# SIDAK: Supreme Court must clean up washer mess

*Class-action cases will raise prices on goods*



By J. Gregory Sidak Thursday, November 15, 2012

Last spring, the U.S. Court of Appeals for the 6th Circuit upheld class certification in Glazer v. Whirlpool, a case in which two Ohio residents claim that their front-loading washing machines emitted unpleasant, but medically harmless, odors.

The class consists of all Ohio residents who bought front-loading washers made any time since 2001. Similar class actions already have been filed against other makers of front-loading washers, such as General Electric, Electrolux and LG.

The 6th Circuit's decision is significant because it affirmed the certification of a class in which the vast majority of class members had not suffered any injury. If not addressed by the Supreme Court, and especially if followed by courts in which similar lawsuits against other manufacturers have been filed, this case will broadly raise costs for manufacturers and prices for consumers.

Under the U.S. Constitution, federal courts do not have authority to decide hypothetical questions. To bring a suit, a plaintiff must show that he has suffered, or imminently will suffer, some harm. This principle is essential to a party having the requisite "standing" to sue and a federal court having the equally requisite jurisdiction to decide a "case or controversy."

The basic purpose of a class action is to aggregate many individualized claims into one representative lawsuit. When a certified class includes members who have not suffered and are not even likely to suffer harm, it includes parties whom a court would never allow to pursue individual actions. Therefore, the class should include only those plaintiffs who actually have a legitimate claim of harm.

Even though the two plaintiffs are Ohio residents who filed their case in a federal court in Ohio, which means the court must apply Ohio law, the 6th Circuit justified the inclusion of unharmed members in the class entirely by citing 9th Circuit and California cases that were decided under a provision of California law that does not exist in Ohio. Under the theory imported by the 6th Circuit, even unharmed class members may have incurred "injury" by having paid a "premium price" for a potentially underperforming product. Consequently, the 6th Circuit exposes defendants to liability for potential harm (through the premium-price theory) and actual harm (through the traditional damages approach). In addition, by relying on nonbinding California law, the 6th Circuit subverts the Ohio legislature's right to choose its own product-liability law.

Allowing a couple of individuals and their attorneys to "represent" a class that includes thousands, or even millions, of unharmed, satisfied members forces manufacturing firms to face a new layer of potential liability, which would induce those firms to choose inefficiently high -- that is, societally suboptimal -- levels of performance and information transmitted to the public for the products they produce. Firms would pass on to consumers through higher prices the added costs of increasing performance and informational detail. Furthermore, product differentiation would decline through

reduced offerings of products that have fewer advanced features and correspondingly lower prices.

In a competitive market, products are offered based on consumer preferences, not court-imposed performance standards. Some consumers prefer to purchase less expensive products that do not offer the performance features of more expensive products. Consumer preferences over price and performance options will vary for virtually all types of products. Some consumers will prefer a Ford Fiesta to a Ford Mustang. Others will prefer to pay a higher price for the Mustang, and others a still higher price for a Lincoln. By removing more affordable products from the market, some consumers may be entirely prevented from purchasing certain classes of products. Prices for all goods would likely increase. Consumer choice would be restricted, and consumers would necessarily be worse off.

Whirlpool faces suits because a small percentage of its front-loading washers are alleged to have emitted odors that are medically harmless. The 6th Circuit has increased the potential legal exposure not only for Whirlpool, but also for virtually any company that sells its products in the 6th Circuit. The errors in this case will ultimately be paid for by consumers through higher prices. The Supreme Court should take this case and make clear that a class action is proper only when used to recover for harms that its members actually have suffered.

*J. Gregory Sidak is chairman of Criterion Economics LLC and the Ronald Coase professor of law and economics at Tilburg University.*