Nos. 13-430, 13-431

In the Supreme Court of the United States

SEARS, ROEBUCK AND COMPANY,
Petitioner,
v.

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

WHIRLPOOL CORPORATION,
Petitioner,
v.

GINA GLAZER AND TRINA ALLISON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh and Sixth Circuits

BRIEF OF *AMICUS CURIAE* DRI - THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

DRI – The Voice of the Defense Bar ("DRI") respectfully submits this brief as *amicus curiae* in support of Petitioner Whirlpool Corporation in *Whirlpool Corporation v. Glazer* (Case No. 13-431) and Petitioner Sears, Roebuck, and Co. in *Sears, Roebuck and Co. v. Butler* (Case No. 13-430).[1] DRI urges that the Sixth and Seventh Circuit's recent decisions in those cases undermine constitutional norms and override state law principles by certifying class suits under Federal Rule of Civil Procedure 23(b)(3) without taking into account controlling state law and conducting a proper choice-of-law analysis before finding that the predominance requirement has been satisfied.

DRI is an international, voluntary membership organization which has been in existence for over 50 years. Comprised of more than 22,000 attorneys defending businesses and individuals in civil litigation, DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys around the globe. Therefore, DRI seeks to address issues of interest and importance to defense attorneys and the civil justice system.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, *amicus curiae* states that petitioners and respondents have consented to its filing.

DRI's members are increasingly called upon to defend their clients in multistate class action lawsuits where variations in state law may defeat a finding of predominance under Federal Rule of Civil Procedure 23(b)(3). DRI is affiliated with over 54 active state and local defense organizations. Because its members and affiliates practice throughout the country in state and federal courts, DRI publishes state-law compendiums highlighting the differences in state laws. In the last decade, DRI has authored over 25 publications, many of which detail the nuances of state laws in various areas of practice. Of these compendiums, several have been specifically tailored to product liability and class action claims:

- Product Liability Defenses: 2004 Compendium (2004);
- Product Liability Defenses: 2007 Compendium (2007);
- Products Liability Cases and the Duty to Warn: A 50 State Compendium (2007);
- Class Action Compendium (2011);
- Products Liability Defenses: A State-by-State Compendium (2013); and
- Product Liability Compendium: Warnings, Instructions, and Recalls (2013).

DRI therefore has a unique vantage point to help this Court understand the importance of rigorous analysis of state law in the certification process.

DRI has a strong interest in assuring that district and appellate courts alike follow this Court's directive – most recently enunciated in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013) – to conduct a "rigorous analysis" before certifying a class. This requires conducting a choice-of-law analysis to account for the

impact of outcome-determinative variations in the laws of the states at issue. Anything less will undermine defendants' right to rely on favorable aspects of state tort law in defending against class suits brought under state law. In addition, applying a particular state's law, which does not allow either liability or recovery of damages for uninjured litigants, to support certification in a way that grants rights where none exists undermines notions of federalism and the predictability that strengthens the rule of law.

Federal class action rules governing class certification must be consistently and correctly applied to ensure that a defendant's right to present its case is not abrogated or hindered by virtue of a class certification decision. Left unreviewed by this Court, the Sixth and Seventh Circuit's decisions will have a profound effect on businesses and individuals who may be subject to these types of suits because they authorize a trial court to certify a proposed class under Federal Rule of Civil Procedure 23(b)(3), even where a proper analysis under controlling state law would reveal that class treatment is improper. This creates the potential for abuse of the class action mechanism. Relieving plaintiffs of their burden of establishing predominance under Rule 23(b)(3) directly affects the fair, efficient, and consistent functioning of our civil justice system, and, as such, is of vital interest to DRI.

SUMMARY OF ARGUMENT

This Court's recent decision to decertify a class under Rule 23(b)(3) emphasizes the importance of ensuring that the predominance requirement is not reduced "to a nullity." *Comcast Corp v. Behrend*, 133 S.Ct. 1426, 1433 (2013). The requirements of Rule

23(b)(3) afford the parties important procedural protections that, if not enforced, may jeopardize their due process rights. Key among these protections is the rule that class treatment is only proper when a rigorous analysis confirms that common questions predominate over individual ones. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2552 (2011). It is impossible to correctly undertake this analysis without examining controlling state law. Indeed, constitutional principles require it. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426-27 (1996), citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (noting the requirement that "federal courts sitting in diversity apply state substantive law and federal procedural law."). When a court certifies a class without looking to state substantive law or conducting a choice-of-law analysis, the result may be an overbroad class comprised largely of non-injured plaintiffs who cannot satisfy the elements of proof required to recover under controlling state law.

This is exactly what occurred in *Glazer v. Whirlpool Corporation*, 722 F.3d 838 (6th Cir. 2013), and *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796 (7th Cir. 2013). Despite this Court's order to reconsider their prior opinions in light of *Comcast*, *Whirlpool Corp. v. Glazer*, 133 S.Ct. 1722 (2013) (mem), and *Sears, Roebuck and Co. v. Butler*, 133 S.Ct. 2768 (2013) (mem), the *Glazer* and *Butler* courts failed to rigorously analyze the predominance requirement of Rule 23(b)(3) and affirmed certification of class actions suits without examining controlling state law and, in the case of *Butler*, without undertaking a choice of law analysis. Had the *Glazer* and *Butler* courts properly exercised their duty under Rule 23(b)(3), they would have

necessarily concluded that common questions did not predominate under applicable state law. But the *Glazer* and *Butler* courts essentially ignored that duty and adopted a sweeping approach to Rule 23(b)(3) predominance that has no basis in state tort law.

Where, as here, a federal rule is interpreted so expansively that it overrides state tort principles that are supposed to govern, it has a pernicious effect and undermines the delicate balance of "Our Federalism." The concept of "Our Federalism" recognizes the need for "sensitivity to the legitimate interests of both State and National Governments," and encourages a system in which "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). See also *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 611 (1997). In areas such as product liability, which is heavily regulated by the individual states through common law tort doctrines and various state statutes, notions of "Our Federalism" require federal courts in diversity cases to defer to state substantive law in determining whether class treatment is the appropriate approach.

The Sixth and Seventh Circuit's precedent-setting errors are of exceptional importance because they undermine the rule of law and increase defendants' class-action exposure by encouraging litigation regardless of whether there is any reasonable basis for liability under forum law. Further, these errors threaten to increase exponentially the already-

extortionate settlement pressures that class defendants confront. Opportunistic plaintiffs using the Sixth and Seventh Circuit's decisions as roadmaps will find it easier to convert a product liability suit into a local or multistate class action by pointing to favorable law in one state and then exporting that law across state lines under the guise of "predominance." Not only is this an inappropriate use of class action procedure, but it allows the class action device to alter the law of the several states by obliterating important state law differences or by imposing on one state the law of another.

ARGUMENT

This Case Presents The Court With An Opportunity To Clarify That The Courts Are Required, Under The Principle Of "Our Federalism", To Analyze Controlling State Law Before Finding That The Predominance Requirement Of Federal Rule Of Civil Procedure 23(b)(3) Has Been Met.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550 (2011), quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979). Accordingly, the drafters enacted a rule with stringent prerequisites that a proposed class must satisfy in order to avail itself of class treatment. Fed. R. Civ. P. 23. Under Federal Rule of Civil Procedure 23, no class may be certified unless it satisfies the four prerequisites of subsection (a), and fits within one of the three class action types set forth in subsection (b).

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614 (1997) Under Rule 23(b)(3), a class action is maintainable only when common issues are shown to predominate over individualized ones. This is a far more demanding standard than Rule 23(a)(2) commonality and places upon plaintiffs the burden of demonstrating, at the certification stage, that "the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem, supra,* at 623-24.

In order to conduct the "rigorous analysis" required by Rule 23, a court must first identify the elements of the plaintiffs' claims and then determine the proof that will be required to establish those elements. *Dukes*, *supra*, at 2551-52. "If proof of the essential elements of the cause of action requires individual treatment, then predominance is defeated and a class should not be certified." *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009) (citation and quotation marks omitted). The predominance question cannot be answered without examining and applying controlling state law.

The Sixth and Seventh Circuits, in their most recent opinions, adopted similar approaches that essentially dispensed with the predominance requirement of Rule 23(b)(3) and allowed certification of class action suits without examining controlling state law and, in the case of *Butler*, without undertaking a choice-of-law analysis. *Glazer v. Whirlpool Corporation*, 722 F.3d 838 (6th Cir. 2013); *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796 (7th Cir. 2013). Both constitute profound error.

Instead of identifying the requirements of Ohio law and analyzing the appropriateness of class certification under that law, the *Glazer* Court displaced Ohio law's framework for a negligent failure-to-warn claim and replaced it with features of California's consumer-protection statutes. 722 F.3d at 857. This distorted the legal framework under which the class certification decision should have been made and created a right to recover where none exists by imposing a California consumer-protection analysis on what should have been an Ohio product liability analysis. In short, even though Ohio products claims of negligent design and negligent failure to warn are not intended to afford recovery for economic loss, Ohio Rev. Code § 2307.71(G), (M), the *Glazer* Court introduced a new, California-based theory of damages for economic loss. 722 F.3d at 857. In addition, the *Glazer* Court erroneously relied upon a number of Ninth Circuit and California cases, all of which addressed standing issues under California law, to affirm the district court's inclusion of class members who have not suffered "actual injury."

The Seventh Circuit in *Butler* similarly dispensed with the predominance requirement of Rule 23(b)(3) and allowed certification of two class action suits (the "mold" and "control unit" classes) based on the warranty laws of six different states. 727 F.3d 796. This too constituted error. The Seventh Circuit's failure to account for the impact of outcome-determinative variations in the laws of the states at issue runs directly afoul of this Court's requirement that courts conduct a choice-of-law analysis *before* making a determination on predominance. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985). See

also *Castano v American Tobacco Co*., 84 F.3d 734, 741 (5th Cir. 1996). Had the Seventh Circuit correctly undertaken that analysis, or remanded to the district court for a choice-of-law determination, it would have necessarily concluded that common issues did not predominate over individualized ones. This is particularly so where the law in most, but not all, of the six states at issue bars a warranty claim based, as is the case here, on an unmanifested defect. *Carey v. Select Comfort Corp*., 2006 WL 871619, at *2-3, 5 (Minn. Dist. Ct. Jan. 30, 2006); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 192 (Ky. 1994); *Angel v. Goodman Mfg. Co., L.P*., 330 Fed. Appx. 750, 754 (10th Cir. 2009); *In re Air Bag Prods. Liab. Litig*., 7 F.Supp.2d 792, 804 (E.D. La. 1998).

Although the Court in *Comcast* clarified that plaintiffs seeking class certification must "affirmatively demonstrate" with "evidentiary proof" that common questions will "predominate over any questions affecting only individual members" at trial, 133 S.Ct. 1432, the Sixth and Seventh Circuits did not require this affirmative demonstration. The Sixth and Seventh Circuit's failure to appreciate the import of *Comcast* invites this Court's review.

A. The Rule 23(b)(3) predominance analysis must include an inquiry into the elements of the Plaintiffs' state law claims and, in multistate class actions, a choice-of-law analysis.

This Court has recognized for over a century that state sovereignty is a "fundamental concept of our system of government." *Garcia v San Antonio Metropolitan Transit Authority* 469 U.S. 528, 573 (1985), citing *Lane County v. Oregon*, 19 L.Ed. 101

(1869). In *United States v. Lopez*, 514 U.S. 549, 581 (1995), the Court reaffirmed that the "[s]tates may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." See also *F.E.R.C. v. Mississippi*, 456 U.S. 742, 788 (1982). In 1999, President William Clinton issued an executive order proclaiming that "the States possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy." Executive Order 13132 at § 2(e). It is for this very reason that "issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people." *Id*. at §2(a). See also *Garcia v San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 573, quoting *National League of Cities v. Usery*, 426 U.S. 833, 842 (1976) (observing that "our federal system of government imposes defined limits upon the authority of Congress to regulate the activities of States as States by means of the commerce power.").

The Federal Rules of Civil Procedure governing class actions are not intended to infringe upon this unique power of the States. A critical part of "Our Federalism" is the requirement that "federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Center for Humanities, Inc*., 518 U.S. 415, 426-27 (1996), citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). See also 28 U.S.C. § 1652 (providing that the "laws of the several states…shall be regarded as rules of decision in civil actions in the courts of the United States," except where the federal Constitution or other federal legislation requires otherwise). Accordingly, Rule 23

should not be used to obliterate state law distinctions and violate these constitutionally-based principles.

A vast number of states have enacted comprehensive legislation and common law rules to govern products liability claims and recoveries by their citizens. Am. L. Prod. Liab. 3d § 39.1 (2013). A federal court certifying a class therefore must, as part of the "rigorous analysis" required by Rule 23, identify the elements of the plaintiffs' claims as defined by controlling state law and then determine the proof that will be required to establish those elements. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551-52 (2011) ("the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."). Other federal circuit courts of appeal have correctly applied this Court's teachings to conduct just such a rigorous analysis of state law elements of proof to see whether the predominance requirement is satisfied. "If proof of the essential elements of the cause of action requires individual treatment, then predominance is defeated and a class should not be certified." *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009) (citation and quotation marks omitted). See also *Newton v. Merrill Lynch, Pierce, Fenner & Smith., Inc.*, 259 F.3d 154, 172 (3d Cir. 2011). When state law requires that all class members have suffered injury, as does Ohio tort law, *Hoang v. E*Trade Group, Inc.*, 151 Ohio App. 3d 363, 369-70; 784 N.E.2d 121, 155 (Ohio Ct. App. 2003), class treatment of a class comprised of mostly uninjured litigants is improper.

Similarly, when determining whether to certify a class involving multistate parties, this Court explained

that the court must conduct a choice-of-law analysis as part and parcel of its "rigorous analysis." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985). And it must do so before finding that common issues predominate over individualized ones. This is because multistate class actions, like the "mold" and "control unit" suits at issue in *Butler*, complicate the predominance analysis and place additional obligations on courts making certification decisions. Because class action treatment is improper "unless all litigants are governed by the same legal rules[,]" *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002), a district court conducting a Rule 23(b)(3) inquiry in a multistate class action "must consider how variations in state law affect predominance and superiority…A requirement that a court know which law will apply before making a predominance determination is especially important when there may be differences in state law." *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996). Accordingly, "choice-of-law principles play a crucial rule in the certification of (b)(3) class actions, particularly when the class consists of persons living in many different states." Steven S. Gensler, *Civil Procedure: Class Certification and the Predominance Requirement Under Oklahoma Section 2023(B)(3)*, 56 Okla. L. Rev. 289, 296 (2003).

Federal Rule of Civil Procedure 23 was not enacted to override and obliterate state law principles. An over-inclusive approach to class certification is therefore contrary to its purpose and violates principles of "Our Federalism." See *Alden v. Maine*, 527 U.S. 706, 748 (1999) ("Although the Constitution grants broad powers to Congress, our federalism requires that

Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.").

The Sixth and Seventh Circuit's decisions highlight the need for guidance from this Court. This need is strengthened because the Sixth and Seventh Circuits' approaches, which essentially dispense with rigorous analysis of the elements of proof under state law and the choice of law issues, conflict with decisions of this Court and of other circuits.

B. Despite this Court's pronouncements in *Comcast*, neither the Sixth nor Seventh Circuit conducted a meaningful Rule 23(b)(3) inquiry of controlling state tort or warranty law.

This Court made clear in *Comcast* that plaintiffs seeking class certification under Rule 23(b)(3) must provide "evidentiary proof" in order to "affirmatively demonstrate" their compliance with the predominance requirement, and that the court must "take a close look at whether common questions predominate over individual ones." *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1432 (2013). Despite this Court's instruction to the Sixth and Seventh Circuits to reevaluate their prior analysis with these principles in mind, the *Glazer* and *Butler* Courts sidestepped their obligations and reaffirmed certification of classes comprised mainly of uninjured litigants without affirmatively demonstrating that common questions predominated over individual ones. Most alarmingly, they did so without analyzing whether the classes were properly certified under controlling state law.

1. The Sixth Circuit's decision in Glazer emphasizes the need for guidance from this Court in determining whether class plaintiffs can prove the essential elements of their claims as defined by controlling state tort law principles.

The failure to apply controlling state law may deprive a defendant of its ability to challenge proximate cause, injury, and damages. Accordingly, it is imperative that a class certification analysis be accompanied by an examination of controlling state law. The Sixth Circuit's opinion following the GVR order, however, overlooked the requirements of Ohio law and by doing so, created a "no-injury" class allowing uninjured litigants to recover. A federal circuit's failure to ground its Rule 23 analysis in the forum state's law relieves plaintiffs of their burden of proving the essential elements of their claims as defined by state tort principles. This, in turn, negatively impacts a defendant's ability to mount a defense and stave off certification of an improper class.

To prove negligent design or tortious breach of warranty under Ohio law – the state law at issue in *Glazer* – a plaintiff must prove that the product at issue is defective, a plaintiff suffered *actual injury*, and the design defect proximately caused that injury. *See Temple v. Wean United, Inc.*, 364 N.E.2d 267, 270 (Ohio 1977). Proving a negligent failure to warn claim also requires proof of actual injury and proximate cause. *Hanlon v. Lane*, 648 N.E.2d 26, 28 (Ohio Ct. App. 1994); *Wolf v. Lakewood Hospital*, 73 Ohio App. 3d 709, 716, 598 N.E.2d 160, 164 (Ohio Ct. App. 1991); *Strock v. Pressnell*, 38 Ohio St.3d 207, 527 N.E.2d 1235 (Ohio

1988). If the plaintiff fails to prove actual injury, the cause of action fails. *Lautner v. Chen Chin Lin*, 2005 Ohio 4549, *P16, 2005 WL 2087886, **11 (Ohio Ct. App. 2005). Indeed, Ohio courts have recognized that when some class members have suffered injury, but others have not, class certification is not appropriate. *Hoang v. E*Trade Group, Inc.,* 151 Ohio App. 3d 363, 369-370, 784 N.E.2d 151, 155 (Ohio Ct. App. 2003).[2]

The Sixth Circuit, on remand, failed to apply controlling Ohio law to determine whether common questions predominated over individualized ones. Instead, the court borrowed inapplicable law and employed the broadest liability theory available to reaffirm class treatment of a class comprised mainly of uninjured litigants. The court concluded that "[b]ecause all Duet owners were injured at the point of sale upon paying a premium price for the Duets as designed, even those owners who have not experienced a mold problem are properly included within the certified class." 722 F.3d at 857. Ohio law does not recognize this premium price theory where injury is unmanifested. To the contrary, Ohio law prohibits tort liability for any of the three causes of action pled by Plaintiffs here where the alleged defect has not manifested in the putative class members' products. *Hoffer v. Cooper Wiring Devices*, 2007 WL 1725317, at *7-8 (N.D. Ohio June 13, 2007). Ohio courts have routinely refused to create a cause of action where none would otherwise exist, solely on the basis of a diminished product value. *Delahunt v. Cytodyne Technologies, et. al.*, 241 F. Supp.2d 827 (S.D.

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[2] See *also*, *Barber v. Meister*, 2003 WL 1564320 (Ohio App. 8th Dist. 2003) and *Faralli v. Hair Today, Gone Tomorrow*, 2007 WL 120664, *21-25 (N.D. Ohio Jan. 10, 2007).

Ohio 2003); *Bouchard v. Am. Hom Prods. Corp*., 213 F. Supp. 2d 802, 807 (N.D. Ohio 2002).

In actuality, the *Glazer* Court looked to California law and imported its "premium price" injury theory to allow consumers who never experienced a mold problem with their washers to be included in the class. 722 F.3d at 857, citing *Tait v. BSH Home Appliances Corp*., 289 F.R.D. 466, 479 (C.D. Cal. 2012). This reliance on laws from another state to determine the rights of Ohio residents results in extraterritorial application of California law and the granting of a right to recovery where Ohio law would not allow it, based solely on the use of the class-action mechanism. In this way, the Sixth Circuit permitted a procedural rule to modify substantive rights, in violation of the Rules Enabling Act. *See* 28 U.S.C. § 2072 (procedural "rules shall not abridge, enlarge or modify any substantive right"); *cf. In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) ("No injury, no tort, is an ingredient of every state's law[.]").

Equally troubling, if the Sixth Circuit's decision were allowed to stand, the result would be the imposition of California's unique, consumer-protection laws to claims arising in other states. This, in turn, would create substantive rights where none previously existed. The federal judiciary would observe a marked increase in the volume of class actions consisting primarily of members who had not been injured, exposing American defendants to existential threats created by high-exposure class-action litigation.

2. As illustrated by the Seventh Circuit's decision in Butler, the appellate courts need direction from this Court on the need for, and the appropriate manner of, conducting a choice-of-law analysis under Rule 23(b)(3).

This Court's guidance is equally needed to clarify that in multistate class actions, the court must conduct a choice-of-law analysis before finding that common issues predominate over individualized ones. A court's failure to undertake a choice-of-law analysis and appropriately account for the impact of admitted, outcome-determinative variations in the laws of the states at issue is fatal to a finding of predominance under Rule 23(b)(3). The Seventh Circuit committed just this error by failing to conduct a choice-of-law analysis before finding that common issues predominated over individualized ones. 727 F.3d 796.

The Seventh Circuit's most recent opinion underscores the need for this Court's intervention and begs for clarification. The proposed class suits in this mold and control unit class were "based on the breach-of-warranty laws of six states[:]" California, Illinois, Texas, Minnesota, Kentucky, and Indiana. *Id*. at 797. These states employ different legal rules on a host of issues related to the warranty claims, including the crucial issue of whether a warranty claim may rest on an unmanifested defect. While the Seventh Circuit correctly noted "differences among those states' laws[,]" *Id*. at 798, it engaged in no analysis whatsoever of whether those differences defeated predominance under Rule 23(b)(3). This is so even though the law is well-settled that the choice-of-law analysis be "tackled

at the front end" of the class certification stage "since it pervades every element of FRCP 23." *In Re Prempro Products Liability Lit*., 230 F.R.D. 555, 561 (E.D. Ark. 2005). See also *Castano v. American Tobacco Co*., 84 F.3d 734, 741 (5th Cir. 1996) (emphasis added) ("A requirement that a court will know which law will apply *before* making a predominance determination is especially important when there may be differences in state law."). Indeed, "[t]he district court's predominance finding depends on its choice of law analysis." *Spence v. Glock, Ges.m.b.H*., 227 F.3d 308, 311 (5th Cir. 2000). See also *Walsh v. Ford Motor Co*., 807 F.2d 1000 (D.C. Cir. 1986) (R.B. Ginsburg, J.), cert. denied, 482 U.S. 915 (1987).

When courts disrupt this equilibrium by delaying a choice-of-law analysis until after class certification, as the Seventh Circuit has done, the result is class treatment of claims which hinge on state-specific inquires that do not predominate over any common questions. A warranty claim cannot proceed in California unless the alleged latent defect is "*substantially certain* to result in malfunction during the useful life of the product." *Am. Honda Motor Co. v. Superior Court,* 199 Cal. App. 4th 1367, 1375 (Cal. App. 2 Dist. 2011) (emphasis added). Texas similarly forbids warranty claims if the injury "might never happen." *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 306 (Tex. 2008). Illinois law requires proof of "present personal injury and/or damages" to sustain a breach of warranty claim." *Verb v. Motorola, Inc*., 672 N.E.2d 1287, 1295 (Ill. App. 1 Dist. 1996). See also *In re Bridgestone/Firestone*, 288 F.3d 1012, 1017 (7th Cir. 2002) (naming California, Illinois, and Texas as states that "would not entertain" a theory of recovery absent

proof of injury). This conflict alone should have rendered certification under Rule 23(b)(3) improper. *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 730 (5th Cir. 2007) (variations in law regarding recovery for unmanifested defects, which precludes recovery for some class members, precluded predominance); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) ("if more than a few of the laws of the fifty states differ, the district court would face an impossible task of instructing a jury on the relevant law.").

But the conflict between the relevant states' laws on the issue of recovery for breach of warranty absent proof of injury did not give the Seventh Circuit any cause for concern, nor prompt it to consider how variations in the six state's laws affect predominance. Instead, the Seventh Circuit incorrectly reasoned that subclasses could adequately deal with the manner in which "liability might vary across the states embraced by the class action because of differences among those states' laws[,]" and therefore this "was not an obstacle to certification of a single mold class at the outset." 727 F.3d at 798-99. This too amounts to reversible error. See *Shutts*, 472 U.S. at 821; *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) ("The district court's class certification was in error because the district court did not conduct a thorough conflicts-of-law analysis with respect to each plaintiff class member before applying Minnesota law."); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1012 (D.C. Cir. 1986) (Ginsberg, J.) (remanding for examination of whether variations in state warranty law preclude a finding of predominance).

If the Seventh Circuit's opinion is left intact, district and appellate courts around the Nation may think that the creation of subclasses can resolve any individual issues which might otherwise defeat a finding of predominance. But this is not the case. Even if the claims were sub-classed by state law, this would not achieve Rule 23(b)(3) predominance. Further subclasses – broken down by design changes, instruction changes, product usage, etc. – would be required before common questions could be said to truly predominate over individual ones. How can the class action device be the more effective mechanism for adjudicating claims when dozens of subclasses are needed to account for individualized issues? The answer is simple: it is not. As the Eleventh Circuit put it, "[c]ommon sense tells us that '[t]he necessity of a large number of subclasses may indicate that common questions do not predominate[.]'" *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare*, 601 F.3d 1159, 1176 (11th Cir. 2010), citing Manual for Complex Litigation, § 21.23 (4th ed. 2004). See also *Harding v. Tambrands Inc.*, 165 F.R.D. 623, 630 (D. Kan. 1996) ("The potential for numerous different subclasses weighs against a finding of predominance of common issues."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 & n. 20 (5th Cir. 1996); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 446-47 (4th Cir. 2003) (Niemeyer, J., concurring in part and dissenting in part).

Performing the choice-of-law analysis is no easy task. Indeed, for some courts "the mere preliminary burden of determining which states' laws apply may render the class uncertifiable." Rory Ryan, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 4 Baylor L. Rev. 467, 475-76 (2002),

citing *Emig v. American Tobacco Co*., 184 F.R.D. 379, 393-94 (D. Kan. 1998), and *Kurczi v. Eli Lilly & Co*., 160 F.R.D. 667, 674 (N.D. Ohio 1995). However, the analysis is constitutionally required and must take its proper place at the forefront of the predominance determination. See *Alden v. Maine*, 527 U.S. at 748.

C. Absent review by this Court, the class action device will continue to be used as a vehicle to override and obliterate state law principles.

Federal Rule of Civil Procedure 23(b) provides the key component of the balance of when class treatment is preferable over individual actions. The Sixth and Seventh Circuit's decisions disrupt this careful balance by preventing defendants from relying on favorable aspects of state tort law, aspects which in these cases, generally refuse to recognize claims where the class is comprised of mostly uninjured litigants.

Left unreviewed by this Court, the Sixth and Seventh Circuit's decisions will create a host of grave consequences for corporations and businesses defending class actions. First, the decisions strip virtually all predictability and consistency from the class certification process. The Sixth and Seventh Circuit's failure to ground their Rule 23 analysis in the appropriate state's law leaves defendants wholly unable to predict the standard under which federal appellate courts will review class certification decisions. In *Glazer*, for example, Whirlpool had no way to predict that the Sixth Circuit would disregard Ohio law and relieve plaintiffs of their burden of proving defect, actual injury, and proximate cause as defined by the laws of Ohio – the state in which plaintiffs were advancing their claims. In *Butler*, Sears

had no way of knowing that the Seventh Circuit would dodge altogether the variations of the state laws at issue and certify a multistate class action without undertaking a proper choice-of-law analysis. Left as precedent, defendants in future cases will have no way to predict which law the court will apply – or whether it will apply any substantive law at all – in reviewing whether a class was properly or imprudently certified under Federal Rule of Civil Procedure 23(b)(3).

Second, the decisions create a precedent that an appellate court may look to out-of-state law when reviewing class certification decisions. The *Glazer* Court affirmed the district court's class certification by relying on Ninth Circuit decisions decided largely under California law. 722 F.3d at 857. This, in turn, effected an extraterritorial application of California law in a case arising under Ohio law. The result is that legal concepts arising from unique California consumer-protection laws have been applied to grant rights of recovery where Ohio law would not, simply because of the class-action mechanism – in violation of the Rules Enabling Act and the notions of "Our Federalism."

Third, in certifying classes containing members who suffered no injury, the *Glazer* and *Butler* decisions provide a "back door" for uninjured litigants to obtain relief in federal court where they would be unable to maintain a claim themselves. In this way, the decisions encroach on Article III's standing requirement by certifying a class comprised of one or more class members who do not have "actual injury." U.S. Constitution art III, sec 2; *Hein v. Freedom From Religions Foundation Inc.*, 551 U.S. 587, 598 (2007);

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Left intact, the Sixth and Seventh Circuit's decisions will have a profound effect on businesses which may be subject to these types of suits as they lessen the certification standard to allow the judiciary to certify classes comprised largely of non-injured plaintiffs who cannot establish the elements of their claims under controlling state tort law. This, in turn, will likely lead to an increase in "blackmail settlements" and major financial problems for companies nation-wide. Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J. L. & Pub. Pol'y 607, 612 (Spring 2010).

For these reasons, this Court should grant certiorari to review the *Butler* and *Glazer* opinions and clarify that a district court must first examine the elements of proof required under controlling state law, and then determine whether those elements of proof and other liability-determinative considerations, such as product-misuse at issue in this case, require individualized determinations that prevent class certification. In multistate class actions, this process must begin by conducting a choice-of-law inquiry.

CONCLUSION

Amicus Curiae DRI respectfully urges the Court to grant Whirlpool Corporation's Petition for Writ of Certiorari in Case No. 13-431, as well as Sears, Roebuck and Co.'s Petition for Writ of Certiorari in Case No. 13-430.

Respectfully submitted,

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