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MAY 18 2012

LEONARD GREEN, Clerk

Case No. 10-4188

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GINA GLAZER AND TRINA ALLISON,
Individually and on Behalf of All Others Similarly Situated

Plaintiffs-Appellees,

v.

WHIRLPOOL CORPORATION,

Defendant-Appellant.

On Appeal from the July 12, 2010, Class Certification Decision of the United States District Court for the Northern District of Ohio, Eastern Division at Cleveland, Ohio, Case Nos. 1:08-wp-65000 and 1:09-wp-65001

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF REHEARING EN BANC UNDER FEDERAL R. APP. P. 35

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-4188 Case Name: Glazer v. Whirlpool Corporation

Name of counsel: John H. Beisner

Pursuant to 6th Cir. R. 26.1, The Product Liability Advisory Council
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on May 18, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ John H. Beisner

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 35 AND SIXTH CIRCUIT LOCAL RULE 35

I express a belief, based on a reasoned and studied professional judgment, that the panel decision in *Glazer v. Whirlpool Corp.*, No. 10-4188, *available at* 2012 U.S. LEXIS 9002 (6th Cir. May 3, 2012), is contrary to decisions of the Supreme Court, the Sixth Circuit, and decisions of other federal courts of appeals.

The panel's decision is contrary to the decisions of the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997). The decision also conflicts with prior Sixth Circuit precedent, most notably *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1080, 1084 (6th Cir. 1996).

In addition, this appeal involves a question of exceptional importance because the panel's decision threatens to eviscerate substantive tort requirements by virtue of the class-action device. Such a result is not only at odds with *Dukes* and the Rules Enabling Act, *see* 28 U.S.C. § 2072(b), but also portends grave public-policy consequences for companies doing business in the United States.

s/John H. Beisner
John H. Beisner

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

The Product Liability Advisory Council ("PLAC") respectfully submits this brief as *amicus curiae* in support of appellant Whirlpool Corporation ("appellant" or "Whirlpool").

STATEMENT OF INTEREST

PLAC is a non-profit association with more than 100 corporate members representing a broad cross-section of American and international product manufacturers.[1] Since 1983, PLAC has filed more than 950 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. PLAC's members have an interest in the panel's ruling because its loose application of class-action procedure could dramatically increase the class-action exposure of PLAC's members and all companies doing business in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant en banc review because the panel opinion is contrary to the reasoning of Supreme Court and Circuit precedent on class-certification questions of great importance to the parties and to future litigants in this Circuit.

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[1] A list of PLAC's current corporate membership is attached as Appendix A.

The panel's precedent-setting errors are two-fold. *First*, the panel approved certification of a class consisting largely of uninjured individuals. Its reasoning misconstrued Circuit precedent, departed from decisions of other courts, and ran contrary to the Supreme Court's recent pronouncement that the class device cannot be used to afford relief to those who would have no claim in an individual action. *Second*, the panel also failed to engage in the necessary "rigorous analysis" in considering whether common issues predominate under Rule 23(b)(3).

If left to stand, the panel's opinion would bode ill for American businesses, which would face a mounting horde of purported "class" litigation premised on alleged defects that affect but a handful of consumers. The inevitable increase in the cost of doing business would be passed along to consumers, leaving only the plaintiffs' lawyers to benefit. The Court should grant review to prevent these results and to bring this Court's precedent in line with those of its sister courts, as well as the reasoning of the Supreme Court's class-action jurisprudence.

ARGUMENT

I. THE PANEL APPROVED A WILDLY OVERBROAD CLASS.

The panel's affirmance of the district court's ruling is premised on the mistaken belief that any overbreadth problems could be ignored because certification of a (b)(3) class may be appropriate even when "some class members have not been injured." (Opinion & Judgment at 14 (filed May 3, 2012) ("Op.")

(internal quotation marks and citation omitted).) But the word "some" cannot mean that certification is proper where – as here – plaintiffs conceded that *65%* of the class is uninjured and thus could not establish liability under state law. Otherwise, class actions threaten to become a mechanism for handing out free money to satisfied consumers. For this reason, most federal decisions have rejected proposed classes where "many persons in the class as defined . . . have suffered no injury." *In re McDonald's French Fries Litig.*, 257 F.R.D. 669, 672 (N.D. Ill. 2009) (refusing to certify a class of purchasers where many class members continued to consume the products at issue after the truth came to light – and thus had no injury); *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581, 596 (9th Cir. 2012) (class was "overbroad" because it was not "defined in such a way as to include only members who" could claim an injury and "exclude those members who" knew of a car's alleged defect before they bought it).[2]

The panel seemed to view the Sixth Circuit as more tolerant of overbreadth, citing *Gooch v. Life Investors Insurance Co. of America*, 672 F.3d 402 (6th Cir.

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[2] *See also, e.g.*, *In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.*, No. MDL 1703, 2009 U.S. Dist. LEXIS 97594, at *15-16 (N.D. Ill. Oct. 20, 2009) ("plaintiffs' proposed classes are 'wildly' overbroad" given that "a great many of the putative class members were not injured"); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513-14 (7th Cir. 2006) (upholding denial of class certification because the class "could include millions [of consumers] who were not deceived and thus have no grievance" against Coca-Cola); *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009) (class of all owners of an iMac was overbroad because definition included individuals who were not injured).

2012), for the proposition that injury to each class member is not a prerequisite to class certification. (Op. 14.) But *Gooch* does not suggest that class certification is appropriate where the vast majority of the class is uninjured. Moreover, *Gooch* concerned a class seeking declaratory relief under Rule 23(b)(2) – not monetary relief under 23(b)(3) – a distinction that *Gooch* expressly identified as material to its overbreadth conclusion. *See* 672 F.3d at 428. Accordingly, *Gooch* cannot excuse the panel's departure from the majority rule on overbreadth.[3]

The majority approach reflects profound policy concerns that the panel evidently overlooked. The rule against overly broad classes advances the substantive tort requirement that a plaintiff must be injured in order to recover. *See, e.g.*, *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) ("No injury, no tort, is an ingredient of every state's law."). This requirement does not disappear merely because class, rather than individual, relief is sought; to the contrary, the "Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C. § 2072(b)). Allowing a class to proceed even

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[3] The panel also suggested class members might be injured even if no defect has manifested, citing *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168 (9th Cir. 2010), a Ninth Circuit ruling by a panel that included Judge Gwin, sitting by designation. (Op. 14-15.) But *Wolin* addressed predominance, not overbreadth, and thus has no bearing on the question. *See, e.g.*, *Webb v. Carter's Inc.*, 272 F.R.D. 489, 505 (C.D. Cal. 2011) (distinguishing *Wolin* on this ground in concluding a class was too broad because many members lacked standing).

though it encompasses many individuals without injury contravenes the Rules Enabling Act by threatening liability to individuals only because they availed themselves of the class-action device.

The consequence of such an approach would be bad for business. It would grant plaintiffs' lawyers license to use the class device to turn every idiosyncratic product defect into a purported "classwide" issue – even when the vast majority of class members never experienced any problem. Such suits hurt the consumers they purportedly represent by providing a windfall to plaintiffs' lawyers at great cost to manufacturers, hurting innovation and raising prices on consumer goods. Whirlpool's petition for rehearing en banc should be granted to prevent this result.

II. THE PANEL FAILED TO CONDUCT A SUFFICIENTLY "RIGOROUS" PREDOMINANCE ANALYSIS.

Rehearing en banc is also in order because the panel ignored the Supreme Court's command in *Dukes* that a court conduct a "rigorous analysis" with respect to each class-certification requirement. Instead, the court intermingled the commonality and predominance requirements, virtually ignoring the latter, on the asserted ground that "we have no difficulty affirming the district court's finding that common questions predominate over individual ones[.]" (Op. 15.)

This terse analysis flies in the face of well-established Supreme Court precedent holding that "the predominance criterion is far more demanding" than the commonality requirement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624

(1997). It also conflicts with prior Sixth Circuit precedent and casleaw from other circuits recognizing the same principle. *See In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1080, 1084 (6th Cir. 1996) (highlighting that predominance is a "more stringent requirement" than commonality and ordering decertification of (b)(3) class involving product-liability claims); *Kilby v. CVS Pharm., Inc.*, No. 09cv2051-MMA (KSC), 2012 U.S. Dist. LEXIS 47855, at *19 (S.D. Cal. Apr. 4, 2012) ("If [plaintiff] cannot meet the less stringent commonality requirement of Rule 23(a), she certainly cannot meet the predominance requirement of Rule 23(b)(3).").[4]

As explained in *Dukes*, a truly "rigorous analysis" requires a court to determine whether the plaintiff has "affirmatively demonstrate[d] his compliance with the Rule." *Dukes*, 131 S. Ct. at 2551. This "requires the court to 'find,' not merely assume, the facts favoring class certification.'" *Altier v. Worley Catastrophe Response, LLC*, No. 11-241, 2011 U.S. Dist. LEXIS 85696, at *9 (E.D. La. July 26, 2011) (citation omitted). Only then can the trial court engage in a "meaningful determination of the certification issues.'" *Id.* (citation omitted).

As other federal appeals courts have determined, the panel's conclusion that the presence of one common issue satisfies the predominance requirement is not sufficiently "rigorous" to satisfy this test. *See, e.g.*, *Jackson v. Motel 6*

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[4] *See, e.g.*, *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1175 (11th Cir. 2010); *Kennedy v. Natural Balance Pet Foods, Inc.*, 361 F. App'x 785, 787 (9th Cir. 2010).

Multipurpose, Inc., 130 F.3d 999, 1006 (11th Cir. 1997) (ordering lower court to decertify class because, *inter alia*, "the single common issue . . . whether Motel 6 has a practice or policy of discrimination – is not rendered predominant" in light of "all the other issues that will attend the *Jackson* plaintiffs' claims"); *Kennedy*, 361 F. App'x at 787 ("[t]he district court's analysis under Rule 23 conflates . . . commonality . . . with the more rigorous predominance requirement").

A proper analysis could not have concluded that common issues predominate. For example, the panel ignored myriad individualized affirmative defenses that destroy any semblance of predominance – in particular, evidence that washer misuse could have been the cause of any "defect." In so doing, it ignored yet another dictate of *Dukes*: "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its . . . defenses to individual claims." 131 S. Ct. at 2561. The panel's cursory analysis of predominance, which is contrary to well-settled Supreme Court and other federal appellate court precedent, thus supports Whirlpool's petition for rehearing en banc as well.[5]

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[5] The panel's analysis regarding superiority was similarly perfunctory, summarily holding that this essential prerequisite was satisfied on the ground that "class members are not likely to file individual actions because the cost of litigation would dwarf any potential recovery," while ignoring the practical difficulties posed by an aggregate trial of varying claims. (Op. 15.)

CONCLUSION

For the foregoing reasons, and those stated by appellant Whirlpool Corporation, the petition for rehearing en banc should be granted.

Dated: May 18, 2012

Respectfully submitted,

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APPENDIX A

CORPORATE MEMBERS OF THE
PRODUCT LIABILITY ADVISORY COUNCIL

3M
A.O. Smith Corporation
ACCO Brands Corporation
Altec Industries
Altria Client Services Inc.
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire the Americas LLC
Cooper Tire and Rubber Company
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors Corporation

GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pella Corporation
Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.

Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Segway Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Techtronic Industries North America, Inc.
Terex Corporation
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief Of The Product Liability Advisory Council As *Amicus Curiae* Supporting Appellant's Petition For Rehearing En Banc was filed via the Court's electronic filing system on May 18, 2012, which will serve electronic notice to all parties of record.

s/John H. Beisner
John H. Beisner