kevin C. Newsom
Bradley Arant Boult Cummings LLP

The district court's error in this case was simple but serious: it premised its decision to certify the class on legal presumptions that are no longer controlling, and it ignored recent binding precedent. In *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), and then again even more recently in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the United States Supreme Court articulated the controlling standards for class certification. The *Dukes* Court emphasized that at the certification

stage of a putative class action, all of Rule 23's requirements mandate affirmative proof, not just pleading. The requirement of an evidentiary predicate arises from the unique nature of the class-action device, which is a narrow and novel exception to the usual rule that litigation is conducted by and on behalf of named parties only. The point is that if a party cannot demonstrate compliance with Rule 23, it should not be permitted to utilize such an exceptional litigation tool.

The *Dukes* Court stressed that when the plaintiffs' evidentiary proof is disputed, compliance with Rule 23 should not be presumed. Indeed, the Court specifically jettisoned previously operative presumptions under which disputed accounts of the relevant evidence were resolved in favor of certification, rather than against it. Not long after deciding *Dukes*, the Supreme Court observed in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), that in practice, the high evidentiary bar (and absence of any presumption) is likely to preclude most class claims.

Although the district court here cited *Dukes*, it refused to heed the Supreme Court's warnings—and indeed forthrightly admitted that it was doing so. In particular, the district court expressly stated that it was (1) resolving doubts related to certification in favor of certifying the class, and (2) adhering, even in the extraordinary class context, to the principle that a court should draw all inferences in favor of the Plaintiffs. This approach flatly contravenes both *Dukes* and *Comcast* (the latter of which the court failed even to mention).

The district court's threshold analytic errors led it into additional trouble down the road—the court failed to abide by the even more specific instructions in *Dukes*. This case pivots on the commonality requirement of Rule 23, about which *Dukes* gave express guidance. As to the evidence required to establish commonality, *Dukes* held that a plaintiff must prove that the members of a class have suffered the same injury—not merely violations of the same legal rules, which may occur in varying ways—and that their injury is capable of both common contention and classwide resolution.

Here, the commonality evidence (to the extent it existed at all) was disputed. Electrolux argued that the Plaintiffs failed (1) to present any evidence of an injury common to the class and, further, (2) to refute Electrolux's evidence that there could be no such injury because fewer than 1% of all purchasers of front-loading washers request warranty service for the mold and odor issues that underlie Plaintiffs' complaint. In a similar vein, Electrolux contended that Plaintiffs failed to refute Electrolux's proof that some purchasers used their washers without any problems for years, thereby suffering no harm at all, and now suffer zero risk of future harm because they no longer own the machines.

Despite Electrolux's arguments, the district court found a common injury and certified a class, largely based on a legal *theory* of injury. The district court was persuaded that the Plaintiffs' common injury was that they overpaid for their clothes washers, because the mold-and-mildew defect that they alleged reduced the value of the machines (regardless whether a plaintiff had made a warranty claim or later got rid of the machine). But this is precisely the type of pleaded, suggested, and theorized—but not proven—injury that *Dukes* holds is insufficient.

Indeed, Electrolux argued that even this injury would require member-by-member proof, illustrating that a customer who used her machine with no problems for years and then sold it necessarily got exactly what she paid for. That argument should have been enough to preclude class certification. Although the district court recognized the dispute over the proof, it tilted the wrong way in addressing it, erroneously applying a no-longer-controlling presumption in favor of, rather than against, class certification.

In accordance with the concrete evidentiary requirements of Rule 23—and because a class may not be certified where plaintiffs cannot carry their burden—the district court's order is REVERSED.

Dissenting View:
Jason L. Lichtman
Lieff Cabraser Heimann & Bernstein

This Court reviews a district court's class certification opinion for abuse of discretion. *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1253 (11th Cir. 2014) (citation omitted). Because the court below did not abuse its discretion in certifying the class, its certification order should be affirmed.

Appellant Electrolux manufactured certain models of washing machines with a particular type of gasket. This gasket traps water, which can lead to mold and other bacterial growth. For that reason, Electrolux ultimately made a new replacement gasket that does *not* trap water. Plaintiffs-Appellees allege that the old gasket that traps water is defective: they want Electrolux to give every person who received the old gasket a new one. Electrolux contends that the old gasket is just fine because (Electrolux claims) trapped water does not *always* lead to visible mold and bacteria. In other words, the primary question in this litigation is whether the original gasket was defective—either the gasket is defective (and Electrolux is liable to all class members) or it is not (and Electrolux is liable to none). Class certification was thus wholly appropriate. *See, e.g., Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013); *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010) (Easterbrook, J.) ("Rule 23 allows certification of classes that are fated to lose as well as classes that are sure to win.").

Electrolux's various arguments to the contrary are unavailing.

First, Electrolux is simply wrong to claim that *Comcast Corporation v. Behrend* somehow precludes class certification if a majority of proposed class members did not experience a problem with their washer. 133 S. Ct. 1426 (2013). *Comcast* implies—much less says—nothing of the sort, which is presumably why Electrolux has no citation to *Comcast* in support of its unusual assertion. In any event, the very question this litigation will answer is whether all class members had a problem with Electrolux's product because all of the gaskets at issue in this case trap water.

What Electrolux is really claiming is that a gasket that traps water is not a problem for *any* class member, and a jury may agree. But Electrolux is not pointing to any "fatal dissimilarity" among the members of the certified class that would render the class action mechanism unfair or inefficient for decision-making. Instead, "[it is] point[ing] to 'a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs' cause of action.'" *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 858-61 (6th Cir. 2013), *cert. denied sub nom., Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014) (citing *Amgen*, 133 S. Ct. at 1196) (other citations omitted).

Second, Electrolux misses the point when it complains that the district court articulated the wrong legal standard for class certification. To be sure, any plaintiff seeking certification of a damages class must affirmatively prove seven prerequisites to class certification by a preponderance of the evidence. *See, e.g., Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 F. App'x 782, 787-88 (11th Cir. 2014) (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011)). Here, the district court was merely mistaken in citing to an older case that stated that courts should accept a plaintiff's allegations as true and draw inferences in favor of class certification.

But district courts are not appellate courts: what matters to us is not what the lower court said, but what it did. In particular, a district court does not abuse its discretion in granting class certification when it thoroughly reviews and weighs all relevant evidence from both parties, even when the court elsewhere articulates (wrongly) that it should take all of plaintiffs' allegations as true. *Gooch v. Life Investors Insurance Co. of America*, 672 F.3d 402, 417 (6th Cir. 2012); *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604, 618 (8th Cir. 2011). And there should be no real question that the district court—in 64 pages of careful analysis—*did* thoroughly review and weigh all relevant evidence. In other words, the errors in the district court's statement of the law were harmless. *Gooch*, 672 F.3d at 417.

One final point merits brief comment. In other writings, the majority has indicated that it believes that class actions are bad economic policy. I disagree, but different judges will assuredly answer different policy questions differently. And that is the real problem with the Court's opinion today. Courts should not attempt to read the Federal Rules to reach any particular policy outcome. Instead, they should strive to ensure that the law does not vary based solely on who happens to be assigned to a particular panel: we must set aside our biases and read the rules as they are written, regardless of whether any of us might wish those rules had been written differently.

I respectfully dissent.

Kevin C. Newsom is a Partner at Bradley Arant Boult Cummings LLP, in Birmingham, Alabama, where he chairs the firm's appellate practice group; he wishes to thank Anna Manasco, also an attorney at Bradley Arant, for her invaluable assistance in preparing this piece. **Jason L. Lichtman** is a Partner in the New York office of Lieff Cabraser Heimann & Bernstein, where his class-action practice focuses on consumer protection and defective products.

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