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CLASS ACTION BLOG

Third Circuit Affirms Class Certification Denial of Nationwide and Four-State Classes

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Summary: Patricia Wright and Kevin West sued Owens Corning and Owens Corning Sales, LLC ("Owens Corning") in Pennsylvania pursuing a nationwide class action case for allegedly selling defective roofing shingles. The summary judgment ruling in favor of the Defendants was partially reversed on appeal which led Wright and West to join with Jaime Gonzalez and others in filing similar suits in California, Illinois, Pennsylvania, and Texas. Those cases were then transferred and consolidated in Pennsylvania. The District Court denied the motion to certify the Nationwide and Four-State Class Action cases, rulings the 3rd Circuit affirmed in March of 2018. The case was before the 3rd Circuit on a Rule 23(f) appeal.

Gonzalez v. Corning

Plaintiffs are California, Illinois, Pennsylvania, and Texas homeowners who had Owens Corning Oakridge shingles installed on their roofs. They alleged that the shingles did not perform as promised because they were "manufactured 'in accordance with defective design specifications.'" The Oakridge shingles were all subject to warranties of at least 25 years, which Plaintiffs contended amounted to "affirmative representations about the shingles' expected useful life." The Four-State Class alleged state law causes of action against Owens Corning, while the Nationwide Class sought a "ruling regarding the legal standard governing whether Owens Corning can use a bankruptcy discharge defense to shield itself from liability." (The original district court summary judgment for Owens Corning had denied that relief.)

The Four-State Class was defined as "all individuals and entities that own a building or structure physically located in the states of California, Illinois, Pennsylvania, or Texas on which Owens Corning's Oakridge-brand shingles were installed from 1992 through 2012, and where those shingles manifested any cracking, degranulation, fragmentation, or deterioration during the warranty coverage period." The Nationwide Class was defined to include "all individuals and entities that own a building structure physically located in the United States on which Owens Corning's Oakridge-brand shingles are currently installed, where those shingles were purchased on or before September 26, 2006." (The 2006 date was when the "Bankruptcy Court… confirmed a reorganization plan for Owens Corning".)

During the 20-year period proposed for the Four-State Class Action, Owens Corning had "manufactured at least 23 kinds of Oakridge shingles at 13 different plants around the country using more than 500 design specifications. Plaintiffs did not dispute that all of these specifications met the applicable industry standard (ASTM D3462), which prescribes minimum measurements for newly manufactured shingles."

The District Court had concluded that the Four-State Class Plaintiffs "had not met their burden under Rule 23(b)(3) to show that 'questions of law or fact common to class members predominate over any question affecting only individual members'" and that it was inappropriate to certify an issues class "to decide issues of liability." Regarding the Nationwide Class the District Court held that class could not satisfy the Rule 23(a) commonality requirement "because the only common question it presented was not justiciable."

The 3rd Circuit first tackled the question whether the Nationwide Class Action established the justiciability of the question: "What legal standard governs the dischargeability of Owens Corning?" Unless it could, "the Nationwide Class cannot satisfy the commonality requirements and certification is inappropriate under either Rule 23(b)(1)(B) or (b)(2)." The Court supported that conclusion by citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). The Court affirmed the District Court regarding the Nationwide Class "because the only common question it poses can be answered only by way of an advisory opinion, which is forbidden by Article III."

Owens Corning had assured Plaintiffs and the Court "that it will not raise a discharge defense." Despite that assurance, Plaintiffs wanted a court ruling which "precluded [Owens Corning] from raising a discharge defense" just in case Owens Corning changed its mind at a later date and a Court in a hypothetical future case failed to rule that Owens Corning was collaterally estopped from doing so. There was no commonality because the applicable bankruptcy test required "a fact intensive analysis of each claim under the applicable state limitations law, [and] a court's declaration that '[the bankruptcy test] applies' would not determine whether the claims held by individual members of the Nationwide Class were discharged. That would depend on the outcome of the [bankruptcy test] analysis as applied to each claim." Having obtained partial success in the earlier appeal, the Plaintiffs wanted the Court to declare that the bankruptcy test applied, but in a class context, so they could then use that ruling "as a preemptive strike in the event Owens Corning might raise a discharge defense in future litigation." Because "the sole common question the Nationwide Class asked the District Court to answer was not justiciable under Article III," the 3rd Circuit affirmed the District Court's ruling "that Plaintiffs could not satisfy the commonality requirement of Rule 23(a)."

Turning to the Four-State Class the Court relied in part on its 2009 ruling in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3rd Cir. 2009). The 3rd Circuit agreed that the "defect question is primary, because success on each claim requires a finding that Oakridge shingles are defectively designed. This is because '[t]he only misrepresentations or omissions that Owens Corning is accused of making are that Oakridge-brand shingles will last for at least 25 years, or for the same number of years as the limited shingle warranty.'" Accordingly, the Court examined whether defective design was "susceptible to class-wide evidence" as the dispositive issue of "whether Plaintiffs can satisfy predominance."

Plaintiffs argued that "all Oakridge shingles could be considered defectively designed, regardless of their actual measurements for performance, because Owens Corning's design specifications provided for a range of measurements that resulted in some shingles having a higher-than-advertised likelihood of failing before the warranties expired. It therefore did not matter that Plaintiffs' expert could not identify the particular measurements that supposedly rendered Oakridge specifications defective. Regardless of the quality of the shingles on the roofs, all Oakridge customers had unknowingly entered a 'shingle lottery.'" Plaintiffs admitted that "a great many Oakridge shingles will last through the end of their warranty periods, and that a shingle-by-shingle inspection is necessary to distinguish which ones that are likely to fail before the end of their warranty periods from ones that are likely to perform as expected (i.e., that are not defective)." For that reason, the 3rd Circuit was able to distinguish the *Gonzalez* case from "those [cases] in which the latency of an alleged defect did not pose an obstacle to certification." In *Gonzalez* the Plaintiffs were unable to "identify an alleged defect common to all Oakridge shingles" and further were unable to "specify where within a range of measurements a particular design 'crosses the line from producing non-defective products to producing defective products or to quantify how often defective products, versus non-defective products, were produced.'" In class litigation where the "proponents of the class do not allege a defect common to the class, the defectiveness of a given product is, by necessity, not susceptible to proof by class wide evidence."

The Plaintiffs had challenged on appeal the District Court's ruling that Plaintiffs' expert's testimony based on his testing of Oakridge shingles was inadmissible. He had tested a statistically insignificant number of shingles and the 298 he tested had been "returned in connection with a warranty claim, so they were the antithesis of a random sample" of the millions of involved shingles.

The Court concluded its analysis on that issue by stating that rather than "alleging a defect common to the class that might be proved by class wide evidence, Plaintiffs invite us to equate the existence of a defect with the mere possibility that one might exist. We find no support in Rule 23 or case law for class certification on such a speculative basis." The Court further held that the District Court had not abused its discretion, but rather had "properly concluded that Plaintiffs' novel reformulation of the concept of a product defect could not be permitted to work an end run around the requirements of Rule 23(b)(3)."

Plaintiffs relied on many cases to support their analysis, including: *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016), *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), *In re IKO Shingle Products Liability Litigation* 757 F.3d 599 (7th Cir. 2014), *Wolin v. Jaguar Land Rover N.Am., LLC*, 617 F.3d 1168 (9th Cir. 2010), *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010) (per curiam), *Daffin v. Ford Motor Co.*, 458 F.3d 549 (6th Cir. 2006), and *McManus v. Fleetwood Enterprises, Inc.*, 320 F.3d 545 (5th Cir. 2003). The Court concluded that each of those cases was inapposite and proceeded to distinguish them as dealing with latent defects or other issues not present in *Gonzalez*. For example, *Tyson Foods* had a predominant liability issue with individualized damages issues which could be determined later.

The *Gonzalez* opinion is important primarily for the way in which it dealt with the product defect theory of liability pursued as contrasted with the "latent defect" cases where other circuits had found it proper to certify a class action. It is also important for the way in which the Court applied its *In re Hydrogen Peroxide* decision and limited the *Tyson Food* analysis noting the common FLSA question while reserving the damages claim for later individual scrutiny. The Court was unwilling to adopt a "novel" design defect theory in order to allow the case to proceed as a class action case.

The Court's analysis regarding the justiciability of the potential collateral estoppel issue is also important. The Court did not cite *Spokeo* in its analysis, but rather relied on other Supreme Court and circuit court precedent to find the only potential common questions for the Nationwide class were not justiciable.