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November 16 **2012**

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7th Circuit Provides Much Needed Clarification of Class Action "Predominance" Requirement: *Butler v. Sears*

Occasionally when I sit down to write my weekly blog post, I am left mulling over several equally worthwhile topics to cover. Other times, there is absolutely no question what the post ought to be about. This week's post arises in the latter category. This past week, the Seventh Circuit Court of Appeals handed down a vitally important decision in the world of class action case law. The decision, *Butler v. Sears, Roebuck and Co.*, helped to provide some much needed clarification of the "predominance" requirement in certifying a class.

As a quick overview, the basis for certifying a class for the purposes of a class action case in federal court is outlined in Rule 23 of the Federal Rules of Civil Procedure. The rule sets forth three types of class actions that can proceed under it. The most typical type of class to be sought is one that is certified pursuant to Rule 23(b)(3). One requirement under Rule 23(b)(3) for certifying a class is "that the questions of law or fact common to class members predominate over any questions affecting only individual members[.]" It is this requirement that was addressed by

the *Butler* opinion. For further discussion on the basics of class certification, look to our previous post "How Does a Class Action Case Work?"

The opinion was written for the unanimous court by the famous Judge Richard Posner; a man whose sometimes considered to be more infamous by law students who struggle through his complex analytical approach to cases. I add this discussion to understand the weight behind the voice writing for the court in this case. The case came before the appellate court after the district court denied plaintiff's motion to certify a class for Whirlpool washers but certified a class for Kenmore washing machines. The case was permitted appeal for the sole purpose of clarifying the "predominance" requirement.

The case pertains to defect in Whirlpool and Kenmore washing machines that lead to mold problems. This action sought to certify classes of plaintiff's from six states. A sister case to this one arose in Ohio. The case, *In re: Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, made its way up to the Sixth Circuit Court of Appeals. There, the court upheld the certification of an Ohio class of plaintiffs for this issue and found that "predominance" was not an issue that would preclude certification.

Returning to *Butler*, the court had to address two issues: (1) whether the trial court erred in not certifying a class of Whirlpool owners; and (2) whether it erred in certifying a class of Kenmore owners.

I. Whirlpool Owners

With regards to the Whirlpool owners, the issue was that Sears argued "that Whirlpool made a number of design modifications as a result of which different models are differently defective and some perhaps not at all, and therefore common questions of fact concerning the mold problem and its consequences do not predominate over individual questions of fact." The trial judge agreed with this position and refused to certify the class. The Seventh Circuit, however, did not agree with it.

Before we delve into the court's analysis, let us consider why the trial judge would have agreed with the position of Sears. At the heart of the "predominance" requirement is that "questions of law or fact" must predominate over individual issues. What Sears argued is that because there were so many variations in models that it would be impossible to establish a class wide determination when each model would have to be shown to have a defect and then each class member would have to be shown to have owned each model. Now that we are clear on Sears' position and what the trial judge hung her hat upon, we can examine why Sears was wrong.

The court found that "predominance" is ultimately a question of efficiency. Thus, to determine whether the "predominance" requirement is met, the question must be, "Is it more efficient, in terms both of economy of judicial resources and of the expense of litigation to the parties, to decide some issues on a class basis or all issues in separate trials?" In this case, the court found that "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." The court went on to point out that if the sole issue were determining the damages to class members, then that issue alone is not sufficient to deny class certification.

Sears, like countless defendants who fail to fully understand the class action process, argued that a class could not be certified because most members of the class did not have mold problems. The court replied that even this is true, "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 did not opt out of the class action would be bound by the judgment." The court went on to recognize that in two or three of the states – California, Illinois, and maybe Texas – a plaintiff can succeed on a defective product claim even if the product has not yet failed.

The court also acknowledged the Sixth Circuit's opinion in *In re: Whirlpool Corporation* and found that to deny class certification would have the result of creating a circuit split – *id est* having different law in different federal circuits. The result was the court reversing the trial judge's denial of class certification for Whirlpool owners.

II. Kenmore Owners

The class of Kenmore owners, unlike the Whirlpool class, was certified by the trial court. Thus, procedurally, the appeal of this issue was brought by Sears where the Whirlpool issue had been brought by the owners. Sears argued that this class ought to be decertified due to individual issues. The issue of Kenmore washing machines stems from defective circuit boards. The court found:

> The only individual issues—issues found in virtually every class action in which damages are sought—concern the amount of harm to particular class members. It is more efficient for the question whether the washing machines were defective—the question common to all class members—to be resolved in a single proceeding than for it to be litigated separately in hundreds of different trials, though, were that

> approach taken, at some point principles of *res judic*ata or collateral estoppel would resolve the common issue for the remaining cases.

To summarize, the court found, again, that if the only issue is damages, then that will not preclude the certification of a class. Moreover, the court noted a practical reason for class certification. That reason stems from the principles of *res judicata* or collateral estoppel. These principles were explained in our prior post: "How a Prior Case Can Impact Your Current Case: Issue and Claim Preclusion."

The ultimate result was that both the Whirlpool and Kenmore owner classes were certified and a very important decision that further describes how the "predominance" requirement works. The big take away is that "predominance" is ultimately a question of efficiency and where determination of damages are the only issue then "predominance" will be met by the value of adjudicating numerous claims at once through the class action procedure.

Join us again next time for further discussions of developments in the law.

****UPDATE****

The defendant, Sears, Roebuck and Company, sought certiorari of this case to the Supreme Court of the United States. On June 3, 2013, the Court granted certiorari, thus vacating the decision of the Seventh Circuit Court of Appeals. The Court's order stated:

> The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of Comcast Corp. v. Behrend, 569 U.S. ___ (2013).

Sources

- *Butler v. Sears, Roebuck and Co.*, 702 F.3d 359 (7th Cir. 2012), *reh'g and reh'g en banc denied*, *cert. granted sub nom., Sears, Roebuck & Co. v. Butler*, 12-1067, 2013 WL 775366 (U.S. June 3, 2013).

- *In re: Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 678 F.3d 409 (6th Cir. 2012), *reh'g and reh'g en banc denied*, *cert. granted and judgment vacated sub nom., Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013).

- Federal Rule of Civil Procedure 23.