Weil

Class Action Monitor

How Moldy Washing Machines Are Putting a Damper on *Comcast*

By David R. Singh and Joshua I. Schlenger

In recent years, the Supreme Court has repeatedly emphasized that a trial court may need to probe behind the pleadings to decide whether to enter a class certification order and that class certification is proper only if the trial court is satisfied, after rigorous analysis, that the prerequisites for class certification under Rule 23 of the Federal Rules of Civil Procedure (Rule 23) have been satisfied.[1] For example, in *Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (2013), the Supreme Court emphasized that, in evaluating a motion for certification of a damages class, a trial court must be satisfied, after a rigorous analysis, not only that the requirements of Rule 23(a) have been satisfied, but also that Rule 23(b)(3)'s predominance criterion has been met. *See id.* at 1432. In *Comcast,* a putative antitrust class action alleging unlawful monopolization and price-fixing by Comcast in the Philadelphia-area cable television market, the Supreme Court held that, where the trial court had held that only one of four of plaintiffs' theories of antitrust impact could be determined in a manner common to all the class plaintiffs, it was an error for the Third Circuit to refuse to entertain arguments that plaintiffs' only evidence of damages—a regression analysis—failed to isolate damages attributable to that theory (as opposed to the other three theories), simply because this argument overlapped with the merits determination. *See id.* at 1432-35. Since *Comcast* was handed down, several lower federal courts have cited it as a basis for denying class certification outright, or remanding for further proceedings in light of the decision's emphasis on the rigorous analysis necessary before certifying a damages class.[2] Indeed, earlier this month, a Texas federal district court judge denied a motion to certify a class of investors who allegedly suffered losses in the aftermath of the explosion of the Deepwater Horizon oil rig and the ensuing oil spill into the Gulf of Mexico on the grounds that plaintiffs "failed to discharge their burden to establish that damages … can be measured on a classwide basis consistent with their theories of liability," as required by *Comcast*.[3] In particular, the trial court accepted BP's argument that plaintiffs' proposed damages model did not disaggregate inflation according to the type of misrepresentation corrected or risk disclosed and therefore the trial court was not assuaged that the classwide damages methodology proposed would track plaintiffs' theories of liability.[4]

The "Washing Machine" Cases

Two Court of Appeals decisions issued a few months ago could potentially limit the impact of *Comcast*: *Butler v. Sears, Roebuck & Co.,* 727 F.3d 796 (7th Cir. 2013), and *In re Whirlpool Corporation Front-Loading Washer Products Liability Litigation,* 722 F.3d 838 (6th Cir. 2013). In both cases, the Courts of Appeals held that *Comcast* does not require damages to be uniform among class members in order for a Rule 23(b)(3) class to be certified. Rather, "[i]f 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." *Butler,* 727 F.3d at 801; *see also Whirlpool,* 722 F.3d at 860. In reaching this conclusion, the Sixth and Seventh Circuit Courts of Appeals downplayed the extent to which *Comcast* signified a shift in the scrutiny required to satisfy the "predominance" standard.[5]

Butler and *Whirlpool* both arose out of allegations that defects in front-loading washing machines manufactured by Whirlpool and sold in overlapping periods from 2001 to 2004 caused mold to grow inside the machines.[6] The trial court in *Whirlpool* granted plaintiffs' motion to certify a damages class pursuant to Rule 23(b)(3) on the grounds that the common issue of whether the defect in the machines caused mold growth predominated across all putative class members, and the Sixth Circuit affirmed. *See* 722 F.3d at 844. In *Butler*, the trial court denied plaintiffs' motion for class certification on the mold claim, but the Seventh Circuit reversed. *See Butler*, 727 F.3d at 797-98.

Defendants in *Butler* and *Whirlpool* each petitioned the Supreme Court for certiorari on the grounds that the respective grants of class certification misapplied the Rule 23(b)(3) "predominance" standard. These petitions, however, were filed before the Supreme Court issued its opinion in *Comcast.* Soon after deciding *Comcast*, the Supreme Court granted defendants' petitions for writ of certiorari in *Butler* and *Whirlpool*, vacated the judgments, and remanded to the Courts of Appeals for further consideration in light of *Comcast*.[7]

The Courts of Appeals Affirm the Class Certification Order in the Face of *Comcast*

On remand, both the Courts of Appeals held that, notwithstanding *Comcast*, class certification was appropriate in these instances because all class members' damages were attributable to the same injury—the alleged defect in the washing machines that caused mold growth. *See Butler*, 727 F.3d at 801; *Whirlpool*, 722 F.3d at 860.

Judge Posner's opinion for the Seventh Circuit in *Butler* is instructive and representative of both Courts of Appeals' reasoning. In it, he notes that the Supreme Court in *Comcast* never held that damages had to be identical across class members; rather, Judge Posner reasoned, the Supreme Court merely held that the damages be susceptible of classwide *proof*, meaning that they must all be attributable to the same *injury*.[8] Judge Posner further opined that *Comcast* did not even impose a requirement that the proof of injury be the same for all individual class members. Indeed, different types of proof can be still presented by different class members in a series of mini-hearings to ascertain the amount of individual damages.[9] All that is required is that the proof of damages link back to the common injury. To require anything more, Judge Posner commented, would vitiate the efficiencies gained by the class action mechanism. *See Butler*, 727 F.3d at 801. Based on this interpretation of *Comcast*, Judge Posner concluded that, in *Butler*, because "[t]here is a single, central, common issue of liability[, namely,] whether the Sears washing machine was defective," all class members' damages could be attributed to a common injury, thus satisfying Rule 23(b)(3)'s predominance requirement." *Id.* at 801. In support of the Seventh Circuit's decision to re-affirm the certification of the class in *Butler*, Judge Posner noted that the Sixth Circuit, only one month earlier in *Whirlpool*, had likewise re-affirmed class certification on remand from the Supreme Court, employing similar reasoning. "The concordance in reasoning and result of our decision and the Sixth Circuit's decision,"

Judge Posner observed, "averts an intercircuit conflict." *Id.* at 802.

Sears and Whirlpool Petition for Certiorari (Again)

After the Sixth and Seventh Circuits re-affirmed the respective grants of class certification, Sears and Whirlpool again petitioned the Supreme Court for writs of certiorari. Whirlpool's petition for certiorari argues that the Sixth Circuit's decision should be vacated and reversed because "the aggregate of common liability issues" do not predominate over "the aggregate of individualized issues"; neither injury nor damages can be proven on a classwide basis; most members of the class have never experienced the alleged defect; and issues of both injury and damages would have to be litigated on a member-by-member basis.[10] Sears likewise argued in its petition for certiorari that Judge Posner erroneously singled out "one abstract [common] issue" in order to justify the efficiency of a class action in *Butler* "without considering the host of individual issues that would need to be tried to resolve liability and damages and without determining whether the aggregate of common issues predominates over the aggregate of individual issues." Sears further maintains that most members of the class in *Butler* did not experience the alleged injury.[11]

Common to both Whirlpool's and Sears's petitions for certiorari is the argument that the Sixth and Seventh Circuits' reinstatement of the respective class certification orders rendered the Supreme Court's remand to reconsider those orders in light of *Comcast* "a pointless exercise."[12] In particular, both Whirlpool and Sears argue that the Sixth and Seventh Circuits attempted to "dodge[*Comcast*] by attributing all damages … to supposed classwide defects" in the washing machines, while ignoring the host of individualized issues even on the question of liability alone.[13] Essentially, Whirlpool and Sears maintain that the Courts of Appeals re-characterized the facts of the cases in order to create classes in which all class members' damages flowed from a common injury.

Sears and Whirlpool filed their respective petitions for certiorari on October 7, 2013, and one week later, consented to the filing of amicus curiae briefs in support of either party. Various *amici curiae* filed briefs on November 6, 2013, and respondents themselves filed their opposition briefs one month later, on December 6, 2013. Sears and Whirlpool now have an opportunity to submit reply briefs in support of their respective petitions, after which the Supreme Court will rule.

Potential Implications and Open Issues

In the event that the Supreme Court does grant Sears's and Whirlpool's petitions for certiorari, its resolution of *Whirlpool* and *Butler* will be worth watching, as it could significantly impact the class action landscape. First, the Sixth and Seventh Circuits' holding that damages need not be uniform among all class members in order to certify a Rule 23(b)(3) class is not universally accepted: for example, one New York federal trial court has held that, under *Comcast,* differences in damages among individual class members can defeat certification of a Rule 23(b)(3) class.[14] The trial court reasoned that in the case before it, a wage-and-hour suit brought by restaurant workers against their employer, plaintiffs failed to satisfy Rule 23(b)(3)'s predominance requirement because plaintiffs' proofs of wage-and-hour violations focused on scattered examples of situations where employees allegedly did not receive certain payments or rest periods. According to the trial court, these forms of proof "indicate[d] that damages in this putative class [were] in fact highly individualized," and therefore, plaintiffs failed to offer a "model of damages susceptible of measurement across the entire … class."[15] This decision is currently on appeal to the Second Circuit,[16] and, if affirmed, could result in a circuit split on the proper interpretation of *Comcast* with respect to the question of whether individualized damages can defeat predominance for Rule 23(b)(3) purposes.

Second, if affirmed (or if the Supreme Court does not grant certiorari), plaintiffs' counsel may attempt to invoke Judge Posner's opinion in *Butler* to urge district courts to create subclasses for the purpose of finding predominance on a piecemeal basis. For instance, even though *Butler* involved two distinct claims—one alleging a defect in the machines that

caused mold to grow, and one alleging that a defect in the machines' control unit caused the machines to suddenly stop, *see Butler*, 727 F.3d at 798—Judge Posner still maintained that all damages flowed from a common injury because the class action in *Butler* was "really two class actions. In one the defect alleged involves mold, in the other the control unit. Each defect is central to liability… ." *Id.* at 801-802. Coupled with Judge Posner's emphasis on the fact that *Comcast* did not affect the ability of district courts to fashion subclasses under Rule 23(c)(5),[17] plaintiffs' counsel may attempt to exploit *Butler* to evade *Comcast*'s more rigorous application of Rule 23(b)(3)'s predominance requirement. The Supreme Court's clarification of these issues will potentially have a significant impact on corporate defendants' ability to defeat class certification motions.[18] Weil's Class Action Task Force will continue to monitor developments in *Butler* and *Whirlpool* and will provide updates as necessary in the coming alerts.

1. *See, e.g., Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (2013); *Standard Fire Insurance Co. v. Knowles,* 133 S. Ct. 1345 (2013); *Wal-Mart v. Dukes,* 131 S. Ct. 2541 (2011).
2. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869,* 725 F.3d 244, 255 (D.C. Cir. 2013) ("[W]e vacate the district court's class certification decision and remand the case to permit the district court to reconsider its decision in light of *Comcast Corp. v. Behrend.*"); *Wheeler v. United Servs. Auto. Ass'n,* No. 3:11–cv–00018–SLG, 2013 WL 4525312, at *5 (D. Alaska Aug. 27, 2013) (denying motion for class certification on the grounds that "the necessary damage calculations would involve separate and significant personal injury damages evaluations for each of the proposed 136–plus class members") (internal quotation marks omitted); *Martins v. 3PD, Inc.,* Civil Action No. 11–11313–DPW, 2013 WL 1320454, at *8 (D. Mass. Mar. 28, 2013) (denying class certification as to two counts of the complaint because "[n]o common form of proof exists to prove these elements for the entire class").
3. *See In re BP P.L.C. Sec. Litig.,* MDL No. 10–md–2185, Civ. Action No. 4:10–md–2185, 2013 WL 6388408, at *18 (S.D. Tex. Dec. 6, 2013).
4. *See id.* at *16-17.
5. *See Butler,* 727 F.3d at 801 (using pre-*Comcast* cases to construe the limits of the Rule 23(b)(3) predominance standard); *Whirlpool* 722 F.3d at 860 (emphasizing that the Court in *Comcast* described its reversal of the Court of Appeals as turning "on the straightforward application of class-certification principles") (quoting *Comcast,* 133 S. Ct. at 1433).
6. *Butler,* 727 F.3d at 797; *Whirlpool,* 722 F.3d at 846-47. Plaintiffs in the Seventh Circuit action additionally claimed that a separate defect in the control unit caused the machines to stop inopportunely. *Butler,* 727 F.3d at 797.
7. *See Sears, Roebuck & Co. v. Butler,* ––U.S. ––––, 133 S.Ct. 2768 (2013) (mem.).; *Whirlpool Corp. v. Glazer,* –– U.S. ––––, 133 S.Ct. 1722 (2013) (mem.). On the same day that it issued its remand order in *Whirlpool,* the Supreme Court also vacated a class certification order in *RBS Citizens, N.A. v. Ross,* a bank employees' class litigation against a bank alleging violations of the Fair Labor Standards Act and the Illinois Minimum Wage Law, and "remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Comcast*." 133 S. Ct. 1722 (2013). Two months later, the parties in *RBS* notified the Seventh Circuit that they had reached a tentative settlement and jointly moved for a stay of the proceedings, which the Seventh Circuit granted. *See* Order, *RBS Citizens, N.A. v. Ross,* No. 10-3848 (7th Cir. June 4, 2013), ECF No. 43.
8. *See Butler,* 727 F.3d at 800 ("[I]t was not the existence of multiple theories in [*Comcast*] that precluded class certification; it was the plaintiffs' failure to base all the damages they sought on the antitrust impact—the injury of which the plaintiffs were complaining.").
9. Additionally, Judge Posner noted that *Comcast*'s requirement that damages be susceptible of classwide proof does not preclude the creation of subclasses—provided for explicitly by Rule 23(c)(5)—to deal with ancillary issues, such as minor differences between separate state warranty laws. *See id.* at 802 (noting that, in the washing machine cases, "[c]omplications arise from the design changes and from separate state warranty laws, but can be handled by the creation of subclasses").
10. *See* Pet. for Cert. at i, 15-20, *Whirlpool Corp. v. Glazer,* No. 13-431 (U.S. filed Oct. 7, 2013) (Whirlpool Pet.).
11. *See* Pet. for Cert. at i, 13-24, *Sears, Roebuck & Co. v. Butler,* No. 13-430 (U.S. filed Oct. 7, 2013) (Sears Pet.).
12. *See* Sears Pet. at 1; see also Whirlpool Pet. at 2 ("Despite this Court's GVR order, a two-judge panel deemed *Comcast* of 'limited application.'") (citation omitted).
13. *See* Sears Pet. at 2; *see also* Whirlpool Pet. at 2 (arguing that "*Comcast* establishes *a fortiori* that class certification is improper here … [because] *liability* here … depends on individualized issues that permeate plaintiffs' claims and Whirlpool's defenses") (emphasis in original).

14. *See Roach v. T.L. Cannon Corp.,* No. 3:10–CV–0591 (TJM/DEP), 2013 WL 1316452, at *3 (N.D.N.Y. Mar. 29, 2013) (stating that plaintiffs' contention that "damages need not be considered for Rule 23 certification even if such damages might be highly individualized" was "in contravention of the holding of [*Comcast*]").

15. *Id.* at *3-5.

16. *See* Order, *Roach v. T.L. Cannon Corp.,* No. 13-1383 (2d Cir. Aug. 15, 2013), ECF No. 39 (granting plaintiffs' motion, "pursuant to Federal Rule of Civil Procedure 23(f), for leave to appeal the district court's order denying their motion for class certification").

17. *See supra* note 9. Indeed, Prof. John C. Coffee of Columbia Law School has noted that, after *Comcast,* plaintiffs' counsel will increasingly attempt to certify "issue classes" limited to the issue of liability under Federal Rule of Civil Procedure 23(c)(4). *See* Wystan Ackerman, "Insights From the ABA National Institute on Class Actions – Part 1," INSURANCE CLASS ACTIONS INSIDER, *available at* http://www.insuranceclassactions.com/seminarsprograms/insights-from-the-aba-national-institute-on-class-actions-part-1/ (last visited Dec. 13, 2013). Prof. Coffee separately predicts that plaintiffs' counsel will also increasingly resort to RICO as a basis for class actions following *Comcast* because RICO claims do not require proof of reliance. *See id.* (citing *In re Foodservice Inc. Pricing Litig.,* 729 F.3d 108 (2d Cir. 2013), where the Second Circuit affirmed certification of a RICO class notwithstanding *Comcast*).

18. It should be noted that the trial judge in the *Comcast* case recently denied Comcast's motion to strike a recertification motion proposing a narrower class than the one invalidated in the Supreme Court's *Comcast* decision, and ordered Comcast to respond to the motion. *See Glaberson v. Comcast Corp.,* Civ. Action No. 03-6604, 2013 WL 5988966, at *8 (E.D. Pa. Nov. 12, 2013) (concluding "that the Plaintiffs' proposed motion for certification of a narrower class with a revised antitrust impact analysis consistent with the Supreme Court's decision is not precluded as a matter of law").

Class Action Monitor is published by the Litigation Department of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

If you have questions concerning the contents of this issue of *Class Action Monitor*, or would like more information about Weil's Class Action practice, please speak to your regular contact at Weil, or to the editors or authors listed below:

Editors:

Holly Loiseau (DC)	Bio Page	holly.loiseau@weil.com	+1 202 682 7144
David Singh (NY)	Bio Page	david.singh@weil.com	+1 212 310 8159

Contributing Authors:

David Singh (NY)	Bio Page	david.singh@weil.com	+1 212 310 8159
Josh Schlenger (NY)	Bio Page	joshua.schlenger@weil.com	+1 212 310 8486