POST-*COMCAST* FORECAST: CLOUDY WITH A CHANCE OF CERTIFICATION

By Elizabeth J. Cabraser*

Introduction and Overview: *Concepcion, Wal-Mart,* and *Comcast*: Oh My!

The big news of 2013 for class action practitioners and pundits was the Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), which rejected class certification in an antitrust action; *Comcast*, which foundered on the mis-match between plaintiffs' damages expert's report and the surviving damages theory of the case. *Comcast*, both before and after the actual decision was issued, was forecast (especially on the defense side) to have widespread implications for the future of class certification, across substantive lines. While the actual decision in *Comcast* is difficult to square with such widespread impact (and at least the first year of post-*Comcast* appellate and district court decisions has belied such influence) the prediction that *Comcast* would be a class-killer was not entirely wishful thinking. *Comcast* took hostages. Among these were two consumer actions, alleging breach of warranty, and involving an alleged common mold-producing defect in specific models of front-loading washing machines manufactured by the Whirlpool Corp. Using the "GVR" mechanism (grant-vacate-remand), the class certifications decisions of, respectively, the Sixth and Seventh Circuits, in *Glazer v. Whirlpool Corp.* (*In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*)[1] and *Butler v. Sears Roebuck & Co.*[2] were vacated, held, and remanded by the Supreme Court in its 2013 term, to be re-examined in light of the *Comcast* decision.

Upon their return trips to the Sixth and Seventh Circuits, these "moldy washer" certification decisions were dually revisited in light of *Comcast*, and, in a surprise to some, but not all—reaffirmed. The class certification re-grants of *Butler v. Sears Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013) and *Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013) were, then, predictably, both subjected to renewed petitions for *certiorari*, and took their second trips to the Supreme Court, whereupon *certiorari* was (wait for it…) denied.[3] Both cases, as certified class actions, are proceeding toward trial.

Those who forecast the demise of the front-loading washers class actions upon post-*Comcast* remand to their respective Circuits, and who later predicted that the result—the renewed class certification decisions of these Circuits would be rinsed away upon subsequent

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* Ms. Cabraser is a partner in the firm of Lieff Cabraser Heimann & Bernstein, LLP, with offices in San Francisco, New York, and Nashville. She serves on the American Law Institute Council, and was an advisor to the ALI's *Aggregate Litigation* project. The Lieff Cabraser firm serves as one of class counsel in the *Whirlpool*, *Butler*, *Deepwater Horizon*, and *High-Tech Cold Calling* cases described in this article. The views expressed in this article are her own.

[1] 678 F.3d 409 (6th Cir. 2012), rehearing, *en banc*, denied, 2012 U.S. App. LEXIS 12560 (6th Cir. 2012); vacated, remanded by *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013).

[2] 702 F.3d 359 (7th Cir. 20112), rehearing, *en banc*, denied, 2012 U.S. App. LEXIS 26202 (7th Cir. 2012); vacated by, remanded by *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013).

[3] U.S. Supreme Court denied *certiorari* in *Whirlpool Corp. v. Glazer*, 2014 U.S. LEXIS 1484 (February 24, 2014); and *Sears v. Butler*, 2014 U.S. LEXIS 1507 (February 24, 2014).

grant of *certiorari*, have again been disappointed by the outcome: these classes could not be laundered away by *Comcast*.

Indeed, in the Seventh Circuit, Judge Posner, who authored both *Butler v. Sears* decisions (pre- and post-*Comcast*) displayed them in turn as the basis for a subsequent series of post-*Comcast* decisions that have reset the basic standards for class certification, reaffirmed the long-established policy that class certification should be utilized to enable small claimants to have their day in court, and reaffirmed the propriety and utility of what are sometimes called "issues" classes: classes that are either expressly certified under Rule 23(c)(4), or which are certified under Rule 23(b)(3) for particular purposes, such as, in the case of *Butler* itself, class certification for purposes of the determination of common questions of liability, leaving damages for individualized, follow-on procedures.

Plaintiffs' counsel and consumer advocates, not without reason, have tended to see the currently-configured Supreme Court as hostile to class actions. It can be difficult to disentangle skeptical scrutiny of the procedural mechanism of Rule 23 class certification, from a perceived underlying hostility toward the claims—and claimants—themselves, in the cases most frequently cited as evidence of this hostility. Cases in point: *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (rejecting the class certification quest of a nationwide class of women employees alleging gender discrimination in promotion); and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (throwing cell phone customers out of court by enforcing mandatory-arbitration clauses in the fine print of form contracts). *Wal-Mart* and *Concepcion* delivered much greater impact on employees, consumers and their class action efforts than has occurred with *Comcast*, although the effect of *Wal-Mart* and *Concepcion* as set-backs may be ameliorated over time. There have been many defeats, but some victories, in employment cases since *Wal-Mart*; and the judicial infatuation with forced arbitration clauses may be giving way to potential legislative and regulatory reform, and to public outrage.[4]

While *Concepcion* clearly promoted arbitration at the expense of civil litigation, and *Wal-Mart* arguably changed class action law, by essentially borrowing an influential articulation of Rule 23(b)(3) predominance and applying it as the test of Rule 23(a)(2) commonality[5], *Comcast* did not purport, and has not been interpreted by appellate or district courts, to change class

[4] General Mills, for example, recently tried to activate mandatory arbitration provisions for those who "liked" it on Facebook. Like turned to anger, and on April 19, 2014, General Mills yielded to public pressure, dropped its forced arbitration clause and apologized to consumers. *See* http://www.blog.generalmills.com/2014/04/weve-listened-and-were-changing-our-legal-terms-back-to-what-they-were//.

[5] Exhibit A: the famous, and practical, admonition of *Wal-Mart*, that "[w]hat matters to class certification…is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." 131 S. Ct. 2541, 2551, quoting Nagareda, Class Certification In The Age Of Aggregate Proof, 84 N.Y.U. L. Rev. 97,132 (2009). The quoted section of this seminal article, authored by the late Professor Richard Nagareda, one of the Reporters for the ALI's *Aggregate Litigation* project, was specifically addressing Rule 23 predominance of common questions under Rule 23(b)(3), not the less rigorous commonality standard involved in the *Wal-Mart* case itself, a Rule 23(b)(2) class action. No matter: for practical purposes, commonality and predominance have merged.

certification standards.[6] It is fair to say that class certification is more difficult and less predictable, across substantive lines, than it was before *Wal-Mart* and *Comcast*, but this is primarily because of the increasing emphasis, in these decisions and others, on an extensive factual record and expert reports as predicates to the class certification decision. This cumulative emphasis on evidentiary bases for every element of class certification "proof" has been driving the Rule 23 determination farther and farther away from the filing of the complaint, divorcing it from other procedural and pleadings disputes, and pushing it ever-closer to trial. As a result, class actions are more protracted and costly, and the class certification is ever more fact-specific. While courts, including the Supreme Court, continue the mantra that merits determination and class certification are distinct, certification is more and more merits-inflected, and the class/merits divide fuzzy.

The eve-of-trial certification phenomenon is the result of a series of decisions, none of which announced an express intent to make class actions more expensive, time-consuming, or merits-dependent, but which have, collectively and synergistically, had exactly this effect. In this era of rising concern over widening income disparity, whether it is sound policy to make class actions, which are frequently consumers' only avenue to an enforceable determination of their claims, a more expensive and less certain enterprise, is dubious. Nonetheless (outside the Seventh Circuit, at least), that is the present reality. The good news for plaintiffs is that courts, when they do reach the merits of the issues before them on the class certification inquiry, have been able to parse *Comcast* accurately, to enable class certification to proceed. This article surveys some of these recent decisions in the Circuit and district courts.

(b)(3) or Not (b)(3): What *Is* Predominance?

The touchstone of class certification under Rule 23(b)(3)—the issue that remains when Rule 23's other pertinent requirements (typicality, commonality, adequacy of representation, impracticability of joinder) have been met—is whether "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." Rule 23(b)(3) considerately supplies a list of factors, at 23(b)(3)(A)—(D), which may be consulted to determine whether a class action is "superior" to other available procedures, but, maddeningly perhaps, leaves the concept of predominance undefined. Courts have striven for decades to reach a workable definition. Post-*Comcast*, courts, including the influential Seventh Circuit, have tended to address predominance in practical,

[6] While *Comcast* would logically be expected to have greatest impact on class certification in antitrust cases, courts deciding class certification in such actions have continued to see the class certification process as straightforward. As observed by one seasoned jurist, Judge Samuel Conti in certifying the class in *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2013 U.S. Dist. LEXIS 137946 (N.D. Cal. 2013), the court's job at the antitrust class certification stage is simple: determine whether the putative class showed that there is a reasonable method for determining, on classwide basis, the antitrust impact's effects on the class members. This is a question of methodology, not merit. As the *CRT* court noted, "defendants continually argue…that the standard is somehow changed drastically under [*Wal-Mart*], *Comcast*, or *Amgen*, but the Court does not find that this is true. None of those cases changed the standard.… It is true that the Court's analysis overlaps with the merits…and requires that the [plaintiffs] make an evidentiary case for predominance, *Comcast*, 133 S. Ct. at 1431; *Amgen*, 133 S. Ct. at 1196; [*Wal-Mart*], 131 S. Ct. at 2551, but the defendants are trying to push the.… the Court toward a full-blown merits analysis, which is forbidden and unnecessary at this point, *Amgen*, 133 S. Ct. at 1194-95.

functional terms. Judge Lucy Koh, no stranger to sophisticated high-tech and intellectual property cases that characterize civil litigation in the Northern District of California, took a cue from the post-*Comcast Butler* decision, and the from the Supreme Court's 2013 *Amgen* decision,[7] and expressly defined the predominance inquiry as a pragmatic one in her decision denying class certification in *In re: Google Inc. Gmail Litigation*, 2014 U.S. Dist. LEXIS 36957, *48 (N.D. Cal. 2014):

> "Importantly, the predominance inquiry is a pragmatic one, in which the Court does more than just count up common issues and individual issues. Wright & Miller, *Federal Practice & Procedure* § 1778 (3d ed. 2005) (noting that "the proper standard under Rule 23(b)(3) is a pragmatic one, which is in keeping with the basic objectives of the Rule 23(b)(3) class action"). As the Seventh Circuit recently stated, "predominance requires a qualitative assessment too; it is not bean counting." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). The Court's inquiry is not whether common questions predominate with respect to individual elements or affirmative defenses; rather, the inquiry is a holistic one, in which the Court considers whether overall, considering the issues to be litigated, common issues will predominate. *Amgen*, 133 S. Ct. at 1196."

2014 U.S. Dist. LEXIS 36952, *48.

Judge Koh's *Gmail* decision does not rely entirely on post-*Comcast* authority for its predominance analysis. Rather, it demonstrates the unbroken line of legal development regarding the judicial view of predominance as a practical inquiry focusing on the utility and superiority of the preclusive classwide trial of important common questions. This is a trend that *Wal-Mart*, *Comcast*, and *Amgen* have punctuated, but did not interrupt. As Judge Koh summarized,

> "The Court's predominance analysis "entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials." *Gene And Gene LLC*, 541 F.3d at 326; *see also In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008) ("Under the predominance inquiry, a district court 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." (internal quotation marks omitted)); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (finding predominance "[w]hen com on questions present a significant aspect of the case and they can be resolved for all members of the class a single adjudication"). To meet the predominance requirement, "common questions must be a significant aspect of the case that can be resolved for all members of the class in a single adjudication." *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir. 201 ') (internal quotation marks and alterations omitted)."

[7] Practitioners tend to see the Supreme Court's 2013 *Amgen* and *Comcast* decisions as twins: which one is the "good" twin, and which is the "evil one, depends on which side of the "v" is "the vantage point."

Id. at **47-48.

Just the Facts, Ma'am

In 2014, courts are practical cats: facts matter. The facts of a specific case, and the expertise that can be mustered to support them, arguably matter more than anything, including the philosophy or ideology of a particular judge. While the *Gmail* class was denied under the rigorous analysis of Judge Koh, the same analysis, by the same judge, applying the same caselaw, yielded a grant of class certification in *In re: High-Tech Employee Antitrust Litigation*, 2013 U.S. Dist. LEXIS 153752 (N.D. Cal. 2013), where multiple rounds of briefing and hearings were required to satisfy the court that, in this antitrust action, common questions indeed predominated. In her *High-Tech* decision, Judge Koh discussed, at length, the class certification standards emerging from *Wal-Mart*, *Comcast*, and *Amgen*, together with the Ninth Circuit's own post-*Comcast* decision, *Levya v. Medline Industries*, 716 F.3d 510 (9th Cir. 2013), which reversed the denial of class certification in a labor law case. Likewise deployed were the Seventh Circuit's post-*Comcast Butler* decision, and its decision in *Messner v. North Shore University HealthSystem*, 669 F.3d 802 (7th Cir. 2012), which had also reversed a denial of class certification.

Adding tartness to this mix was the D.C. Circuit's post-*Comcast* decision in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), in which the D.C. Circuit had held that common questions of fact "cannot predominate where there exists no reliable means of proving classwide injury in fact" in the antitrust context. 725 F.3d at 252-53. Moreover, it is now "indisputably the role of the district court to scrutinize the evidence before granting certification." *Id.* at 253. The *High-Tech* court combined the qualitative predominance assessment articulated by the Sixth and Seventh Circuits in the "washer" cases with the "show me" skepticism of the *Fuel Surcharge*, which "requires district courts to closely scrutinize factual evidence and expert reports that demonstrate that impact can be proven on a classwide basis." *See High-Tech*, 2013 U.S. Dist. LEXIS 153752 at *50.

In *High-Tech* and in *Gmail*, Judge Koh took the opportunity to distill, from the Supreme Court and Appellate decisions, a holistic predominance analysis to apply in the antitrust context:

> "Certain principles regarding the legal standard that this Court must apply in determining whether the Technical Class should be certified emerge from *Walmart*, *Amgen*, *Comcast*, and the circuit court cases applying this Supreme Court authority. First, and most importantly, the critical question that this Court must answer is whether common questions predominate over individual questions. *Amgen*, 133 S. Ct. at 1191. In essence, this Court must determine whether common evidence and common methodology could be used to prove the elements of the underlying cause of action. *Id.* Second, in answering this question, this Court must conduct a "rigorous" analysis. *Comcast Corp.*, 133 S. Ct. at 1432. This analysis may overlap with the merits, but the inquiry cannot require Plaintiffs to prove elements of their substantive case at the class certification stage. *Amgen*, 133 S. Ct. at 1194. Third, this Court must determine not only the admissibility], of expert evidence that forms the basis of the methodology that demonstrates whether common questions predominate. *Ellis*, 657 F.3d at 982. Rather, this Court must also determine whether that expert evidence is persuasive,

> which may require the Court to resolve methodological disputes. *Id.*; *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 255. Fourth, the predominance inquiry is not a mechanical inquiry of "bean counting" to determine whether there are more individual questions than common questions. *Butler*, 727 F.3d at 801. Instead, the inquiry contemplates a qualitative assessment, which includes a hard look at the soundness of statistical models. *Id.*; *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 255. Fifth, Plaintiffs are not required to show that each element of the underlying cause of action is susceptible to classwide proof. *Amgen*, 133 S. Ct. at 1196. Rather, they need only show that common questions will predominate with respect to their case as a whole. *Id.*"

High-Tech, *Id.* at **53-54.

A *Deepwater* Dive Into *Wal-Mart*, *Amgen*, and *Comcast*

In affirming the Rule 23(e) final approval of a comprehensive economic loss class action settlement to compensate claims arising from the April 20, 2010 explosion, fire, and resulting catastrophic oil spill from the drilling rig *Deepwater Horizon*, the Fifth Circuit had occasion to discuss the reach of *Comcast*, which, among other decisions, was mustered as authority, by a handful of settlement objectors, against settlement approval.[8]

Writing for the majority, Judge Davis first rejected the necessity or propriety of an evidentiary inquiry into the Article III standing of absent class members, essentially holding that standing as a matter of allegation, that is, of pleading, rather than of proof. *In re: Deepwater Horizon–Appeals of the Economic and Property Damage Class Action Settlement*, 739 F.3d 790, 805-806 (5th Cir. 2014).[9] Judge Davis rejected the standing challenge as necessitating a merits inquiry synthesizing the Supreme Court's holdings in *Amgen* and *Wal-Mart* as follows:

> BP has cited no authority—and we are aware of none—that would permit an evidentiary inquiry into the Article III standing of absent class members during class certification and settlement approval under *Rule 23*. It is true that a district court may "probe behind the pleadings" when examining whether a specific case meets the requirements of Rule 23, such as numerosity, commonality, typicality, and adequacy.[58] But the Supreme Court cautioned in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95, 185 L. Ed. 2d 308

[8] While the class action settlement itself has been affirmed, disputes over settlement interpretation remain before the Fifth Circuit. Notwithstanding this activity, over $3 billion has thus far been distributed to class members. For a detailed description of the economic settlement's terms, *see* Samuel Issacharoff and D. Theodore Rave, "The BP Oil Spill Settlement and the Paradox of Public Litigation, 74 L. L. Rev 397 (2014).

[9] This analysis, and its conclusion, forecast the observations of Justice Scalia, writing for a unanimous court in *Lexmark Int'l v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), a non-class action, "proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct…like any other element of a cause of action, it must be adequately alleged at the pleading stage in order for the case to proceed.… If a plaintiff's allegations, taken as true, are insufficient to establish proximate causation, then the complaint must be dismissed; if they are sufficient, then the plaintiff is entitled to an opportunity to prove them." *Id.*, at n.6.

(2013), that "*Rule 23* grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied.

> 58 *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011) (*quoting *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))*.

Deepwater settlement objectors had argued that *Comcast* (decided three months after the district court's settlement class certification and settlement approval orders) "precludes certification under Rule 23(b)(3) in any case where the class members' damages are not susceptible to a formula for classwide measurement." 739 F.3d at 815. As the *Deepwater* majority explained, this is "a misreading of *Comcast.…Comcast* held that a district court errs by premising its Rule 23(b)(3) decision on a formula for classwide measurement of damages whenever the damage is measured by that formula are incompatible with the class action's theory of liability." *Id*. As the *Deepwater* decision goes on, while this rule "may reveal an important defect in many formulas for classwide measurement of damages," nothing in *Comcast* mandates a formula for classwide measurement of damages in all cases. *Id.* The *Comcast* rule, that the damages evidence must match the damages theory, "has no impact on cases…in which predominance was based not on common issues of damages but on the numerous common issues of liability." *Id.*

Thus, in the *Deepwater* economic settlement, "the district court did not include a formula for classwide measurement of damages among its extensive listing of the 'common issues' that weighed in favor of certification. The district court always recognized that the class members' damages 'would have to be decided on an individual basis where the case is not being settlement,' as would 'the extent to which the *Deepwater Horizon* incident versus other factors caused a decline in the income of an individual or business.'" 739 F.3d at 815. The *Deepwater Horizon* settlement class is thus analogous to the defective washer classes certified in *Butler* and *Whirlpool* (both of which were certified for the classwide determination of common liability issues) rather than the antitrust decision in *Comcast*, in which plaintiffs sought an aggregate classwide damages figure.[10]

Post-*Comcast* Class Certification Decisions In The Seventh Circuit

Perhaps surprisingly to those who recollect the Seventh Circuit's earlier withering critiques of class actions in decisions such as *Rhone-Poulenc* and *Bridgestone/Firestone*,[11] the Seventh Circuit has emerged in recent years, both pre- and post-*Wal-Mart* and *Comcast*, as a leading class action court, most notably in decisions authored by Judge Posner, the author of *Rhone-Poulenc*. Both *Butler* decisions (pre- and post-*Comcast*) were authored by Posner, and

[10] *See Butler*, 727 F.3d at 800; *In re Whirlpool Corp.*, 722 F.3d at 860.

[11] *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (Posner, J.) (reversing class certification of nationwide personal injury class of hemophiliacs alleging negligent HIV contamination of blood products under multiple states laws); *In re Bridgestone/Firestone Tire Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002) (Easterbrook, J.) (reversing class certification of nationwide consumer fraud class).

recent months have seen an additional series of class certification decisions, constituting a Seventh Circuit, 21st Century jurisprudence of class certification, that promotes the efficiency and utility of the class action mechanism, particularly with respect to consumer claims. These decisions are not limited to the consumer arena, however. In the immediate wake of *Wal-Mart*, a Posner-authored affirmation of employment class certification was issued in *McReynolds*, an employment discrimination case involving smaller-scale class, of African-American stockbrokers.[12]

Other post-*Wal-Mart*, post-*Comcast* recent Posner class certification decisions include: *Chapman v. Wagener Equities, Inc*., 2014 U.S. App. LEXIS 5962 (7th Cir. March 31, 2014) (certification of a class of junk fax recipients in an action brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(C) for statutory damages); *Parko v. Shell Oil Co.*, 739 F.3d 1083 (7th Cir. 2014) (an opinion rejecting defendants' "numerosity" challenge; but reversing class certification for plaintiffs' failure to satisfy predominance in a benzene exposure case); *Driver v. AppleIllinois, LLC*, 739 F.3d 1073 (7th Cir. 2014) (23(f) petition from denial of motion to decertify class denied); *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076 (7th Cir. 2013) (denial of class certification reversed in Fair Debt Collection Practices case. Articulating a practical standard for adequacy, and reaffirming that "proof of injury is not required when the only damages sought are statutory." 730 F.3d at 1083.); *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672 (7th Cir. 2013) (decertification order reversed). In *Hughes*, Jude Posner promotes the use of *cy pres* as an effective remedy in small-damages suits—bucking a trend of judicial skepticism toward *cy pres*: "In a class action, the reason for a remedy modeled on *cy pres* is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or of the judgment, in the rare case in which a class action not dismissed pretrial goes to trial rather than being settled) to the class members." For contrast, see Chief Justice Roberts' unusual dissent from the denial of certiorari in *Marek v. Lane*, 134 S. Ct. 8 (2103), targeting *cy pres* for future Supreme Court scrutiny.

***Whirlpool* and *Butler*: Moldy Washers Redux**

What Happened to the Washers? The class certification decisions of the Sixth and Seventh Circuits in the "moldy washer" cases, *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409 (6th Cir. 2012) and *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012) spent a year in the Supreme Court on "GVR" (Grant-Vacate-Remand), and were then sent back to their respective circuits for further consideration in light of *Comcast*. *See Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013). After reconsidering the matter in light of *Comcast*, the Sixth Circuit affirmed the order of the district court certifying a liability class. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 845 (6th Cir. 2013). Similarly, on remand from the United States Supreme Court, the Seventh Circuit reconsidered its prior ruling in light of *Comcast*, and denied defendant's quest for further remand to the district court "for a fresh ruling on certification in light of *Comcast*"…while the plaintiffs requested the court to reinstate its prior judgment, granting class certification. *See Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798 (7th Cir. 2013). The Seventh Circuit reaffirmed its earlier grant of class certification.

[12] *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012).

In a nutshell, the "moldy washer" cases involve Whirlpool-manufactured front-loading washing machines (branded as "Kenmore" when sold by Sears) that allegedly were designed in such a way that they trapped mold and do not adequately self-clean. As a result, consumers are required to undertake expensive and extraordinary maintenance to try to ameliorate the development of mold and resulting noxious odors: a situation undisclosed by defendants at the time of sale. As summarized in the plaintiffs' Initial Brief in opposition to the second round (post-*Comcast*) of certiorari petitions, plaintiffs summarized a problem revealed in pre-certification discovery as follows:

> "Whirlpool's own engineers have conceded that the FLWs [front-loading washing machines] are the "ideal environment for bacteria and mold to flourish" because of their "lower water levels, high moisture, and reduced ventilation." *Id*. at 412-13. Whirlpool, moreover, concluded that odor, a common end result of mold contamination, had developed in 35% of the FLWs within just a few years, and estimated that 50% of "current front-load washer owners might be looking for a solution to an odor problem with their machines." *Id*. at 415; *see also* D. 213-13 (7/02/05 Memo) at 1 ("[H]igh #of customers (35%) complaining about bad odors.…").
>
> While Sears and Whirlpool denied warranty coverage for this problem, Whirlpool developed and sells a product to *all* purchasers of the FLWs that it touts as addressing the problem. *See Glazer*, at 415. ("Whirlpool marketed Affresh <TM> [tablets] as 'THE solution to odor causing residue'"); *see also* D. 213-l l (9/20/07 Affresh Memo) at l-2 (explaining that no other "cleaning product provided a complete solution to effectively combat" the buildup of "mold and mildew" within the Washers). Sears and Whirlpool, moreover, eventually instructed *all* purchasers to follow elaborate procedures to forestall the mold problem, including running extra cycles with bleach, wiping and cleaning the machine after each use, and leaving the washer door open at all times."· 2012 U.S. Briefs 1067, **4-5."

In *Butler II*, on remand from the Supreme Court, the Seventh Circuit reiterated its previous holding that it was the district court that had erred, by failing to conduct a rigorous class certification analysis of the claims, and reiterated its reversal of the district court's denial of mold class certification. In applying the *Comcast* decision to the facts as developed in the case, and the claims asserted, Judge Posner summarized holding of *Comcast* as follows:

> "*Comcast* holds that a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of the class-wide *injury* that the suit alleges. *Comcast* was an antitrust suit, and the Court said that "if [the plaintiffs] prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *133 S. Ct. at 1433*. "[A] methodology *that identifies damages that are not the*

result of the wrong" is an impermissible basis for calculating class-wide damages. *Id. at 1434* (emphasis added). "For all we know, cable subscribers in Gloucester County may have been overcharged because of petitioners' alleged elimination of satellite competition (*a theory of liability that is not capable of classwide proof*)." *Id*. (emphasis added). And on the next page of its opinion the Court quotes approvingly from Federal Judicial Center, *Reference Manual on Scientific Evidence* 432 (3d ed. 2011), that "the first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*." (emphasis the Court's). None of the parties had even challenged the district court's ruling that class certification required "that the damages resulting from ... [the antitrust violation] were measurable 'on a class-wide basis' through use of a 'common methodology.'" 133 S. Ct. at 1430. 727 F.3d at 799."

The situation in *Comcast* was then contrasted to the claims presented in *Butler*: "Unlike the situation in *Comcast*, there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis; all members of the mold class attribute their damages to mold and all members of the control-unit class to a defect in the control unit." *Id.*

* * *

Sears compares the design changes that may have affected the severity of the mold problem to the different antitrust liability theories in *Comcast*. But it was not the existence of multiple theories in that case that precluded class certification; it was the plaintiffs' failure to base all the damages they sought on the antitrust impact—the injury—of which the plaintiffs were complaining. In contrast, any buyer of a Kenmore washing machine who experienced a mold problem was harmed by a breach of warranty alleged in the complaint.

Furthermore and fundamentally, the district court in our case, unlike *Comcast*, neither was asked to decide nor did decide whether to determine d the damages on a class-wide basis." *Id.*

Butler, consistent with the Seventh Circuit's earlier, post-*Wal-Mart* decision in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) explains that class action "limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogenous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed." 727 F.3d at 800.[13]

In *Butler*, the Seventh Circuit further takes the opportunity to emphasize a key holding of *Wal-Mart*: that an "issue 'central to the validity of each one of the claims' in a class action, if it

[13] Rule 23(c)(4) has an established history in the Seventh Circuit as a practical, efficient, and Rule-based mechanism to sort common questions from individual ones; the former are provided class treatment, while the latter are reserved for individual determination. *See, e.g.*, Pella Corp. v. Saltzman, 606 F.3d 391, 393-4 (7th Cir. 2010) (*per curiam*).

can be resolved 'in one stroke' can justify class treatment." *Butler*, 727 F.3d at 801, *citing Wal-Mart*, 131 S.Ct. at 2551. *Butler* recognizes that *Wal-Mart* was speaking of Rule 23(a)(2) commonality [although, as this article notes, it borrowed from Nagareda's predominance articulation to do so]. But *Butler* goes on to observe that "predominance requires a qualitative assessment too; it is not bean counting," *citing Amgen; Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997); and its own *Messner v. Northshore University Health System*, 669 F.3d 802, 819 (7th Cir. 2012) decisions to do so. Moreover, as *Butler* notes, damages is *not* one of those questions which must be placed on the "common" side of the ledger in order for predominance to be met. To do so would render Rule 23 disfunctional:

> It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits. As we noted in *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004), "the more claimants there are, the more likely a class action is to yield substantial economies in litigation. It would hardly be an improvement to have in lieu of this single class 17 million suits each seeking damages of $15 to $30…The realistic alternative to a class action is not individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30" (emphasis in original). The present case is less extreme: tens of thousands of class members, each seeking damages of a few hundred dollars. But few members of such a class, considering the costs and distraction of litigation, would think so meager a prospect made suing worthwhile.

727 F.3d at 801.

The *Butler* decision, on remand, reaffirmed a single, central, unifying, and predominating common question, which it described as follows:

> There is a single, central, common issue of liability: whether the Sears washing machine was defective. Two separate defects are alleged, but remember that this class action is really two class actions. In one the defect alleged involves mold, in the other the control unit. Each defect is central to liability. Complications arise from the design changes and from separate state warranty laws, but can be handled by the creation of subclasses. *See, e.g., Johnson v. Meriter Health Services Employee Retirement Plan, supra*, 702 F.3d at 365 (10 subclasses). These are matters for the district judge to consider in the first instance, and Sears will be able to present to her the evidence it's obtained since the district judge ruled on certification almost two years ago.

727 F.3d at 801-802.

On post-*Comcast* remand, the Sixth Circuit also reaffirmed class treatment, in a decision dissimilar in style, but not in substance, to that in *Butler*. Addressing the meaning of a GVR order, the *Whirlpool* decision observed that such is not equivalent to reversal on the merits, nor is it an "invitation to reverse"; rather, it requires a simple determination of whether the original decision to affirm the class certification order was correct, or "whether *Comcast Corp.* compels a different resolution." 722 F.3d 838, 845.

Reviewing, again, the facts developed in the case, including Whirlpool's clever transformation of a warranty liability to a profit center (the development and sale of "Affresh" tablets to their customers to battle the mold problem, 722 F.3d at 848-849, the court had no difficulty in determining common questions of defect, nondisclosure, breach of warranty, and economic harm. The *Whirlpool* court applied both *Comcast* and *Amgen* to its re-analysis, concluding as follows:

> Following *Amgen*'s lead, we uphold the district court's determination that liability questions common to the Ohio class—whether the alleged design defects in the Duets proximately caused mold to grow in the machines and whether Whirlpool adequately warned consumers about the propensity for mold growth—predominate over any individual questions. As in *Amgen*, the certified liability class "will prevail or fail in unison," *id.* at 1191, for all of the same reasons we discussed above in conjunction with the Rule 23(a) prerequisites of commonality and typicality. Rule 23(b)(3) does not mandate that a plaintiff seeking class certification prove that each element of the claim is susceptible to classwide proof. *Id.* at 1196. Evidence will either prove or disprove as to all class members whether the alleged design defects caused the collection of biofilm, promoting mold growth, and whether Whirlpool failed to warn consumers adequately of the propensity for mold growth in the Duets.

722 F.3d at 859.

Turning to an analysis of *Comcast*, and a comparison of the *Comcast* claims and facts with those presented by the washer litigation, the Whirlpool court concluded:

> This case is different from *Comcast Corp.* Here the district court certified "class and reserved all issues concerning damages for individual determination; in *Comcast Corp.* the court certified a class to determine both liability and damages. Where determinations on liability and damages have been bifurcated, *see* Fed. R. Civ. P. 23(c)(4), the decision in *Comcast*—to reject certification of a liability and damages class because plaintiffs failed to establish that damages could be measured on a classwide basis—has limited application. To the extent that *Comcast Corp.* reaffirms the settled rule that liability issues relating to injury must be susceptible of proof on a classwide basis to meet the predominance standard, our opinion thoroughly demonstrates why that requirement is met in this case. *See Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (observing after Comcast that class "must be able to show that their damages stemmed from the defendant's actions that- created- the legal liability").

722 F.3d at 861.

The *Whirlpool* decision also carefully considered the overall impact of both *Amgen* and *Comcast* on Rule 23 class certification criteria. It noted that both cases "are premised on existing class-action jurisprudence. The majority in *Comcast Corp.* concludes that the case 'turns on the straightforward application of class certification principles,' 133 S.Ct. at 1433, and the dissent concurs that 'the opinion breaks no new ground on the standard for certifying a class action…'" concluding that 'in "the mine run' of cases it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members." 722 F.3d at 860-861.

> As to the methodology for adjudication, *Whirlpool* is succinct:
> Once the district court resolves under Ohio law the common liability questions that are likely to generate common answers in this case, the court will either enter judgment for Whirlpool or proceed to the question of plaintiffs' damages. In the latter event, the court may exercise its discretion in line with Amgen, Comcast Corp., and other cases cited in this opinion to resolve the damages issues.

722 F.3d at 861.

In the washers cases, did both the Sixth and Seventh Circuits defy *Comcast* in reconsidering, and reaffirming, their previous class certification decisions? Defendants certainly thought so, and promptly filed petitions for *certiorari* in both actions, sending the moldy washers cases on a return trip (a second rinse cycle, if you will) back to the Supreme Court. Surprisingly, or not, *certiorari* was denied in both actions, *see Sears v. Butler*, 2014 U.S. LEXIS 1507 (February 24, 2014); *Whirlpool Corp. v. Glazer*, 2014 U.S. LEXIS 1484 (February 24, 20140). The cases are proceeding toward trial in their respective district courts at this writing. *Comcast* thus did not cast its shadow across these consumer warranty cases. The simplest explanation is that the holding and rationale of *Comcast* simply did not reach them. Neither washers case sought an aggregate classwide damages amount. Rather, class certification in each was sought for the preclusive determination of liability-related common questions only.

An Inconclusive Conclusion

Rule 23 is, by design, a trans-substantive rule. However, the way claims and their elements are asserted and proved in different substantive areas of the law (for example, antitrust versus consumer warranty cases) means that class certification decisions, even those by our highest court, that do not change fundamental Rule 23 criteria or standards can have far different levels of impact—or no impact at all—when applied through the claims and questions of a case in a different subject area, or even to a case of the same ilk but very different facts. Thus, it should not surprise us that the principles of *Comcast*, faithfully applied upon remand by the Sixth and Seventh Circuits in the molding washers cases, did not alter the previous class certification orders. Likewise, it should not be jarring that Judge Koh's application of *Comcast* principles to *Gmail*, a non-antitrust case, factored into a denial of class certification, while the same Judge's similarly rigorous application of *Comcast* and *Wal-Mart* factored into a grant of class certification in an antitrust action (like *Comcast*) that arose in an employment context (like *Wal-Mart*).

Intended or not, the message of recent Supreme Court class-related decisions for the practitioner is both encouraging and daunting: those who seek class certification must attend to the rigorous development of their facts, and of the expert support necessary to establish the technical, scientific, and (if classwide damages are sought) the damages aspects of their case. Those who oppose class certification may depend upon cases like *Comcast*, and *Wal-Mart*—but not too much. These cases have, most clearly and expansively, reaffirmed the ideas that class certification is not a matter of mere facial allegation, that it does not come easily or quickly, and that it pivots upon a rigorous analysis of the fact and law, as these will apply to the trial of what are contended to be classwide questions of law or fact. Such questions must be both provable on classwide basis, and significant in comparison to the inevitable individual issues also presented by every case. The plaintiffs may take heart that neither *Comcast*, *Wal-Mart*, nor *Amgen* changed the fact that no class action is entirely a class action: all questions are not required to be triable on a classwide basis. But the classwide questions must be important ones. They must serve a functional purpose, as Judge Posner has pointed out repeatedly; and as Judge Koh echoed in *Google*, the predominance inquiry is a pragmatic one. Is that clear?