No.

In the Supreme Court of the United States

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

LARRY BUTLER, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Plaintiffs sought certification of a six-state breach-of-warranty class, claiming that front-loading washing machines they bought from Sears, Roebuck and Co. have a design defect that causes musty odors and a manufacturing defect that interrupts operation with false error codes. Holding that two classes (one for each alleged defect) should be certified under Rule 23(b)(3), the Seventh Circuit ruled that a class action is "the more efficient procedure" based on a single purportedly common question—whether there is a defect. The court did not address any of the many individual questions that would need to be tried, much less determine whether the purportedly common question predominates over individual questions. The questions presented are:

1. Whether the Rule 23(b)(3) predominance requirement can be satisfied based solely on a determination that it would be "efficient" to decide a single common question at trial, without considering any of the individual issues that would also need to be tried, and without determining whether the aggregate of common issues predominates over the aggregate of individual issues.

2. Whether a class may be certified on breach of warranty claims where it is undisputed that most members did not experience the alleged product defect and where fact of injury would have to be litigated on a member-by-member basis.

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner Sears, Roebuck and Co. is a subsidiary of Sears Holding Corporation, which is a publicly held company that owns 10% or more of Sears, Roebuck and Co.'s stock.

Plaintiffs-Respondents are Larry Butler, Joseph Leonard, Kevin Barnes, Victor Matos, Alfred Blair, and Martin Champion.

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PETITION FOR A WRIT OF CERTIORARI

Sears, Roebuck and Co. ("Sears") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion (App., *infra*, 1a-8a) appears at 702 F.3d 359. Its order denying rehearing en banc (App., *infra*, 29a-30a) is unpublished. The district court's order granting in part and denying in part plaintiffs' motion for class certification (App., *infra*, 9a-22a) is unpublished. The district court's order denying plaintiffs' motion for reconsideration (App., *infra*, 23a-28a) is unpublished.

JURISDICTION

The Seventh Circuit's judgment was entered on November 13, 2012. Sears' timely petition for rehearing was denied on December 19, 2012. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Relevant portions of Federal Rule of Civil Procedure 23 are reproduced at App., *infra*, 31a-34a.

STATEMENT OF THE CASE

Plaintiffs claim to represent all owners of Kenmore-brand front-loading washing machines (the "Washers") manufactured by Whirlpool Corporation and sold by Sears since 2001 in six states. Plaintiffs allege that all Washers contain a design defect that may cause them to accumulate an excessive amount of laundry residue ("biofilm") and emit musty odors as a result. Plaintiffs do not allege that biofilm poses

any health or safety risk, and they (and their expert) admit that biofilm accumulates naturally in all washing machines, no matter what the make or model. Plaintiffs contend that all class members were injured simply by buying a Washer, regardless of whether the alleged defect has caused or ever will cause an odor problem. Indeed, four of the six plaintiffs, like the vast majority of Washer purchasers, have never noticed odors in their Washers despite years of use.

Plaintiffs also seek to represent all owners who bought Washers built between 2004 and 2007, some of which allegedly have a manufacturing defect in the central control unit ("CCU"). Plaintiffs say a manufacturing flaw in a tiny fraction of CCUs could produce cracked solder pads that potentially cause machines to display "false" error codes and become temporarily inoperable. Plaintiffs claim that it is irrelevant whether class members ever experienced or will experience that problem, and they do not dispute that the vast majority do not and will not have an error code problem.

The district court denied certification of the odor class under Rule 23(b)(3) because numerous design changes prevented common issues from predominating over individual ones. The court, however, granted certification of the CCU class after finding that individualized issues—including the crucial question of which Washers actually contained the alleged manufacturing defect—did not outweigh supposedly common issues.

The Seventh Circuit granted Rule 23(f) cross-petitions "in order to clarify the concept of 'predominance' in class action litigation." App., *infra*, 2a. Instead of clarifying that requirement, however,

Judge Posner's opinion for the court effectively eliminated it, replacing it with an "efficiency" standard that is satisfied if just one issue could be litigated efficiently.

Specifically, the Seventh Circuit held that "[p]redominance is a question of efficiency." App., *infra*, 4a. In the court's view, predominance was satisfied for both classes because the "common" question of whether the Washers are "defective" is more efficiently "resolved in a single proceeding" than in "hundreds of different trials," even though that "single proceeding" necessarily would involve, or leave for a later day, thousands of individual trials on a multitude of non-common questions. The court did not even attempt to address the numerous individual questions that would have to be tried, much less determine whether the lone common defect question would predominate over those individual questions. If the court had done so, it could not have concluded that a single common-issue trial followed by thousands of individual liability and damages trials would be an efficient—much less *fair*—procedure for resolving purchaser claims.

The Seventh Circuit's erroneous decision warrants this Court's immediate review. The court of appeals' holding that "[p]redominance is a question of efficiency" in litigating a single issue cannot be reconciled with Rule 23's predominance standard. It replaces the critical inquiry into whether the aggregate of common issues predominates over the aggregate of individualized issues with a highly uncertain and manipulable test found nowhere in the Rule.

The Seventh Circuit's new predominance standard is flatly at odds with this Court's precedents, which make clear that predominance

must be analyzed rigorously and with careful evaluation of the issues that actually will need to be resolved at trial. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Despite acknowledging that answers to even the single purportedly common defect question "may vary" with "differences in design," the Seventh Circuit disregarded this Court's instruction that truly common questions must be capable of "generat[ing] common *answers* apt to drive the resolution of the litigation." *Dukes*, 131 S. Ct. at 2551.

The Seventh Circuit also contravened *Dukes* when it certified classes in which at least 95% of class members, including some of the named plaintiffs, never experienced moldy odors or a CCU problem and thus would have no warranty claim in most of the six states at issue. *Dukes* confirms that named plaintiffs and absent class members must suffer "the same injury." 131 S. Ct. at 2551. The Seventh Circuit viewed the fact that most class members have not experienced either alleged problem as "an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate Sears." App., *infra*, 5a. The court's treatment of this issue is legally erroneous and adds to a deep circuit split regarding the propriety of class certification when most absent class members have suffered no manifested harm.

Certification of these massive classes—filled with hundreds of thousands of uninjured members—creates enormous pressure to settle without regard to the merits and distorts similar litigation pending

throughout the country. This case is one of numerous nearly identical odor-defect class actions pending in federal courts against every major manufacturer of front-loading washers.[1] In each case, only a small minority of buyers experienced odor problems. Yet, three of these cases have now been certified. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 420 (6th Cir. 2012) ("*Glazer*"); *Tait v. BSH Home Appliances Corp.*, 2012 WL 6699247, at *11 (C.D. Cal. Dec. 20, 2012).[2] If the class-certification order in this case is permitted to stand, it is likely to influence the remaining certification motions in all these cases. Collectively, the proposed classes include tens-of-millions of consumers and every front-loading washer sold over more than a decade. Regardless of which of these certified

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[1] 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.); *Tait v. BSH Home Appliances Corp.*, 8:10-cv-00711 (C.D. Cal.); *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 Sixth Circuit's decision in *Glazer* is the subject of a pending petition for certiorari (*Whirlpool Corp. v. Glazer*, No. 12-322 (filed Sept. 14, 2012)), and has drawn widespread criticism. See, *e.g.*, *Supreme Laundry List: The Justices Should Hear a Misguided Class-Action Case*, Wall St. J., Oct. 9, 2012, at A18; Michael Hoenig, *Supreme Court Review Sought on Crucial Class Action Issues*, N.Y.L.J., Dec. 12, 2012; J. Gregory Sidak, *Supreme Court Must Clean Up Washer Mess,* Wash. Times, Nov. 15, 2012, at B4; Brief Amicus Curiae of Pacific Legal Foundation (Oct. 2, 2012), 2012 WL 4842966; Brief Amicus Curiae of Product Liability Advisory Council (Sept. 28, 2012), 2012 WL 4842965; Brief Amicus Curiae of Chamber of Commerce (Sept. 28, 2012), 2012 WL 4481322.

cases is tried first, one jury should not be permitted to determine the fate of an entire industry.

A. Plaintiffs' Allegations

In 2001, Whirlpool began manufacturing high-efficiency front-loading clothes washers under the Kenmore brand name exclusively for re-sale by Sears (D231-1 ¶ 7), which issues limited warranties for its Kenmore appliances (*e.g.*, D231-3 at 4; D231-4 at 50).[3] Year after year, *Consumer Reports* ranked the Washers among the best and most reliable, confirming that they outperform top-loading washers on energy- and water-efficiency, cleaning, capacity, and fabric-care measures. D231-2 ¶ 27.

Plaintiffs nonetheless allege that all Kenmore front-loading Washers made since 2001 suffer from a design defect that causes some Washers to accumulate excessive biofilm and emit moldy odors. They also allege a manufacturing defect in the CCUs of some Washers built between 2004 and 2007 that causes false error messages. Plaintiffs assert claims for breach of written and implied warranties on behalf of a putative class of all Washer buyers in California, Illinois, Indiana, Kentucky, Minnesota, and Texas. D207 at 8.

B. The Odor Class

1. *Washer Purchasers' Varied Experiences*

For the odor claims, plaintiffs moved to certify a class of all residents of the six states who bought any of 27 different Washer models sold since 2001. D206 at 2; D207 at 8. Those models, which were introduced at different times throughout the class period, have

[3] "D" refers to docket numbers assigned in the district court.

different designs and features. D231-2 ¶ 9; D231-8 ¶¶ 3-17. Yet plaintiffs asserted that these Washers share design "characteristics" that at indeterminate times may result in odors, even if the buyers follow Sears' use-and-care instructions. D207 at 7, 10-13, 15; D239 at 25. Plaintiffs' defect theory is that because the Washers use significantly less water than top-loading washers and have interior surfaces that can capture residue, they accumulate excessive quantities of naturally occurring biofilm—which occurs in *all* top-loading and front-loading washing machines—that can produce a moldy odor. App., *infra*, 3a.[4]

Sears presented abundant evidence that plaintiffs' claims raise a host of individual issues. D230 at 12-28; D231. For instance, plaintiffs' engineering expert admitted that all washers—top-loading and front-loading—accumulate biofilm over time, and that the *amount* of biofilm "depends on the use and habits" of "the consumer." D231-12 at 7-8, 11, 21. The evidence showed that plaintiffs treated their washers in very different ways and failed to comply, or complied in different degrees, with Sears' odor-prevention instructions. D230-1 § III; D230-2 ¶¶ 13-19.

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[4] The Seventh Circuit's statement that the Washers use lower water temperatures is wrong; the user selects the temperature. *E.g.*, D231-4 at 13, 35. This and other factual errors in the opinion are attributable to the court's deciding the appeal based solely on short Rule 23(f) petition filings rather than on full briefing. The court's approach to the facts is at odds with the Rule 23 requirement that certification be based on "findings of fact," not "assumptions of fact." *Parker* v. *Time Warner Entm't Co.*, 331 F.3d 13, 21 (2d Cir. 2003).

Sears also offered unrefuted evidence that putative class members bought Washers that differed materially in design and relevant features. D231-2 ¶ 9. As Whirlpool and Sears acquired information regarding biofilm and odors, Whirlpool made design changes and Sears and Whirlpool jointly revised the relevant use-and-care literature. D231-1 ¶ 25; D231-2 ¶¶ 13-19; D231-8 ¶ 41. The design changes, most of which are not present in the named plaintiffs' Washers, included eliminating residue collection points on components that plaintiffs' expert opined were part of the "defect" (D208-3 at 9), and adding a cleaning cycle to enable owners to remove biofilm from inside the Washer. D231-8 ¶ 41(B)-(G), (J); D231-9 at 71, 73, 75. Literature revisions included advising owners to take simple maintenance steps to prevent excessive biofilm and odors, such as using only low-sudsing high-efficiency detergent, leaving the door slightly ajar after use to dry out the machine, and running a monthly cleaning cycle. D231-2 ¶¶ 14-19. Some models also have features that further limit biofilm, including mechanisms that superheat the water or steam-sanitize interior surfaces. D231-8 ¶ 42.[5]

Together, these changes cut the already low rate of odor reports in half. D231-13 at 6, 10-12. Plaintiffs adduced no contrary evidence. Their engineering expert, Dr. Wilson, admitted he had not evaluated

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[5] The Seventh Circuit erroneously stated that Whirlpool "made only five design changes that relate to mold." App., *infra*, 4a. There were far more (see D231-8 ¶ 41 (identifying nearly a dozen)), executed at different times and in different combinations (*ibid.*). The court also ignored the changes that Sears made to its instructions to consumers about how to prevent odors. D231-2 ¶¶ 13-19.

whether the design, literature, or feature changes were effective in limiting biofilm and preventing odors, D208-3 at 10; D231-12 at 15, 26, 30, and he conceded that some of them likely reduced biofilm buildup, D231-12 at 13-14, 23.

The evidence showed that most putative class members have not experienced *any* machine odor. Sears submitted undisputed field data showing that only 0.37% of all U.S. owners reported any odor problem in the first year of service. D231-13 at 5-6. Sears' service data further showed that over 95% of Washer buyers who bought Sears' five-year extended service plan never reported any moldy odor during that warranty period or after. *Id.* at 6-9. Data compiled by *Consumer Reports* showed that less than 1% of all front-loading washer owners reported any odor during the first four years of service. See CONSUMER REPORTS, Feb. 2010, at 44 (of the 11% of Washers with reportable problems, only 8% of those problems "were caused by mold or mildew"); D231-2 ¶ 28; D231-7 at 5, 8. Plaintiffs offered no empirical data to counter this evidence of low reported odor rates.[6]

Only two named plaintiffs—Leonard and Blair—claim they actually experienced any moldy odor, and neither contacted Sears or requested warranty service. D230-1 §§ IV(A), (E), VII(A), (E). The other

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[6] Plaintiffs cited a small Whirlpool Internet survey to argue that 35% of Washer buyers experienced machine odor. D207 at 19-20; D213-14. But that survey broadly covered dishwashers and top-loading washers and odors unrelated to biofilm or mold. D213-14. Whirlpool documents on which plaintiffs rely to assert that the complaint rate could be in the "50% range" in fact say nothing about Washer odor-complaint rates. D207 at 19-20; D231-14 ¶¶ 19-20.

four named plaintiffs used their Washers for five years or more without experiencing odor problems or requesting any repair or other warranty assistance from Sears. *Id.* § IV(B)-(D), (F). And other Washer purchasers have attested that they too never experienced any odor or that all odor problems ended when they followed the use and care instructions for their Washers. D231-23 at 138-148; D231-24 at 45-51; D231-25 at 44-47.

2. *The Decisions Below*

The district court denied certification of an odor class. It ruled that Rule 23(b)(3)'s predominance requirement was not satisfied because plaintiffs failed to show they could prove with common, classwide evidence that all Washers were defective. App., *infra*, 20a. The court found that the various design changes reduced the possibility of odor, and that Washer models have different biofilm-limiting designs and features, requiring plaintiffs to prove at trial that each model failed to prevent excessive biofilm. *Id.* at 18a-20a.

The Seventh Circuit reversed. Judge Posner began his opinion with a pronouncement that "[p]redominance is a question of efficiency." App., *infra*, 4a. Based on that premise, the court held 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." *Ibid.* It was enough that "[t]he basic question in the litigation—were the machines defective in permitting mold to accumulate and generate noxious odors?—is common to the entire mold class," even though "the answer may vary with the differences in design." *Ibid.*

The court of appeals deferred consideration of individual issues of proof about whether plaintiffs and absent class members were injured (*i.e.*, whether their machines emitted odor). It rejected Sears' argument that determining whether a member of the class had been injured would require highly individualized inquiries incompatible with class adjudication, stating that this was "an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate Sears." App., *infra*, 5a. Further, although the court acknowledged that the amount of damages could not be established on a classwide basis, it deemed that fact irrelevant to class certification on an assumption that "the parties would agree on a schedule of damages." *Id.* at 4a. The court made no mention of the individualized inquiries that would be needed to ascertain both injury and damages at trial.

The court recognized that the laws of the six states differ regarding whether a suit for breach of warranty can succeed "even if the defect has not yet caused any harm." App., *infra*, 5a. Yet it failed to account for the impact of these differences on class certification, including how class members residing in the majority of states that require defect manifestation could prove their claims with common evidence at trial. *Id.* at 5a-6a.

C. The CCU Class

1. *Sporadic CCU Manufacturing Flaws*

Plaintiffs also sought certification of a class of 2004-2007 model-year Washers, alleging that a manufacturing flaw affecting some CCUs potentially could cause the machine to display false error codes. D207 at 31-32.

Sears presented unrefuted evidence that the alleged manufacturing flaw was a sporadic problem caused by assembly-operator error and did not affect the vast majority of CCUs manufactured during the period in question. D231-15 ¶¶ 17-20. It is undisputed that a machine-specific engineering analysis is required to determine whether the flaw (cracked solder pads) is present in any given CCU. *Id.* ¶ 18. A similar engineering analysis also is required to determine if an error code displayed by an individual Washer was caused by the alleged CCU defect. *Id.* ¶¶ 9, 11-13. Sears showed too that during the putative class period, manufacturing and design changes eliminated the cause of this problem. *Id.* ¶¶ 7-8, 16, 22.

For Washers sold in 2004 and 2005, the complaint rates for *all* error codes (not just those related to the alleged defect in the CCU) were 4.9% and 6.1%, respectively. D231-19 ¶ 6 & Table 2. This dropped to 1.4% in 2006 and 0.8% in 2007. *Ibid.* Plaintiffs did not dispute these rates or offer any contrary evidence. D207 at 31-34; D239 at 38. And of the few who experienced error codes, many asked for and received free repairs under their warranties. Indeed, the plaintiffs who contacted Sears within the warranty period have conceded that they received free repairs in accordance with their warranties. D230-1 §§ VI, VII.

2. *The Decisions Below*

The district court certified the CCU class, concluding that "individual issues identified by Sears do not outweigh the common issues raised by this class." App., *infra*, 21a. The court did not conduct a conflict-of-law analysis or identify the elements of plaintiffs' warranty claims to determine if those

claims could be proven on a classwide basis. And despite Sears' unrefuted evidence showing that most Washers do not even contain potentially defective CCUs and that the vast majority of class members had not experienced any error code problem, the court stated without explanation that "[a]t this stage, it is not clear that the proposed class includes many members who were not injured by [the] alleged control unit defect." *Ibid*.

The Seventh Circuit affirmed. Although it recognized that only "some" CCUs contained the alleged defect, it deemed the "principal issue" of "whether the control unit was indeed defective" to be common to the class, stating that the "only individual issues" concern "the amount of harm to particular class members." App., *infra*, 7a. The court did not identify any of the numerous individual questions that would have to be litigated at trial, concluding simply that it would be "more efficient for the question whether the washing machines were defective" to be "resolved in a single proceeding." *Id*. at 7a-8a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision conflicts sharply with this Court's class certification precedents and exacerbates an existing circuit split. The court's ruling that improved "efficiency" from class resolution of one abstract issue establishes predominance disregards the plain language of Rule 23(b)(3) requiring that common questions predominate over individual questions. It also clashes with *Amchem*'s holding that the predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." 521 U.S. at 623.

The court of appeals decided that a defect question was common even though the answer will vary by design (not to mention by product literature and machine features), ignoring *Dukes*' holding that questions are common only when they "generate common answers." 131 S. Ct. at 2551. And the court allowed certification of a class filled with unharmed purchasers, despite *Dukes*' instruction that class members must "have suffered the same injury" (*ibid.*) and rulings from other circuits rejecting such sweeping class actions. The court of appeals' erroneous decision invites a flood of class action lawsuits against retailers and manufacturers based on the experiences of a handful of purchasers who use the threat of classwide liability to coerce settlements of meritless claims.

I. Certifying A Class Merely Because Litigating One Issue On A Class Basis Is Deemed "Efficient" Conflicts With Rule 23 And This Court's Precedents.

A. The Seventh Circuit improperly conflated "efficient" resolution of a single issue with predominance.

Granting appellate review "in order to clarify the concept of 'predominance' in class action litigation," the Seventh Circuit pronounced a new standard, untethered from the language of Rule 23(b)(3), which asks only whether it is "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." App., *infra*, 2a, 4a. After framing the predominance question as one of efficient resolution of a single issue and summarily stating that whether "the machines [are] defective" is a question "common" to the entire class,

the court deemed classwide adjudication of that single question "the more efficient procedure," without addressing any of the individual questions that would need to be resolved at trial. *Id.* at 4a.

Judge Posner's blinkered focus on single-issue "efficiency" departs sharply from the language and purpose of Rule 23 and this Court's precedents. Rule 23 dictates that a (b)(3) class cannot be certified unless common "questions" (stated in the plural) "predominate over any questions [again stated in the plural] affecting only individual members," and class resolution would be "superior to other available methods for *fairly and* efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). The Rule makes clear that efficient adjudication cannot be achieved unless the court first identifies all individual and common issues to be tried, weighs the individual issues against the common ones, and then finds that the aggregate of common issues predominates over the aggregate of individual ones. "**It is *only* where this predominance exists that economies can be achieved by means of the class-action device**." Fed. R. Civ. P. 23(b)(3), 1966 advisory committee note (emphasis added); see 1 Joseph M. McLaughlin, MCLAUGHLIN ON CLASS ACTIONS § 5:23, at 1225 (9th ed. 2012) ("The requirement that common issues predominate over individual issues assures that the goal of judicial economy is served").

In addition, by requiring that class adjudication be conducted "fairly," the Rule makes clear that (b)(3) certification is impermissible where efficiencies can be achieved only by "sacrificing procedural fairness." 1966 advisory committee note, *supra.* That crucial limitation avoids idiosyncratic certification

rulings based on individual judges' views on what procedural protections may be sacrificed in the name of efficiency. As this Court stated in *Amchem*, Rule 23's requirements "serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment." 521 U.S. at 621.

The Seventh Circuit deemed the existence of a single "common" question—whether the Washers are defective—sufficient to justify certification because it would be more "efficient" to resolve that supposedly common question in a single proceeding. App., *infra*, 4a. But commonality alone is not sufficient for (b)(3) certification. The predominance inquiry is independent of and "far more demanding" than commonality. *Amchem*, 521 U.S. at 623-624.

In *Amchem*, this Court considered whether courts could ignore disparities among class member claims to achieve undeniable efficiencies by disposing of "hundreds of thousands" of current and future asbestos claims through the vehicle of a single (b)(3) settlement class. In rejecting that class, this Court held that efficiency interests alone do not override the need to prove the class cohesion that Rule 23(b)(3) mandates. 521 U.S. at 615, 622-624; accord *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 858 (1999).

The Seventh Circuit's treatment of predominance renders that requirement a nullity. Commonality already demands that there be a truly common question that would generate efficiencies through class treatment. Fed. R. Civ. P. 23(a)(2); see *Dukes*, 131 S. Ct. at 2551 n.5 (commonality serves as a "guidepost[] for determining whether under the particular circumstances maintenance of a class action is economical"). And the superiority requirement specifically tests whether a class action is the

best method for "efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Predominance must, therefore, mean something more than the "efficiency" to which the Seventh Circuit reduced it.

B. The Seventh Circuit failed to engage in a rigorous predominance analysis.

Properly understood, predominance tests whether "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. The inquiry requires a court to identify issues subject to common proof for all class members, to identify all individualized legal and factual issues that will need to be resolved using non-common proof, and to weigh them against each other to determine whether individual or common issues predominate. See *Myers v. Hertz Corp.*, 624 F.3d 537, 550 (2d Cir. 2010); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (courts "must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case"). The Seventh Circuit did not ask these questions.

1. The Seventh Circuit first erroneously assumed that the existence of a biofilm defect in the Washers is a question common to the class. It is undisputed that Whirlpool made numerous design changes to the 27 Washer models at different times and in different combinations that controlled biofilm growth and prevented odors. Accordingly, regardless of which party the Seventh Circuit thinks is likely to persuade the jury about the effect of each of those changes, model-specific evidence will be needed at trial to evaluate plaintiffs' contention that all models are

basically the same and Sears' defense that they are not. As the Seventh Circuit acknowledged, whether the Washers contain a biofilm defect "may vary with the differences in design." App., *infra*, 4a.

Determining the impact of these design variations cannot be put off to a future consideration of subclasses. App., *infra*, 6a. Rule 23 was amended in 2003 to eliminate conditional certification. If a court is not "satisfied that the requirements of Rule 23 have been met," it "should refuse certification until they have been met." Fed. R. Civ. P. 23(c)(1)(A), 2003 advisory committee note. Thus, "courts should not rely on later developments to determine whether certification is appropriate." 5 MOORE'S FEDERAL PRACTICE § 23.80[2], at 23-330 (3d ed. 2005).

Commonality of the defect issue is even more obviously lacking for the CCU claims. Irregular, random deviations from manufacturing standards by individual assemblers caused cracked solder pads in only a small minority of the CCUs. Answering the purportedly common question whether the Washers contain defective CCUs will therefore require unit-specific engineering analysis that will produce different conclusions.

Questions that are susceptible to varying answers based on particularized circumstances are not common for Rule 23 purposes. As this Court explained in *Dukes*, "What matters to class certification" is "not the raising of common 'questions'—even in droves," but "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). The Seventh Circuit's treatment of

commonality revives lax notions of commonality that *Dukes* squarely rejected.

2. A court must identify all the individual questions that would have to be tried before it can determine whether any common questions would *predominate* over them. See *Amchem*, 521 U.S. at 623-624. That inquiry "begins, of course, with the elements of the underlying cause of action" and requires the court to consider what kind of proof is needed to support each element. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). But the Seventh Circuit never identified the elements of plaintiffs' warranty claims, much less considered the individualized proofs that would be required to establish them at trial. Had the court done so, it would have been clear that individual questions of law and fact predominate over the purportedly common defect question.

Under Illinois law, for example, claims for breach of implied warranty require proof of a defect, unfitness for ordinary purpose, notification to the dealer or manufacturer, failure to repair or replace, damages, and proximate cause. See Ill. Pattern Jury Instr.-Civ. 185.05. Breach of written warranty claims additionally require proof that the warranty covers the defect and that the plaintiff complied with warranty terms. See *id.* 185.03.

The questions whether any given Washer actually emitted moldy odors, did so during the warranty period, and did so due to the alleged defect (as opposed to the buyer's failure to follow use-and-care instructions) are buyer-specific questions. Likewise, whether a Washer actually contained the alleged CCU manufacturing defect, whether a Washer that displayed one of the two error codes did

so during the warranty period, and whether it did so due to the alleged CCU defect (as opposed to other causes) are all buyer-specific questions that will require highly individualized evidence at trial. Beyond this, only buyer-by-buyer evidence could establish whether any buyer timely requested warranty service and whether Sears honored its warranty obligations. And with respect to implied warranty claims, individualized inquiries are needed to determine whether any odor or false error code rendered the Washer unfit for its ordinary purpose.

The Seventh Circuit also failed to consider the individualized nature of Sears' affirmative defenses, including product misuse and the statute of limitations, and how any class trial could be conducted without stripping Sears of its Seventh Amendment right to present those defenses. Defenses must be considered under Rule 23(b)(3) when assessing predominance. *Dukes*, 131 S. Ct. at 2561 ("a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims"). Sears' constitutional right "to present every available defense" (*Lindsey v. Normet*, 405 U.S. 56, 66 (1972)) cannot be swept away in the interests of "efficiency."[7]

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[7] The Seventh Circuit dismissed the individualized issues inherent in Sears' consumer-misuse defense by asserting that "Sears offers no details." App., *infra*, 6a. In fact, the record is replete with evidence of consumer misuse. Individual compliance with Sears' use-and-care instructions must be evaluated at trial because (i) it relates to Sears' product misuse affirmative defense (see D230-4 § III.A), (ii) express warranty terms require such compliance (D231-2 ¶¶ 23-24; see, *e.g.*, Ill. Pattern Jury Instr.-Civ. 185.03), and (iii) proximate cause is an element of each warranty claim (see D230-4 §§ I.A, II.A; *Marcus*

Damages, too, could not be determined using common evidence. Recognizing this, the court of appeals excised damages determinations from any class trial by assuming that "the parties" would "agree on a schedule of damages." App., *infra*, 4a. In other words, the court committed Sears to a winner-takes-all roll of the dice in a class-action liability trial on the assumption that it will waive its constitutional right to contest damages. Certifying a class on such an assumption is clear legal error. See *Dukes*, 131 S. Ct. at 2560 ("Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay").

By failing to consider any of the individual questions of proof required to establish plaintiffs' claims, the Seventh Circuit overlooked its "critical" duty to "identify the nature of the issues that actually will be presented at trial" and "tes[t]" whether those issues are "susceptible of class-wide proof." Fed. R. Civ. P. 23(c)(1)(A), 2003 advisory committee note. Its use of the "efficiency" label to avoid these critical inquiries cries out for review.

C. This Court should provide guidance on the Rule 23(b)(3) predominance inquiry.

Rule 23(b)(3) requires courts to determine whether common factual and legal issues will predominate at trial. The Rule, however, does not specify what it means by "predominate." Interpretation has been left to the courts.

This Court last addressed predominance 16 years ago. In *Amchem*, the Court insisted that a class be "sufficiently cohesive to warrant adjudication by

v. BMW of N. Am., LLC, 687 F.3d 583, 604 (3d Cir. 2012) ("Causation is pivotal to each of [plaintiff's warranty] claims")).

representation." 521 U.S. at 623. But it did not elaborate on the criteria that judges should use in implementing the cohesion test. See Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1060 (2005) (*Amchem* did not articulate standards "to evaluate the relative significance of unity and disunity (or similarity and dissimilarity) among claims and defenses"). This has resulted in "a myriad of vague and distinct formulations" by the lower courts. *Id*. at 1058-1060 (citing various predominance standards utilized by trial courts); see also 7AA Charles A. Wright, Arthur R. Miller, & Mary K. Cooper, FEDERAL PRACTICE AND PROCEDURE § 1778, at 119 (3d ed. 2005) ("Nor have the courts developed any ready quantitative or qualitative test for determining whether the common questions satisfy the rule's test").

The predominance inquiry must involve more than a "chancellor's foot" or "gestalt judgment" of the sort Judge Posner delivered here. *Amchem*, 521 U.S. at 621. Facile labels like "efficiency" cannot substitute for rigorous identification and weighing of the common and individualized "factual and legal issues comprising the plaintiff's cause of action" and the defendant's "defenses." *Dukes*, 131 S. Ct. at 2552, 2561; *Falcon*, 457 U.S. at 160. Given the centrality of the predominance inquiry to ensuring that any Rule 23(b)(3) class protects the rights of the defendant as well as absent class members, and given the hydraulic pressure to settle exerted by (b)(3) certification, this Court should make clear how courts are to determine predominance and instruct that it is not merely commonality by another name or simply a matter of efficiency. See *Jones v. Harris Assocs.*, 130 S. Ct. 1418, 1430 (2010) (reversing the Seventh

Circuit and explaining that courts are poorly situated to resolve debates over economic issues).

II. Certifying A Class Composed Largely Of Uninjured Buyers Is Inconsistent With This Court's Precedents And Deepens A Circuit Conflict.

A. The decision below conflicts with the *Dukes* requirement of common injury.

This Court reaffirmed in *Dukes* that class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." 131 S. Ct. at 2550. To justify this departure, putative class representatives must demonstrate that they and the class members "have *suffered the same injury*." *Id.* at 2551. Otherwise, commonality is lacking. *Ibid.* Undisputed evidence here showed that most class members (and, indeed, most plaintiffs) have not experienced *any* machine odor or "false" error code problem. Nevertheless, the court of appeals held certification of both classes appropriate.

Allowing certification of classes full of uninjured persons—who would lack standing to sue in their own right and whose unmanifested defect claims would not survive a motion to dismiss in most states—cannot be reconciled with *Dukes*' common-injury requirement. Yet, without mentioning *Dukes*, the Seventh Circuit asserted that the fact that most class members have not experienced any problem "is an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate Sears." App., *infra*, 5a. That reasoning is fundamentally wrong.

In a properly certified class action, any judgment would be based only on the claims of the named plaintiffs, and that judgment would then apply to the entire class. See *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc) ("as goes the claim of the named plaintiff, so go the claims of the class"). Here, the claims pursued at trial would be those of a few plaintiffs handpicked from the minority of purchasers who experienced an odor or CCU problem, yet a judgment in their favor would bind both Sears and the majority of class members who never experienced any odor or CCU problem. It would be manifestly unfair and inefficient to rest a classwide liability determination on the idiosyncratic experiences of these few selected named plaintiffs. Such a class action would not produce even rough justice, but only mass injustice. See 1 MCLAUGHLIN ON CLASS ACTIONS, *supra*, § 5:23, at 1227 ("Where the right to recover for each class member would 'turn * * * on facts particular to each individual plaintiff,' class treatment makes little sense").

B. Lower courts disagree on the relevance of uninjured class members to class certification.

Whether to certify a case alleging problems with products that affect only a small fraction of purchasers is an issue that arises frequently.[8] Plaintiffs here,

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[8] E.g., *Walewski v. Zenimax Media, Inc.*, 2012 WL 6631506 (11th Cir. Dec. 20, 2012); *Glazer*, 678 F.3d 409; *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d at 1168, 1173 (9th Cir. 2010); *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 730 (5th Cir. 2007); *In re Bridgestone/Firestone, Inc., Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002).

while conceding that many members of the class have not experienced the problem, assert that other owners are at risk of a future malfunction and that the "propensity to fail" of all the various models renders all units of all models less valuable for all consumers. See Sheila B. Scheuerman, *Against Liability for Private Risk-Exposure*, 35 Harv. J.L. & Pub. Pol'y 681, 694 (2012).

But in the vast majority of states—including most of the six at issue here—a plaintiff *cannot* bring a warranty claim where the alleged defect has not manifested itself. See 1 MCLAUGHLIN ON CLASS ACTIONS, *supra*, § 5:56, at 1572 ("The majority view is that there is no legally cognizable injury in a product defect case, regardless of [legal] theory, unless the alleged defect has manifested itself in the product used by the claimant"); *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (summarizing cases); *Cole*, 484 F.3d at 729. Courts reason that without experiencing the problem, a plaintiff either lacks Article III standing (*e.g.*, *Birdsong v. Apple, Inc.*, 590 F.3d 955, 961 (9th Cir. 2009); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320-321 (5th Cir. 2002)), or cannot prove the elements of injury and damages necessary to establish state law claims (*e.g.*, *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009)).

The Seventh Circuit's statement that courts in California, Illinois, and "possibly" Texas recognize warranty claims for unmanifested defects is incorrect. App., *infra*, 5a. California courts hold that a latent defect will support a warranty claim only if it is "substantially certain to result in malfunction during the useful life of the product." *Am. Honda Motor Co. v. Super. Ct.*, 132 Cal. Rptr. 3d 91, 98 (Ct.

App. 2011). Texas courts forbid warranty claims if the injury "might never happen." *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 306 (Tex. 2008); see also *Angel v. Goodman Mfg. Co.*, 330 F. App'x 750, 754 (10th Cir. 2009). Illinois requires proof of "present personal injury and/or damages" to sustain a breach of warranty claim. See *Verb v. Motorola, Inc.*, 672 N.E.2d 1287, 1295 (Ill. App. Ct. 1996). The difficulty of getting each state's law right and then conducting a manageable jury trial that respects state law variations is precisely why courts routinely refuse to certify the kind of multi-state class action certified here. *E.g.*, *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946-949 (6th Cir. 2011); *Casa Orlando Apartments, Ltd. v. Federal Nat'l Mortg. Ass'n*, 624 F.3d 185, 194-195 (5th Cir. 2010).

Federal courts are profoundly divided over how to analyze a putative class that comprises thousands or millions of consumers who never experienced the alleged defect. Some courts have held that whether absent class members have experienced a defect is irrelevant to the Rule 23 inquiry; others have found it to be a fundamental obstacle to class certification.

Consider, for instance, two recent cases from the Central District of California. In the span of one month, judges reached irreconcilable conclusions on the issue. Compare *Tait*, 2012 WL 6699247, at *11 (certifying class on warranty and consumer fraud claims alleging latent defect causing moldy odors in Bosch front-loading washing machines), with *In re Toyota Motor Corp. Hybrid Brake Litig.*, 2013 WL 150205, at *4 (C.D. Cal. Jan. 9, 2013) (rejecting class certification for warranty and consumer fraud claims alleging latently defective brakes). In *Tait*, the court reasoned that because the plaintiffs alleged that all

owners "overpaid" due to the presence of an alleged latent defect, they need not prove that any given washer developed odor to succeed on their claims. 2012 WL 6699247, at *11. In *Toyota*, by contrast, the court rejected this same argument as a "creative damages theory" that was insufficient as a matter of law to satisfy Rule 23. 2013 WL 150205, at *4.

This division is reflected in a sharp conflict among the circuits. Courts in the Second, Third, Fifth, Eighth, and Eleventh Circuits generally reject no-injury class actions, holding that a class full of persons who did not experience the alleged problem cannot be certified. Notwithstanding that common conclusion, they offer varying rationales for denying certification, from lack of Article III standing, to failure to satisfy commonality or predominance requirements, to overbreadth or unascertainability of the defined class.[9]

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[9] See *Avritt*, 615 F.3d at 1034 (injured person may not bring a class action on behalf of persons who lack Article III standing); *Cole*, 484 F.3d at 730 (no predominance where most class members could not recover for an unmanifested defect); *Walewski*, 2012 WL 6631506, at *3 (rejecting class defined to include purchasers with "no complaints" about the allegedly defective product); *In re Canon Cameras*, 237 F.R.D. 357, 359 (S.D.N.Y. 2006) (rejecting certification where less than 1% of class members reported a malfunctioning camera); accord *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 603 (S.D.N.Y. 1982); *Payne v. FujiFilm U.S.A., Inc.*, 2010 WL 2342388, at *5 (D.N.J. May 28, 2010); *Lewis v. Ford Motor Co.*, 263 F.R.D. 252, 264 (W.D. Pa. 2009); *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 451 (E.D. Pa. 2000); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 455 (D.N.J. 1998). Under any of these approaches, a court would have to engage in buyer-by-buyer inquiries to determine who suffered injury. *E.g.*, *Avritt*, 615 F.3d at 1035 (due to "the varying experiences of each of the

The Sixth and Ninth Circuits have adopted the opposite position. See *Glazer*, 678 F.3d at 420; *Stearns*, 655 F.3d at 1021 (rejecting argument that certification was improper because most absent class members had not been harmed and thus lacked standing); *Wolin*, 617 F.3d at 1173 (certification was proper regardless of whether any class members actually experienced premature tire wear caused by alleged defect). These courts view the question whether absent class members suffered any injury as a merits issue not appropriately addressed at the certification stage.

In *Glazer*, for example, the Sixth Circuit approved a class action involving similar Whirlpool-made front-loading washers and nearly identical biofilm defect allegations. It agreed with *Wolin* that "proof of the manifestation of a defect is not a prerequisite to class certification" and held that "[c]lass certification is appropriate" when "some class members have not been injured by the challenged practice." 678 F.3d at 420. The court then suggested that the plaintiffs "may be able" to show that all owners were injured—regardless of whether they experienced any problems—by paying a "premium price" for their washers. *Ibid*.

The Seventh Circuit here joined the Sixth and Ninth Circuits, expressly agreeing with *Glazer*. App., *infra*, 6a-7a. As in *Wolin* and *Glazer*, it deemed manifestation of the defect a merits issue irrelevant at the certification stage. Review by this Court is required to resolve this deep and mature conflict on a

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members of the putative class," only individualized inquiries could determine who was injured).

recurring issue with enormous practical consequences.

C. A class of mostly uninjured buyers may not be certified under Rule 23(b)(3).

This Court has repeatedly explained that Rule 23 cannot be used to alter the nature of the parties' claims or defenses. *Dukes*, 131 S. Ct. at 2561; *Ortiz*, 527 U.S. 845; *Amchem*, 521 U.S. at 612-613. The "Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Dukes*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)). Federal courts also lack authority to create substantive common law or use the law of the forum state as an adjunct to Rule 23 for multi-state class actions. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). And "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem*, 521 U.S. at 612-613.

Lower courts should not be permitted to gloss over these requirements by certifying a sprawling multi-state class full of uninjured persons. Before a class may be certified, the question whether class members have suffered an injury must be answered in the affirmative for all (or, at a minimum, the vast majority of) class members with evidence common to the class. If, as here, a determination of injury can be made only on an individual basis, the proposed class does not satisfy Rule 23.

Courts should not rely on allegations that all members overpaid for a product with a defect as a basis for finding a common injury. Whether any particular class member overpaid for a Washer is an individual question. If, for example, a class member

purchased a Washer in 2002 that never developed odor during the life of the Washer (as is true for the vast majority of Washer buyers), the buyer received precisely what he or she bargained for and the alleged injury is purely chimerical. This is true regardless of whether some small percentage of *other* owners experienced an odor problem. See *O'Neil*, 574 F.3d at 504 (rejecting argument that owners did not receive the benefit of the bargain for cribs that did not malfunction; their bargain "did not contemplate the performance of cribs purchased by other consumers"). Determining which members did or did not receive what they bargained for is an inherently individualized inquiry that cannot be trumped by a broad-brush "premium price" theory. See *Dukes*, 131 S. Ct. at 2561; *Ortiz*, 527 U.S. at 845 (warning against "novel" and "adventurous" applications of Rule 23 that override individualized factual issues).

The class action device may not circumvent the resolution of individual issues that would be necessary under applicable substantive law if each class member's claim were tried separately. See Erbsen, *supra*, at 1045. Certiorari is warranted to resolve the conflict on this issue and ensure proper and uniform application of this Court's precedents.

III. The Questions Presented Have Exceptional Practical Importance To The Administration Of Civil Justice In Federal Courts.

Judge Posner's opinion, combined with the Sixth Circuit's *Glazer* decision and the Ninth Circuit's *Wolin* decision, opens up new territory for massive class actions. Classes now may be certified in three circuits whenever a few consumers assert that a mass-produced product did not meet their expectations—regardless of whether most buyers are

satisfied with the product, whether buyers used the product as instructed, and whether a host of individual issues must be tried to resolve their claims. So long as plaintiffs assert that all purchasers were injured by paying too much for a product that *might* fail, a class containing all purchasers—including those who are perfectly satisfied with their products—will be certified. Plaintiffs' counsel need only seek out jurisdictions that are friendly to these "no injury" class actions to impose massive liability risk on a company or industry.

Glazer and *Wolin* have already had a significant impact in the lower courts. *E.g.*, *Tait*, 2012 WL 6699247, at *11; *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 524, 527-528, 531 (C.D. Cal. 2012); *Beck-Ellman v. Kaz USA, Inc.*, 283 F.R.D. 558, 568 (S.D. Cal. 2012); *Yamada v. Nobel Biocare Holding AG*, 275 F.R.D. 573, 579 (C.D. Cal. 2011); *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 482 (N.D. Cal. 2011); *Motley v. Jaguar Land Rover N. Am.*, 2012 WL 5860477 (Conn. Super. Ct. Nov. 1, 2012); *Colon v. Jaguar Land Rover N. Am., LLC*, 2012 WL 3133944, at *10 (Cal. Super. Ct. July 12, 2012). Each of these decisions permitted certification despite significant differences among model designs and class member experiences. With the Seventh Circuit's decision, the trend is certain to grow.

Several of these decisions assure defendants that, assuming liability is found, class members will still need to prove individual damages before they can recover. *E.g.*, App., *infra*, 4a; *Glazer*, 2010 WL 2756947, at *3 n.1 (N.D. Ohio July 12, 2010). But the reality is that most, if not all, of these class actions will settle. See Nagareda, 84 N.Y.U. L. Rev. at 99 (trial after class certification is the "vanishingly rare

exception"). "[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." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); accord *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); see also *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 (2010) (Ginsburg, J., dissenting) (class proceeding can result in an "exorbitant inflation of penalties"). Settlements imposed by failure to insist on rigorous compliance with Rule 23 result in an unwarranted windfall to class members who have no viable claim of their own.

That harm is imposed on consumers and the larger economy as well. The costs of defense and settlement, "which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices." Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004); see also J. Gregory Sidak, *Supreme Court Must Clean Up Washer Mess*, Wash. Times, Nov. 15, 2012, at B4 (allowing no-injury classes forces manufacturers to "pass on to consumers through higher prices the added costs of increasing performance and informational detail"). In the end, the only beneficiaries of improper class actions are "the lawyers handling the case and perhaps the few consumers directly involved in the litigation." Scheuerman, *Against Liability for Private Risk-Exposure*, *supra*, at 741.

Given the importance of the certification decision to class litigation, as well as the number and size of similar class actions pending across the country, this Court's review is warranted to address the critical issues raised here, which repeatedly confront class litigants and the lower federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2013

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 11-8029, 12-8030

LARRY BUTLER, *et al.,* individually and
on behalf of all others similarly situated,
Plaintiffs-Appellants,
Cross-Appellees,

v.

SEARS, ROEBUCK AND CO.,
Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 06 C 07023, 07 C 00412, 08 C 01832
Sharon Johnson Coleman, *Judge.*

Submitted: September 28, 2012.
Decided: November 13, 2012.

Before POSNER, RIPPLE, and HAMILTON, *Circuit Judges*.

POSNER, *Circuit Judge*. The parties to this class action suit, which is based on the warranty laws of six states, petitioned us to review separate orders by the district court ruling on motions for class certification filed by the plaintiffs. Fed. R. Civ. P. 23(f). The suit is really two class actions because the classes have different members and different claims, and therefore they should have been severed, though both arise from alleged defects in Kenmore-brand Sears washing machines sold in overlapping periods beginning in 2001 and 2004. One class action complains of a defect that causes mold (the "mold claim"), the other of a defect that stops the machine inopportunely (the "control unit claim"). The district court denied certification of the class complaining about the defect that causes mold and granted certification of the class complaining about the defect that causes the sudden stoppage. The denial of certification of the mold class precipitated the petition for review by the plaintiffs who are complaining about the mold, while the grant of certification to the plaintiffs (a different set of named plaintiffs) complaining about the stoppage precipitated Sears's petition for review.

We have accepted the appeals in order to clarify the concept of "predominance" in class action litigation. Rule 23(b)(3) conditions the maintenance of a class action on a finding by the district court "that the questions of fact or law common to class members predominate over any questions affecting only individual members." If there are no common questions or only common questions, the issue of predominance is automatically resolved. Any other case re-

quires "weighing" unweighted factors, which is the kind of subjective determination that usually—including the determination whether to certify a class—is left to the district court, subject to light appellate review. *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011); Charles Alan Wright, Arthur R. Miller & Mary K. Kane, 7AA *Federal Practice and Procedure* § 1785, pp. 370-72 (3d ed. 2005).

The mold claim pertains to all Kenmore-brand front-loading "high efficiency" washing machines manufactured by Whirlpool Corporation and sold by Sears since 2001. The claim is that because of the low volume of water used in these machines and the low temperature of the water, compared to the volume and temperature of the water in the traditional top-loading machine, they don't clean themselves adequately and as a result biofilm—a mass of microbes—forms in the machine's drum (where the washing occurs) and creates mold, which emits bad odors. Traditional household cleaners do not eliminate the biofilm, the mold, or the odors. Roughly 200,000 of these Kenmore-brand machines are sold each year and there have been many thousands of complaints of bad odors by the owners.

Sears contends that Whirlpool (which remember is the actual manufacturer of the washing machines, not Sears) 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 judge accepted this argument; it is the ground on which she denied the motion to certify the mold class.

Although Sears contends that during the period covered by the complaint it sold 27 different Kenmore-brand models, Whirlpool made only five design changes that relate to mold. The basic question in the litigation—were the machines defective in permitting mold to accumulate and generate noxious odors?—is common to the entire mold class, although the answer may vary with the differences in design. The individual questions are the amount of damages owed particular class members (the owners of the washing machines).

Predominance is a question of efficiency. See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615-16 (1997); Committee Notes to 1966 Amendment to Fed. R. Civ. P. 23; *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 n. 12 (11th Cir. 1997); William B. Rubenstein, 2 *Newberg on Class Actions* § 4:49 (5th ed. 2012). 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? 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. If necessary, a determination of liability could be followed by individual hearings to determine the damages sustained by each class member (probably capped at the cost of replacing a defective washing machine—there doesn't seem to be any claim that the odors caused an illness that might support a claim for products liability as distinct from one for breach of warranty). But probably the parties would agree on a schedule of damages based on the cost of fixing or replacing class members' mold-

contaminated washing machines. The class action procedure would be efficient not only in cost, but also in efficacy, if we are right that the stakes in an individual case would be too small to justify the expense of suing, in which event denial of class certification would preclude any relief.

Sears argues that most members of the plaintiff class did not experience a mold problem. But if so 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.

In two states (see *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 920-23 (2001); *Schiffner v. Motorola, Inc.*, 697 N.E.2d 868, 874-76 (Ill. App. 1998)), or possibly three (see *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-07 (Tex. 2008)), of the six states in which members of the class reside, a defective product can be the subject of a successful suit for breach of warranty even if the defect has not yet caused any harm. If, as appears to be the case, the defect in a Kenmore-brand washing machine can precipitate a mold problem at any time, the defect is an expected harm, just as having symptomless high blood pressure creates harm in the form of an abnormally high risk of stroke. A person who feels fine, despite having high blood pressure, and will continue feeling fine until he has a stroke or heart attack, would expect compensation for an unlawful act that had caused his high blood pressure even though he has yet to suffer the consequences. Every class member who claims an odor problem will have to prove odor in order 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 for an expected rather than for only a realized harm from a product defect covered by an express or implied warranty.

Sears does not contend that any of Whirlpool's design changes eliminated the odor problem but only that they reduced its incidence or gravity. The number of buyers of each design of the Kenmore-brand machine who encountered mold would have been large even if those who bought later in the product cycle were less likely to encounter the problem. Should it turn out as the litigation progresses that there are large differences in the mold defect among the five differently designed washing machines, the judge may wish to create subclasses; but that possibility is not an obstacle to certification of a single mold class at this juncture.

Sears argues inconsequently that it did not know about the defects in all the different models. But liability for breach of warranty is strict. Sears may be able by means of a suit for contribution or indemnity to shift the cost of any damages it incurs in the present case to Whirlpool, but that is not a defense to liability.

Sears also makes arguments that were not considered by the district court, such as that mold problems may reflect how the owner of a washing machine uses it. That would be a defense of mishandling to the charge of breach of warranty. Sears offers no details.

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.

We turn to Sears's appeal from the certification of a class of buyers of Kenmore-brand washing machines who incurred a harm because of the defective control unit. Each washing machine has a computer device that gives instructions to the machine's moving parts. This "central control unit" consists of circuit boards that are soldered together. In 2004 a company called Bitron that supplied the central control units in the Kenmore-brand washing machines altered its manufacturing process in a way that inadvertently damaged the layer of solder, causing some of the control units mistakenly to "believe" that a serious error had occurred and therefore to order the machine to shut down even though nothing was the matter with it. Sears is alleged to have known about the problem but to have charged each owner of a defective machine hundreds of dollars to repair the central control unit. The defect was corrected in 2005 but Sears continued to ship machines containing the earlier-manufactured, defective control units.

The principal issue is whether the control unit was indeed defective. 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 defec-

tive—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 judicata or collateral estoppel would resolve the common issue for the remaining cases.

Again the district court will want to consider whether to create different subclasses of the control unit class for the different states. That should depend on whether there are big enough differences among the relevant laws of those states to make it impossible to draft a single, coherent set of jury instructions should the case ever go to trial before a jury.

To summarize, the denial of class certification regarding the mold claim is reversed and the grant of class certification regarding the control unit claim is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

LARRY BUTLER, JOSEPH LEONARD, KEVIN BARNES, VICTOR MATOS, ALFRED BLAIR, and MARTIN CHAMPION, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

SEARS, ROEBUCK AND CO.,
Defendant.

No. 06-cv-7023.
Judge Sharon Johnson Coleman

[September 30, 2011]

ORDER

The plaintiffs in this action are purchasers of front loading, high efficiency washing machines manufactured by Whirlpool and sold by Sears. They

claim that the machines suffer from two defects: an inability to cleanse inner surfaces which results in an accumulation of bacteria and mold; and a faulty electronic control board unit that interrupts normal operation. The plaintiffs allege that Sears' sale of the washers breached its express warranties against defective products and its implied warranties of merchantability.

The plaintiffs seek certification of two class actions: a class including purchasers whose machines suffered from the mold defect and a class including purchasers whose machines suffered from the control board problem. They also seek to sever the two class actions into separate proceedings. In addition, they request leave to amend their complaint to re-allege previously dismissed claims of consumer fraud and unjust enrichment. Sears opposes each of the plaintiffs' motions, and also moves to strike testimony of a plaintiff expert offered in support of the motion for class certification. The plaintiffs' motion to amend their complaint is denied. Sears' motion to strike the testimony of plaintiffs' expert is denied. The plaintiffs' motion for class certification is denied as to the proposed class of purchasers of washers suffering from the mold defect, and granted as to the proposed class of purchasers of washers suffering from the control unit defect. Plaintiffs' motion to sever is denied without prejudice to reconsideration of the motion as dictated by further proceedings.

BACKGROUND

Beginning in 2001, Sears sold Kenmore-brand front loading, high efficiency washers manufactured by Whirlpool. The plaintiffs, each a purchaser of one of the machines, brought this action, seeking damages under federal and state law for two claimed de-

fects. According to the plaintiffs, the wash cycles of front loading, high efficiency machines use less water overall and water heated to lower temperatures than the cycles of top-loading, standard efficiency machines. The plaintiffs allege that the lower volume of water and the lower water temperatures result in diminished cleansing of dirt and other wash residue from some internal sections of their machines. They further allege that this diminished cleansing, combined with the increased sealing of the wash tub door compared with top loading machines, produces an environment that results in the growth of bacteria and mold which ultimately creates odors that permeate the laundry washed in the machines and even the areas where the machines are located. The plaintiffs claim that this problem is inherent in the design of all of the Sears/Whirlpool front loading high efficiency washers.

The second claimed defect is alleged to have affected a more narrowly defined group of machines. The parties do not dispute that all of the subject washers contain a "Central Control Unit" (CCU), an electronic processor that instructs the machines to start and stop its various functions. The plaintiffs claim that for machines manufactured from 2004 to 2007, the CCU was provided to Whirlpool by a third party supplier, Bitron. They further claim that Bitron's employees, while installing the CCU into its housing, sometimes damaged the circuit boards of the CCUs, causing them to generate error messages that interrupted normal functioning of the machines.

Before consolidation of their cases into this action, separate subgroups of the current group of plaintiffs filed complaints that asserted consumer fraud claims against Sears under various state stat-

utes. The consumer fraud claims were dismissed by District Judge Joan H. Lefkow for failure to make sufficient, non-conclusory allegations. The plaintiffs were allowed to file amended complaints, and the consumer fraud claims were again dismissed, this time with prejudice. *See Munch v. Sears, Roebuck and Co.,* 2008 WL 4450307 (N.D. Ill. 2008); *Bettua v. Sears, Roebuck and Co.,* 2009 WL 230573 (N.D. Ill. 2009); and *Butler v. Sears, Roebuck and Co.,* 2009 WL 3713687 (N.D. Ill. 2009). Plaintiffs' remaining claims are federal and state law claims for breaches of express and implied warranties.

PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Plaintiffs seek leave to file an amended complaint which reasserts their consumer fraud claims. Permission of any such amendment following dismissal of their claims with prejudice would be contrary to the law of the case doctrine, which "reflects the rightful expectation of litigants that a change of judges midway through a case will not mean going back to square one." *Best v. Shell Oil Co.,* 107 F.3d 544, 546 (7th Cir. 1997). Although the law of the case doctrine is not an absolute bar to a court's reconsideration of its own rulings or those of a different member of the same court, prior rulings should not be revisited in the absence of a "compelling" reason, such as manifest error or a change in the law. *Minch v. City of Chicago,* 486 F.3d 294, 301 (7th Cir. 2007).

No compelling reason for revisiting Judge Lefkow's rulings has been presented by the plaintiffs here. They contend that subsequent holdings by the Supreme Court (*Matrixx Initiatives, Inc. v. Siracusano,* – U.S. –, 131 S. Ct. 1309 (2011)) and the Seventh Circuit *(In re Text Messaging Antitrust Liti-*

gation, 630 F.3d 622 (7th Cir. 2010)) establish the erroneous nature of the dismissals of the consumer fraud counts of their complaints.

This court does not share the plaintiffs' view. In *Matrixx,* the Supreme Court held that a plaintiff could sufficiently allege the failure to disclose materially adverse information about a drug product without alleging a statistically significant link between the product and an alleged harmful side effect. 131 S. Ct. at 1321-23. In contrast, the plaintiffs' consumer fraud claims in this case were not held to be inadequate because of a failure to allege a statistically significant number of washer problems, but because the only allegations supporting a consumer fraud claim were conclusory assertions that Sears was aware of a high problem rate with the washers. Judge Lefkow found that without some allegation of the comparison between problem rates for the subject washers and those of other machines, the plaintiffs had not sufficiently alleged that the problems were so common that Sears knew the machines were defective. *Butler,* 2009 WL 3713687 at *5. Therefore, while *Matrixx* suggests that materiality can be sufficiently alleged in the absence of statistics, it does not suggest that the statistics provided by the plaintiff here were, by themselves, sufficient to state a consumer fraud claim, or that the other pleading deficiencies noted by Judge Lefkow could no longer serve as the basis for a 12(b)(6) dismissal.

Plaintiffs' reliance on *In re Text Messaging* is similarly misplaced. In that case the Seventh Circuit clarified that the pleading standard required to survive a 12(b)(6) dismissal motion is a "nonnegligible probability," (630 F.3d at 629) but it did not in any way suggest that allegations of raw numbers of prob-

lem products, without further context, were sufficient to state a claim that a manufacturer knew of a product defect that it should disclose to consumers.

Plaintiffs' additional arguments in support of its assertion of compelling reasons to disregard the law of the case doctrine are unpersuasive. They contend that discovery revealed facts that would now enable them to plead their consumer fraud claims with appropriate specificity. However, they do not suggest that these revelations occurred after Judge Lefkow's most recent dismissal of those claims in November 2009. They also argue that other plaintiffs in similar actions for the same defects in Whirlpool-manufactured washers in other jurisdictions have been allowed to pursue consumer fraud claims, and that an inconsistent ruling here would be unjust. In the court's view, such inconsistency is a possibility inherent in the pursuit of multiple actions in different jurisdictions, and does not constitute a compelling basis for reconsideration of the prior dismissals of the plaintiffs' consumer fraud claims.

Plaintiffs' motion for leave to file an amended complaint is therefore denied.

DEFENDANT'S MOTION TO STRIKE OPINIONS OF PLAINTIFFS' EXPERT

Plaintiffs supported their motion for leave to certify this proceeding as a class action with the opinion of an expert, R. Gary Wilson. It is undisputed that Wilson holds a doctorate degree in mechanical engineering and that he was employed by Whirlpool from 1976 to 1999, including tenure from 1997 to 1999 as its director of laundry technology.

According to Wilson, the subject washers are defective in design because their basic functional char-

acteristics, including their use of lower water volumes at cooler temperatures than standard machines, makes them unable to rid themselves of residue in the normal wash and rinse cycles and makes them incubators for the growth of bacteria and mold. Wilson concluded that the core design of all of the Whirlpool-built front loading high efficiency washers is defective, without regard to any changes made to individual models to attempt to mitigate the problem.

It is undisputed that Wilson inspected fewer than 20 washers in total, that most of the washers he inspected were from a group of machines known to have mold problems, and that he did not evaluate the impact of model changes made by Whirlpool to address those problems. Sears contends that his opinions must be excluded because they were based upon insufficient facts and because they were not produced by reliable, scientifically valid methods.

An expert's testimony is not unreliable simply because it is founded on his experience rather than on data. *Metavante Corp. v. Emigrant Savings Bank,* 619 F.3d 748, 761 (7th Cir. 2010). An expert knowledgeable about a particular subject need not be precisely informed about all details of the issues raised in order to offer an opinion. *Thomas J. Kline, Inc. v. Lorillard, Inc.,* 878 F.2d 791 (4th Cir. 1989). Here, Wilson's knowledge of and experience with washing machine design is not questioned. The value of Wilson's testimony is not based upon his sampling methods; it is instead based upon his knowledge of washer technology and his understanding of the principles that generally keep machines functionally clean, as well as the extent to which the subject machines depart from those principles. In the court's view, Wilson is clearly qualified to use his knowledge

of those principles to offer an opinion, for purposes of a class certification motion, that all front loading high efficiency machines are similarly defective in design. The fact that his opinion does not account for mitigating model changes that do not alter the machines' basic design is relevant to the weight to be assigned to his opinion, but does not indicate that the opinion is inadmissible in support of the certification motion.

Sears' motion to exclude Wilson's opinion is therefore denied.

CLASS CERTIFICATION— MACHINES WITH MOLD PROBLEMS

An action may be certified as a class action if the putative class satisfies all four requirements of Federal Rule of Civil Procedure 23(a)—numerosity, commonality, typicality, and adequacy of representation—and any one of the conditions of Rule 23(b). *Siegel v. Shell Oil Co.,* 612 F.3d 932, 935 (7th Cir. 2010).

Plaintiffs represent that the subject washers have been sold in several states for many years, and Sears does not deny that the number of potential members of the putative class is sufficiently large to make class action certification appropriate. Plaintiffs also assert, without dispute from Sears, that they and their counsel would be adequate representatives of the class.

Sears argues that the named plaintiffs are not typical of the class they purport to represent because they did not notice odor problems, did not consider them significant, or were not sufficiently troubled by them to report them to Sears within the warranty period. A plaintiff's claim is typical for purposes of Rule

23(a) analysis "if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Keele v. Wexler,* 149 F.3d 589, 595 (7th Cir. 1998), quoting *De La Fuente v. Stokely-Van Camp, Inc.,* 713 F.2d 225, 232 (7th Cir. 1983). Typicality may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members. *Muro v. Target Corp.,* 580 F.3d 485, 492 (7th Cir. 2009). In the present case, even though plaintiffs may have suffered or noticed mold problems to different degrees, their claims are all based upon the same course of Sears conduct: the sale of a washer type that is alleged to be unduly prone to the problem. The court therefore concludes that the named plaintiffs' claims are typical of those of the class they seek to represent.

The court similarly concludes that the plaintiffs satisfy the commonality requirement of Rule 23(a)(2). To meet that requirement, "[i]t is enough that there be one or more common questions of law or fact." *Spano v. The Boeing Co.,* 633 F.3d 574, 585 (7th Cir. 2011). Whether the subject washers were uniformly defective in design, and whether their sale violates Sears' warranties are questions that are apparently common to all members of the class, thus satisfying the rule.

More problematic for the plaintiffs, however, is the requirement of Rule 23(b)(3): that questions of law or fact common to class members "predominate over any questions affecting only individual members." A determination of whether questions common to class members predominate begins with the elements of the underlying cause of action and an anal-

ysis of whether they can be resolved on a common, classwide basis. *Erica P. John Fund, Inc. v. Halliburton Co.,* – U.S. – , 131 S. Ct. 2179, 2184 (2011).

Plaintiffs' complaint alleges that Sears did not have solutions that would resolve the design defects that created the mold problem, and that it continued to sell the machines despite its knowledge of the problem and of the inadequacy of its proposed remedies. "Sears is aware that the Mold Problem is caused *inter alia,* by the inability of the Machine to clean itself following a wash cycle and that none of the proposed solutions Sears has offered Plaintiffs and the Class members will adequately remedy the defect." Amended Consolidated Class Action Complaint, Docket #162, par. 37. "Sears has long known that the Washing Machines suffer from a self-cleaning defect and do not perform as intended, because they are susceptible to and likely to experience Mold Problems as a result of *inter alia,* the water drainage defect, which Sears has been, and continues to be, unable to remedy." *Id*. at par. 43. The plaintiffs' allegations thus establish as central issues Sears' failure to fix the mold problem and its knowledge that the problem had not been and could not be fixed.

In response, Sears has produced evidence of numerous model changes that were aimed at fixing the mold problem, including problem areas identified by the plaintiffs' expert. One such change was a smoothing of the inside surface of the washer's water tub, eliminating crevices where mold could more easily evade rinse water. A second identified problem area was a metal cross piece component, which, according to plaintiffs' expert, also had crevices which promoted mold growth and which contained a level of copper that promoted corrosion. Sears produced unrebutted

evidence that this piece was also smoothed in later models and that its copper content was reduced to lower the corrosion risk. Sears contends that these changes from model to model reduced any mold problems that the machines had. Declaration of Anthony Hardaway, Docket #231, Attachment 8, pars. 41-43.

The plaintiffs do not offer any evidence suggesting that they assessed the impacts of any of these changes, and their expert's testimony indicates that he did not attempt to calculate any of those impacts in determining that the machines were defective in design, without regard to any later attempts to remedy the mold problem. The plaintiffs identify internal Whirlpool documents that characterize the problem as extending across all front loading high efficiency platforms, but these documents predate the model changes that, according to Sears, fixed the problem.

In the court's view, the issues raised by the effect of the washer modifications and the extent of Sears' knowledge across multiple product iterations cannot be answered on a basis as wide as the class defined by the plaintiffs' certification motion. If the washer model changes had any impact on the problem, the extent to which Sears continued to sell a defective washer and the extent of its knowledge of a continued problem are questions whose answers will differ from model to model.

Plaintiffs argue that the efficacy of such changes is an issue to be decided on the merits of their claim, and that their assertion of a design defect that defies all attempted remedies was sufficient to allow similar claims to be certified as a class action in a proceeding in the United States District Court for the Northern District of Ohio. The court notes that in the Seventh Circuit, preliminary inquiries into the facts

and merits are appropriate in reviewing the predominance of common issues for certification purposes. *Szabo v. Bridgeport Machines, Inc.,* 249 F.3d 672, 676-77 (7th Cir. 2001).

The model-specific issues regarding the washer modifications and Sears' knowledge of ongoing problems, in this court's view, outweigh the mold problem issues that can be resolved on a class-wide basis. See *In re Bridgestone/Firestone, Inc.,* 288 F.3d 1012, 1018-19 (7th Cir. 2002). The party seeking class certification bears the burden of demonstrating that each of the elements required for certification are present. *Retired Chicago Police Association v. City of Chicago,* 7 F.3d 584, 596 (7th Cir. 1993). The court concludes that this burden has not been met for the mold problem class, and accordingly denies the plaintiffs' motion to certify that class.

CLASS CERTIFICATION—
MACHINES WITH CONTROL UNIT PROBLEMS

As in its response to plaintiffs' motion to certify the mold problem class, Sears does not dispute plaintiffs' assertion of the presence of the Rule 23(a) factors of numerosity and adequacy of representation for certification of the proposed control unit class. The common class questions that satisfied the rule's moderate commonality requirement for purposes of the proposed mold problem class achieve the same result for this proposed class.

Unlike the proposed mold problem class, the claimed predominance of common issues is not lessened by model-specific differences within the control unit class. This proposed class is limited to an identified production period during which control units from a single supplier were installed by a unique

process. The parties do not dispute that washers with the Bitron control unit in question are readily identifiable by serial number, and Sears does not suggest that it employed remedies that solved the problem before the end of the production run of the washers in the proposed class. Although Sears does contend that individual issues predominate over the potential common issues in this proposed class, the court finds that the individual issues identified by Sears do not outweigh the common issues raised by this class.

Sears also argues that the proposed control unit class is fatally over-inclusive because, according to its records, the vast majority of its customers suffered no control unit issues, and because the issues that did occur were not demonstrated to have been caused by the same defect. The court considers Sears' assertions on this issue to be evidence of the problems for which it received a customer complaint rather than a demonstration of the over-inclusive definition of the class. At this stage, it is not clear that the proposed class includes many members who were not injured by alleged control unit defect, so Sears' assertions of overbreadth are not a basis for denial of certification.

The court finds that the proposed control unit class meets the requirements of Rule 23(a), that questions of law and fact common to members of the class predominate over questions affecting only individual class members, and that a class action is superior to other methods for fairly and efficiently adjudicating the issues of Sears' liability for the alleged control unit problems. Plaintiffs' motion for certification of a control unit class is therefore granted.

PLAINTIFFS' MOTION TO SEVER

Plaintiffs ask that, for reasons of judicial economy, their control unit class claims be severed from their mold problem claims. Since the scope and direction of remaining proceeding have not yet been determined, the court considers this motion to be premature, and accordingly denies the motion without prejudice to its reassertion later in the proceedings.

CONCLUSION

The plaintiffs' motion for leave to file an amended complaint is denied. Sears' motion to exclude the opinions of the plaintiffs' expert is denied. The plaintiffs' motion for certification of a class of purchasers of machines with mold problems is denied. The plaintiffs' motion for certification of a class of all persons or entities who purchased, not for resale, a front-load washing machine manufactured from 2004 to 2007 with a Bitron CCU, in the states of California, Indiana, Illinois, Kentucky, Minnesota and Texas is granted. The plaintiffs' motion to sever is denied without prejudice.

So ordered.

September 30, 2011

/s/
Sharon Johnson Coleman
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

LARRY BUTLER, JOSEPH LEONARD, KEVIN BARNES, VICTOR MATOS, ALFRED BLAIR, and MARTIN CHAMPION, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

SEARS, ROEBUCK AND CO.,
Defendant.

No. 06-cv-7023.
Judge Sharon Johnson Coleman

[July 20, 2012]

ORDER

Plaintiffs seek reconsideration of this court's order denying its motion for certification of a class of those who purchased from defendant a "front-load

washing machine manufactured through 2008, without a steam feature, in the States of California, Indiana, Illinois, Kentucky, Minnesota and Texas." Alternatively, they seek certification of smaller subclasses of plaintiffs. For the reasons detailed below, plaintiffs' motion is denied.

BACKGROUND

This court's prior order denied plaintiffs' motion for certification of a proposed single class of buyers of washers suffering from a mold problem as a result of their front loading, high-efficiency design. The court noted that Sears had presented evidence of multiple model changes intended to combat the problem. The court further noted that these changes, along with the changes in Sears' knowledge of and responses to the mold problem, raised model-specific issues that outweighed the mold problem issues that could be resolved on a class wide basis.

PLAINTIFFS' MOTION FOR RECONSIDERATION

In its prior order, this court observed that evidence of knowledge of problems with the machines by their manufacturer, Whirlpool, "predated" the model changes that, according to Sears, fixed the problem. Plaintiffs correctly note that there is also evidence of Whirlpool knowledge of the persistence of the problem after the various model changes, and they contend that the existence of such evidence demonstrates a factual misapprehension by this court that merits reconsideration of its earlier order.

The significance of the evidence in question is its capacity to establish that legal and factual issue related to the machines' alleged mold problem can be resolved on a class-wide basis. Plaintiffs allege that

the inherent propensity of front-loading high efficiency washers to develop mold problems was present in all machines in the proposed class. In response, Sears contends that various modifications over the machines' product cycles reduced the problem. (Declaration of Anthony Hardaway, Docket #231-8, par. 41.) Sears' argument thus suggests that the alleged propensity of all high efficiency washers to develop mold problems may have been remediated to different degrees in different models, in spite of their common overall design platform. Evidence of Whirlpool's knowledge of the problem before the model changes does not address the effectiveness of any such changes or preclude variations in the issues to be determined in assessing those changes.

The subsequent evidence identified by plaintiffs as indicative of knowledge of the continued problem by Sears and Whirlpool is similarly lacking in distinction between various machine models. Each of the documents cited by plaintiffs addresses the group of high efficiency washers as a whole, or their general propensity to develop the mold problem. None addresses the specific effect of any modification in mitigating the impact of that general propensity.

Therefore, while plaintiffs may present allegations of defectiveness that are common to all machines in the proposed class, the record presented at this stage suggests that Sears' defenses regarding the machines' functions will be model-specific. Plaintiffs' evidence of post-modification knowledge of the mold problem does not diminish the likelihood that design change issues not common to the entire proposed class will require resolution by the trier of fact.

In further support of their motion for reconsideration, plaintiffs argue that the court erroneously as-

sessed the testimony of their expert, R. Gary Wilson, in finding that he had not tested washers that incorporated any of Sears' design changes. The court made no such finding. In addressing the impacts of Sears' model-specific changes, the court found that Wilson "did not attempt to calculate any of those impacts in determining that the machines were defective in design, without regard to any later attempts to remedy the mold problem." Stated differently, the court interpreted Wilson's testimony to express the opinion that the front loading high efficiency washers are defective due to their susceptibility to the mold problem, notwithstanding any later modifications. The court also concluded that Wilson had not assessed the individual impact of any individual design change. Plaintiffs' motion confirms this conclusion: "It is true, of course, that Dr. Wilson did not attempt to quantify the impact of any particular design change in isolation, but this only reflects his conclusion that all of the machines suffered from the mold problem and that none of Whirlpool's changes remedied the essential defect—the failure of Sears' machines to fully clean themselves." (Memorandum in Support of Motion for Reconsideration, Docket #290, p. 13 of 22, n. 9.) Like the Whirlpool evidence discussed above, Wilson's expert opinion that there are no model-specific differences material to the mold problem may result in common allegations by plaintiffs in attempting to prove their case, but they do not diminish the likelihood that Sears will raise in its defense issues that are not common to all the models.

In addition to the model-specific issues related to the machines' design, plaintiffs' complaint raises issues regarding Sears' knowledge of the mold problem. Two counts of the complaint claim that Sears violated the Magnuson-Moss Act, 15 U.S.C. § 2301,

by its conduct, including "knowledge of the defective Washing Machines" and "action, and inaction, in the face of that knowledge." (Amended Complaint, Docket #162, pars. 95, 104.) At this stage of the proceedings, the court has not been presented with evidence that Sears' knowledge of the alleged mold problem and its responses to that knowledge were uniform throughout the machines' product cycles. The issues regarding Sears' knowledge and its actions in response to that knowledge raise additional questions of law and fact not common among the various washer models.

For these reasons, the court adheres to the view that issues of fact and law common to all washers defining the proposed class do not predominate over the issues that will require resolutions that potentially differ between various models. Plaintiffs' motion for reconsideration is accordingly denied.

PLAINTIFFS' MOTION FOR CERTIFICATION OF SUBCLASSES OR PARTICULAR ISSUES

Plaintiffs alternatively seek certification of subclasses or of specific issues. Such certification is appropriate only upon a finding that the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy of representation are satisfied. See *In re Factor VII or IX Concentrate Blood Products,* 2005 WL 497782 (N.D. Ill. 2005) at *3. As the court's prior order noted, Sears did not dispute the numerosity of the previously proposed single mold problem class. However, the parties have not had the opportunity to address the numerosity of subclasses defined by the model-specific changes to the washer models at issue. Plaintiffs also acknowledge that newly defined subclasses would necessitate a reassessment of the current plaintiffs' typicality of the newly defined

class. The court concludes that the plaintiffs have not yet established the propriety of certification of subclasses or particular issues, and their alternative request for such relief is denied.

So ordered.

July 20, 2012

/s/
Sharon Johnson Coleman
District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 11-8029, 12-8030

LARRY BUTLER, *et al.,* individually and
on behalf of all others similarly situated,
Plaintiffs-Appellants,
Cross-Appellees,

v.

SEARS, ROEBUCK AND CO.,
Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 06 C 07023, 07 C 00412, 08 C 01832
Sharon Johnson Coleman, *Judge.*

December 19, 2012

Before
Richard A. Posner, *Circuit Judge*
Kenneth F. Ripple, *Circuit Judge*
David F. Hamilton, *Circuit Judge*

ORDER

On November 28, 2012, defendant-appellee, cross-appellant filed a petition for rehearing and petition for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*.[*] The petition is therefore DENIED.

[*] Circuit Judges Joel M. Flaum and John Daniel Tinder did not participate in the consideration of this petition for rehearing.

APPENDIX E

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) **Prerequisites**. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Types of Class Actions**. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual

adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) **Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses**.

(1) ***Certification Order***.

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by

order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel*. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice***.

(A) *For (b)(1) or (b)(2) Classes*. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment***. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues***. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses***. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

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