No. 12-1067

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.

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

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

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INTEREST OF *AMICUS CURIAE* DRI[1]

DRI – The Voice of the Defense Bar ("DRI") is a voluntary membership organization 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 germane to defense attorneys and to the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, balanced, and - where national issues are involved – consistent. To promote its objectives, DRI participates as *amicus curiae* in cases such as this that raise issues of importance to its membership, their clients, and the civil justice system.

DRI's members are increasingly called upon to defend their clients in multistate class action lawsuits where variations in state law defeat a finding of predominance under Federal Rule of Civil Procedure 23(b)(3). DRI has a strong interest in assuring that district and appellate courts alike follow this Court's directive to conduct a "rigorous analysis" before certifying a class, which requires conducting a choice-of-law analysis to account for the impact of outcome-determinative variations in the laws of the states at

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[1] Pursuant to Supreme Court Rule 37.6, DRI certifies that no counsel for any party authored this brief, either in whole or in part, and that no entity or person, aside from DRI, its members, and its counsel, made a monetary contribution to the brief's preparation or submission. DRI further certifies that counsel of record for both parties received timely notice of DRI's intent to file this brief. The parties have consented to the filing of this brief.

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 recovery 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. This, in turn, increases defendants' exposure to "no injury" class actions regardless of forum law and forces defendants to settle even meritless suits.

DRI has a strong interest in assuring that federal class action rules governing class certification are 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. The petitioner has shown that the Seventh Circuit's class certification decision violates this principle in a number of ways, but DRI focuses here on one: the court's ruling deprives defendants of their right to present their case by upholding certification of multistate class actions where no choice-of-law analysis has been undertaken to determine whether variations in state law defeat a finding of predominance. Left unreviewed by this Court, the Seventh Circuit's decision in this case will have a profound effect on business and individuals who may be subject to these types of suits because it authorizes a trial court to certify a proposed class under Rule 23(b)(3), even where a choice-of-law analysis would reveal that individual issues of fact and law predominate over any common issues. 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 the members of DRI.

Finally, DRI knows, as a result of its members' experience in defending class action litigation, of the need for clarification of the law regarding the proper interpretation of Rule 23(b)(3)'s predominance requirement. DRI's members, like all of the bench and bar, need guidance that is currently unavailable. The Seventh Circuit's decision in this case is but the most recent in a set of wrongly-decided certification decisions issued by the appellate circuits which have reduced the predominance requirement to a cramped, obsolete form of Rule 23(a)(2) commonality. See *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litigation*, 678 F.3d 409 (6th Cir. 2012). The current lack of clarity in the law of predominance will be left even more muddied in the wake of the Seventh Circuit's decision if this Court denies certiorari. DRI has a strong interest in assuring that a uniform rule is adopted which maintains the viability of class action suits while safeguarding the Legislative requirement that a proposed class under Rule 23(b)(3) be certified only when common questions of law and fact actually predominate over individualized questions.

SUMMARY OF ARGUMENT

"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). It is for this precise reason that 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) ("[i]n addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification *must* show that the action is maintainable under Rule 23(b)(1), (2), or (3)") (emphasis added). 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,* 521 U.S. at 623-24 (1997).

The Seventh Circuit adopted an approach that 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, on the ground that "[p]redominance is a question of efficiency." *Butler v. Sears, Roebuck and Co*., 702 F.3d 359, 362 (7th Cir. 2012). This was profound error. The Seventh Circuit's failure to account for the impact of admitted, outcome-determinative variations in the laws of the six states at issues 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 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).

Left intact, the Seventh Circuit's error threatens to increase exponentially the already-extortionate settlement pressures that class defendants confront. *Castano*, 84 F.3d at 746 ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. . .These settlements have been referred to as judicial blackmail."). See also Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357 (2003). Opportunistic plaintiffs using the Seventh Circuit's decision as a roadmap will find it easier to convert a simple lawsuit into a multistate class action by pointing to favorable law in one state and exporting that law across state lines under the guise of mere "efficiency." This, in turn, will invite a significant upswing in the opportunistic filing of abusive class actions with their devastating consequences for businesses, their owners, employees, customers, and the judicial system.

This case provides this Court with the ability to 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 require individualized determinations that prevent a finding of Rule 23(b)(3) predominance. This issue is ripe for this Court's review as the showing necessary to satisfy Rule 23(b)(3) in multistate class actions presents an issue on which this Court has not yet spoken. And this Court's very 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" and supports the grant of certiorari here. *Comcast Corp. v. Behrend*, --- S.Ct. ---; 2013 WL 1222646, *5 (Mar. 27, 2013). Granting certiorari will ensure that the decision and future decisions relying on it protect the due process rights embodied by Rule 23 and promote certainty and consistency for all litigants and citizens. And it allows the Court to ensure that both district and appellate courts safeguard and enforce an interpretation limiting class treatment to situations in which a single trial will resolve issues shared by all class members – which should be the goal of all.

ARGUMENT

This Case Presents The Court With An Opportunity To Clarify That Courts Must Undertake A Choice-Of-Law Analysis Before Determining That A Multistate Class Action Satisfies The Predominance Requirement Of Federal Rule Of Civil Procedure 23(b)(3).

A. Where plaintiffs seek to certify a multistate class action under Federal Rule of Civil Procedure 23(b)(3), the court's "rigorous analysis" must include a choice-of-law analysis in conjunction with its predominance determination.

In requiring a proposed class action to fit within one of three expressly enumerated "types" or "categories," the Legislature sought to "strike a balance between the desirability of classwide adjudication and the interests of class members to pursue claims separately or not at all." Mark Anchor Albert, *Required Class*, 32-JUN L.A. Law. 38, 40 (2009). The third of the three class types, and the one the consumers relied on here to certify their breach of warranty class claims, permits class treatment only when "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." Fed. R. Civ. P. 23(b)(3). This "predominance" requirement "tests whether the proposed classes are sufficiently cohesive to warrant

adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). Only where predominance exists does class treatment result in economies or efficiencies. Rule 23(b)(3), Advisory Notes to 1966 Amendment.

While Rule 23(b)(3) predominance parallels Rule 23(a)(2) commonality in that both require the existence of common questions, the predominance requirement is "even more demanding" than the commonality requirement under Rule 23(a). *Comcast Corp. v. Behrend*, --- S.Ct. ---; 2013 WL 122646, at *5, citing *Amchem*, *supra*; *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997). It requires a showing that the issues subject to generalized proof and applicable to the entire class predominate over those issues which are subject to individualized proofs only. *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1557-58 (11th Cir. 1989). If individual treatment of the essential elements of the cause of action is required, "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). See also *Newton v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3d Cir. 2001).

Multistate class actions, like the "mold" and "control unit" suits at issue in this case, 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). Variations in state law may "swamp" any issues common to the class and defeat predominance in a multistate class action. *Id*., citing *Georgine v. Amchem Prods*., 83 F.3d 610, 618 (3d 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).

In deciding whether to certify a multistate class under Rule 23(b)(3), the district court must therefore 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. Part and parcel of conducting this "rigorous analysis" is identifying the elements of the plaintiffs' claims and then determining 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.'"). In order for common issues to predominate and justify a (b)(3) certification of a multistate class action, each state must have the same legal standards. *Casa Orlando Apartments, Ltd. v. Federal Nat. Mortg. Ass'n*, 624 F.3d

185, 194 (5th Cir. 2010). In short, the court considering certification "must be satisfied that choice of law and potential conflict of law issues are resolved so that there are no predominance or manageability problems with the proposed class." *Cunningham Charter Corp. v. Learjet, Inc.*, 258 F.R.D. 320, 332 (S.D. Ill. 2009), citing *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674-76 (7th Cir. 2001).

It is critically important 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, the result is class treatment of claims which hinge on state-specific inquires that do not predominate over any common questions. The Seventh Circuit's decision illustrates this error.

B. 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 – as the Seventh Circuit has done here - is fatal to a finding of predominance under Rule 23(b)(3).

In total disregard of this Court's precedent that a court determining whether to certify a class involving multi-state parties conduct a choice-of-law analysis, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-823 (1985), the Seventh Circuit certified both the "mold" and "control unit" classes under Rule 23(b)(3) without so much as a cursory review of whether variations in state law defeated a finding of predominance. *Butler*, 702 F.3d at 362-63. Even more alarmingly, the Seventh Circuit did so even though it explicitly recognized that there were differences on the critical question of whether the applicable states' warranty laws require a defect manifestation in order to sustain a warranty claim. *Id*. at 362. In the Seventh Circuit's view, these differences were irrelevant because "[p]redominance is a question of efficiency." *Id*.

Classes should not be certified in ways that prevent defendants from relying on favorable aspects of state tort law. But 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. The proposed class suits in this mold and control unit cases were "based on the warranty laws of six states[:]" California, Illinois, Texas, Minnesota, Kentucky, and Indiana. 702 F.3d at 360. 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 that the law of the six states at issue varies with respect to whether "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[,]" *Id*. at 362, it misstated their breach of warranty standards, underscoring the difficulties of adjudicating warranty claims from multiple states in a single class action.

Contrary to the Seventh Circuit's decision, 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 for unmanifested defects. *Angel v. Goodman Mfg. Co., L.P.*, 330 Fed. Appx. 750, 754 (10th Cir. 2009). 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 because "two…or possibly three" of the six states in which members of the proposed classes reside allow a breach of warranty clam even if the alleged defect has not yet caused any harm, that law should apply to all six states. 702 F.3d at 362. 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).

The law of one state cannot be exported across state lines to make a class action "efficient." As this Court explained in *Shutts*, "the constitutional limitation on choice of law…[are] not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions[.]" 472 U.S. at 821. In cases such as this, where the plaintiffs bringing state law claims reside in different states, the court must

perform a choice-of-law analysis for each claim of each plaintiff. If, after this analysis, the court determines that the law of a single state will apply to all claims of all class members, then the fact that the class members reside in different states by itself will not prevent class certification (though, of course, other issues, such as the lack of standing of uninjured purchasers, may do so, see, *e.g., Clapper v. Amnesty Intern.* 133 S.Ct. 1138 (2013)). However, if each plaintiff's home state's law applies, and those laws differ – as they do in this case – individual issues will likely predominate and render certification under Rule 23(b)(3) improper. See *In re Jackson Nat. Life Ins. Co. Premium Litigation*, 183 F.R.D. 217, 223 (W.D. Mich. 1998) (denying class certification where state law variations "seriously undermine plaintiffs' predominance showing" and noting that "the choice-of-law analysis is a matter of due process and is not to be altered in a nationwide class action simply because it may otherwise result in procedural and management difficulties."). This is vital to the rule of law, to the vindication of "our federalism" with its general assignment of many areas of law to the states, and to ensuring that defendants are not deprived of legal defenses under the guise of efficiency.

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. If courts are permitted to gerrymander predominance by discounting variations in state law – as the Seventh Circuit has done in this case – the result is an overabundance of certified classes, resolution of which turns on individualized, state-specific inquiries. This, in turn, creates a host of problems the Legislature never intended when it enacted Rule 23 "to promote judicial economy by allowing for litigation of common questions of law and fact at one time." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982), citing *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

C. Setting aside choice-of-law considerations until the post-certification stage produces all of the problems attendant of abusive class actions but none of the benefits.

According to the Seventh Circuit below, only *after* class certification should the district court consider "whether there are big enough differences among the relevant laws of [the] states to make it impossible to draft a single, coherent set of jury instructions[.]" 702 F.3d at 363. This is directly contradictory to the courts' legal pronouncement that the choice-of-law analysis must take place *before* certification of a multi-state class action. *In Re Prempro Products Liability Lit.*, 230 F.R.D. at 561; *Castano v American Tobacco Co.*, 84 F.3d at 741; *In re Baycol Products Litigation*, 218 F.R.D. 197, 207 (D. Minn. 2003). It also conflicts with the Rules Advisory Committee's statement that a class may not be certified under subdivision (b)(3) until it is established "that the questions common to the class

predominate over the questions affecting individual members." Rule 23(b)(3), Advisory Notes to 1966 Amendment. Further, from a practical perspective, postponing any meaningful choice-of-law analysis until after a class has been certified results in grave consequences for defendants.

Even in the usual course, "the vast majority of certified class actions settle, most soon after certification." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291-1291 (2002) ("[E]mpirical studies…confirm what most class action lawyers know to be true[.]"); see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial."); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle."). Indeed, a 2005 study conducted by the Federal Judicial Center found that roughly 90% of the suits under review that were filed as class actions settled after certification. Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005). This is because class actions place defendants in the untenable position of betting the company on the outcome of a trial. Defendants, unwilling to roll the dice, are placed under intense pressure to settle, even if an adverse judgment seems "improbable." See Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). Fear of

negative publicity is also a motivating factor to settle even weak class claims. L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 La. L. Rev. 157, 222 (Fall 2004).

The Seventh Circuit's holding in this case, if left uncorrected by this Court, will only exacerbate these problems and proliferate more of these "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). In short, the Seventh Circuit's decision that Rule 23(b)(3) predominance can be satisfied through a mere showing of efficiency rather than after a thorough choice-of-law analysis and finding of predominance allows abusive class actions to progress more easily to certification – and legally unwarranted settlement. And the enhanced promise of a pay-off is likely to trigger the filing of many more lawsuits, including "strike suits" brought by opportunistic plaintiffs' attorneys to obtain "the defendants' cost savings from avoiding the litigation, distraction, and reputation costs of responding to the plaintiffs' complaint" rather than the true worth of the claim. James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. Pa. L. Rev. 903, 970 (1996).

The strain this places on the individuals and businesses that DRI's members are regularly called on to defend cannot be overstated. Even before the Seventh Circuit's decision in this case, the attendant costs of a major lawsuit could sound the death knell for new companies and those suffering under today's current economic climate. 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). But the Seventh Circuit's recent decision gives even more power in up front settlement discussions to plaintiffs whose claims might require individualized causation and remedy determinations. "Such leverage can essentially force corporate defendants to pay ransom…" S. Rep. No. 109-15, 17 20-21 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21; Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (Winter 2010). And the ripple effects of these exorbitant settlements will be felt throughout the economy. The costs of settlements are, at least partially, inevitably passed on to consumers in some form or another.

But there will be additional victims, too, if the courts are permitted to certify class actions under Rule 23(b)(3) without first taking into account whether choice-of-law considerations renders a finding of predominance impossible. The Seventh Circuit's approach will place a robust strain on the courts and judges called on to adjudicate these class claims. It is well-understood that class action litigation consumes more judicial resources than individual litigation. In fact, one study found that class actions consume almost five times more judicial time and resources than non-class civil actions. Thomas E. Willging, et. al., *Empirical Study of Class Actions in Four Federal District Courts*, 7, 11, 23 (1996). It becomes even more problematic for the bench to carry out proceedings when adjudication of a class suit involves both class

and individual trials. The class action mechanism should not be used in situations like the present one where proper adjudication of the claim will require individualized proofs and trial; these claims are better brought as individual suits. Reaffirming the notion that class actions should be limited to situations where a single issue or issues can be resolved through a single trial, will go a long way in preserving the district and appellate courts' limited judicial resources.

Until this Court provides guidance, DRI's members will have no way to predict whether their clients will fall victim to misuse of Rule 23. Certainly, the Seventh Circuit's relaxation of class certification requirements will encourage potential class members to forum-shop, a practice looked upon with disfavor by the Court. See *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 254 (1981); *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326 (1980). But beyond that, DRI's members and clients have no way of knowing what standard a particular court will apply when determining whether common issues predominate over individualized ones. DRI therefore has a strong interest in assuring that this Court adopts a clear rule that is capable of consistent application across the country.

Federal Rule of Civil Procedure 23(b) provides the key component of the balance of when class treatment is preferable over individual actions. The Seventh Circuit's decision disrupts this careful balance by preventing defendants from relying on favorable aspects of state tort law, aspects which in this case, generally refuse to recognize claims where the class is comprised of mostly uninjured litigants. It is imperative that this Court review the Seventh Circuit's

decision and adopt a rule that preserves the careful balance. Otherwise, the reach of the Seventh Circuit's decision will invite a wave of multistate class actions brought by uninjured litigants seeking to satisfy their burden of demonstrating predominance through a mere showing of efficiency. The time is ripe for this Court to step in and provide guidance on this issue.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* DRI respectfully urges the Court to grant Sears, Roebuck and Co.'s Petition for Writ of Certiorari.

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