

For Immediate Release

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Tim Kolly 312-698-6220 | tkolly@dri.org**DRI Files Amicus Brief Seeking U.S. Supreme Court Review in Class Action Case of *Sears, Roebuck and Co. v. Larry Butler, et al***

CHICAGO – (April 5, 2013)—DRI – The Voice of the Defense bar has filed an amicus brief supporting Sears, Roebuck and Co.’s petition for a writ of certiorari to the United States Supreme Court in *Sears, Roebuck and Co. v. Larry Butler, et al*.

The case arises out of claims by owners of Kenmore-brand front-loading washing machines manufactured by Whirlpool Corporation and sold by Sears since 2001 in six states. Plaintiffs claim that the washing machines contain a design defect that may cause them to accumulate of an excessive amount of laundry residue and emit musty odors as a result. Plaintiffs also claim that some washing machines have a manufacturing defect in the central control unit which could potentially cause machines to display “false” error codes and temporarily interrupt their operation.

Plaintiffs therefore sought to assert class claims for breach of written and implied warranties on behalf of a putative class of all washer buyers in California, Illinois, Indiana, Kentucky, Minnesota, and Texas. And they did so under Federal Rule of Civil Procedure 23(b)(3) – which requires the court to find “that the questions of law or fact common to class members predominate over any questions affecting only individual members.”

The district court for the Northern District of Illinois denied certification of the odor class, ruling that Rule 23(b)(3)’s predominance requirement was not satisfied because plaintiffs failed to show that they could prove that all washing machines were defective with common, class-wide evidence. In the district court’s view, various design changes reduced the possibility of odor, and that different washer models have different biofilm-limiting designs and features, requiring plaintiffs to prove at trial that each model failed to present excessive biofilm. However, the district court did certify the control unit class.

The Seventh Circuit affirmed certification of the control unit class but reversed the district court’s decision to deny certification of the odor class. In the Seventh Circuit’s view, “[p]redominance is a question of efficiency.”

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The DRI brief urges the Supreme Court to grant certiorari 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). The DRI brief argues that the Seventh Circuit erred in failing to conduct a choice-of-law analysis before finding that common issues predominated over individualized ones. Here, had the Seventh Circuit conducted the proper analysis, it would have necessarily determined that variations in state law defeated a finding of predominance. The DRI brief explains that left uncorrected by the Court, the Seventh Circuit's decision will create a host of grave problems for defendants that run directly afoul of the purpose and spirit of Rule 23, among them whether a class may be certified on breach of warranty claims where it is undisputed that most members did not experience the alleged product defect.

DRI brief authors Mary Massaron Ross and Hilary A. Ballentine of Plunkett Cooney, Bloomfield Hills, MI., are available for interview or for expert comment through DRI's Communications Office.

For the full text of the amicus brief, click [here](#).

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