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7th Circuit Again Certifies *Butler v. Sears, Roebuck, & Co.* Class

On Thursday, the Seventh Circuit Court of Appeals handed down its decision in *Butler v. Sears, Roebuck, & Co. II*. The court once more certified the two classes despite remand from the Supreme Court of the United States after a grant, vacate, and remand (GVR) order in light of the case *Comcast Corp. v. Behrend*. If you are a regular to the Hoosier Litigation Blog, then you know this is a decision that I have been waiting on with bated breath. It is not that I ever had even the slightest doubt that the Seventh Circuit would once more certify the class, but that I was anxious to see Judge Posner's thoughts on the application of *Comcast*.

A brief bit of background is necessary to understand the importance of this decision. Under the Federal Rules of Civil Procedure, Rule 23 governs class action cases. In order to certify a class, the party seeking certification must meet the prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy. The party must then meet the requirements of one of the three sections of Rule 23(b). Rule 23(b)(3), at issue in both *Butler I* and *Comcast*, requires that common issues predominate over individual issues and that the class mechanism is superior to other methods. Typically, this is interpreted to establish two general requirements: (1) that common issues "predominate" and (2) "superiority."

I am not going to delve into great detail about the general value of *Butler I*

because I have already done so in great detail in another post: *7th Circuit Provides Much Needed Clarification of Class Action "Predominance": Requirement: Butler v. Sears*. For our purposes, it is sufficient to say that *Butler I* stood for the proposition that predominance is fundamentally a question of efficiency. *Comcast*, on the other hand, is a case that no one can quite figure out what it stands for. Some courts have interpreted it for the blanket proposition that predominance has the additional hurdle of requiring a showing that damages can be calculated on a classwide basis. However, this proposition flies in the face of a long line of cases that say the exact opposite. I have contended that the case is limited to the rather unremarkable proposition that when a mechanism for demonstrating damages is advanced, that mechanism must be tied to the actual theory of damages for which the class is certified.

In the wake of *Comcast*, the Supreme Court issued three GVR orders whereby they granted certiorari – their discretionary review power – over the cases, then vacated the opinions without any discussion, and remanded the cases to their respective circuit courts. One of the cases was a sister case to *Butler I – In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation I* from the Sixth Circuit. Another was the Seventh Circuit's decision in *Ross v. RBS Citizens, N.A*. The third, obviously, was *Butler I*. At the time, your author was openly critical of the Supreme Court's decision. I asked, by way of blog post, "*Is the Supreme Court Needlessly Using Comcast Corp. v. Behrend to Vacate Certified Classes?*"

Last month, I informed our loyal readers that the Sixth Circuit had reaffirmed class certification in *Whirlpool II*. In my post on the *Whirlpool II* decision I stared into my crystal ball and prognosticated the following:

> In light of *Whirlpool II*, I think it is all but a foregone conclusion that the Seventh Circuit will recertify the class in *Ross*. It is less clear whether the court will do the same in *Butler*, but if I were a betting man I'd set the odds at a comfortable 80-20 in favor of Judge Posner distinguishing *Comcast* and recertifying the *Butler* classes.

My *Butler* odds may have been a bit too generous in favor of Sears. With the case back before the Seventh Circuit and before Judge Posner, we now have one of the most authoritative discussions of the *Comcast* cases outside of the confusing text of the case itself.

After discussing the background of the *Butler I* decision, the court moved on to the question at hand, "So how does the Supreme Court's *Comcast* decision bear on the rulings, just summarized, in our first decision?"

The Seventh Circuit summarized the *Comcast* as "hold[ing] that a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of the class-wide injury that the suit alleges." The court then distinguished *Comcast* because, "there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis[.]" Specifically, the two classes were separated specifically on the basis for their damages: the mold class, deriving harm from mold issues in the machines, and the control class, claiming damage from a defect in the control unit.

Sears argued that the *Comcast* holding had rejected the *Butler I* position that predominance "is a question of efficiency." Shockingly, in support of that position, Sears only citation came from the *Comcast* dissent stating "that 'economies of time and expense' favor class certification." Mind you, this is the same dissenting opinion that stated, "[T]he opinion breaks no new ground on the standard for certifying a class action under [Rule] 23(b)(3)." The Seventh Circuit rejected the citation and argument as inherently flawed in that it relies on the errant view that anything voiced in a dissenting opinion must necessarily be disapproved by the majority opinion.

After rejecting Sears' argument, the court turned to the question that has left your authored puzzled for months, "But if we are right that this is a very different case from *Comcast*, why did the Supreme Court remand the case to us for reconsideration in light of that decision?" The court found that the answer must be the "emphasis" that the opinion places on courts rigorously scrutinizing the predominance requirement.

Judge Posner and I must depart a bit on this answer. It is true that the *Comcast* decision stands for the position that a trial court must go through a rigorous analysis prior to determining the merits of class certification and that the "predominance criterion is even more demanding" than the prerequisites of 23(a). However, the portion that requires rigorous analysis is a direct quotation from *Wal-Mart Stores, Inc. v. Dukes* and the demanding nature of predominance is directly from *Amchem Products, Inc. v. Windsor*. Both decisions predate *Butler I*. Consequently, I fail to see how that portion of *Comcast* could be sufficiently novel as to mandate a GVR. Also a bit surprisingly absent from the discussion is the position voiced heavily by the Sixth Circuit in *Whirlpool II*: "a GVR order does not necessarily imply that the Supreme Court has in mind a different result in the case, nor does it suggest that [the] prior decision was erroneous."

In addressing the arguments made by Sears in its petition for certiorari to the Supreme Court, the Seventh Circuit recognized that "[a]n issue 'central to the

validity of each of one of the claims' in a class action, if it can be resolved 'in one stroke,' can justify class treatment." Moreover, that predominance "is not bean counting." Meaning, that it is not a test of whether there are more common issues than individual issues. In its strongest pronouncement, perhaps driven by the outbreak of vampire fever among American teenagers, Judge Posner wrote,

> It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregated magnitude but so widely distributed as not to be remediable in individual suits.

A last point, of substantial weight, is that the court recognized the recent decision by the Sixth Circuit in *Whirlpool II* as a basis for recertifying the *Butler II* class. The court found that, in so doing, the decision would be in line with *Whirlpool II* and thereby prevent a circuit split.

With only one more GVR case remaining – *Ross* – it seems like the future of *Comcast* is to be limited to its facts. Two circuits have now strongly rejected the proposition that *Comcast* requires a showing of a method for establishing classwide damages. Consequently, if *Comcast* truly did stand for the requirement of classwide damages evidence, then it will take another Supreme Court decision to once more elevate *Comcast* to that position.

As I predicted before *Butler II*, and once more reiterate now: I have no doubt that the Seventh Circuit will once more certify the class in *Ross II*. Of the three cases that received GVR orders, *Ross I* was easily the most astonishing. The opinion in *Ross I* did not address Rule 23(b) at all. The *Ross I* decision was limited to two narrow issues: (1) "whether the . . . certification order complied with Rule 23(c)(1)(B) and (2) whether the . . . classes satisfy the commonality prerequisite [of Rule 23(a)(2)] post-*Dukes*." Thus, I have no doubt that the Seventh Circuit will once more certify the *Ross* class. When/if it happens, you can be certain it will find its way onto the Hoosier Litigation Blog.

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

Sources

- *Butler v. Sears, Roebuck & Co. II*, --- F.3d ---, Nos. 11-8029 & 12-8030 (7th Cir. 2013).

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- Colin E. Flora, *7th Circuit Provides Much Needed Clarification of Class Action "Predominance": Requirement: Butler v. Sears*, Hoosier Litigation Blog (Nov. 16, 2012).

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- Colin E. Flora, *6th Circuit Reaffirms Class Certification in Whirlpool II*, Hoosier Litigation Blog (July 26, 2013).

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