LAW360

Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Airing Class Action Dirty Laundry In Washer Mold Cases

Law360, New York (May 28, 2013, 1:45 PM ET) -- In the ongoing saga of allegedly moldy "high efficiency" washing machines,[1] that very principle of "efficiency" has threatened to alter class certification analysis on a fundamental level. Specifically, in a recent reversal of a class certification denial involving allegedly defective Whirlpool-brand front-loading washing machines,[2] the Seventh Circuit announced in Butler v. Sears, Roebuck and Co. that it was clarifying the "concept of 'predominance' in class action litigation."[3]

The clarification was this: "Predominance is a question of efficiency."[4]

The Seventh Circuit's pronouncement is potentially as troubling as it was curt, and it is certain to be trumpeted by plaintiffs seeking certification. Indeed, it is already being touted as the new standard by which to analyze predominance.[5]

Yet, this new "predominance equals efficiency" analysis appears to conflict with significant precedent, including both the U.S. Supreme Court's recent holding in Wal-Mart v. Dukes[6] and the Seventh Circuit's own precedent.[7] These apparent inconsistencies prompted Sears to petition for rehearing, which the Seventh Circuit denied.[8]

The Seventh Circuit's denial of rehearing in Butler was hoped to have set the stage for the Supreme Court "to clarify the concept of 'predominance'" as the circuit court in Butler purported to do. As Sears argued in its petition for writ of certiorari, the Seventh Circuit in Butler did not "clarify the concept of 'predominance;'" rather, "the court effectively eliminated it, replacing it with an 'efficiency' standard that is satisfied if just one issue could be litigated efficiently."[9]

Butler follows another petition for appeal to the Supreme Court of a class certification grant in a companion "washer mold" case, Whirlpool Corp. v. Glazer.[10] Until recently, it seemed that resolution of these two cases by the Supreme Court could bring some much-needed clarity to class certification analysis, particularly with respect to predominance.

However, the Supreme Court in April granted certiorari in Glazer but then vacated the Sixth Circuit's class certification grant and summarily remanded — commonly referred to as a "GVR" 11 — "for further consideration in light of Comcast Corp. v. Behrend."[12]

It remains to be seen whether the GVR of Glazer signals a similar fate before the Supreme Court for Butler. As numerous amici and commentators have urged,[13] given the issues at stake to both class action jurisprudence and the business community, the Supreme Court should take the opportunity to review Butler on the merits.

Indeed, summary reversal of Butler without substantive consideration of the issues will leave litigants and practitioners mired in uncertainty and wanting for clear guidance from the Supreme Court, particularly on the critical issue of the proper scope of the predominance inquiry in class certification.

The Rise of "Efficiency" in Butler

Butler involved a putative class of plaintiffs alleging "that front-loading washing machines they bought from Sears, Roebuck and Co. have a design defect that causes musty odors and a manufacturing defect [in the central control unit (CCU)] that interrupts operation with false error codes."[14]

The district court denied certification as to the "odor class" and granted certification as to the "CCU class."[15] The district court held that the odor class failed to satisfy Rule 23(b)(3)'s predominance requirement because "numerous design changes prevented common issues from predominating over individual ones."[16]

On appeal, the Seventh Circuit reversed the district court's class certification denial as to the "odor class" and affirmed the district court's certification of the "CCU class."[17] The Seventh Circuit accepted the appeal expressly "to clarify the concept of 'predominance' in class action litigation."[18] To that end, the Seventh Circuit held that "predominance is a question of efficiency."[19]

Despite the possibility that "most members of the plaintiff class did not experience a mold problem," the Seventh Circuit found requisite predominance because, the court explained, a "class action is the more efficient procedure for determining liability and damages in a case such as this," where the alleged defect "may have imposed costs on tens of thousands of consumers yet not a cost to any one of them large enough to justify the expense of an individual suit."[20]

The Seventh Circuit denied Sears' motion for rehearing en banc, after which Sears petitioned the Supreme Court for writ of certiorari.[21] As of the publication of this article, that petition remains pending, with a conference set for May 30, 2013.[22]

Tension Among Butler and Rule 23(b), Supreme Court Precedent and Seventh Circuit Precedent

The appreciation for "efficiency" in Butler is nothing new, but its manifestation as the central element of a Rule 23(b) predominance analysis is striking for several reasons. In particular, the concept that "predominance is a question of efficiency" appears to be in tension not only with the language of Rule 23(b) but also with the Supreme Court's recent decision in Wal-Mart v. Dukes and the Seventh Circuit's own class certification jurisprudence.

Tension with Rule 23

The Federal Rules of Civil Procedure explain that predominance means something different from — and more than — mere efficiency. Specifically, Rule 23(b)(3) requires both that common questions predominate over individual ones and "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[23]

Because efficiency is an express consideration in the separate "superiority" requirement, the predominance of common questions must mean something different than mere efficiency. Indeed, as Sears noted in its petition for rehearing, "reducing predominance to efficiency, as the panel did, would effectively read the predominance requirement out of Rule 23."[24]

Moreover, the advisory committee notes to the Federal Rules of Civil Procedure suggest that predominance must mean something more — and require something more — than mere efficiency. The advisory committee notes indicate that a class action will only be an efficient method of adjudication if the common questions predominate over the individual: "It is only where this predominance exists that economies can be achieved by means of the class-action device."[25]

In other words, efficiency follows from predominance — but efficiency alone does not establish predominance. Thus, by conflating these two concepts,[26] and by equating predominance with efficiency, the Seventh Circuit appears to have created tension between its position on class certification analysis and the language of Rule 23.

Tension with Supreme Court Precedent

The second surprising feature of the Seventh Circuit's focus on efficiency is its apparent tension with Supreme Court class certification decisions. The most salient example is the relationship between the language in Judge Posner's Butler opinion and that of Justice Scalia in Wal-Mart v. Dukes.[27]

In Dukes, the Supreme Court reversed the Ninth Circuit's certification of a class of plaintiffs comprised of 1.5 million current and former female Wal-Mart employees alleging gender discrimination.[28] Addressing the nature of the "commonality" requirement of Rule 23(a)(2), Justice Scalia wrote, "What matters to class certification ... is not the raising of common 'questions' — even in droves — but, rather the capacity of a classwide proceeding to generate common answers."[29]

Relying on this reasoning from Dukes, Sears argued in Butler that the questions of fact plaintiffs raised were not susceptible to common answers because those individuals owned different models of washers that, due to numerous design modifications, “are differently defective and some perhaps not at all.”[30]

Sears argued further that the questions of law that plaintiffs raised were not susceptible to common answers because of “outcome-determinative” differences in the substantive law of the six states in which the plaintiffs resided.[31]

The Seventh Circuit rejected Sears’ argument, deciding that common questions of law and fact predominated over individual questions.[32] However, the Butler court’s reasoning for this conclusion seemed to reject Dukes by acknowledging that while “the basic question in the litigation ... is common to the entire mold class ... the answer may vary with the differences in design.”[33]

In other words, while Justice Scalia explained in Dukes that predominance requires common answers, Posner appeared to hold in Butler that predominance can lie despite different answers to common questions.

Attempting to reconcile Butler and Dukes is difficult. That difficulty is amplified by the fact that Butler does not cite or mention Dukes even once. Thus, parties are left without the benefit of the Seventh Circuit’s reasoning for how its ruling is consistent with or distinguishable from that of the Supreme Court precedent.

It is possible that the Seventh Circuit believed the two cases to be distinguishable because they addressed different aspects of class certification, with Butler addressing the concept of predominance and Dukes dealing specifically with commonality. But in light of Butler’s failure to even mention Dukes, such theories are mere speculation.

Butler also appears to create tension with the Supreme Court’s class certification approach in Amchem Prods. Inc. v. Windsor.[34] Amchem affirmed the Third Circuit’s reversal of the district court’s certification of a large class that “sought to achieve global settlement of current and future asbestos-related claims.”[35]

The district court had certified the class, finding Rule 23(b)(3)’s predominance requirement satisfied on two grounds: “class members’ shared experience of asbestos exposure” and “their common ‘interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system.’”[36]

The Supreme Court rejected this approach to predominance, holding, “The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration ... but is not pertinent to the predominance inquiry.”[37] Instead of weighing the benefits of the class action mechanism for a given group of plaintiffs, the court held, “The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”[38]

The Seventh Circuit's predominance-as-efficiency approach appears at odds with the predominance framework employed in Amchem. Whereas the Supreme Court in Amchem appeared to explicitly reject a weighing of costs and benefits in favor of a cohesion-based approach, Butler relies almost entirely on the concept of efficiency to find requisite predominance under Rule 23(b)(3).

As Sears stated in its certiorari petition, "The Seventh Circuit's treatment of predominance renders [Amchem's cohesion] requirement a nullity."[39]

Tension with Seventh Circuit Precedent

Butler appears to be at irreconcilable odds with Rule 23 and Supreme Court precedent. But it also seems to conflict with Seventh Circuit precedent and even some of Posner's own recent opinions, in several respects.

First, Posner expressed serious concerns with the "enhanced risk of costly error" in class action adjudication as recently as 2010 in Thorogood v. Sears, Roebuck and Co. [40] Thorogood involved the reversal and decertification of a class alleging Sears deceptively advertised its Kenmore-brand clothes dryers.

Concerned about the risk of "costly error" in class actions, Posner wrote: "But when the central issue in a case is given class treatment and so resolved by a single trier of fact, a trial becomes a roll of the dice; a single throw will determine the outcome of a large number of separate claims." Further, Posner wrote, "There is no averaging of divergent responses from a number of triers of fact having different abilities, priors, and biases."[41]

No such concern is evident, however, in Butler. Instead, in Butler, Posner suggested that the same defendant entitled to protection from the potentially "costly error" of sweeping class certification in Thorogood (Sears) should now welcome the certification of a class of individuals for whom common questions do not predominate.

Indeed, Butler explained: "But if [most members of the plaintiff class did not experience a mold problem,] that is an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate Sears — a course it should welcome, as all class members who had not opted out of the class action would be bound by the judgment."[42]

Butler fails to address the possibility that a single trier of fact could incorrectly enter a judgment for an entire class of plaintiffs, many of whom were not even injured.

Second, the Seventh Circuit decertified the class in Thorogood in part because of federalism concerns. Where class action claims are based on state law, Thorogood explained, the need to combine the substantive laws of many states in ways that may offer plaintiffs relief beyond the scope allowed by their own states threatens "to undermine federalism."[43]

In Butler, many members of the proposed class had not actually experienced a mold problem, yet only two or three of the six states where plaintiffs resided allowed breach-of-warranty claims for a defect that has not yet caused any harm.[44] Thus, the concern in Thorogood that a class action could undermine federalism by "expand[ing] the relief obtainable under state law"[45] should have been especially compelling in Butler.

But no such concerns appear in Butler; instead, the court cryptically explained that "every class member who claims an odor will have to prove an odor to obtain damages," but "class members who have not yet encountered odor can still obtain damages for breach of warranty, where state law allows such relief — relief from an expected rather than for only a realized harm from a product defect covered by an express or implied warranty."[46]

Third, Butler also raises questions about the appropriate level of review for district courts' class certification decisions. Butler recognized that class certification decisions are supposed to be left to the district court's discretion, "subject to light appellate review."[47] Sears presented strong arguments to the district court that common questions did not predominate because of the differences in factual circumstances (different model products with different designs and different degrees of harm) and differences in legal circumstances (different substantive laws regarding recovery for expected harms).

The district court, in the exercise of its discretion, agreed with those arguments and made similar findings on those issues. However, in light of what should have been a more deferential "abuse of discretion" standard, Posner's efficiency-based reversal suggests something more than mere "light appellate review."

In this regard, Butler suggests somewhat of a trend away from an abuse-of-discretion standard to something more like a de novo standard of review for class certification decisions in the Seventh Circuit and by Posner in particular.[48]

It is possible to read Butler as fitting within a general framework of past class certification decisions.[49] But given the irreconcilability of the Seventh Circuit's view of commonality with the Supreme Court's in Dukes, the tension between the Seventh Circuit's view of predominance and the Supreme Court's in Amchem and the seemingly differing analyses employed by Posner in Thorogood and in Butler, it appears that Butler endorses a new analytical framework for class certification.

The significance and staying power of the Seventh Circuit's approach will likely remain unclear without guidance from the Supreme Court.

Ramifications for the Future of Class Certification

While Butler remains pending before the Supreme Court, the Seventh Circuit's holding continues to gain traction with plaintiffs.[50] If the influence of the Seventh Circuit's Butler decision continues to spread, it could have a substantial effect on future class certifications. Although the contours of such changes will

become clearer with additional litigation, several concerns are immediately apparent.

First, the Seventh Circuit's willingness to certify a large class composed of some members who have experienced no harm is a frightening prospect for businesses. Indeed, the "no injury" class — in which a class of all owners of the same product can potentially be certified even if many or most of them have not been harmed by the alleged defect — can turn a minor potential warranty concern into a possible "bet the company" case.[51]

Even if subclasses are eventually created to weed out those class members whose states' laws do not provide for recovery where there is a mere potential for future harm, businesses may "drown in the discovery bog" before getting to that point.[52] In any event, the prospect of a single alleged defect with a miniscule incidence rate creating a productwide class threatens the imposition of massive discovery costs, forcing businesses to consider classwide settlements of predominately nonmeritorious claims.[53]

Moreover, as Sears noted in its certiorari petition in Butler, courts around the country are sharply divided as to whether certification is appropriate for classes with "thousands or millions of consumers who never experienced the alleged defect."[54] Butler adds to this division, and in the absence of guidance from the Supreme Court, litigants will be left to wonder whether multistate classes may properly consist of members who have not suffered any harm.

Second, many class action lawsuits settle before getting to the stage of damages subclasses. The Seventh Circuit's approach in Butler allows plaintiffs who may have no right to recovery to benefit from settlement agreements with class members who more arguably do have a right to recovery because the latter suffered some actual harm or live in a state that allows expectancy damages.

The Seventh Circuit expressed concern with "settlement extortion" in Thorogood.[55] Yet, Butler appears to create new opportunities for attorneys to practice exactly this kind of extortion by leveraging the threat of ever-mounting discovery costs into large, overinclusive settlements.

Third, Butler implies that class certification decisions are ultimately questions of efficiency and collapses what should be a nuanced, multiprong analysis into a nearly single-factor test. Class certifications will proliferate if plaintiffs need only show that a single lawsuit with thousands of plaintiffs would be a more efficient method of adjudication than thousands of individual lawsuits.

As the factors of commonality, typicality and predominance give way to a pure efficiency-driven analysis, defendants can expect the number of class action cases against them to rise substantially.

Next Stop: the United States Supreme Court or Back Down — or Nothing?

The future for this washer mold litigation, including Glazer and Butler, is uncertain. Before seeking review in the Supreme Court, and in petitioning for rehearing before the Seventh Circuit, Sears specifically invited the panel judges of the Seventh Circuit who disagreed with Judge Posner to dissent from the denial of rehearing in the hopes of facilitating further review of Glazer, Butler or both.[56] No

Seventh Circuit judge accepted that invitation.

Nonetheless, despite the apparent solidarity within the Seventh Circuit, the recent Comcast-driven GVR in Glazer, on which Butler specifically relied and with which Posner intended to align in authoring that opinion, certainly calls into question Butler's analysis, holding and continued vitality for several reasons.

First, many of the same issues that will be at play before the Sixth Circuit on remand in Glazer following Comcast are involved in Butler as well, including the issue of claims by parties who have not suffered any actual injury. Specifically, a major driver of the reversal of certification in Comcast was the fact that the plaintiffs could not show damages "capable of measurement on a classwide basis."[57]

Meanwhile, in Butler, the Seventh Circuit certified the class despite the lack of predominance of damages across the entire class, suggesting instead that "a determination of liability could be followed by individual hearings to determine the damages sustained by each class member" or that the parties could "agree on a schedule of damages based on the cost of fixing or replacing class members' mold-contaminated washing machines."[58] Comcast would seem to undermine, if not directly overrule, at least this aspect of Butler's analysis and ruling.

Second, Butler is very much in line with the dissent in Comcast, specifically on the issue of the propriety of certifying a class based on alleged commonality as to liability but not damages. Indeed, in their dissent, Justices Ginsburg and Breyer argued that the majority opinion in Comcast "should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable 'on a class-wide basis.'"[59]

Moreover, the dissenting justices did not limit their view about the lack of such a damage requirement to the peculiar antitrust facts of Comcast. Rather, they argued: "Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal."[60]

Thus, like the Seventh Circuit in Butler, the Comcast dissent urges that a "class may be divided into subclasses for adjudication of damages," or "at the outset, a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings"[6]1 — i.e., exactly the sort of piecemeal approach endorsed in Butler.[62]

Given the similarities between the reasoning in Butler and the Comcast dissent, and given that the Comcast majority opinion clearly conflicts with the Comcast dissent, it would seem that the Supreme Court should disagree with any suggestion that Comcast does not affect Butler, just as it rejected the same suggestion in Glazer by issuing its GVR there.

Third, the Seventh Circuit specifically stated that it believed Butler went hand-in-hand with Glazer, and the court explicitly endorsed the Glazer court's methodology and approach.[63] The parallels between Butler and Glazer at least partly explain why the Seventh Circuit ruled as it did in Butler — to avoid a circuit split.[64] This tethering would further suggest that, like Glazer, Butler is similarly affected by Comcast and thus deserving of further review, either by the Supreme Court — which would be

preferable — or below on a GVR.

Indeed, as Sears recently argued to the Supreme Court in Butler, while “plenary review” is warranted, the Supreme Court’s GVR of Glazer — “the Sixth Circuit decision on which the Seventh Circuit principally relied — means that at least a GVR is required” in Butler.[65]

Denying further review of Butler at some level in light of Comcast while Glazer undergoes such review does not seem viable as that would potentially result in the very “intercircuit conflict” Butler sought to avoid.[66]

It seems unlikely Butler will evade further review in light of Comcast and the GVR in Glazer. And while the ultimate outcome in Butler, Glazer and the other front-loading washer mold cases is currently uncertain, the stakes for class certification are clear.

As Sears argued to the Supreme Court in Butler, the issues presented in these cases involving millions of products are likely “to determine the fate of an entire industry.”[67] They may very well do that. But, depending on the class action precedent that ultimately results, these cases may also determine the fates of many other industries that find themselves besieged by similar sweeping class action litigation.

--By Robert L. Wise and Isaac W. Messmore, Bowman & Brooke LLP

Robert Wise is co-managing partner in the firm's Richmond, Va., office. Ike Messmore is an associate in the Minneapolis office.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] The case that is the main focus of this article — Butler v. Sears, Roebuck and Co. — is one of many similar alleged washing-machine-odor-defect cases pending throughout the country against all of the major manufacturers. See, e.g., In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-wp-65000 (N.D. Ohio); Spera v. Samsung Elecs. Am., 2:12-cv-05412 (D.N.J.); Fishman v. Gen. Elec. Co., 2:12-cv-00585 (D.N.J.); Montich v. Miele USA, Inc., 3:11-cv-02725 (D.N.J.); Terrill v. Electrolux Home Prods., Inc., 1:08-cv-00030 (S.D. Ga.); Harper v. LG Elecs. USA, Inc., 2:08-cv-00051 (D.N.J.).

[2] The opinion also affirmed the district court’s grant of certification to a separate class of plaintiffs claiming that a manufacturing defect in certain washing machines’ central control units caused them to stop working. In the interest of brevity, this article will focus on the proposed “mold class” only.

[3] Butler v. Sears, Roebuck and Co., 702 F.3d 359, 361 (7th Cir. 2012).

[4] Id. at 362.

[5] See, e.g., Harris v. comScore, No. 11 C 5807 *10 n.9 (N.D. Ill. Apr. 2, 2013) (citing Butler for the proposition that “individual factual damages issues do not provide a reason to deny class certification when the harm to each plaintiff is too small to justify resolving the suits individually” and granting, in part, the plaintiffs’ motion for class certification). At least six certification-related motions have cited Butler for some variant of the proposition that predominance is a question of efficiency.

[6] 131 S.Ct. 2541, 2551-52 (2011).

[7] See, e.g., Thorogood v. Sears, Roebuck and Co., 547 F.3d 742, 748 (7th Cir. 2008); In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1020-21 (7th Cir. 2002).

[8] Butler v. Sears, Roebuck and Co., 702 F.3d 359, reh’g denied Dec. 19, 2012.

[9] Pet. for Writ of Cert. at *3, Sears, Roebuck and Co. v. Butler, No. 12-1067 (U.S. Feb. 27, 2013).

[10] Glazer v. Whirlpool Corp., 678 F.3d 409 (6th Cir. 2012), cert. granted, No. 12-322 (U.S. April 1, 2013).

[11] See, e.g., Lawrence v. Chater, 516 U.S. 163, 167 (1996) (“Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.”).

[12] Whirlpool Corp. v. Glazer, 133 S.Ct. 1722 (2013) (referring to Comcast v. Behrend, 133 S.Ct. 1426 (2013)). In Comcast, the Supreme Court reversed the Third Circuit and decertified a class consisting of Comcast cable-television service subscribers alleging various antitrust violations. 133 S.Ct. at 1430. In an opinion authored by Justice Scalia, the Court held that Rule 23(b)(3)’s predominance requirement was not satisfied because “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.” Id. at 1433. The Court further stated that “courts must conduct a ‘rigorous analysis’ at the class certification stage to determine whether the plaintiffs’ damages model “establish[es] that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).” Id. at 1433 (citing Dukes, 131 S.Ct. at 2551-52).

Whirlpool had alternatively suggested a “grant, vacate, and remand” in light of Comcast as one possible form of relief, after the preferred options of granting certiorari or summary reversal. Supp. Br. for Pet’r, Whirlpool Corp. v. Glazer, No. 12-322, at *5 (U.S. Mar. 28, 2013). Glazer, on the other hand, argued that Comcast changed nothing, and that the Court should neither grant certiorari not remand in light of Comcast. Br. of Resp’ts at 10, Sears, Roebuck and Co. v. Butler, No 12-1067 (U.S. April 30, 2013).

[13] In addition to amici Product Liability Advisory Council, the Chamber of Commerce of the United States of America, the Pacific Legal Foundation, and DRI, the Wall Street Journal and the Washington Times in several newspaper articles also urged the Court to grant certiorari to address the class action

issues arising in these “washer mold” cases. See, e.g., Supreme Laundry List: The Justices Should Hear a Misguided Class-Action Case, Wall St. J., Oct. 9, 2012, at A18; J. Gregory Sidak, Supreme Court Must Clean Up Washer Mess, Wash. Times, Nov. 15, 2012, at B4.

[14] Pet. for Writ of Cert. at *i, Butler.

[15] Id. at *2.

[16] Id.

[17] Butler, 702 F.3d at 363-64.

[18] Id. at 361.

[19] Id. at 362.

[20] Id.

[21] See Pet. for Writ of Cert. at *1, Butler.

[22] Supreme Court Docket, Sears, Roebuck and Co. v. Butler, No. 12-1067, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-1067.htm (last visited May 15, 2013).

[23] Fed. R. Civ. P. 23(b)(3).

[24] Pet. for Reh’g En Banc at *6, Butler v. Sears, Roebuck and Co., Nos. 11-8029, 12-8030 (7th Cir. Nov. 27, 2012).

[25] Fed. R. Civ. P. 23(b)(3), Advisory Committee Notes to 1966 Amendment.

[26] Butler also appears to conflate predominance with superiority. Specifically, at the same time that it equates predominance with efficiency, Butler explains: “A class action is the more efficient procedure for determining liability and damages in a case such as this, involving a defect that may have imposed costs on tens of thousands of consumers yet not a cost to any one of them large enough to justify the expense of an individual suit.” Butler, 702 F.3d at 362. This analysis sounds more appropriate for a superiority determination than a predominance inquiry. See, e.g., 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1779, 167 (3d ed. 2005) (holding that the superiority standard may be satisfied when “the economics of the situation make it impossible for the aggrieved [class] members to vindicate their rights by separate actions”); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997) (noting Rule 23’s requirement that “class resolution must be ‘superior to other available methods for the fair and efficient adjudication of the controversy’” (emphases added)); In re TWL Corp., No. 12-40271, n.11 (5th Cir. March 29, 2013) (stating that efficiency and cost-

effectiveness are properly considered "in analyzing Rule 23's superiority requirement").

[27] Dukes, 131 S.Ct. at 2551-52.

[28] Id. at 2547.

[29] Id. at 2551.

[30] Butler, 702 F.3d at 361.

[31] Pet. for Reh'g En Banc at *10, Butler.

[32] See Butler, 702 F.3d at 361.

[33] Id.

[34] 521 U.S. 591 (1997).

[35] Id. at 597.

[36] Id. at 622.

[37] Id. at 622-23.

[38] Id. at 623.

[39] Pet. for Writ of Cert. at *16, Butler.

[40] Thorogood v. Sears, Roebuck and Co., 624 F.3d 842, 849 (7th Cir. 2010). This citation is to one of three appearances Thorogood made before the Seventh Circuit. The others are 627 F.3d 289 (7th Cir. 2010) and 547 F.3d 742 (7th Cir. 2008).

[41] 624 F.3d at 849.

[42] Butler, 702 F.3d at 362.

[43] Thorogood, 547 F.3d at 745; see also In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020-21 (7th Cir. 2002).

[44] See Butler, 702 F.3d at 362.

[45] 547 F.3d at 746.

[46] Butler, 702 F.3d at 362.

[47] Id. at 361; see also Califano v. Yamasaki, 442 U.S. 682, 703 (1979) (noting "certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court" and reviewing under an abuse-of-discretion standard).

[48] See, e.g., Thorogood, 547 F.3d at 748 (reversing the district court and decertifying the class after a thorough certification analysis that does not include the word "discretion"); Butler, 702 F.3d at 361, 363 (reversing the district court as to its denial of the mold class certification under putatively "light appellate review"); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 492 (7th Cir. 2012) (reversing the district court and decertifying the class after a thorough certification analysis).

[49] For instance, Thorogood is potentially distinguishable in that it was a false advertising case where there was no indication, according to Judge Posner, that anyone in the proposed class other than Thorogood himself was misled by Sears's representations or relied on those representations in their purchasing decisions. 547 F.3d at 747-48. Indeed, the case was later described by Judge Posner as a "near-frivolous class action suit." 624 F.3d at 843. Nevertheless, the Seventh Circuit's concerns about the cost of error, risk to federalism, potential for unfairly burdensome discovery, or risk of lawyer collusion and settlement extortion expressed in the Thorogood opinions are wholly absent from Butler.

[50] See, e.g., Harris v. ComScore, supra note 5.

[51] Br. of the Chamber of Commerce of the United States of America et al. as Amici Curiae in Supp. of Pet'r at 19, Sears, Roebuck and Co. v. Butler, No. 12-1067 (U.S. April 1, 2013).

[52] Thorogood, 624 F.3d at 851 (7th Cir. 2010) (noting the potential in large class actions for defendants to be "drowned in the discovery bog").

[53] See, e.g., AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

[54] Pet. for Writ of Cert. at *26-28, Butler (noting the Second, Third, Fifth, Eighth, and Eleventh circuits have rejected "no-injury class actions," while the "Sixth and Ninth circuits have adopted the opposite position"); see also id. at *26-27 (citing cases involving a similar division at the district court level).

[55] 624 F.3d at 848.

[56] Pet. for Reh'g En Banc at *15, Butler.

[57] 133 S.Ct. at 1433.

[58] Butler, 702 F.3d at 362.

[59] 133 S.Ct. at 1436 (Ginsburg & Breyer, JJ., dissenting).

[60] Id. at 1437.

[61] Id. at 1437 n.*.

[62] Butler, 702 F.3d at 361-62.

[63] Butler, 702 F.3d at 363 ("The Sixth Circuit recently upheld the certification of a single mold class in a case, identical to this one (except that it did not involve the other claim in this case, the control unit claim), against Whirlpool. In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation, 678 F.3d 409 (6th Cir.2012). For us to uphold the district court's refusal to certify such a class would be to create an intercircuit conflict—and a gratuitous one, because, as should be apparent from the preceding discussion, we agree with the Sixth Circuit's decision.").

[64] Id.

[65] Reply Br. for Pet'r at 2, Sears, Roebuck and Co. v. Butler, No. 12-1067 (U.S. May 13, 2013).

[66] Id.; see also Br. of Resp'ts at 10, Sears, Roebuck and Co. v. Butler, No. 12-1067 (U.S. April 30, 2013) (arguing that "the central legal issues in [Butler] are identical to those presented in Glazer").

[67] Pet. for Writ of Cert. at *6, Butler.

All Content © 2003-2013, Portfolio Media, Inc.