The Rational Class: Richard Posner and Efficiency as Due Process

Elizabeth J. Cabraser[*]

> *"Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one."*[1]

I read those words as a young lawyer in 1978, and they made me cry. I read them as a revelation, as a divine injunction from the pages of a landmark California Supreme Court decision by that sainted jurist, Stanley Mosk. I read them and found a purpose for my professional life: promoting the social purpose of the class action. Of market forces, I was clueless.

Nearly twenty years later, I was inspired anew, by a quote set, like a hopeful jewel, amongst the complicated and seemingly contradictory language of Justice Ginsburg's opinion in *Amchem Products, Inc. v. Windsor*[2]:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."[3]

---

[*] Ms. Cabraser is a founding partner in Lieff Cabraser Heimann & Bernstein, LLP, concentrating her practice on the representation of plaintiffs in class actions, group actions, and multidistrict litigation. This paper embodies her lunch hour remarks at the symposium, hence the informality. The views expressed are her own, which she reserves the right to rethink, refine, and possibly regret.

[1] Vasquez v. Superior Court, 484 P.2d 964, 968 (Cal. 1971) (Mosk, J.) (alteration in original) (quoting Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941)).

[2] Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

[3] *Id.* at 617 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir.

Well, that was reassuring—and disappointing at the same time. So class suits still have a "policy" justification—and they still solve the "problem" of access for small claims—but, as Peggy Lee might say, "Is that all there is? Is that all there is to a class action?" And is that all I am, as a class action lawyer—an aggregator of the paltry? And why, oh why, Justice Ginsburg, are you citing the Seventh Circuit (*Mace v. Van Ru Credit Corp.*[4]), that dreaded place in the dead center of the nation—that place we avoid like the plague—that place that spawned (flinch) *In re Rhone-Poulenc Rorer Inc.*[5]

Rhone-Poulenc, Judge Richard Posner's tour de force, rang the death knell of mass tort class actions, and, to mix metaphors, drove the three stakes through the heart of class actions that every plaintiff's lawyer learns at birth:

Class actions are bad because they force defendants "to settle even if they have no legal liability."[6]

Class actions seek to displace the lingua franca of state common law with synthetic "Esperanto," "a legal standard that does not actually exist anywhere in the world."[7]

Class actions violate the Seventh Amendment by unreasonably dividing issues between separate trials to require reexamination of the same facts.[8]

No, I decided, I cannot go there, to the Circuit where high purpose is ridiculed, where policy goes to die, where principles fall as flat as the plains, and where only the paltry survive.

But then I remembered my beloved *Vasquez v. Superior Court*[9] quote was actually from a 1941 law review article by Harry Kalven, Jr., and Maurice Rosenfield, from the University of Chicago.[10] And some interesting class action decisions had been coming out of the Seventh Circuit. When I looked them up again, it turns out that the plurality of them had been, in Lexis search terminology, "writtenby (Posner)." Most recently, in reading Justice Ginsburg, this time in 2013's *Amgen Inc. v.*

1997)). This principle was reaffirmed, and this passage quoted, in *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1202 (2013).

4 Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997).

5 *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).

6 *Id.* at 1299.

7 *Id.* at 1300.

8 *Id.* at 1302–04.

9 Vasquez v. Superior Court, 484 P.2d 964 (Cal. 1971).

10 Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

Connecticut Retirement Plans and Trust Funds[11] decision, my spirit soared with her own tour de force, a summation of the operation of Federal Rule of Civil Procedure 23, and my eye rested on a telling phrase (this time without attribution):

> Essentially, Amgen . . . would have us put the cart before the horse. To gain certification under Rule 23(b)(3), Amgen and the dissenters urge, Connecticut Retirement must first establish that it will win the fray. But the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather it is to select the "metho[d]" best suited to adjudication of the controversy "fairly and efficiently."[12]

"Put the cart before the horse"? That is not just any cliché—that is Chicago talking. Could it be? It is! Judge Posner, in affirming the certification of a class of U.S. Treasury note futures investors, in *Kohen v. Pacific Investment Management Co.*,[13] hitched up that cart and horse in explaining why class definitions may and do include those who have not suffered damages:

> If PIMCO is found to have cornered the market . . ., then each member of the class will have to submit a claim for the damages it sustained as a result of the corner. . . .
>
> PIMCO argues that before certifying a class the district judge was required to determine which class members had suffered damages. But putting the cart before the horse in that way would vitiate the economies of class action procedure; in effect the trial would precede the certification.[14]

I was intrigued. Putting aside my *Rhone-Poulenc* gag reflex, I took a fieldtrip through the class certification decisions of Judge Posner, beginning with *Rhone-Poulenc*, proceeding chronologically, and ending with his most recent decision. Of these decisions, eleven have been decided since the Supreme Court's *Wal-Mart Stores, Inc. v. Dukes*.[15]

I am back from this fieldtrip to report on what I have learned from these decisions[16]: (1) Judge Posner has postulated a practical test for

---

[11] Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013).

[12] *Id.* at 1191.

[13] Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672 (7th Cir. 2009).

[14] *Id.* at 676.

[15] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

[16] Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities, Inc., 747 F.3d 489 (7th Cir. 2014); Parko v. Shell Oil Co., 739 F.3d 1083 (7th Cir. 2014); Driver v. AppleIllinois, LLC, 739 F.3d 1073 (7th Cir. 2014); Phillips v. Asset Acceptance, LLC, 736

predominance and defined precisely the purpose and policy of the class action in factual terms, and (2) he has done so without resource to analyses of politics or corporate governance, and without agonizing over inadequate representatives or disloyal agents.

Together, these Posner opinions provide a superficially paradoxical yet reasonably consistent account of how class actions can succeed, and why they fail. Every class action proponent should be sure to review them, take them to heart, take the medicines they prescribe as directed, and quote them profusely. Pay attention to the judge who solved, for corporate defendants, a problem they forgot to brief (and a problem they might not have even known they had) in *Rhone-Poulenc*: the dreaded hydraulic pressure placed by the certified class on defendants to settle otherwise worthless suits.[17] He has found a countervailing value that justifies—indeed mandates—the *grant* of class certification: judicial economy and litigation efficiency. Although it may not ring noble, it rings practical, and rings true. Is that all there is to a class action? It may be enough.

First we learn that not all class actions are like *Rhone-Poulenc*. Not all are too big, economically, or too broad, geographically. Some, like *Mejdrech v. Met-Coil Systems Corp.*,[18] are just right, even though they may be classified as mass torts, and involve long-term pollution, and include many individual issues as well as a few common questions.

Some, like *Hughes v. Kore of Indiana Enterprise, Inc.*,[19] a case involving minute, per-transaction (albeit undisclosed, and hence violative) charges at ATMs,[20] are too small to be anything but class actions. In *Hughes*, Judge Posner observed, echoing the famed *Amchem-Amgen* "core policy" passage, "[t]he smaller the stakes to each victim of unlawful conduct, the greater the economies of class action treatment and the likelier that the class members will receive some money rather than (without a

F.3d 1076 (7th Cir. 2013); Hughes v. Kore of Ind. Enter., Inc., 731 F.3d 672 (7th Cir. 2013); Butler v. Sears, Roebuck & Co. (*Butler II*), 727 F.3d 796 (7th Cir. 2013); Johnson v. Meriter Health Servs. Emp. Ret. Plan, 702 F.3d 364 (7th Cir. 2012); Butler v. Sears, Roebuck & Co. (*Butler I*), 702 F.3d 359 (7th Cir. 2012), *vacated*, 133 S. Ct. 2768 (2013) (mem.); Thorogood v. Sears, Roebuck & Co., 678 F.3d 546 (7th Cir. 2012); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012); Creative Montessori Learning Ctrs. v. Ashford Gear LLC, 662 F.3d 913 (7th Cir. 2011); Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672 (7th Cir. 2009); Carnegie v. Household Int'l, Inc., 376 F.3d 656 (7th Cir. 2004); Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).

17 *Rhone-Poulenc*, 51 F.3d at 1298–99.

18 Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003).

19 Hughes v. Kore of Ind. Enter., Inc., 731 F.3d 672 (7th Cir. 2013).

20 *Id.* at 674.

class action) probably nothing."[21]

In *Rhone-Poulenc*, "carv[ing] at the joint" was held to be impossible, and separate trials there would have violated the Seventh Amendment.[22] In *Mejdrech*, such carving was "reasonable, indeed right."[23] In *Mejdrech*, Judge Posner abjured the methodical, subsection-by-subsection "pars[ing]" of Rule 23.[24] Instead of this formalistic approach, he "merely" pointed out that:

> [C]lass action treatment is appropriate and is permitted by Rule 23 when the judicial economy from consolidation of separate claims outweighs any concern with possible inaccuracies from their being lumped together in a single proceeding for decision by a single judge or jury. Often . . . these competing considerations can be reconciled in a "mass tort" case by carving at the joints of the parties' dispute. If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve these issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.[25]

The common questions in *Mejdrech* were: (1) whether defendant leaked chemicals in violation of the law, and (2) whether these reached the soil and groundwater beneath the class members' homes.[26] Judge Posner considered these questions "straightforward."[27] Of course, it helped that "[t]he homes of the approximately 1,000 members of the plaintiff class [were] within a mile or two of the factory,"[28] and their claims were thus not proceeding with so many states' laws that "determination of class-wide issues would require the judge to create a composite legal standard that is the positive law of no jurisdiction."[29] It also helped that "even if these questions [were] answered against Met-Coil, the consequences for it [would] not [have been] catastrophic."[30] No Esperanto; no looming

---

21 *Id.* at 675.

22 *Rhone-Poulenc*, 51 F.3d at 1302–04.

23 *Mejdrech*, 319 F.3d at 911.

24 *See id.*

25 *Id.*

26 *Id.*

27 *Id.* at 911–12.

28 *Id.* at 911.

29 *Id.* at 912.

30 *Id.*

bankruptcy. In *Mejdrech*, there were, on a smaller scale and within a tightly confined geographical area, remaining individual issues. "The individual class members," for example, would "still have to prove the fact and extent of their individual injuries."[31] This inevitable individuality did not force the rejection of class treatment; rather, it called for dividing the case between class and nonclass questions.[32] "The need for such [individual] proof will act as a backstop to the class-wide determinations."[33] This is equitable practicality. Judge Posner apportions the benefits and economies, the costs and burdens of the class proceeding—carving at the joints between common and individual questions and maximizing the institutional interest of judicial economy.[34] Class treatment is granted where it is possible, even likely, that the factfinder can and will get the common questions "right" in the first proceeding, and can allow access to common liability proof for litigants with claims too small to proceed entirely individually, while maintaining upon them, for follow-up proceedings, the burden of proof on whether each "suffered any legally compensable harm and if so in what dollar amount."[35]

Must all in the class prove they have been harmed or damaged before a class action may proceed? Judge Posner took on this so-called "no injury" issue in *Kohen*, in which defendant was alleged to have attempted to cover the future market for ten-year U.S. Treasury notes.[36] No, class members did not need to preprove damages to establish class membership; the standing of a single named plaintiff—one class representative—sufficed.[37] That plaintiff, and the objectively defined class he represented, was the horse, and the cart was the class phase of the case in which class members could ride until it came time to prove-up their damages.[38] The class is a one-horse cart. "[A]s long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied."[39] "[O]ne is all that is necessary."[40] That "one" may fail to prove injury, without affecting class standing.[41] The utility of the class action

---

31 *Id.*

32 *See id.* at 911–12.

33 *Id.* at 912.

34 *See id.* at 911.

35 *Id.*

36 Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 674 (7th Cir. 2009).

37 *Id.* at 676.

38 *Id.*

39 *Id.*

40 *Id.* at 677.

41 *Id.*

comes from its preclusive effect: win or lose, the defined class is bound by the outcome of the liability questions. If the outcome is a class "win" then class members may proceed to prove their own damages—if they can. The class "win" does not guarantee individual recovery.[42]

The "inevitab[ility]" of the inclusion of those uninjured—or unable to prove it—in the class thus "does not preclude class certification."[43] But this class rule must also be balanced against the "*in terrorem* character of a class action."[44] So, "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant."[45] Why? Because (in a reprise of *Rhone-Poulenc*): "When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good."[46]

That said, Judge Posner rejected PIMCO's concern that the class was a Trojan horse hiding many speculators who actually made money on the market conspiracy: investor conduct the defendants "obsessive[ly] complained of as "wildly overstat[ing] the number of parties that could possibly demonstrate injury."[47] The Posnerian cure was a rational (indeed, statistical) solution: depositions of a random sample of class members to determine the percentage of "net gainers."[48] A high percentage of "net gainers" would enable "the district court to revisit its decision to certify the class."[49]

As to intraclass conflicts among those also invested at different times, or for different reasons (and who would thus wish to employ particular facts or theories), the advice again was conventional, practical, and based on techniques provided by Rule 23. "If and when they become real, the district court can certify subclasses with separate representation of each [under Rule 23(c)(5)] if that would be consistent with manageability."[50] "To deny class certification now, because of a potential conflict of interest

---

42 *Id.*

43 *Id.*

44 *Id.* at 677–78.

45 *Id.* at 677.

46 *Id.* at 678 (citing Blair v. Equifax Check Servs., 181 F.3d 832, 834 (7th Cir. 1999); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1297–1300 (7th Cir. 1995)).

47 *Id.* at 679 (internal quotation marks omitted).

48 *Id.*

49 *Id.*

50 *Id.* at 680 (internal citations omitted).

that may not become actual, would be premature."[51]

Judge Posner abjures basing the class certification outcome on a prejudgment of the merits. Class certification must be functionally efficient either way—but he does love facts—as the reader of any Judge Posner decision knows well. Mastery of the presentation of facts in a way that highlights common questions one court can reasonably be asked to decide, in one trial, is the essential prerequisite—perhaps the only requirement—of a Posner class. The question implicitly posed by a Judge Posner analysis of any class action is a profoundly simple one: does it work? If it works as a class, it is a class. Functionality comes first, labeling later.

Judge Posner is a strict taskmaster. He came down hard on putative class counsel in the "junk fax" case, *Creative Montessori Learning Centers v. Ashford Gear LLC*,[52] in which the single class representative may not have had standing (it may not have received the fax complained of).[53] The consumer class's damages were individually modest but magnified greatly by the per-fax statutory penalties involved, and the number of class actions (which had multiplied to fifty suits) threatened to swamp the resources of a relatively small defendant.[54] Judge Posner vacated class certification where "[t]here [was] reason to doubt" class counsel would meet the standards of fair and adequate representation under Rule 23(g)(1)(B).[55]

Judge Posner observed that "[t]he named plaintiff . . . is complaining about two one-page faxes that . . . it may never even have received."[56] Although the Telephone Consumer Protection Act of 1991[57] (as amended by the Junk Fax Prevention Act of 2005[58]), "with its draconian penalties for multiple faxes, *is what it is*," the act does not foreclose the use of a class action to enforce it.[59] The counsel, however, apparently schooled the class representative, and many others, using a fax broadcaster's records and brought "more than 50 similar class action suits."[60] The *Montessori*

---

[51] *Id.*

[52] Creative Montessori Learning Ctrs. v. Ashford Gear LLC, 662 F.3d 913 (7th Cir. 2011).

[53] *Id.* at 915.

[54] *Id.* at 915–16.

[55] *Id.* at 919.

[56] *Id.* at 915.

[57] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394.

[58] Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359.

[59] *Montessori*, 662 F.3d at 915 (emphasis added). The statutory penalties are $500 per fax—and $11.11 million in a suit—against "a home-furnishings wholesaler in California that has three employees and annual sales of half a million dollars." *Id.* at 914–16.

[60] *Id.* at 916.

decision is, not surprisingly, an object lesson, a *Rhone-Poulenc* redux; Rule 23 does not countenance Goliath vs. David role-reversal in class actions.

Dukes daunted the plaintiffs' employment bar, but Judge Posner (joined by Judges Wood and Hamilton) kept hope alive with his post-*Dukes* decision in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[61] a Title VII case brought on behalf of 700 black brokers.[62] At issue in *McReynolds* was a disparate impact claim based on the superficially individualized or localized practices of the employers, a stock brokerage.[63] Before getting to the merits of plaintiffs' appeal from the district court's denial of class certification, Judge Posner addressed the Rule 23(f) argument raised by defendant, that the appeal from class certification denial was untimely.[64]

Rule 23(f) is simple enough on its face: it requires that leave to appeal be sought within fourteen days of the entry of an order granting or denying class certification.[65] The district court had denied the initial motion for class certification in August 2010; in July 2011 the plaintiffs filed an amended motion for class certification, which the district court again denied, and plaintiffs sought leave to appeal under 23(f) within fourteen days of the second denial.[66] The defendant argued that any request for appeal should have been filed within fourteen days of the first denial.[67] Judge Posner lauded the role of early Rule 23(f) appellate review, balancing the risks to the litigants and to the system: "[A] grant of certification may place enormous pressure on the defendant to settle even if the suit has little merit" whereas "[a] denial of class certification often dooms the suit—the class members' claims may be too slight to justify the expense of individual suits."[68]

But although timing may be everything, facts matter too. The occasion for plaintiffs' renewed class certification motion was the Supreme Court's decision in *Dukes*, handed down a month earlier.[69] *Dukes* was, as Judge Posner drily characterized it, "an important development in the law governing class certification in employment discrimination cases—possibly

---

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

62 *Id.* at 488–89.

63 *Id.*

64 *Id.* at 484–87.

65 FED. R. CIV. P. 23(f).

66 *McReynolds*, 672 F.3d at 484.

67 *Id.*

68 *Id.*

69 *Id.* at 487.

a milestone."[70] The district court saw *Dukes* as grounds for a 23(f) appeal from his order again denying class certification, commenting, from the bench and in his order, that it "really cries out for" a 23(f) appeal given "the change in the landscape by the [*Dukes*] opinion."[71] In *McReynolds*, Rule 23(f) was indeed in the eyes of the judicial beholders, at the district and appellate levels.

At issue in *McReynolds* was a practice superficially as localized and unstandardized as that in *Dukes*: brokers were encouraged, but not required, to form teams, which shared clients.[72] The *McReynolds* decision described the aim in forming or joining a team as "to gain access to additional clients, or if one is already rich in clients to share some of them with brokers who have complementary skills that will secure the clients' loyalty and maybe persuade them to invest more with Merrill Lynch."[73] Of course, teams with more clients, who invested more with Merrill Lynch, earned more. Although the teams were formed by the brokers themselves, "once formed a team decides whom to admit as a new member."[74] The Seventh Circuit accordingly dubbed these teams "little fraternities" and noted "as in fraternities the brokers choose as team members people who are like themselves."[75] But what appeared, at first glance, to be decentralized and discretionary was revealed by the court as being influenced by, and traceable to,

> the two company-wide policies at issue: authorization to brokers, rather than managers, to form and staff teams; and basing account distributions on the past success of the brokers who are competing for the transfers. Furthermore, team participation and account distribution can affect a broker's performance evaluation, which under company policy influences the broker's pay and promotion. The plaintiffs argue that these company-wide policies exacerbate racial discrimination by brokers.[76]

In an elegant display of judicial jujitsu, Judge Posner and colleagues used *Dukes* to *reverse* the district court's denial of class certification.[77] *Dukes* was reduced to a single point: "[T]he incidents of discrimination complained of do not present a common issue that could be resolved

---

70 *Id.*

71 *Id.* at 488 (internal quotation marks omitted).

72 *Id.* at 488–89.

73 *Id.* at 488.

74 *Id.*

75 *Id.* at 489.

76 *Id.*

77 *Id.* at 492.

efficiently in a single proceeding."[78] In *McReynolds*, as in *Dukes*, there were indeed local decisions—including decisions made by the brokers themselves—and broad office manager discretion as well.[79] But, and this is the critical distinction made between the impossibility of a nationwide class in *Dukes* and the potential for such a class in *McReynolds*, in *McReynolds* "the exercise of that discretion is influenced by the two company-wide policies at issue."[80] In the Posnerian analysis, the localized decisions, and ultimately the claimed disparate impact of those decisions on the plaintiff black brokers, flowed from the top and were traceable. The two questions on which the *McReynolds* case turned—(1) did these policies result in disparate impacts and (2) (in defense) were these policies justified by business necessity—were common ones. They thus "could be most efficiently determined on a class-wide basis."[81]

For the Seventh Circuit, "[t]he only issue at this stage is whether the plaintiffs' claim of disparate impact is most efficiently determined on a class-wide basis rather than in 700 individual lawsuits."[82] In Posner's view, *Dukes* is helpful because it sharpens the inquiry as to "on which side of the line that separates a company-wide practice from an exercise of discretion by local managers [a] case falls."[83] Again, the facts matter, and the ability of the advocate to frame a fact question as both an important one and a common one, is key. If this threshold is reached, efficiency does the rest.

In *McReynolds*, as in *Kohen* before it, and in *Amgen* after, the presence of powerful, plausible common questions is the horse that carries the class action cart. But that horse must have a kick. The classwide proceeding must not only have integrity, but its outcome must be plausible, if it is to serve its function as an adjudication mechanism that is superior to the repeated individual trials that were the preferred process in *In re Bridgestone/Firestone, Inc.*[84] According to Posner, "[t]he kicker is whether the accuracy of the resolution would be unlikely to be enhanced by repeated proceedings."[85] Why? In a bet-the-company case the defendant may be forced to settle "and this is an argument against definitively

---

78 *Id.* at 488.

79 *Id.* at 489.

80 *Id.*

81 *Id.* at 490.

82 *Id.*

83 *Id.*

84 *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020 (7th Cir. 2002) (Easterbrook, J.).

85 *McReynolds*, 672 F.3d at 491 (internal quotation marks omitted).

resolving an issue in a single case if enormous consequences ride on that resolution."[86] "But Merrill Lynch is in no danger of being destroyed by a binding class-wide determination that it has committed disparate impact discrimination against 700 brokers . . . ."[87] Here again, Judge Posner looks to the next stage of the proceeding—"hundreds of separate suits for backpay"[88]—to balance the stakes and decree these suits sufficiently valuable to be feasible. Thus seeing no "downside of the limited class action treatment that we think would be appropriate in this case," the Court *reversed* the denial of Rule 23(b)(2)/(c)(4) certification.[89]

In November 2012, in *Butler v. Sears, Roebuck and Co.* ("*Butler I*"),[90] a multistate consumer class action involving allegations of two types of design defects in washers made by Whirlpool and sold by Sears under its "Kenmore" brand name, Judge Posner affirmed the grant of class certification regarding the defective control unit claim and reversed the denial of class certification on the claim that the machine's design permitted mold to accumulate and generate odor.[91] Judge Posner also noted that the case, which involved independent defects, should really have been two class actions, "and therefore they should have been severed," but did not stand on formalism—his decision endorsed both classes, arising under the warranty laws of six states, as Rule 23(b)(3) class actions.[92]

In *Butler I*, Judge Posner expressly accepted both 23(f) appeals "in order to clarify the concept of 'predominance' in class action litigation."[93] Posner likens predominance as an exercise irrelevant to the vast majority of class actions: those which involve either no common issues or only common issues. The question of predominance is clearly answered yes or no in these cases: they sort themselves.[94] As to cases where common vs. individual requires closer analysis, Judge Posner characterizes the

---

86 *Id.*

87 *Id.*

88 *Id.* at 492.

89 *Id.*

90 Butler v. Sears, Roebuck & Co. (*Butler I*), 702 F.3d 359 (7th Cir. 2012), *vacated*, 113 S. Ct. 2768 (2013) (mem.).

91 *Id.* at 361–64. In so doing, Posner acknowledged a decision by the Sixth Circuit affirming the grant of class certification involving the same mold defect in the same washers—this time sold under Whirlpool's own name. *Id.* at 363 (citing *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 678 F.3d 409 (6th Cir. 2012), *vacated sub nom.* Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013) (mem.)). Spoiler alert: as this article subsequently reveals, both *Butler I* and *Whirlpool* survived the certiorari process—twice.

92 *Id.* at 360–61.

93 *Id.* at 361.

94 *Id.*

predominance exercise, with dry understatement, as one that "requires 'weighing' unweighted factors, which is the kind of subjective determination that usually—including the determination whether to certify a class—is left to the district court, subject to light appellate review."[95]

The *Butler I* case involved twenty-seven "Kenmore" models, five design changes made that related to the mold problem, and, as noted, the warranty laws of six states.[96] Sears argued that most class members did not actually experience a mold problem.[97] A more than passing resemblance to the *Rhone-Poulenc* scenario might be discerned. But Judge Posner did not prescribe a decentralized, multitrial regime to determine the viability and value of these consumer claims, as he had in the *Rhone-Poulenc* personal injury tort context,[98] or as his colleague Judge Easterbrook had with the latent design defect consumer claims in *Bridgestone/Firestone*.[99]

Why must the washer claims be certified?[100] Because in Judge Posner's contemporary view, "[p]redominance is a question of efficiency,"[101] and as to the Whirlpool washer mold claims, aggregate treatment of the common questions was the most efficient of the proper approaches. In Posner's analysis, Rule 23(b)(3) asks this question: "Is it more efficient, in terms both of economy of judicial resources and of the expense of litigation to the parties, to decide some issues on a class basis or all issues in separate trials?"[102] The answer for each of the alleged defects in the *Butler I* case is that

> [a] class action is the more efficient procedure for determining liability and damages in a case such as this, involving a defect that may have imposed costs on tens of thousands of consumers yet not a cost to any one of them large enough to justify the expense

---

95 *Id.*

96 *Id.* at 360–61.

97 *Id.* at 362.

98 *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302–04 (7th Cir. 1995).

99 *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020–21 (7th Cir. 2002).

100 As go the washers, so did not go the dryers. Consumer classes involving alleged rust defects in Sears dryers were the subject of an increasingly testy sequence of decisions involving repeated attempts by a group of lawyers to certify what Posner viewed as spurious claims, and the ineffective attempts of the district court to stop them, in *Thorogood v. Sears, Roebuck & Co.*, 678 F.3d 546 (7th Cir. 2012). This most recent decision, issued after the Supreme Court's *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), decision, reluctantly concluded that the *Bayer* case did not allow preclusive orders involving members of an uncertified class to whom notice had not been sent. *Thorogood*, 678 F.3d at 551–52.

101 *Butler I*, 702 F.3d at 362.

102 *Id.*

of an individual suit.[103]

Shades of *Vasquez*! It's the 70s or, more accurately, Holy *Kalven and Rosenfield*! It's the Fabulous 40s: Efficient deterrence lives!

What about inclusive group remedies? In the Posnerian vision, class certification, whether under Rule 23(b)(2) and (c)(4), as in *McReynolds*,[104] or under 23(b)(3), as in *Butler I*,[105] is about the liability determination. Individualized damages proceedings are presumed. Here, too,

> [i]f necessary a determination of liability could be followed by individual hearings to determine the damages sustained by each class member . . . . But probably the parties would agree on a schedule of damages based on the cost of fixing or replacing class members' mold-contaminated washing machines. The class action procedure would be efficient not only in cost, but also in efficacy, if we are right that the stakes in an individual case would be too small to justify the expense of suing, in which event denial of class certification would preclude any relief.[106]

So, a combination of common liability adjudication with follow-on individualized damages determinations creates the economically feasible, and hence inclusive, group remedy—where to do so, Posner always reminds us, does not threaten the defendant with risk of loss that exceeds the range of predictable merit of the claims.

So, did *Butler I* also solve the "no injury" argument? You betcha:

> Sears argue[d] that most members . . . did not experience a mold problem. But if so that is an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate Sears—a course it should welcome, as all class members who had not opted out . . . would be bound by the judgment.[107]

As Judge Posner acknowledged, there's a bit of a *Rhone-Poulenc* issue in *Butler I*, but only a bit. The laws of the states did vary—in two or maybe three of the six states where the class members resided

> 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.

---

103 *Id.*

104 McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 483, 492 (7th Cir. 2012).

105 *Butler I*, 702 F.3d at 361.

106 *Id.* at 362.

107 *Id.*

> If, as appears to be the case, the defect in a Kenmore-brand washing machine can precipitate a mold problem at any time, the defect is an expected harm, just as having symptomless high blood pressure creates harm in the form of an abnormally high risk of stroke. A person who feels fine, despite having high blood pressure, and will continue feeling fine until he has a stroke or heart attack, would expect compensation for an unlawful act that had caused his high blood pressure even though he has yet to suffer the consequences. Every class member who claims an odor problem will have to prove odor in order to obtain damages, but class members who have not yet encountered odor can still obtain damages for breach of warranty, where state law allows such relief . . . [,][108]

and subclasses may be formed by such states, or to account for "large differences in the mold defect among the five differently designed washing machines."[109]

A similar analysis followed for Sears's appeal of the certification of the control unit defect class. The present need for subclasses was not seen, given that the predominant issue was the fact issue of defect.[110] "It is more efficient for the question whether the washing machines were defective—the question common to all class members—to be resolved in a single proceeding than for it to be litigated separately in hundreds of different trials . . . ."[111] In making this determination,

> [a]gain the district court will want to consider whether to create different subclasses of the control unit class for the different states. That should depend on whether there are big enough differences among the relevant laws of those states to make it impossible to draft a single, coherent set of jury instructions should the case ever go to trial before a jury.[112]

Apparently Esperanto no longer looms as a disqualifying threat.[113]

In *Johnson v. Meriter Health Services Employee Retirement Plan*,[114] Judge Posner found that Rule 23(a)(4)'s adequacy requirement did not stand in the way of affirming class certification for a technically headless

---

108 *Id.*

109 *Id.* at 363.

110 *Id.*

111 *Id.*

112 *Id.*

113 *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

114 Johnson v. Meriter Health Servs. Emp. Ret. Plan, 702 F.3d 364 (7th Cir. 2012).

class in an ERISA case involving a variety of benefits calculation claims.[115] The original plaintiff failed to meet adequacy because of unique defenses against her, and she was not replaced.[116] No matter: "we have substituted one of the other named plaintiffs."[117] Multiple subclasses were involved, hence the defendant argued Rule 23(b)(2), which required it to have acted on grounds that apply generally to the class, could not be met.[118] Again, no matter—formality is not a barrier. Simply treat each subclass as its own class, and, voila—23(b)(2) is met.

Defendant then argued that the plaintiffs really wanted money damages—the actual point of recalculating their benefits entitlement—and hence 23(b)(2) was inappropriate.[119] Wrong again—plaintiffs wanted declaratory and injunctive relief—a declaration of the proper calculations and a court order for the calculations to be made.[120]

According to Posner, and contrary to Lauper,[121] money doesn't change everything: at least the presence of a monetizable claim does not change a 23(b)(2) claim to one cognizable only under 23(b)(3). "Those benefits would not be damages. They would be the automatic consequence of a judicial order revising the Meriter plan to make it more favorable to participants."[122] Neither did *Dukes* preclude monetary relief in a 23(b)(2) class action. *Dukes* failed on commonality,[123] which Posner defined as "community of interest among class members," and stated that "[t]hose are not problems in this case."[124] *Dukes* indeed precluded "'individualized' awards of monetary damages": "awards based on evidence specific to particular class members."[125] *Dukes*, in Judge Posner's estimation, did *not* foreclose use of Rule 23(b)(2) to facilitate a declaration to require a new set of automatic calculations.[126] As Judge Posner deduces, this will be objective and systematic.[127] It could simply be the result of "laying each

---

115 *Id.* at 372.

116 *Id.* at 365.

117 *Id.*

118 *Id.* at 368.

119 *Id.* at 369.

120 *Id.* at 365.

121 *See* McDonald v. Windus, No. 05-1276, 2007 WL 108467, at *1 (Iowa Ct. App. Jan. 18, 2007) (Eisenhauer, J.) ("In 1983, Cyndi Lauper sang, 'Money changes everything.' This sentiment is still true today." (internal footnote and citation omitted)).

122 *Meriter*, 702 F.3d at 369.

123 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552–54 (2011).

124 *Meriter*, 702 F.3d at 369.

125 *Id.* at 370.

126 *See id.* at 372.

127 *See id.* at 371–72.

class member's pension-related employment records alongside the text of the reformed plan and computing the employee's entitlement."[128] This computation is one of basic arithmetic. It involves simply "subtracting the benefit already credited . . . to [the employee] from the benefit to which the reformed plan document entitles him."[129]

But, as a result of this mathematical exercise, the claims did have an ultimate monetary dimension if successful. Therefore, in Judge Posner's view, this 23(b)(2) class should include an opt-out provision, which is discretionary, though not required, in 23(b)(2) cases.[130] Judge Posner deploys the procedural technique he calls "divided certification": "a (b)(2) proceeding first, and if the plaintiffs obtain declaratory relief a (b)(3) proceeding (where notice and the right to opt out are mandatory) to follow."[131]

But wait?—is there a *Rhone-Poulenc* Seventh Amendment problem?[132] "Divided certification might not be optimal if the issues underlying the declaratory and damages claims overlapped."[133] Does *Beacon Theatres, Inc. v. Westover*[134] mean that in such a case, the damages claims—the jury claims—must be tried first?[135]

Again, this presents no problem, because

> the parties have consented to a bench trial on all issues, so there is no problem with having declaratory relief determined by the judge even if his determination would resolve issues that, were it not for that consent, would by virtue of the *Beacon Theatres* rule be decided by a jury instead.[136]

Apparently the consent of the named parties and counsel can bind the class in this jury trial waiver—even in the case of a "headless" class.

Judge Posner's analysis, although the antithesis of "bleeding heart" emoting, does include a concern for the practical efficacy of a class action mechanism that would leave class members to their own devices in proving up individual entitlement to compensation.[137] Mathematics solves the problem in *Meriter*:

---

128 *Id.* at 371.

129 *Id.*

130 *Id.*

131 *Id.*

132 *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303–04 (7th Cir. 1995).

133 *Meriter*, 702 F.3d at 371.

134 Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

135 *See id.* at 510; *Meriter*, 702 F.3d at 371.

136 *Meriter*, 702 F.3d at 371.

137 *Id.* at 372.

> Should it appear that the calculation of monetary relief will be mechanical, formulaic, a task not for a trier of fact but for a computer program, so that there is no need for notice and the concerns expressed in the [*Dukes*] opinion are thus not engaged, the district court can award that relief without terminating the class action and leaving the class members to their own devices and also without converting this (b)(2) class action to a (b)(3) class action.[138]

The *Meriter* defendant claimed intrasubclass class conflicts created a Rule 23(a)(4) problem that precluded the certification of any class at all.[139] But apparently not: Judge Posner agreed with the district judge that the conflict arguments were "too hypothetical to bar class certification."[140] Defendant, despite looking, could not find an active class member—though it knew all their names—who would come forward to express a concern over the class representation or to aver that the class as configured might harm him.[141]

Judge Posner pounced on the defendant's allegation that class certification would be harmful to some class members on the basis of its Rule 23(a)(4) argument. In Judge Posner's determination, defendant's

> contention that some class members will be hurt by class treatment rings hollow. It knows the names of all the class members and could have found one—if there is one—who if informed of the class action would express concern that it might harm him. Meriter either didn't look for such a class member, which would be inexcusable, or it looked but didn't find one, which would probably mean that there isn't any such class member.[142]

A practical solution was at hand: "should the conflicts prove real despite our skepticism," the resolution could be to "divid[e] some of the subclasses and appoint[] new class representatives for the newly carved out subclasses."[143] It was "premature to declare the alleged conflicts of interest an insoluble bar to the class action."[144]

After this talk was given, *Butler I*, and a parallel Sixth Circuit class

---

138 *Id.*
139 *Id.*
140 *Id*.
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*

certification affirmance, *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*,[145] 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 the Supreme Court's 2013 *Comcast Corp. v. Behrend*[146] decision.[147] After reconsidering the matter in light of *Comcast*, the Sixth Circuit reaffirmed class certification.[148] Similarly, on remand from the United States Supreme Court in *Butler v. Sears, Roebuck and Co.* ("*Butler II*"),[149] the Seventh Circuit reconsidered its prior ruling in light of *Comcast* and denied defendant's request 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.[150] Writing for the Court again, Judge Posner reaffirmed the earlier grant of class certification.[151] Whirlpool petitioned for certiorari on both the Sixth and Seventh Circuit decisions; those petitions were both denied on February 24, 2014, and the Whirlpool class certifications stood.[152]

In applying the *Comcast* decision to the facts as developed in the *Butler II* case and the claims asserted on behalf of the washer owners, Judge Posner summarized the 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

---

145 *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 678 F.3d 409 (6th Cir. 2012), *vacated sub nom.* Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013) (mem.).

146 Comcast Corp v. Behrend, 133 S. Ct. 1426 (2013).

147 Sears, Roebuck & Co. v. Butler, 133 S. Ct. 2768, 2768 (2013) (mem.); Whirlpool Corp. v. Glazer, 133 S. Ct. 1722, 1722 (2013) (mem.).

148 *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 845 (6th Cir. 2013), *cert. denied sub nom.* Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014) (mem.).

149 Butler v. Sears, Roebuck & Co. (*Butler II*), 727 F.3d 796 (7th Cir.2013), *cert. denied*, 134 S. Ct. 1277 (2014) (mem.).

150 *Id.* at 798.

151 *Id.* at 801–02.

152 Sears, Roebuck & Co. v. Butler, 134 S. Ct. 1277, 1277 (2014) (mem.); Whirlpool Corp. v. Glazer, 134 S. Ct. 1277, 1277 (2014) (mem.).

damages attributable to that theory.[153]

The situation in *Comcast* was then contrasted to the claims presented in *Butler II*:

> 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.
>
> . . . .
>
> 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 damages on a class-wide basis.[154]

Butler II, consistent with *McReynolds*, explains that class certification "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 homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed."[155] In *Butler II*, Judge Posner takes the opportunity to reemphasize a key holding of *Dukes*: that an "issue 'central to the validity of each one of the claims' in a class action, if it can be resolved 'in one stroke,' can justify class treatment."[156] Judge Posner recognizes that *Dukes* was speaking of Rule 23(a)(2) commonality—although it borrowed from Professor Nagareda's predominance articulation to do so.[157] But in *Butler II*, Judge Posner goes on to observe that "predominance requires a

---

153 *Butler II*, 727 F.3d at 799 (alteration in original) (quoting Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013)).

154 *Id.* at 800.

155 *Id.*

156 *Id.* at 801 (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)).

157 *Dukes*, 131 S. Ct. at 2551 (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–32 (2009)).

qualitative assessment too; it is not bean counting."[158] Moreover, as *Butler II* 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.[159] To do so would render Rule 23 dysfunctional:

> 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.[160]

So where is due process in all of this? Has it been sacrificed to efficiency? Judge Posner views class certification in functional, not formalistic terms. Rule 23(b)(3) predominance requires a qualitative assessment of which questions are truly the *Dukes* resolution drivers: predominance is not "bean counting," nor is it achieved by "counting noses" (nor, presumably, any other object).[161] If a class, whether denominated partial, divided, or sequential, can function most efficiently to resolve important aspects of the controversy and advance the case toward resolution without prejudging either side, then creativity and decisiveness

---

158 *Butler II*, 727 F.3d at 801.

159 *See id.*

160 *Id.* For other post-*Dukes*, post-*Comcast* Posner class certification decisions, see Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities, Inc., 747 F.3d 489, 490–91 (7th Cir. 2014) (certification of a class of junk fax recipients in an action brought under the Telephone Consumer Protection Act for statutory damages); Parko v. Shell Oil Co., 739 F.3d 1083, 1084, 1087 (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, 1074 (7th Cir. 2014) (Rule 23(f) petition from denial of motion to decertify class denied); Phillips v. Asset Acceptance, LLC, 736 F.3d 1076, 1083 (7th Cir. 2013) (denial of class certification reversed in Fair Debt Collection Practices case; articulating a practical standard for adequacy, and reaffirming that "[p]roof of injury is not required when the only damages sought are statutory").

161 *Butler II*, 727 F.3d at 801; *see also* Parko, 739 F.3d at 1085 (Predominance "is not determined simply by counting noses," and "like the other requirements for certification of a suit as a class action, goes to the efficiency of a class action as an alternative to individual suits.").

are brought to bear to apply the class action procedures that fit the circumstances of the case; each side gets the process it is due when common proof saves time and money for the class, and especially when the class mechanism enables litigation that would otherwise be priced out if Court efficiency equals due process. This emotionless due process, delivered in the name of efficiency, may disappoint for lack of avowed high purpose; but it is no less real, and it is most effective. It solves, rationally and undramatically, the "problem of fashioning an effective and inclusive group remedy," the long-sought and profound goal of the class suit.[162]

[162] Vasquez v. Superior Court, 484 P.2d 964, 968 (Cal. 1971).