

Products Liability Law Daily Wrap Up, CLASS ACTIONS AND MULT-DISTRICT LITIGATION—HOUSEHOLD PRODUCTS—9th Cir.: Game on: Microsoft must face further rounds of Xbox® “scratched disc” class allegations, (Mar. 19, 2015)

By Susan Lasser, J.D.

The dismissal of product defect allegations by a putative class of owners of Microsoft Corporation’s (Microsoft) Xbox 360® video game console (Xbox) was reversed by the U.S. Court of Appeals for the Ninth Circuit because the trial court abused its discretion in misapplying the law as established in an earlier Ninth Circuit decision. A federal district court in Washington had dismissed the class action lawsuit with prejudice, striking the class allegations, in deference to an earlier order denying class certification to a similar putative class ([Baker v. Microsoft Corp.](#), March 18, 2015, amended July 20, 2015, Rawlinson, J.).

Background. The consumers in the putative class action alleged a design defect in the Xbox console that gouges game discs. Specifically, they alleged that the Xbox optical disc drive is unable to withstand even the smallest of vibrations, and that during normal game playing conditions discs spin out of control and crash into internal console components, resulting in scratched discs that are rendered permanently unplayable. Microsoft responded that the overwhelming majority of Xboxes do not manifest the alleged defect—only 0.4 percent of Xbox owners have reported disc scratching—and that the cause of any disc scratching is consumer misuse, not a product defect.

Prior “Scratched Disc Litigation.” In 2007, other Xbox owners sued Microsoft, alleging claims similar to those asserted in the current case. Those cases were consolidated before United States District Judge John Coughenour who denied class certification (*In re: Microsoft Xbox 360 Scratched Disc Litig.* (W.D. Wash., Oct. 5, 2009)), reasoning that individual issues of fact and law predominated over common issues of fact and law. He relied on the reasoning from a California district court decision, *Gable v. LandRover N. Am., Inc.* (C.D. Cal., September 29, 2008), in which the putative class alleged an alignment defect in one of the manufacturer’s model vehicles. Land Rover argued that because the alleged defect did not manifest in every vehicle, individual inquiries would be required. The district court in that case agreed with Land Rover, and denied class certification because the plaintiffs failed to demonstrate that the purported defect manifested in a majority of vehicles. In *Scratched Disc Litigation*, Judge Coughenour reasoned that, like the Land Rover owners in *Gable*, most Xbox owners had not experienced the purported defect. Because not all purchasers sustained damages under this rationale, Judge Coughenour ruled that the need to consider damages on an individual basis “preclude[d] the certification” of the class of Xbox owners. Moreover, he rejected the consumers’ attempt to distinguish *Gable* on the basis that the design defect existed in every Xbox console and could only stem from one cause, while only very few class members in *Gable* had actually experienced the defect and misalignment could have different causes.” He noted that while the Xbox plaintiffs and the *Gable* plaintiffs both asserted a defect involving a common design flaw, the lack of uniform manifestation of the acknowledged design flaw in both cases prevented class certification. Thus, he cited *Gable* for the notion that individual issues of causation predominated because differing causes may have produced the same defect.

Wolin decision. Ten months following the dismissal of *Scratched Disc Litigation*, the Ninth Circuit reversed (*Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168 (9th Cir. 2010)) the *Gable* decision upon which Judge Coughenour had relied in denying class certification. The appellate court, in *Wolin*, concluded that the trial court in *Gable* erred in rejecting certification because the plaintiffs did not prove that the defect manifested in most of the class’s vehicles. The court of appeals concluded that while “individual factors may affect premature tire wear, they do not affect whether the vehicles were sold with an alignment defect.” According to the court in that decision, the timing of the defect affected the amount of damages, not the appropriateness of class certification because “the fact remained that all class members at some point experienced the same injury due to the same defect.” Thus the appellate court held that the requirement of typicality could be satisfied even though there were different factual circumstances surrounding the manifestation of the defect; and as such, the class members had a viable claim against Land Rover regardless of how the defect was manifested in the individual vehicles.

The lower court in the current case determined that the Ninth Circuit's ruling in *Wolin* did not undermine the causation analysis articulated in *Scratched Disc Litigation*, and that comity required deferral to the earlier certification order. As such, the district court struck the class action allegations from the complaint, noting that no Ninth Circuit or Supreme Court precedent articulated the mechanism by which comity was to operate. Rather, it adopted the suggestion of the American Law Institute (ALI) that a prior denial of class certification on the same subject matter by a different district court judge be given a rebuttable presumption of correctness. Having determined that the presumption had not been rebutted, the trial court deferred to Judge Coughenour's prior decision.

Jurisdiction. The court of appeals found that it had jurisdiction to consider the consumer class's appeal because the parties stipulated to dismiss the case with prejudice, and the district court approved the stipulation. The Ninth Circuit had held previously that "in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal." The court found that similarly, sufficient adversity existed in the current case to sustain an appeal.

Class action allegations. The Ninth Circuit held that its decision in *Wolin* was controlling, and that the trial court's decision to strike the Xbox consumers' class action allegations from their complaint, based on Judge Coughenour's decision in the *Scratched Disc Litigation* that individual issues of causation predominated in the earlier Xbox defect case, contravened the holding in *Wolin* and was an abuse of discretion.

The trial court had determined that, although *Wolin* reversed the holding in *Gable* (which Judge Coughenour had relied upon), *Wolin* did not undermine the causation analysis set forth in the *Scratched Disc Litigation*. In doing so, the trial court used the same causation analysis as did Judge Coughenour in reaching its conclusion, thereby relying on *Gable* for its causation analysis. The Ninth Circuit disagreed with the lower court's determination that "nothing in *Wolin* undermine[d] Judge Coughenour's causation analysis." The appellate court said that, in *Wolin*, it "expressly and specifically rejected the notion that individual manifestations of the defect precluded resolution of the claims on a class-wide basis."

The court of appeals found that the Xbox case was similar in that even though individual factors could affect the timing and extent of the disc scratching, they did not affect whether the Xboxes were sold with a defective disc system. The consumers asserted that (1) whether the Xbox was defectively designed and (2) whether the alleged design defect breached an express or an implied warranty were both issues capable of common proof. The Ninth Circuit agreed, finding that "as in *Wolin*, these issues are susceptible to proof by generalized evidence and do not require proof of individual causation."

Common questions. The court noted that there were common questions under the breach of warranty claims, including: the existence of any express warranties and/or implied warranties made by Microsoft concerning the Xbox 360; the application of any such warranties to the claims asserted in the class action; and whether Microsoft has breached any of the express and/or implied warranties.

Further, the court rejected Microsoft's argument that the consumers' express warranty claim was not amenable to class treatment because individual proof of causation was necessary to determine whether there was a breach of its express warranty. Microsoft asserted that a determination of whether the allegedly defective Xbox disc system caused a given disc to scratch required proof specific to that class member. The appellate court, however, disagreed because the consumers' position was that the console's design defect itself breached the express warranty. Proof that the allegedly defective disc system caused individual damages was not necessary to determine whether the existence of the alleged design defect breached Microsoft's express warranty, according to the court. Rather, the consumers' breach of express warranty claim presented a common factual question—is there a defect?—and a common mixed question of law and fact—whether the defect breached the express warranty? Therefore, the court concluded that the trial court erred in finding that individual issues of causation predominated over these common questions.

Adjudication by class action. The court expressed no opinion on whether the specific common issues in the case were amenable to adjudication by way of a class action, or whether the consumers should prevail on a motion for class certification if filed. The court limited its holding only to the district court's error and abuse of discretion in striking the class action allegations from the complaint in contravention of the Ninth Circuit's applicable precedent.

Concurrence. Judge Carlos Bea concurred in the result of the majority opinion, but disagreed with the majority's reasoning. He would have held under the principles of comity, that "a federal district court faced with an earlier denial of class certification in an earlier common dispute heard in a different district court should adopt the rebuttable presumption of correctness suggested by the ALI" and that was adopted by the trial court in this case. However, because he concluded that the presumption was rebutted, he concurred with the majority's result.

The case is No. 12-35946.

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