When can a minnow grow into a whale? Ask Benton Harbour, Mich.-based washing-machine manufacturer Whirlpool Corp., which recently asked the Supreme Court for help reeling in leviathan litigation filed against it. The justices, in the end, left Whirlpool to the mercy of the Ohio courts, but the case illustrates the difficulty faced by businesses sued by a "class" for a small problem.

Although the Supreme Court refused to tackle Whirlpool's case head-on, the court has been very active confronting class actions during the last 18 months. This started when the Supreme Court dissolved a class of female Wal-Mart employees in the largest employment-discrimination class action ever filed in the U.S. Rulings in favor of Philadelphia-based Comcast Corp. (sued by customers complaining of being overcharged) and Dallas-based AT&T Inc. (sued by customers over cellphone contracts) further cut back on class actions. But, as Whirlpool can attest, the class action has hardly gone belly up. In 2005, two Ohio women each bought Whirlpool Duet washing machines. They were not fond of their purchases and alleged that their washing machines were moldy and contained a "pungent odor." Businesses never want to disappoint customers, but Whirlpool's problems became more pronounced when these two went to see some lawyers. Before long, the lawyers had retained expert witnesses in the disciplines of "laundry technology" and microbiology, and Whirlpool found itself before a federal judge, who had to decide if the two women could represent a class of persons who also purchased allegedly smelly, moldy washing machines from the defendant.

Just how hard is it for a case brought by two consumers with a small problem to morph into a massive class action? It's not very hard at all. The recipe is straightforward. First add a few paragraphs to the complaint alleging that the plaintiff is bringing the case on behalf of "others similarly situated" and that the case involves "common questions." Then find a judge who will rule that the case can proceed as a class action.

The two Ohio women found such a judge. This illustrates an important fact involving class actions: One judge, who is entrusted with broad discretion on the subject, decides whether a case should be about one plaintiff or, potentially, more than a million of them. What many businesses don't realize is that this decision — which is likely the most important one any trial judge makes in a civil case — is not based on the merits of the case. The judge makes a decision about the certification of a class on allegations, not proof. Essentially, the judge asks: Is this the kind of case that can fairly and efficiently be decided on a class-wide basis? And the decision of that one judge can be well-nigh conclusive on the subject. Although class-action rulings may be appealed, the higher court does not have to accept the case.

The legal system works if the participants believe it operates fairly. Whether you are a consumer or a business, you want a court to use facts and laws to decide the merits of your case. But obtaining that type of justice can be difficult when dealing with class actions. That is because the judge's decision whether to certify the class action is, in most cases, vastly more important than whether the underlying claims have merit. Whirlpool explained to the trial judge, among other things, that mold growth in its washing machines is quite rare. But that didn't matter to the judge. That question could be decided — on behalf of the

**Problem multiplied**

*Why businesses should care about class actions.*
Although a judge’s decision to certify a class is momentous, particularly because appeal prospects are uncertain, it isn’t written in stone.